CONFIDENTIAL

EXPERT REBUTTAL REPORT OF PROFESSOR ADAM J. LEVITIN

In the matter of the application of The Bank of New York Mellon
No. 651786/2011 (N.Y. Sup. Ct.)

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INTRODUCTION

1. My name is Adam Jeremiah Levitin. I was retained by Reilly Pozner LLP ("Firm"), as counsel to the American International Group ("AIG") in *In the matter of the application of The Bank of New York Mellon*, No. 651786/2011 (N.Y. Sup. Ct.) (the "Proceeding"), to provide expert testimony regarding the order proposed by Bank of New York Mellon ("BONY") in its 530 separate capacities as trustee for 530 separate securitization trusts (the "Covered Trusts") approving a settlement on behalf of the Covered Trusts with Bank of America ("BofA") and certain of BofA's affiliates.

SUMMARY OF OPINIONS OFFERED

2. The Firm has requested that I prepare this report to evaluate claims made in the expert reports submitted by Mr. Phillip R. Burnaman, II, Professor Daniel R. Fischel, Mr. Robert I. Landau, and Professor John H. Langbein on behalf of BONY (the "BONY Litigation Experts") as petitioner in the Proceeding. In addition to the reports of the BONY Litigation Experts, I have relied on the documents listed in Appendix A to this report and relied on my own pre-existing knowledge of housing finance, the securitization industry, mortgage servicing, and securitization trustees.

3. It is my opinion that the reports of all of the BONY Litigation Experts are fundamentally flawed with respect to their assumption that BONY acted in good faith when negotiating the settlement. BONY did not. At every step of the settlement process, BONY took actions consistent with advancing its own interests or the interests of BofA, rather than those of the Covered Trusts or the beneficial certificateholders of the Covered Trusts in general. BONY's Litigation Experts fail to factor in the business and financial relationships within the securitization industry in general, and between BONY and BofA in particular. Either BONY's Litigation Experts ignore these crucial facts or they are simply unaware of the economic incentives for BONY to act in the interests of BofA rather than in the interests of the Covered Trusts. Once BONY's economic incentives are understood, BONY's actions in regard to the settlement make sense, and BONY's true motiviation becomes manifest in the following ways:

   - BONY's pretense that an Event of Default had not occurred;
   - BONY's failure [redacted]
   - BONY's failure [redacted]
   - BONY's reliance on an insider subset of certificateholders--many of whom had interests in supporting BofA--[redacted] I have seen no evidence that BONY ever verified that these insiders were in fact net "long" on the Covered Trusts and not net "short" on the settlement;

- BONY's failure to eve[redacted]
- BONY's failure to [redacted]
- BONY's failure to [redacted]
- BONY's reliance on BofA's positions on Countrywide's solvency (including possible fraudulent transfer claims against BofA) without independent investigation or obtaining an independent solvency opinion;
- BONY's use of expert reports based on artificially limited parameters, used to paper its approval of a settlement that had [redacted]
- BONY's trust committee [redacted]
- BONY's treatment of its trusteeship for each of the 530 Covered Trusts as a unitary trusteeship despite the Covered Trusts' mutually adverse positions to each other as competing creditors of Countrywide and BofA;
- BONY's repeat conversion of trust property [redacted]
- BONY's approval of a settlement premised in part on the value of documentation exception cures that is actually narrower than BofA's existing legal duties and which expressly excludes the majority of loans in the Covered Trusts;
- BONY's continued support for a settlement premised in part on the value of servicing improvements, even though those "improvements" basically recreate BofA's existing legal duties;
- BONY's approval of a settlement that permits BofA to place the cost of up to $17.82 billion of loan modifications required in settlements for *BofA*'s alleged improper conduct on the *Covered Trusts*, making the Settlement of possibly *negative value* for the Covered Trusts.

4. Viewed as a whole, there is no escaping the conclusion that the Proposed Settlement is a "sweetheart deal" that serves the interests of BONY and BofA, and not the interests of the Covered Trusts. Simply put, nearly every aspect of the settlement benefits BONY and BofA. The BONY Litigation Experts may quibble with the interpretation of particular actions taken or not taken by BONY, but it is impossible for an unbiased party to view the entirety of BONY's actions and conclude that BONY in its 530 legally distinct roles as Trustee for each of 530 legally separate Covered Trusts has acted in the interests of the Covered Trusts, much less that it has comported with "a punctilio of honor the most sensitive" that New York law demands of fiduciaries. Instead, BONY's actions throughout the entire settlement process are problematic and appear to be contrary to the interests of the Covered Trusts.

5. This report first presents some background on the structure of the mortgage securitization industry and of the business relationships between BONY, BofA, and the group of certificateholders in some, but not all of the 530 trusts, that have been supporting the Proposed Settlement (the "Inside Investors").

6. Next this report goes through the history of the Proposed Settlement and its features, including the use of this Article 77 proceeding, to illustrate how BONY's actions throughout the entire process have been consistent with pursuit of its own economic interest and not the interest of the Covered Trusts. Throughout the report I point out the shortcomings of the BONY Litigation Expert opinions, which appear to ignore the economic framework in which BONY is operating.

7. The report concludes with a discussion of the parallels between BONY's behavior and the actions of trustees of the mortgage bonds of the 1920s, which built the great skyscrapers of Manhattan and prefigured modern mortgage-backed securities. BONY's actions in this case are simply following a strategy that it and other trustee banks used following the 1929 market crash. It took Herculean law reform efforts in the State of New York and Congress (resulting in two of the seven major federal securities statutes) to address the problem previously.

8. This Court has an opportunity to nip the problem in the bud. Doing so will help restore damaged investor confidence in financial markets and in the New York market in particular, by showing investors that they can rely on New York courts to ensure that New York trustees carry out their duties with "a punctilio of honor the most sensitive." Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) (Cardozo, J.).

PROFESSIONAL BACKGROUND AND QUALIFICATIONS

9. I am currently the Bruce W. Nichols Visiting Professor of Law at Harvard Law School in Cambridge, Massachusetts. I am also a tenured Professor of Law at the Georgetown University Law Center in Washington, D.C., where I have taught since 2007. I teach courses in structured finance, bankruptcy, consumer finance, contracts, payment systems, and secured lending.

10. I also currently serve as a Directorial appointee to the statutory Consumer Advisory Board (CAB) of the Consumer Financial Protection Bureau, and am chair of the CAB's mortgage committee. The views expressed in this opinion are solely my own and not those of the CAB or the Consumer Financial Protection Bureau.

11. From 2008-2010, I served as Special Counsel for Mortgage Affairs to the Congressional Oversight Panel that supervised the Troubled Asset Relief Program (TARP). In that position I was in charge of the Oversight Panel's extensive reporting on the government's response to the mortgage crisis, with particular emphasis on mortgage servicing issues.

12. I have also previously served as the Robert Zinman Scholar in Residence at the American Bankruptcy Institute, as a faculty member for the Practicing Law Institute's Consumer Financial Services program, and as the faculty instructor for the Federal Trade Commission's training program for its Division of Financial Practices

personnel. I am also a member of the Mortgage Finance Working Group (MFWG) convened by the Center for American Progress. The MFWG has produced one of the major proposals for the reform of the US housing finance system and presented the proposal before the Treasury Department, Department of Housing and Urban Development, and the President's Council of Economic Advisors.

13. Since 2008, I have testified nineteen times before Congress on financial regulatory issues, including at eight hearings dealing specifically with housing finance. I have also testified before the Government Accountability Office on housing policy issues twice and testified before the Financial Crisis Inquiry Commission about mortgage securitization. I have served as an expert for the New York Attorney General in relation to mortgage servicing issues and as a Volunteer Deputy Attorney General for the State of Delaware for a mortgage securitization-related litigation. In addition, I have presented on mortgage securitization at Federal Reserve, FDIC, and mortgage industry conferences and to Citigroup's institutional clients. I serve as a for-fee consultant on an occasional basis for various investment funds, and consult informally with members of Congress, the Consumer Financial Protection Bureau, the Federal Reserve, International Monetary Fund, World Bank, and non-profit policy groups on financial regulation.

14. The securitization industry and its role in the financial crisis is a major focus of my academic research. I have authored over forty academic articles and book chapters and encyclopedia entries, nearly half of which address the securitization, housing finance industry or the financial crisis of 2008. In particular, two years prior to this engagement I published an article on mortgage servicing that specifically discusses the problematic incentives for mortgage securitization trustees with the business relationship between BONY and BofA servicing as the illustration of the problem.

15. My work has been published in leading law and real estate journals and has been awarded prizes from the American College of Consumer Financial Services Lawyers, the *American Bankruptcy Law Journal*, the George Washington University Center for Law, Economics and Finance, and the *Yale Journal on Regulation*. I serve as a peer reviewer for *Housing Policy Debate* and for *Cityscape*, a housing journal published by the Department of Housing and Urban Development. A complete list of my academic publications from the last ten years may be found in Appendix A to this report.

16. I hold a J.D., *cum laude* from Harvard Law School. I also hold a Bachelor of Arts (A.B.) degree *magna cum laude with highest honors in field* from Harvard College, a Master of Arts (A.M.) degree and a Master of Philosophy degree (M.Phil) from Columbia University. I have served as law clerk to Judge Jane R. Roth on the United States Court of Appeals for the Third Circuit. I am admitted to practice before the bars of the State of New York, the Third Circuit, the Southern District of New York, and the Eastern District of New York. I attached a copy of my curriculum vitae as Appendix B to this report.

17. Based on the foregoing experiences as well as my research following my engagement in this case, I am familiar with the mortgage securitization industry, including the roles of securitization trustees and servicers, and the specifics of the instant litigation.

18. My compensation for preparing this report and for any testimony in this Proceeding is at the rate of $800/hour. My compensation is not dependent either on the opinions I express or the outcome of this Proceeding.

I. The Securitization Industrial Complex

19. In order to understand what is afoot in the Proposed Settlement and the deficiencies of the BONY Litigation Expert reports, it is necessary to understand the basic structure of the securitization industry and how the various parties to this proceeding fit into it. An understanding of the business relationships and economic incentives in the securitization industry shows that the Proposed Settlement is not in the interests of the Covered Trusts, but is instead in the interests of BONY and BofA.

A. An Overview of the Mortgage Securitization Transaction

20. Securitization is a financing mechanism based on segregating selected cashflows of a firm from the firm's liabilities in order to enable investment based solely on the risks inherent in the selected cashflows, rather than in the total package of the selected cashflows' risks as well as all of the firm's other assets and liabilities.

21. Thus, with mortgage securitization, the idea is that investors will be able to invest solely in the risks associated with the mortgages (credit risk and rate risk), rather than in all the risks attendant to an investment in a mortgage lender as an operating entity, such as agency risk[1] and asset substitution risk.[2]

22. This type of financing is often advantageous for both investors and borrowers. Investors can invest in a more targeted, bespoke package of risks than if investing in an operating firm, and securitization borrowers may be able to raise capital at a lower cost than if they borrowed directly. For example, a firm with high quality cashflows, but significant liabilities can raise funds at costs set solely on the quality of the cashflows. Thus, a petroleum company with excellent cashflows but major environmental liabilities might be able to borrow itself at BBB rates, but it could raise funds through securitization at AAA rates.

23. For mortgage-backed securities to be a viable financial product, investors need to be confident that they are subject to the risks in which they believed they invested—and no others. Thus, if investors believe that they are assuming credit and rate risk and find out instead that they are subject to agency or asset substitution risk, they will be wary about investing in the mortgage-based securities in the future.

24. Therefore, a central goal of mortgage securitization is to remove as much uncertainty as possible from the investment. This means utilizing deal structures that minimize agency costs, avoid the possibility of bankruptcy court supervision, and use credit enhancements to ensure regular cash flows to investors.

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[1] E.g., the risk the firm's managers will make bad and possibly self-interested decisions regarding the firms' assets and liabilities.

[2] E.g., the risk the firm will substitute credit card receivables for mortgages as its assets.

25. To this end, private-label residential mortgage securitizations—meaning those mortgage securitizations not guaranteed by the federal government or government-sponsored entities—are done by segregating the mortgages [3] into a "bankruptcy remote" entity.[4] In the typical private-label residential mortgage securitization (and all of the securitizations at issue in this Proceeding), this is done in a two-step process.[5] A financial institution (the securitization "sponsor" or "seller") owns a pool of mortgages, which it either generated itself ("originated") itself or purchased. The sponsor sells the loans to a special-purpose subsidiary (the "depositor") that has no other assets or liabilities. This is done to segregate the mortgages from the sponsor's assets and liabilities. The sale makes the mortgages "bankruptcy remote" meaning that they cannot be consolidated with those of the sponsor in the event the sponsor files for bankruptcy or is placed in an FDIC receivership.

26. The sponsor, however, still controls the depositor, so there is still agency and asset substitution risk. (Additionally, there would be undesirable consolidation for accounting and U.S. tax purposes.) For example, the sponsor could dividend the mortgages up from the depositor or have them sold. Therefore, mortgage securitizations involve a second transaction. The depositor sells the mortgages to a specially purpose entity, typically a trust. The trust pays for the mortgages by issuing certificates of beneficial interest, which the depositor (or its underwriting affiliate) then sells to investors.

27. A trust is commonly used for residential mortgage transactions for reasons that are not germane to this litigation.

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[3] For the purposes of this report, except when otherwise noted, I use the term "mortgage" in its colloquial sense as referring to both the note and the security instrument.

[4] My description of securitization refers to private-label residential mortgage securitizations, like the Covered Trusts. The structure of Ginnie Mae, Fannie Mae, and Freddie Mac securitizations is distinctive.

[5] The process I describe here applies to securitizations done under Pooling and Servicing Agreements. A small subset of residential mortgage securitizations, including 17 of the 530 Covered Trusts, are not governed by a Pooling and Servicing Agreement. Instead, they are governed by a combination of two documents: a Sale and Servicing Agreement and an Indenture. These 17 Covered Trusts are Delaware statutory trusts, not New York common law business trusts. For the Delaware statutory trusts, the Sale and Servicing Agreement covers the transfer of the mortgages from the sponsor to the depositor to the trust and also provides for the servicing of the mortgages. The trust has a Delaware statutory trustee with no duties other than being a Delaware entity and complete indemnification.

The Sale and Servicing Agreement does not govern the issuance of the securities by the trust. Instead, those securities (called notes, rather than certificates) are issued under a subsequent indenture. Under the Indenture, the trust transfers the mortgages to the indenture trustee (BONY) in trust to secure repayment of the notes issued by the trust under the indenture.

The contractual rights of the noteholders under the indenture are *not* identical to those of certificateholders under PSAs. For example, the Event of Default provisions of the indentures are materially different from the PSAs in terms of what is an Event of Default, the ability of noteholders to waive Events of Default, the remedies available to the indenture trustee, and the Event of Default notice requirement. *See, e.g.,* Indenture Dated as of September 30, 2004, CWABS Asset-Backed Notes Trust 2004-SD3, Articles V-VI.

Because most of the Covered Trusts are governed by PSAs, I will refer to PSAs throughout this report rather than Indentures. The different rights of the noteholders under the indentures, however, is an important point as BONY [redacted]

28. Securitization investors want their investments held by a firm that operates robotically, following a nearly complete pre-programmed set of instructions. They do not want the firm's managers exercising discretion in all but a few narrow circumstances: dealing with defaulted loans and dealing with a default by a manager of the firm. Even then, in both cases, discretion is still limited by contractual provisions requiring or forbidding particular actions.

29. The reason that securitization investors want only very limited and closely cabined exercise of discretion by servicers and trustees is because greater range of discretion could result in mismanagement of trust assets (agency costs), asset substitution, or non-contractual liability. Securitization trusts allocate losses among certificateholders via a contractual subordination system known as a "cashflow waterfall". *See* PSA §§ 4.02, 4.04.[6] Losses are borne first by those at the bottom of the waterfall, and only once the position of those at the bottom has been wiped out are the losses then borne by those higher up.[7]

30. Such a system only works if there are no non-contractual creditors, such as tort and tax creditors. The concerns about agency costs, asset substitution, and non-contractual liability are for certificateholders all aspects of credit risk. But they are aspects of credit risk distinct from the credit risk on the mortgages themselves.

31. Limitation of credit risk, as well as accounting and tax treatments mandate that the trust be essentially passive; it is little more than a shell to hold the mortgages and put them beyond the reach of the sponsor's creditors.[8] Use of a trust form requires a trustee to hold legal title to the mortgages in trust for the certificateholders.

32. Mortgages, however, need to be managed. Billing statements must be mailed and payments collected. In theory, this management role could be performed by the trustee; such is the duty of indenture trustees for corporate and municipal bonds. Instead, it is handled by another party known as a "servicer". The reason the roles of trustee and servicer are separate is because servicing is frequently done by the sponsor or one of its affiliates. (Indeed, historically servicing was often a profitable endeavor and one that offered countercyclical revenues to mortgage origination.)

33. If the sponsor (or an affiliate) were to do the servicing and hold the mortgages in trust for the certificateholders, the mortgages might not be bankruptcy remote from the sponsor. There would be a real risk that if the sponsor were to end up in bankruptcy or receivership the mortgages would be treated as if they were the sponsor's, but pledged as collateral for a loan from the certificateholders. This could result in the

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[6] PSA citations in this report refer to the Pooling and Servicing Agreement for Countrywide Alternative Loan Trust 2005-35CB, dated July 1, 2005. While I cite consistently to this particular PSA for convenience, none of the provisions cited are particular to this PSA or to its shelf. Instead, they are standard throughout Countrywide PSAs, include those at issue in this Proceeding.

[7] I oversimply the waterfall here. In most securitizations there are separate waterfalls for principal and interest payments and sometimes payments above a certain level are allocated differently than those below that level.

[8] *See* Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securitie*s, 82 S. CALIF. L. REV. 1075, 1081–84 (2009).

certificateholders not getting the contractual loss allocation that was the basis for their investment.[9]

34. Accordingly, securitization splits the management and title holding functions. The mortgages are managed by the servicer. The servicer is sometimes called a "Master Servicer." Depending on the particulars of a securitization, the servicer will either handle the servicing of the loans directly or subcontract it out to "subservicers."

35. Title to the mortgages is held by a trustee. The trustee's role in mortgage securitization transactions is primarily ministerial. Beyond holding title to the mortgages, the major responsibilities of the trustee are: to verify that the mortgage loans deposited in trust have the proper documentation; to remit payments received by the trust to the certificateholders according to the trust's "cashflow waterfall"; to make periodic reports to the certificateholders on trust performance, PSA § 4.06; and to serve as a financial backstop for the servicer, so that if the servicer ceases to perform its duties, the trustee will take over the servicing function or hire a third party to do so. *See, e.g.*, Jason H.P. Kravitt et al., SECURITIZATION OF FINANCIAL ASSETS, § 9.01[B][3] (2d ed.).

36. The particular ministerial tasks a trustee performs depend on the securitization; sometimes the ministerial tasks are contracted out to various agents, such as document custodians, payment agents, and trust administrators. The trustee does not handle the daily management of the mortgages.

37. A single transactional document called a Pooling and Servicing Agreement (PSA) usually controls the transfer of the mortgages from the sponsor to the depositor, from the depositor to the trust, the creation of the trust, and the issuance of the certificates. The PSA also governs the management of the mortgages by the servicer and the trustee.

B. The Securitization Triangle

38. As the preceding section has detailed, securitization involves at least a quartet of financial entities: the sponsor, the depositor, the servicer, and the trustee. As the depositor is a wholly-owned subsidiary of the sponsor, it can be disregarded for most purposes and treated as virtually synonymous with the sponsor. The sponsor is referred to as the "seller" in Countrywide PSAs because Countrywide securitizations could include loans from more than one Countrywide origination channel (*i.e.*, Park Monaco, Park Granada, Park Sienna), each of which is a separate "seller". To avoid confusing terminology, I use the term sponsor instead of seller. Thus, a securitization transaction is really a triangle between the sponsor, servicer, and trustee. Each of these entities has distinct liability and compensation.

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[9] It is important to note, that the bankruptcy remoteness of the trust does *not* mean that the trust's potential claims against the depositor and sponsor are in any way limited. Bankruptcy remoteness here is about the inability of other creditors of the sponsor to recover from the trust's assets and about the trust's inability to file for bankruptcy itself.

1. The Role of Sponsors

39. The securitization sponsor (through the depositor) sells mortgages to the trust. The sponsor's compensation in the transaction is the proceeds of the sale (typically the trust certificates). The sale includes a set of representations and warranties by the sponsor about itself and the mortgages. To the extent that mortgages do not conform with the representations and warranties, it means that the sponsor was overpaid for the mortgages.

40. The critical representations and warranties deal with the underwriting of the mortgages, the accuracy of the borrowers' credit information, and the credit and collateral documentation. If the mortgages do not conform to the representations and warranties, then the sponsor may be obligated to repurchase them. PSA §§ 2.03, 2.04. The sponsor thus has representation and warranty liability on the mortgages.

2. The Role of Servicers

41. In this case, the servicer is an affiliate of the sponsor. The servicer is compensated in a number of ways. First, the servicer receives a "servicing fee". This fee is between 25 and 50 basis points annually on the unpaid principal balance of the mortgages in the trust. The particular rate depends on the type of mortgages securitized. The servicing fee gets paid before any money flows to certificateholders in the cashflow waterfall. Second, the servicer may receive an "excess servicing fee". This fee is the spread between the interest rate on the mortgages and the interest rate the trust must pay to the certificateholders minus the servicing fee and the trustee's fee. For adjustable or step-rate loans, the excess servicing fee can vary over time. Third, the servicer gets to keep any "float" generated. Servicers collect mortgage payments on the 1st of the month, but are not obligated to remit them to the trustee until the 25th of the month. In the interim, the servicer may invest the mortgage payments (subject to investment restrictions) and keep the investment earnings. Fourth, servicers are entitled to keep most types of "ancillary fees" they collect. These include late fees, various ministerial fees charged to homeowners, and a variety of fees relating to defaults, forbearance, loan modification, and foreclosure.

42. The servicer's primary duty is to manage the mortgage loans, meaning collecting payments and remitting them to the trust and, if a loan defaults, handling the default per the standards required by the PSA. Servicers' incentives in managing defaulted loans may diverge from those of the trust because servicers are paid before the certificateholders—they are in effect the senior creditors of the trust. *See* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011). As senior creditor of the trust, servicers have little incentive to maximize the return on a loan in a foreclosure sale once their own fees are paid. Similarly, servicers are incentivized to foreclose rather than restructure a defaulted loan, even if a restructuring would maximize value for the trust, because the foreclosure results in a certain recovery of funds for the servicer. *Id.*

43. Servicers are also responsible for ensuring that mortgage documentation is correct. Upon receipt of the mortgages, the trustee is required to present the servicer with an

"exceptions report" detailing noncompliance with the trust's documentation requirements. The servicer is then obligated to remediate the documentation problems. Remediation must be done at the expense of the servicer and the sponsor (again, typically an affiliate of the servicer). In my experience, exceptions reports for a typical securitization will contain hundreds to thousands of documentation problems requiring remediation. The expense of doing so would be not insignificant, which incentivizes a servicer not to undertake the remediation of exceptions.

44. The servicer is also required to give notice of violations of the sponsor's representations and warranties, and act as a prudent servicer (which includes the duty to enforce putbacks).[10] When servicers are affiliates of sponsors, as the servicer is here, they are disincentivized from giving notice of or enforcing representation and warranty violations, which would be costly to their sponsor affiliates. Although servicers are entitled to compensation from the sponsor for their costs in enforcing putbacks of representations and warranties, this compensation is without interest and, more importantly, is only available if the putback is successful. PSA § 2.03(c). If the sponsor successfully denies the breach of the representations and warranties, then the servicer is stuck with the costs of the putback effort. As a result, servicers are strongly disincentivized to prosecute representations and warranties, particularly if the sponsor is an affiliate, as it is in the case of the 530 Covered Trusts in this Proceeding.

45. Servicers thus have contractual liability for servicing of the loans, document exception remediation, and failure to give notice of or enforce representation and warranty violations. They also have adverse incentives to comply with all of their duties. To the extent that the servicer can avoid compliance with its own duties, it not only benefits itself, but also the sponsor, which is able to retain the benefit of having sold noncompliant mortgages for compliant mortgage pricing.

46. Yet servicers are gatekeepers for the information necessary to determine their own liability. They are also the gatekeepers for the information necessary to determine the sponsor's liability for representation and warranty breaches, and their own compliance or noncompliance with their duties.[11]

3. The Role of Trustees

47. Trustees are the final part of the securitization triangle. Trustees perform some rote ministerial tasks and provide limited oversight of servicers. This oversight obligation

[10] Additionally, servicers have liability for "advancing" payments to the trust. PSA § 4.01. If a mortgagor fails to pay on the mortgage, the servicer must advance the payment out of its own pocket to the trust, so long as recovery of the advances from the mortgagor or its property are reasonably foreseeable. The duty to advance ensures regular cashflows for investors, which is important because fixed income investor often have regular liquidity needs of their own. The servicer's advances are reimbursed—but without interest—from any recovery from the mortgagor (such as foreclosure sale proceeds), and if that is insufficient, then from the payments on the other mortgages held by the trust. The servicer's recovery of advances is also senior to the certificateholders in the cashflow waterfall.

[11] The PSAs give the Trustee the power to acquire certain information from the servicer that is necessary to determine compliance. In this case it appears [redacted]

typically requires no particular action prior to an Event of Default, and the trustee is not deemed to have knowledge of an Event of Default unless notified. PSA § 8.02(viii). Prior to an Event of Default, the trustee can be held liable for negligent actions or omissions or willful misconduct.[12]

48. Following an Event of Default the trustee must act as a prudent person would under the circumstances. PSA § 8.01.

49. Trustees are compensated with a fixed fee rate based on the unpaid principal balance of a trust. BONY's compensation for the Covered Trusts was nine-tenths of a basis point or 0.009% (0.00009) of the unpaid principal balance of a trust. PSA § 8.05. Trustees are also indemnified by the servicer for any liability, loss, or expense incurred in any legal action related to the PSA that is not taken at the direction of the certificateholders and is in good faith and taken with due care. PSA § 8.05.

50. Investors in securitizations typically have the right to enforce the duties of the servicer or the representations and warranties of the sponsor through a demand on the trustee to act. Such a demand, however, typically requires compliance with a collective action clause that mandates that it be supported by 25% of the voting rights of the certificates, sometimes in each class of certificates. PSA §§ 8.01(iii), 8.02(iv), 10.08. The trustee controls the list of the certificateholders who are otherwise anonymous to each other, unless the requisite number of certificateholders gather to demand the list from the trustee. The certificateholders must also offer the trustee indemnity for its actions. PSA § 10.08. Only if the trustee refuses to act for 60 days following notice and indemnity may a certificateholder bring suit regarding the PSA. PSA § 10.08. The trustee is removable only upon the action of certificate holders representing 51% of the voting rights of the certificates. PSA § 8.07. Thus, trustees are typically the gateway to claims against servicers, and servicers are the gateway to claims against sellers for mortgage underwriting violations.

51. The result of this set-up is a self-protective triangle that controls access to information necessary to enforce trust rights but none of the members of the triangle have any incentive—and in fact are disincentivized—to do so. As a result, it was easy for non-compliant mortgages to be securitized with the losses being borne by the certificateholders, rather than being placed on the sponsors as the result of representation and warranty enforcement. The entire design of the system by sell-side deal attorneys greatly benefits sponsors and facilitated the securitization of the bad loans that fueled the housing bubble and primed the financial system for the acute crisis in the fall of 2008.

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[12] Under common law, a trustee can never be exculpated from the duties of good faith, care, and loyalty, no matter the limitations in the trust document. Robert H. Sitkoff, *Trust as "Uncorporation": A Research Agenda*, 2005 ILL. L. REV. 31, 39 (2005). *See also* Beck v. Manufacturers Hanover Trust Co., 218 A.D.2d 1, 12 (N.Y. App. Div. 1st Dep't 1995); Dabney v. Chase Nat'l Bank, 196 F.2d 668 (2d Cir. 1952) (Hand, L., J.); UNIF. TRUST CODE § 1008, 7C U.L.A. 258 (Supp. 2004); RESTATEMENT (SECOND) OF TRUSTS § 222 (1959). It is worthwhile noting that an organization form exists that offers trustees the potential for complete exculpation, including from good faith duties. This is the Delaware statutory trust. 12 DEL. CODE ANN. § 3807(a). *See also* Sitkoff, *supra*.

a. The "Pocket Trustee" Problem and BONY's Relationships with Bank of America

52. Trustees also lack any incentive to be pro-active and they are strongly incentivized to turn a blind eye to servicer malfeasance and non-compliance. This is because trustees are selected by securitization sponsors, not by investors. Trustees get their business from sponsors. While trustees represent the investors, their client is the sponsor. BofA, not the certificateholders, is BONY's customer.

53. Moreover, there are often close, repeat business relationships between securitization trustees and securitization sponsors. Fischel Report at ¶ 32. BONY, for example, gets two-thirds of its private-label residential mortgage securitization trusteeships from BofA. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 60-63 (2011). BONY was also [redacted] Stanley Dep. at 27-29.

54. BONY's Litigation Expert Professor Fischel assumes that these "preferred trustee" relationships are unproblematic because they are common. He is mistaken. *See In re E. Transp. Co.* (*The T.J. Hooper*), 60 F.2d 737, 740 (2d Cir. 1932) (Hand. L., J.) (common industry practice may nonetheless be negligent). Professor Fischel does not consider how the repeat business relationship might affect the incentives of the trustee when dealing with a default by the sponsor. The "preferred trustee" remains "preferred" only so long as it is compliant with the wishes of the sponsor. In other words, to be a "preferred trustee," it is necessary to also be a "pet trustee" or "pocket trustee." And that means turning a blind eye to the sponsor and affiliated servicer breaches.

55. Furthermore, despite his extensive use of public securities data for his report, Professor Fischel fails to note that BONY had as of the end of 2012 a $1.5 billion equity position in BofA (either for itself or for its clients), accounting for 1.21% of BofA's outstanding stock.[13] This position makes BONY "long" on BofA, and thus "short" on the enforcement of trust rights; to the extent that BofA can shed its MBS-related liability at low cost, it should boost BofA's equity price, which would in turn benefit BONY (or BONY's asset management clients) as a shareholder.

56. BONY claims to have a [redacted] Griffin Dep. at 331. [redacted] *Id.* at 331-32. Moreover, Robert Griffin, [redacted] as well as various other individuals, [redacted] *Id.* at 340-43.

[13] It is unclear if this is an investment for BONY's own account or an investment managed for others.

b. BONY's Litigation Experts Fail to Recognize the Function of a Trustee in the Securitization Context

57. The reports of BONY's Litigation Experts Professor Langbein and Mr. Landau are both predicated on serious misunderstandings about the function of a securitization trustee. Professor Langbein bases his report on the assumption that BONY's actions are to be judged by default trust law. Mr. Landau's report, in contrast, assumes that BONY as a securitization trustee is equivalent to a trustee under a corporate bond indenture. Not only is it hard to square the assumptions of BONY's Litigation Experts with each other, but there are fundamental flaws in both, and those flaws compromise the reliability and utility of their reports.

58. Professor Langbein appears to believe that it is general principles of trust law, such as the "Principle of Necessary Powers" or "The Power to Compromise or Settle Claims," that apply in this Proceeding. To that end, he makes repeated reference to general sources such as the Restatement (Third) of Trusts. Professor Langbein's central premise is that "a trustee has all the powers necessary to perform the trust." Langbein Report at 3.

59. Professor Langbein's contentions of broad trustee powers make no sense within the context of the economics of securitizations. Securitization trustees are paid very little (less than a single basis point!) because they are expected to do very little. Professor Langbein would have the Court believe that sophisticated investors would entrust the fate of their investment to a trustee given wide authority, but with little liability or compensation. If Professor Langbein's contentions were correct, there would be a dramatic mismatch between BONY's powers as trustee and its accountability in the exercise of those powers.

60. Professor Langbein must be read one of two ways: either his claims beg incredulity because a securitization trustee simply does not have the expansive powers described by Professor Langbein; or Professor Langbein's claims are incomplete because in describing the expansive powers under default trust law, he fails to describe the equally expansive duties attendant to the exercise of broad powers.

61. The thrust of Mr. Landau's position is that so long as the Trustee complied with "industry custom and practice" the Trustee has met its obligations and acted reasonably. Mr. Landau's description of "industry custom and practice" is flawed because the duties of a securitization trustee are distinct from those of many types of corporate trustees, including the fact that securitization trustees perform a financial backstop role for the servicer and represent multiple classes of certificateholders. However, as a threshold matter, even if Mr. Landau's discussion of industry custom and practice were correct, that is hardly evidence that the settlement should be approved. The standard for approval of the settlement is not whether the trustee complied with industry standards, not least because industry standards may be problematic. *See, e.g.*, *In re E. Transp. Co.*, 60 F.2d at 740.

C. The Inside Investors (the "Protective Committee)

62. The Inside Investors are a group of financial institutions that have banded together to act as a type of bondholder "protective committee"[14] regarding the MBS.

63. A number of the Inside Investors have business relationships with Bank of America outside of this litigation. It would be surprising if most or all of the Inside Investors were not derivatives and repo counterparties, creditors, debtors, or equityholders of Bank of America in some context. The Federal Reserve Bank of New York has a unique business-regulatory relationship with BofA, and BofA is one of Freddie Mac's major business partners with a clear interest in preserving that relationship. Federal Housing Finance Agency Office of Inspector General, *Evaluation of the Federal Housing Finance Agency's Oversight of Freddie Mac's Repurchase Settlement with Bank of America*, Evaluation Report EVL-2011-006, Sept. 27, 2011, at, 22, 25, 29, 31 n.58 (discussing how Freddie Mac failed to prosecute many repurchase claims because of its interest in maintaining its business relationship with BofA); Federal Housing Finance Agency Office of Inspector General, *Follow-up on Freddie Mac's Loan Repurchase Process,* Evaluation Report EVL-2012-007, Sept. 13, 2012, at 10, 12 (noting that Freddie Mac believed that it "would not recover enough from a more expansive loan review process to offset the loss of business from loan sellers" like BofA); Dep. Ex. 201.

64. According to NASDAQ's listing of the largest institutional holders of the stock of Bank of America Corporation, a number of the Inside Investors hold sizable equity stakes in Bank of America.[15] (It is unclear to the extent this reflects the Inside Investors own funds and those that they manage on behalf of clients, but the distinction is immaterial here.) It is possible that some of the Inside Investors are invested in securitizations not covered by the Proposed Settlement for which BofA may have liability, such as Merrill Lynch and First Franklin securitizations. Like the Trustee, the Inside Investors have interests that indicate they may be "long" on BofA, and hence "short" on maximizing recovery to the Covered Trusts. I have seen no indication that BONY verified one way or the other.

65. Deposition testimony has also established that [redacted] Waterstredt Dep. at 151-52.

66. Additionally, BofA was the largest single equityholder in Blackrock and has a seat on its board of directors. Sree Vidya Bhaktavatsalam, *Bank of America, PNC Unload $8.3 Billion of BlackRock Shares,* Bloomberg, Nov. 9, 2010 (BofA as BlackRock's largest shareholder); Sree Vidya Bhaktavatsalam, *BlackRock Says Montag Joins Board as Krawcheck, Linsz Depart*, Bloomberg, April 7, 2011 (Bank of America Corp.'s joins BlackRock's board).

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[14] I by no means suggest that the Inside Investors banded together to "protect" all investors in the Covered Trusts. In fact, it is just the opposite. Historically, protective committees were creatures of bond houses and their trustees. They would consist of hand-picked favored creditors of the bond houses, which controlled the non-public lists of bondholders and operated to protect the bond houses from other investors.

[15] http://www.nasdaq.com/symbol/bac/institutional-holdings.

67. Moreover, recent media reports suggest that one of the Inside Investors, the Federal Reserve Bank of New York, may have its own reasons to support BofA, unlike other investors. Specifically, the Federal Reserve Bank of New York confidentially agreed to support BofA in other litigation against AIG and released any claims it had against BofA in exchange for a nominal settlement payment. Gretchen Morgenson, *Promises, Promises at the New York Fed*, N.Y. Times, Mar. 3, 2013, at BU1; Gretchen Morgenson, *Don't Blink, or You'll Miss Another Bailout*, N.Y. Times, Feb. 17, 2013 at BU1. This indicates that for whatever reason (its own economic self-interest or the interests of its member banks), the Federal Reserve Bank of New York has an interest in protecting BofA from mortgage litigation.

68. Even within the Covered Trusts, the Inside Investors are not representative of other certificateholders in the following ways:

- First, the particular 189 Covered Trusts in which the Inside Investors have 25% of the Voting Rights may have a different collateral makeup than the other 341 Covered Trusts.[16] To wit, the trusts in which the Inside Investors have 25% of the Voting Rights may have more subprime or Alt-A collateral than the other trusts or vice-versa.

- Second, the Inside Investors may not be invested in similarly exposed tranches of the Covered Trusts to the certificateholders in general. They may be concentrated in the senior tranches, for example. If so, they would likely not have incurred much if any credit losses, but the market value of their certificates would be severely depressed because of the uncertainty of future losses for the trusts. The settlement might increase the market value of their certificates even if they are not compensated for actual losses. In such a situation, the Inside Investors would not be particularly concerned about the level of compensation for actual or future losses, as long as the market value of their certificates was increased. If so, their interests would not be representative of many other certificateholders

- Third, if the Inside Investors accumulated part or all of their positions in the Covered Trusts at distressed prices they would have different incentives regarding the Proposed Settlement from an investor that purchased at par. As I understand it, the Inside Investors have refused a number of discovery requests regarding the details of their positions, including dates and prices at which they purchased their positions. Absent this information, it is impossible to determine whether the Inside Investors are representative of the certificateholders in general. Nothing in the record appears to support an inference that BONY ever attempted to determine the representativeness of the Inside Investors for the certificateholders in either the 189 Covered Trusts in which the Inside Investors have at least 25% of the Voting Rights or in the other 341 Covered Trusts.

[16] At the time the Inside Investors filed their statement in support of the settlement, they held at least 25% of the voting rights in 189 Covered Trusts, but not in the remaining 341 Covered Trusts. *See* Doc. No. 124, p. 5. The Inside Investors' holdings may have changed since then, but for purposes of my report I rely on these figures.

69. Additionally, counsel for the Inside Investors has expressly stated that the Inside Investors did not represent the interests of absent certificateholders during negotiations. Doc. No. 250, at 13 (Inside Investors' Response Brief).

70. Professor Fischel's report contends that because the Inside Investors support the settlement it means it is reasonable. Professor Fischel notes, "Presumably, these highly sophisticated Institutional Investors…were perfectly capable of assessing the Settlement's reasonableness and adequacy in light of their economic self-interest since they had the most to lose by settling for too low an amount." Fischel ¶ 26.

71. The Inside Investors' support of the settlement cannot be taken as evidence for its reasonableness. The only conclusion that can be reached from the Inside Investors' support of the Proposed Settlement is that it is good for the Inside Investors, who may or may not be representative of the other certificateholders.

72. Further, the Insider Investors' letters to BONY notifying BONY of an Event of Default and directing BONY to undertake action provided an opportunity for BofA to create certainty about its exposure to PLS related litigation.[17] The Inside Investors' support for the Proposed Settlement is therefore uninformative.

73. Additionally, Professor Fischel's assumption appears uninformed. Some of the Inside Investors' extraneous relationships with BofA are matters of public record, such as Bank of America's ownership stake in Blackrock. Others are part of the discovery record that Professor Fischel apparently did not consider as he refers solely to AIG's Verified Petition, which was filed before discovery. The likelihood of any major financial market participants like the Inside Investors lacking direct or indirect business relationships with or financial ties to BofA outside of the Covered Trusts is incredibly low. The Inside Investors' interests in BofA cut against Professor Fischel's assumption that their support of the settlement is indicative of the settlement's reasonableness.

74. BONY's Litigation Expert Mr. Burnaman, makes a similarly flawed assumption with respect to his theory that the negotiated settlement amount is the market price for BofA's liability. Burnaman Report at 28. As a necessary condition for this theory, Mr. Burnaman assumes that the settlement was reached by "truly adversarial counterparties negotiating at arms length." *Id.* at 12. Mr. Burnaman admits no basis for this foundational assumption, *id.* at 9, and fails to acknowledge that BofA's repurchase liability is defined by the trust documents, not by what any particular subset of certificateholders is willing to agree to, particularly when the Trustee failed [redacted]

75. Moreover, there is evidence that the Inside Investors actually benefitted from cutting a deal with BofA. Not only could they control the shape of the negotiations and thus craft a deal that was in their interests (but not necessarily the interests of other certificateholders), but they were able to get their attorneys fees covered and secure a

[17] Creation of certainty about PLS-related litigation exposure is hugely important to BofA because of it is believed to be one of the factors dragging down its share price and pushing its market capitalization some $85 billion dollars below its book value. http://finance.yahoo.com/q/ks?s=BAC+Key+Statistics.

release from the indemnity that they were required to provide to BONY under PSA §§ 8.02(ix). *See* Doc. No. 3, at Ex. C (Side Letter) (unwinding Inside Investor instructions).

D. BONY Failed to Honor its Obligations to Each Individual Covered Trust

76. BONY is not a generic trustee. No such entity can exist—a trustee only exists for a discrete trust corpus. In this proceeding there are 530 legally distinct trusts. Accordingly, BONY wears 530 separate legal hats in this Proceeding. BONY appears in this Proceeding as "BONY as trustee for trust 1", "BONY for trustee for trust 2", "BONY as trustee for trust 3"… all the way through "BONY as trustee for trust 530." Crosson Dep. at 79-81. In each case, BONY has distinct contractual and fiduciary duties that may in fact conflict with each other.

77. The distinct legal identity of these trusts is at the heart of securitization. The whole point of securitization is that the trusts are not Countrywide. Instead, each trust is a distinct pool of assets, a separate firm.

78. While BONY appears to believe that for administrative convenience it may treat all of its trusts as a single entity and the BONY Litigation Expert reports treat the trusts as an aggregate entity, doing so is contrary to the fundamental nature of securitization. The 530 trusts are as legally distinct as 530 people.

79. BONY owes each trust a separate and distinct duty of care, and that involves evaluating each trust's specific rights as set forth in the trusts' governing agreement. These rights often vary in subtle ways between trusts, including in the representations and warranties made to the trusts. They also may vary in terms of the rights of the certificateholders or noteholders regarding Events of Default. This is certainly the case as between 513 trusts governed by Pooling and Servicing Agreements and the 17 trusts governed by Indentures. Fulfilling a duty of care to each trust would involve, at the very least, a consideration of the specific rights of the trust.

80. Because each trust is its own separate entity and the Trustee has an individual trusteeship with respect to each Covered Trust, any settlement or potential recovery must be evaluated on a trust-by-trust basis. This is particularly true, where there may be a limited source of recovery. *See* Fischel Report at ¶ 37. Indeed, Countrywide's purportedly limited resources was allegedly a major consideration for BONY when approving the Proposed Settlement. Because of its alleged resource constraints, the recovery for any one trust reduces the assets available for the other trusts. This means that BONY's various trusteeships may be competing with one another for the same resources and BONY must now allow recovery for one trust to prejudice another.

81. The lumping together of the 530 trusts is particularly problematic because [redacted] but the Inside Investors do not even have 25% of the voting rights in 341 of the trusts. There is no evidence that BONY took any steps to determine whether those 341 trusts or any subset of them had distinct rights from those in which the Inside Investors had 25% of the voting rights.

82. A perfect example of the problems with treating the trusts as an aggregate entity is BONY's allocation methodology. If approved, each Covered Trust will be paid its pro rata share of the Settlement Amount based solely on each Trust's losses. But because each Trust is comprised of different collateral, different ratios of collateral types, and other factors affecting the likelihood that any particular Trust suffered more or less losses as a result of breaches of representations and warranties, the allocation will unduly advantage some Trusts and prejudice others. BONY could not possibly approve of such an allocation if it were actually performing its trusteeship faithfully to each Trust individually.

83. The Inside Investors lack any holdings whatsoever in many of the Covered Trusts, yet continue to prosecute the Proposed Settlement that impacts all investors in all of the Covered Trusts. The Inside Investors seek not only for a majority to oppress a minority within some trusts, but for a minority to oppress a majority in other trusts and for non-investors to oppress investors in yet other trusts. Everything about this is contrary to nearly 75 years of business trust law, where since 1939 majorities cannot bind minorities in any way that affects minorities' right to payment. Moreover, an Article 77 proceeding is not an ersatz bankruptcy proceeding under which a majority of creditors can bind a minority. The preferences of the Inside Investors are not those of all investors.

84. Nonetheless, Professor Fischel's report concludes that the Inside Investors are doing a great favor for the 341 trusts in which they do not hold 25% of the Voting Power. Fischel Report at ¶ 34. He assumes that these other 341 trusts will likely get nothing outside of the proposed settlement. Professor Fischel's assumption is unfounded.

85. The certificateholders in the other 341 trusts can—if they so choose—organize and pursue their own remedies and possibly their own settlements. Indeed, the attorneys for the Inside Investors, Gibbs & Bruns, were competing with another firm (Talcott Franklin P.C.) for organizing investors. Alison Frankel, *Did Gibbs pre-empt rival investor group in BofA's MBS deal?* REUTERS, Oct. 3, 2011, *at* http://blogs.reuters.com/alison-frankel/2011/10/03/did-gibbs-pre-empt-rival-investor-group-in-bofas-mbs-deal/. Talcott Franklin P.C. promised to take a more aggressive approach than that of Gibbs & Bruns. *Id.*

86. By expanding the Proposed Settlement to cover the other 341 trusts, the Inside Investors took power that was not theirs to use and imposed themselves on trusts and beneficiaries where they had no right to do so.

87. By dragging in the other 341 trusts, the Inside Investors effectively forestalled any alternative global settlement and thereby made their settlement possible. This was only feasible, however, if BONY was complicit. If BONY had recognized its 530 legally separate roles, it might not have consented in at least 341 cases to be part of the Proposed Settlement. BONY's disregard of the Covered Trusts' legal separateness inured to the benefit of the Inside Investors. It also benefitted BofA, which was able to negotiate a low-ball global settlement, rather than getting ratcheted into higher payments by successive settlements. And this benefitted BONY because BONY will only get BofA's future business if BofA finds BONY to be a sufficiently docile trustee. *See supra*, ¶¶ 52-56.

II. BONY's Actions in Negotiating the Settlement Appear Aimed at Protecting Itself and Bank of America Rather than the Covered Trusts

88. Notwithstanding the position BONY's Litigation Experts have taken—that the Trustee acted reasonably in connection with Proposed Settlement—evidence in the record reveals that BONY's actions throughout the negotiation of the Proposed Settlement have all been aimed at protecting itself and BofA rather than the Covered Trusts, an unsurprising outcome given that BONY receives its trusteeship business from BofA, rather than from the certificateholders.

A. An Event of Default Occurred Under the PSAs

89. BONY [redacted]. The PSA does not require "declaration" of an Event of Default. Instead, an Event of Default simply occurs under PSA § 7.01. While a trustee is not deemed to have knowledge of an Event of Default prior to notice, once a trustee receives notice of an Event of Default, it is required to proceed accordingly. PSA § 8.02(viii). PSAs require merely notice from a requisite minority of certificateholders, not proof of allegations in the notice, and the trustee's assent is not required for an Event of Default.[19] PSA § 8.02(viii). There is no language in the PSAs that requires proof or assent by the Trustee.

90. Indeed, it would make little sense if the PSAs were to require proof of allegations of default. The Trustee and the servicer are the parties with access to the information about servicer defaults: they, not the investors, have access to the loan files and servicing records.

91. Irrespective, not just [redacted] contrary to what BONY's attorney Mr. Kravitt has self-servingly claimed. Kravitt Deposition Transcript at 32. Instead, the PSA requires certain voting thresholds.

92. The notice given by certificateholders is an exercise of contractual rights and must be done in good faith. [redacted] Waterstredt Dep. at 99. Moreover, the Trustee is not required to take action at certificateholder direction without first receiving satisfactory indemnification. *See* PSA § 8.02(vi); *see also id.*

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[18] Again, I continue to refer to the Pooling and Servicing Agreement for Countrywide Alternative Loan Trust 2005-35CB, dated July 1, 2005, as standard language (and often section numbering) among the Covered Trusts' PSAs, but also note that there is sometimes variation among the PSAs and that the 17 Covered Trusts governed by Indentures are subject to provisions, including on Events of Default, that are materially different from the Covered Trusts governed by PSAs. *See supra* notes 5, 6.

[19] The PSAs provide: "the Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof." PSA § 8.02(viii). While this may not be the wisest of contract structures, as "Anybody can allege that there in fact had been noncompliance within the provisions of an indenture," Kravitt Dep. at 32, it is the structure that BONY and the certificateholders all signed-up for, and it is not BONY's to unilaterally second-guess.

at § 10.08. In other words, anyone notifying the Trustee of an Event of Default is required to put their money where their mouth is.

93. Here, an Event of Default occurred. [redacted] [redacted] [redacted] 16 (characterizing [redacted] as "advis[ing BONY] of facts and circumstances constituting Events of Default under the applicable PSAs."). These letters stated the factual predicates for an Event of Default, and there is evidence in the record that an Event of Default occurred:

- First, [redacted]. *See, e.g.*, Waterstredt Dep. at 71-87; Smith Dep. at 202-21; Robertson Dep. at 106-28.
- Second, BONY's entry into settlement negotiations is itself evidence of an Event of Default. BONY's negotiation and agreement to Proposed Settlement is an exercise of discretion that could only be available to the Trustee after an Event of Default.
- Third, in November 2010, BONY's attorney, Mr. Kravitt, [redacted] Dep. Ex. 368. [redacted] Master Servicer could only be replaced if there was an Event of Default. *See* PSA § 7.02.
- Fourth, the terms of the Proposed Settlement themselves evidence servicing failures. The Proposed Settlement contains a number of purported "servicing improvements," and BONY's Litigation Expert, Mr. Burnaman, goes on at length about their purported value to the Covered Trusts.
- Fifth, entry into the Forbearance Agreement is evidence that all parties believed the 60-day Event of Default cure period was running. Dep. Ex. 46.[20]

B. BONY Undertook No Investigation of [redacted]

94. When an Event of Default occurs, the Trustee is held to a prudent person standard, and it is required to send out notice to the certificateholders—at its own expense—within 60 days unless the default is cured. PSA §§ 8.01, 7.03. The PSAs for the Covered Trusts—unlike many other PSAs and corporate bond indentures—contain no exception permitting the Trustee to delay notice if doing so would be in the best interests of the certificateholders.

95. [redacted] Kravitt Dep. at 37-38; Bailey Dep. at 100-22. [redacted] *See* Dep. Ex. 44. These are the actions of a pet trustee trying to ensure a future business flow, not the actions of a trustee fulfilling its duties.

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[20] [redacted]

96. Even the Inside Investors who support the Proposed Settlement have stated that they [redacted] Dep. Ex. 16. [redacted] " *Id*.

97. Among other things, [redacted] Exhibit 16; Exhibit 18. [redacted] Lundberg Deposition Transcript at 149-161. BONY, therefore, failed [redacted] Without looking at loan-level documentation—which BONY was contractually entitled to under PSA § 3.07—BONY could not determine if losses to the trusts were caused by underwriting representation violations, document exceptions, or servicing violations, much less if there was variation among the Covered Trusts, as might be expected given different shelves and vintages.

C. BONY Acted to Avoid the Consequences of an Event of Default

98. Instead of acting per its contractually prescribed duties, or at least [redacted], or seeking judicial guidance (such as through an Article 77 proceeding), BONY acted to cover up the Event of Default. BONY entered into the Forbearance Agreement with Bank of America (Exhibit 46) as well as repeated extensions of the Forbearance Agreement, despite lack of any express contractual authority to do so.

99. BONY's failure to undertake *any* investigation of the Gibbs & Bruns allegations, even while negotiating a settlement, is also consistent with attempting to cover up the Event of Default. [redacted] Lundberg Dep. at 151-61.

100. And perhaps most tellingly, BONY's attorney Jason Kravitt, emailed Bank of America's attorneys at Wachtell, Lipton, Rosen & Katz [redacted]

[redacted]

[redacted]

Dep. Ex. 50. [redacted], thereby relieving the Trustee of its obligation to provide post-Event of Default notice to the certificateholders as required under PSA §7.03. [redacted] *See* Dep. Ex. 50; *see also* Dep. Ex. 44.

101. BONY's actions are particularly striking given what BONY's counsel, Mr. Kravitt, has written on the subject:

> The trustee should prepare and send timely notice of the default to investment holders. Most securitization agreements and TIA Section 315(b) require timely notice unless precipitous notice of a default (other than a nonpayment default) might adversely affect the investors in the trustee's view. *In any case, not only should the trustee send an initial notice, but periodic communications with investors may be appropriate to both inform investors and protect the trustee from after-the-fact second-guessing by investors*.

Jason H.P. Kravitt, SECURITIZATION OF FINANCIAL ASSETS at § 9.03[B][2] (emphasis added) (emphasis added).

102. BONY was strongly incentivized to cover up the Event of Default for several related reasons.

103. First, many of a securitization trustee's duties—and therefore authority—spring only upon the occurrence of an Event of Default. *See* KRAVITT, *supra* ¶ 102, § 9.02[C][1]. Prior to an Event of Default, BONY as trustee was required "to perform such duties and only such duties as are specifically set forth in [the PSA or Indenture]." PSA § 8.01(i). This means that prior to an Event of Default, BONY only had minimal ministerial duties to perform.[21] Following an Event of Default, however, BONY would be required to act as a prudent person. PSA § 8.01. That requirement carries with it significant responsibilities. KRAVITT, *supra* ¶ 102, §§ 9.02-9.03*; see also* Steven L. Schwarcz & Gregory M. Sergi, *Bond Defaults and the Dilemma of the Indenture Trustee*, 59 ALA. L. REV. 1037, 1046 (2008), (noting that "a prudent indenture trustee will seek such direction from bondholders *for any* unilateral action by the indenture trustee that entails a degree of risk.") (emphasis added).

104. Second, the occurrence of an Event of Default could lead to the termination of the Master Servicer. If that were to occur, BONY would have to step in as Master Servicer or find a successor, a complicated task as BONY would be restricted in the compensation it could pay a successor master servicer to the Basic Master Servicing Fee (generally 25 basis points on the unpaid principal balance). PSA § 7.02. Other types of servicing income, such as float, excess spread, and ancillary fees appear to be expressly prohibited for a successor master servicer under the PSA.

105. Likewise, if BofA were terminated as Master Servicer or were insolvent, BONY might be required to make advances to the trust. PSA § 4.01(b). While such advances are reimbursable with interest, they can still place liquidity strains on an institution, especially given the size and number of the Covered Trusts.

106. Additionally, if BONY had to assume the duties of Master Servicer, it would be required to hold regulatory capital against the servicing rights, meaning that BONY

[21] The law still imposes certain non-waivable duties on trustees both before and after an Event of Default.

might have to raise equity capital in order to perform its servicing duties.[22] Mortgage servicing rights have the highest regulatory capital requirements (dollar-for-dollar capital) of any type of asset. 12 C.F.R. Pt. 3, App. A, § 4(f)(4).

107. Third, notice of an Event of Default to certificateholders would increase the likelihood that other investors and investor groups would exercise their rights under the PSAs, or otherwise express competing views on how to deal with BofA.

108. Finally, notice of an Event of Default might have jeopardized BONY's own trusteeship. A simple majority of certificateholders may terminate a trusteeship. PSA § 8.07. If BONY had alerted the certificateholders to the Event of Default as required by the PSA, the certificateholders might have started to ask uncomfortable questions about BONY's relationships with BofA and BONY's own performance under the PSA (particularly in regard to ensuring the cure of mortgage loan document exceptions). Removal from a trusteeship would have been a major reputational hit to BONY's trustee business and it would also cost it trustee fees.

109. Despite greater liabilities and duties, BONY's compensation under the PSA remains unchanged following an Event of Default. Irrespective of an Event of Default, BONY is paid less than a single basis point on the outstanding principal balance of the trusts. Because of the greater duties and potential liabilities, an Event of Default would make BONY's trusteeships less profitable and possibly unprofitable. This compensation structure created an incentive for BONY to cover up the Event of Default.

110. The problematic incentive structure hardwired into BONY's compensation is well-known to scholars of business trusts. Professor Marcel Kahan, [redacted] has written about the conflicts created by the compensation of indenture trustees:

> The Trustee . . . receives no extra compensation for its own efforts if its duties increase as a result of an Event of Default. The structure of the trusteeship . . . creates few incentives for the trustee to act as an effective representative of the bondholders. The trustee has no direct monetary stake in preserving the value of the bonds, and neither the trustee's compensations structure nor its pre-Event of Default duties creates any incentives to do so. Prior to an Event of Default, the trustee's basic incentive is to do nothing, as taking any action entails effort for which the trustee is not compensated. To be sure, after an Event of Default, the liability regime creates incentives to satisfy the "prudent person" standard. It is, however, doubtful whether the fear of liability alone is sufficient to induce the trustee to take optimal actions to represent bondholder interests. *Moreover, the heightened post-Event of Default duties create incentives for the trustee to refrain from any*

[22] It is unclear how a trustee would account for assumption of servicing duties under generally accepted accounting principles (GAAP). If the trustee booked the servicing rights as an asset, however, then bank regulatory capital requirements would apply.

> *action that could trigger an Event of Default, such as investigating suspicions of a default or giving a notice of default to the company*.

Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 77 N.Y.U. L. REV. 1040, 1063-64 (2002) (emphasis added).

111. Third, BONY's business relationship with BofA created a strong incentive for BONY to avoid declaring an Event of Default. Declaring a master servicer Event of Default could have resulted in the termination of BofA as Master Servicer. Not only would that deprive BofA of servicing rights and the associated income, but it would potentially spring servicing rating downgrades or cross-defaults on other contracts. For a pocket trustee like BONY, such a move would endanger future business flows from BofA with no benefit for BONY. Roughly two-thirds of BONY's residential mortgage-backed securities comes from BofA/Countrywide. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011); *see also* Stanley Dep. at 137.[23]

112. These factors help explain why BONY would not want to declare an Event of Default and why it would seek to have the 60-day cure period tolled.

D. Evidence in the Record Shows That BONY [redacted]

113. Evidence in the record shows that BONY [redacted] The three key decision-makers in the settlement process at BONY were [redacted] *See* Griffin Dep. at 45. It appears they never meaningfully contemplated [redacted] Lundberg Dep. at 134-38; [redacted] Dep. at 219-23; [redacted] Dep. at 127-31.

114. BONY did not [redacted]. Instead, BONY retained Jason Kravitt, a *sell-side* securitization *deal* lawyer. Kravitt Dep. at 19-20. Mr. Kravitt's practice is based around [redacted]. *Id.* at 20. Mr. Kravitt is not [redacted]. *Id.* at 236, 448. Instead, Mr. Kravitt's [redacted] *Id.* at 22. In other words, [redacted]

[23] [redacted] Stanley Dep. at 30-33. To the extent that the Inside Investors were "long" on Bank of America and thus net "short" on a settlement, BONY would be further incentivized to reach a settlement the Inside Investors liked, irrespective of whether such a settlement were in the interest of the Covered Trusts or other certificateholders.

[24] The sell-side of the securitization industry refers to securitization sponsors and underwriters—those parties looking to sell mortgage-backed securities. The buy-side of the industry refers to securitization investors. Mr. Kravitt is an officer and founder of sell-side securitization trade associations such as the American Securitization Forum and the European Securitization Forum. The trade association for the buy-side of the securitization industry (investors) is the Association of Mortgage Investors, which was formed in part because the American Securitization Forum was unresponsive to investor concerns including about representation and warranty violations.

[redacted]

115. Mr. Kravitt never considered [redacted] Kravitt Dep. at 603-04.

116. Despite BONY's indemnification under PSA § 8.05 by [redacted] the Master Servicer [redacted] BONY failed to undertake basic investigation of representation and warranty violations, servicing violations, or document exception violations. BONY did not even undertake the most basic step of pulling the loan files to examine them. Lundberg Dep. at 150-51.

117. Not surprisingly, BONY began negotiating a settlement [redacted] Kravitt Dep. at 437; *see also id.* at 143, 438. Mr. Kravitt's follow-up email [redacted] Mr. Kravitt wrote, [redacted] Dep. Ex. 44.

118. The very act of proceeding with settlement negotiations seems inconsistent with BONY's denial that an Event of Default had occurred—if it had not, there would be nothing to settle. Moreover, if BONY ever had the power to negotiate a settlement on behalf of the trusts, it certainly was not until and unless there was an Event of Default, as prior to an Event of Default BONY's powers are narrow and necessarily confined to the letter of the PSA. BONY cannot have its cake and eat it too.

119. BONY does not appear to have considered how litigation could have been useful in developing a record to better understand the strength of its negotiating position, as Professor Coates has suggested in his expert report. Coates Report at 13.

120. As BONY's own expert Professor Fischel notes, "In [failing to bring litigation], the Trustee gave up the possibility of getting a better outcome…." Fischel Report ¶ 16. While Professor Fischel correctly notes that there are circumstances when the trade-off between settling and litigating is reasonable, BONY did not undertake sufficient diligence to make an informed decision here (despite being indemnified for its costs by [redacted] BofA). [redacted] BONY surrendered significant potential negotiating leverage.

E. Evidence in the Record Shows That BONY Used the Settlement Experts to Paper Over the Position It Wished to Adopt, Rather than to Provide Objective Evaluation or to Strengthen Its Negotiating Position

121. Similarly, BONY did not engage experts to create leverage or even objectively evaluate the strength of its claims, but instead to attempt to devalue the Covered Trusts' claims. BONY, either directly or through its counsel Mayer Brown, engaged experts (the "Settlement Experts") during the settlement process. The timing and content of the Settlement Expert reports indicate that BONY's use of the Settlement

Experts was neither to create negotiating leverage nor to provide truly expert evaluation of the strength of its position, but instead, to justify BofA's legal positions.

122. BONY hired two legal experts, Professors Adler and Daines quite late in the settlement process, [redacted] *See* Dep. Ex. 11 (dated May 27, 2011) (Adler Report); Dep. Ex. 10 (dated June 7, 2011) (Daines Report). Moreover, both Professors Adler and Daines testified that [redacted] Adler Dep. at 155-56; Daines Dep. at 151-57. This means that Professors Adler and Daines were not consulted by BONY to either [redacted] Instead, they were hired to [redacted] That is, Professors Adler and Daines's work was used simply [redacted] This conclusion becomes readily apparent when [redacted]

1. <u>BONY's Reliance on the Settlement Experts Was Not Reasonable or Authorized by the PSAs Because It Was Not "In Good Faith and in Accordance with 'Opinion of Counsel'"</u>

123. The manner in which BONY utilized the Settlement Experts refutes the claims of Professor Fischel, Professor Langbein, and Mr. Landau that BONY acted reasonably by relying on experts. Professor Fischel claims that the Trustee acted reasonably by relying on experts. Fischel Report ¶ 15, 16. Similarly, Professor Langbein writes "I see nothing improper in the Trustee's consulting experts after settlement terms had been negotiated in the course of arms'-length bargaining but before the Trustee had bound itself to any of those terms in a final agreement." Langbein Report at 8. And Mr. Landau notes that the fact that "the Trustee hired the Experts and reviewed their reports before making any binding decision" indicates that the Trustee acted "well within industry custom and practice." Landau Report ¶ 27.

124. It is reasonable for a trustee to rely on experts, *if it is relying on them for the right purpose*. [redacted] Instead, it employed experts to provide rubber-stamp confirmation of the position it already wished to take. This is not reliance on experts in any meaningful sense. [redacted]

125. Read narrowly, Professor Langbein's report is correct: there is nothing "improper" about a final check with an expert prior to signing a settlement. That is not what occurred. BONY was consulting with experts about fundamental points of its negotiating leverage *after* negotiating. This is different than checking with an expert about a point that has arisen in the course of negotiations.

126. Professor Langbein and Mr. Landau both emphasize that BONY had not bound itself to a settlement at the time the expert opinions were sought. [redacted] Langbein Report at 8; Landau Report ¶ 29; *see also* Lundberg Dep. at 56. The [redacted]

[redacted], each of which has a separate contractual relationship with BONY and each of which is separately owed duties by BONY as trustee, including a duty of prudent care following an Event of Default.

127. [redacted]. Stanley Dep. at 219-20; Lundberg Dep. at 217. [redacted] Lundberg Dep. at 59. As evidenced by the scope of this and the other expert reports, and the amount of discovery that was necessary to develop the facts of this case, [redacted] roposed Settlement, and its effect on each of the 530 Covered Trusts, each of which was owed a separate and distinct duty of care.

128. [redacted] Lundberg Dep. at 136-39, 212-13, 217, 280-82. [redacted] Stanley Dep. at 100. [redacted] *Id.* at 226-28. [redacted]. *Id.* at 217-18. [redacted]. *Id.* at 226-27.

129. Both Professor Langbein and Mr. Landau emphasize in their reports that BONY is exculpated under PSA § 8.02(ii) for actions taken in reliance of experts. Langbein Report at 7; Landau Report ¶¶ 22-27. Both of them fail to note that the exculpation in the PSA is only for actions taken "*in good faith* and in accordance with [] *Opinion of Counsel*." PSA § 8.02(ii) (emphasis added). Both of these terms are significant.

130. First, there is evidence that BONY did not act in good faith when it relied on its Settlement Expert Reports.

131. When given notice of an Event of Default by a large group of investors, BONY sought to deny and cover-up that an Event of Default had occurred. BONY failed to [redacted]. Likewise, BONY refused to [redacted]

132. Instead, BONY agreed to a settlement that was highly favorable to BofA and which left BONY indemnified. BONY utilized the Settlement Experts simply to help "paper" the settlement that it had already decided to pursue, rather than to help it form opinions.

133. None of this comports with good faith, especially when seen in the context of BONY's business relationships with Bank of America and BONY's own incentives for reaching a deal that resolved the Event of Default issue.

134. Second, reliance on experts is only exculpatory when "in accordance with Opinion of Counsel." "Opinion of Counsel" is defined in the PSAs as "A *written* opinion of counsel…" PSA § 1.01 (definitions) (emphasis added). The requirement of a written opinion letter is significant because it would involve counsel more explicitly assuming malpractice liability; an attorney's opinion letter is functionally an insurance contract. [redacted] *See* Lundberg Dep. at 460. [redacted]

135. Instead, [redacted] Lundberg Dep. at 274-281, 241-242, 136-137, 143.

136. Moreover, because an Event of Default had occurred, the Trustee was held to a prudent person standard, not merely a "good faith" standard. Therefore, PSA § 8.02(ii), could not apply to exculpate the Trustee.

137. Even if there had not been an Event of Default, the Trustee was still subject to heightened duties because in entering into settlement negotiations and ultimately the Proposed Settlement, the Trustee assumed broad powers that necessarily subjected it to broad duties. It therefore cannot simply delegate its trusteeship to outside experts and avoid its own duty of prudence and care.

138. Accordingly, both Professor Langbein and Mr. Landau are incorrect when they claim that BONY was entitled to rely on the Settlement Expert Reports. Because there was an Event of Default, the Trustee could not rely on PSA § 8.02(ii), and even if there was no Event of Default, the PSAs do not authorize reliance on expert reports absent good faith and a written Opinion of Counsel.

<u>2. BONY Was Not Justified in Relying on Professor Adler's Report Because of Its Express Limitations</u>

139. Professor Adler opined on the "materially and adversely affects" clause in section 2.03(c) of the PSAs. BONY relied heavily on Professor Adler's report in approving the Proposed Settlement. Lundberg Dep. at 136-37, 281. His report, however, notes that

> My opinion here is based solely on general principles of contract law as supported by references provided below. I have not broadly reviewed documents relevant to the Potential Settlement. I do not have knowledge of relevant events or of customary documents or practice in the commercial lending industry.

Dep. Ex. 11 at 3. He further noted that:

> Notably, in addition to the competing considerations discussed here, *there may be cases or circumstances of which I am unaware, including but not limited to industry standards or practices*, that would lead a court—through the admission of extrinsic evidence or otherwise—to reach one conclusion or another. But for the reasons described here,

> *based solely on general contract principles, and taking the language of the provision at face value,* it appears to be a reasonable position that a determination of whether a breach materially and adversely affects the interests of Certificateholders *should* turn on the harm caused by the breach.

Id. at 12-13 (emphasis added). In other words, Professor Adler was expressing an opinion on the "materially and adversely affects" clause in a virtual vacuum, without knowing the context of the clause. Contracts, however, are interpreted in context.

140. If Professor Adler had known more about the context, he might well have opined differently about the "materially and adversely affects" clause.

141. By narrowly cabining Professor Adler's inquiry to generic interpretation of language out of context, BONY ensured that the opinion would be nothing more than a guess. Indeed, Professor Adler's opinion is expressed in "should" language, rather than "would." A securitization industry participant like BONY should be highly attuned to the difference between a "should" and a "would" opinion.

142. The very choice of Professor Adler as an expert was itself unusual. Professor Adler does not have experience in mortgage putback litigation. If BONY wanted expertise about the particular clause in issue, it would not have relied on a general contract law professor, but would instead have turned to someone with experience concerning mortgage putback claims.

143. [redacted] legal position:

> [redacted]

3. <u>BONY Relied on Professor Adler's Opinion, But the PSA Language Analyzed by Professor Adler Was Not Applicable to All of the Covered Trusts.</u>

144. BONY's [redacted] approval of the settlement relied [redacted] on the expert reports, [redacted] There are numerous problems with Professor Adler's report, but by far the most critical is that it fails to account for the fact that many of the PSAs directly contradict the proposition for which the Trustee uses his report, and Professor Adler's report contains no indication as to what PSA(s) he reviewed.

145. It is well known throughout the securitization industry that there are variations among PSAs even from certain sponsors and within certain "shelves" or series of similar securitizations. BONY's own outside counsel Mr. Kravitt testified in deposition that [redacted]

[redacted] Kravitt Dep. at 77. Indeed, Loretta Lundberg, noted in deposition testimony that [redacted] Lundberg Dep. at 116; *see also id.* at 117.

146. As it happens, the analysis in Professor Adler's report is clearly wrong in regard to at least some of the 530 Covered Trusts. Professor Adler's report refers to section 2.03(c) from an unspecified Countrywide PSA. The representations and warranties in section 2.03(c), however, are not consistent among the PSAs for the Covered Trusts.

147. Some of the Covered Trusts' PSAs contain language in section 2.03(c) to the effect of:

> Any breach of a representation set forth in clauses [(x) through (y)] of Schedule III-A with respect to a Mortgage Loan … *shall be deemed to materially and adversely affect* the Certificateholders.

See, e.g., PSAs for CWALT 2005-24; CWALT-2005-35; CWALT-2005-36; CWALT 2007-4CB (emphasis added).

148. The particular representations in Schedule III-A in the PSAs with such a "deemed to materially and adversely affect" clause vary by PSA, but they include representations regarding completeness of documentation, compliance with various state and federal predatory lending laws, particular rate or prepayment or arbitration clause features of the loans, the underwriting methodology confirming that at the time of origination "the borrower had the reasonable ability to make timely payments on the mortgage loan," that "The Mortgage Loans, individually and in the aggregate, conform in all material respects to the descriptions thereof in the Prospectus Supplement." *See* PSA for CWALT 2007-4CB, Schedule III-A.

149. Professor Adler's expert report does not consider the effect of the "deemed to materially and adversely affect" clause in some PSAs on his interpretation of the language in general. It is hard to imagine, however, that he would have given the same opinion for the trusts with PSAs containing the "deemed to materially and adversely affect" language. Given the very clear "deemed to materially and adversely affect" in some of the Covered Trusts' PSAs, and purported litigation risk BONY assigned to its settlement decisionmaking would not have been present for at least some of the Covered Trust (once again confirming my point that BONY should have engaged in a trust-by-trust analysis).

150. The importance of the "deemed to materially and adversely affect" language is amplified by the fact that BONY looked at no loans files in the course of purportedly settling BofA's putback liability for the Covered Trusts. Because some PSAs include the language, and because the language applies to some but not all representations and warranties, and because the covered representations and warranties varied from trust-to-trust, BONY's failure to review loan files meant that it could not determine which breaches were deemed to materially and adversely affect and which were subject to further analysis. Nevertheless, BONY applied a material and adverse discount to the aggregated settlement.

4. BONY Litigation Expert Professor Fischel's Report Makes Similar Erroneous Assumptions to Professor Adler's Settlement Report

151. Similarly, BONY Litigation Expert Professor Fischel fails to consider whether the putback mechanism would be enforceable. Instead, he assumes that the only possibility would be loan-by-loan litigation, as BofA claims. Fischel Report ¶ 36. Professor Fischel is incorrect on this account as well.

152. Putbacks based on sampling methodologies have been approved in the monoline bondholder litigation. *See e.g.*, *MBIA v. Countrywide*, Doc. No. 276 (Dec. 22, 2010 Order). Professor Fischel's report uncritically accepts BofA's position that only loan-by-loan litigation is possible.

153. Likewise, Professor Fischel assumes that the only actionable breaches are breaches of underwriting guidelines. Fischel Report at ¶ 35. He further assumes that underwriting guideline violations are difficult to prove. *Id.*

154. Based on my experience and knowledge of mortgage underwriting guidelines, these assumptions are incorrect. Depending on the type of underwriting guideline violation at issue, proof is not particularly difficult. While some underwriting guidelines allow for permissible variance, there can be loans underwritten outside of permissible variance.

155. Even if Professor Fischel were correct, however, regarding the difficulties of proof in regard to underwriting guideline violations, there are other types of breaches that are actionable and easy to prove, such as breaches relating to the accuracy of the information provided on the loan data tape or the sufficiency of loan documentation.

156. Indeed, despite having allegedly reviewed all 530 PSAs or Indentures for the Covered Trusts, Fischel Report ¶ 30, Professor Fischel fails to distinguish between PSAs and Indentures that have deemed materiality and adversity clauses and those that do not. Instead, Professor Fischel assumes that the trusts will have "difficulty … determining whether a breach existed and if so whether it had a material and adverse effect on the interests of the Certificateholders." Fischel Report ¶ 33, 36. This statement is clearly wrong when applied to the representations and warranties covered by deemed materiality and adversity clauses.

5. BONY Was Not Justified in Relying on Professor Daines's Report Because It Was Expressly Limited in Its Analytic Scope and Predicated on Self-Serving Factual Assumptions Provided by BofA

157. Throughout the course of the settlement negotiations, including in the Settlement Experts' reports, and now in the Litigation Experts' Reports, BONY adopted BofA's legal theories in an apparent attempt to devalue the claims of the Covered Trusts (and certificateholders) in order to justify its agreement to the Proposed Settlement.

158. Professor Daines's report was limited to a strangely narrow task and was predicated on questionable factual assumptions provided by BofA. As these issues are addressed by Professor Coates, I omit further discussion here.

6. Capstone Report

159. Another report on which BONY relied in approving the Proposed Settlement was a valuation report from Capstone Valuation Services LLC. The express and implied limitations of the Capstone report made it inappropriate for BONY to rely on it without further diligence. BONY did not undertake that additional diligence.

160. The Capstone report was [redacted] Bingham Dep. at 125. It was also conducted on a [redacted] *Id.* at 18-19.

161. The Capstone report was explicitly premised, in part, on legal assumptions deriving from Professor Daines' report regarding BONY's ability to recover from BofA on account of Countrywide's liability. Dep. Ex. 12 at 3, 5; *see* also [redacted] Griffin Dep. at 284. To the extent that Professor Daines' report was flawed or incomplete, as stated above and discussed in more detail in Professor Coates's opinion, so too was the Capstone valuation. Any problems with the Daines report were necessarily compounded in the Capstone report.

162. Moreover, the Capstone report explicitly relied on "information gathered from [Capstone's] discussions with certain senior members of [Countrywide Financial Corporation] management without independent verification." Dep. Ex. 12 at 3; *see also* [redacted] BONY was relying on an expert report specifically premised on information provided by an adverse party.

163. Because of the limiting assumptions of the Capstone report, the basis of the Capstone report's information, and the limited scope of the Capstone analysis, BONY was not justified in relying on the Capstone report. Instead, the assumptions that BONY provided to Capstone virtually guaranteed that BONY would end up with a report producing a low-ball estimate of the ability of the Covered Trusts to recover on their claims. If BONY had been serious about wanting to evaluate the Covered Trusts' potential recovery, it could have commissioned an expert report on Countrywide's solvency and a broader report on potential theories of recovery from BofA. BONY did not.

7. RRMS/Lin Report on Valuation of Representation and Warranty Claims

164. BONY also relied on the analysis of Brian Lin and RRMS for a valuation of the Covered Trusts' representation and warranty claims. The methodology used by Lin and RRMS did not involve examination or even a sampling of loan files. Instead, Lin and RRMS relied on a model that turned on a series of economic and legal assumptions about potential losses due to representation and warranty claims.

165. As Dr. Cowan notes in his expert report, Mr. Lin and RRMS did not follow standard procedures for calculating representation and warranty claims. Cowan Report at 1, 3-4; *see also* [redacted] In part this is because [redacted] Lin Dep. at 94-98. A review of actual loan files [redacted]

Lin Dep. at 98. Nor was Mr. Lin requested to reunderwrite the loan files. Lin Dep. at 98-99. Instead, BONY simply provided Mr. Lin and RRMS [redacted] Lin Dep. at 73-74, 97-98.

166. Mr. Lin also does not appear to have considered [redacted] Lin Dep. at 528-529. His report was also based on a series of assumptions from unrelated repurchase experiences of the GSEs. [redacted] He did not determine [redacted] Lin Dep. at 559-60. He also failed [redacted] was affected by the GSEs' on-going business relationship with BofA. Lin Dep. at 442-44. As Dr. Cowan has explained in his report, the GSEs' repurchase experience was obviously distinct and therefore a poor basis for Mr. Lin's modeling assumptions. Cowan Report at 13-16.

167. Similarly, Mr. Lin apparently never considered the Covered Trusts' potential direct claims on BofA for servicing and documentation exceptions or its ability to recover from BofA under contractual successor liability per PSA §§ 6.02 and 6.04. Mr. Lin's report on servicing "improvements" did not cover liability for past servicing breaches, although [redacted] Lin Dep. at 484-89.

168. BONY [redacted] and then "relied" on the resulting report. As with the other Settlement Expert reports, this is not a true expert report on which reliance is justified.

F. BONY Failed to Pursue or Even Value Servicing Breaches and Documentation Exceptions, but Released Both in the Settlement Anyway

<u>1. BONY Failed to Investigate or Value Servicing Breaches and Documentation Exceptions</u>

169. The Inside Investors' letters to BONY regarding the Event of Default repeatedly mentioned deficiencies in servicing and loan documentation (Dep. Exs. 18 & [redacted]), not just breaches of representations and warranties relating the underwriting of the mortgage loans.

170. Prior to approving the Proposed Settlement, however, BONY [redacted] Bailey Dep. at 226-35, 237-39, 246-47; Lundberg Dep. at 329-30, 361-62, 377-79; Stanley Dep. at 189-91.

171. [redacted] despite consenting to the release of these claims in the Proposed Settlement. Nothing I have seen in the discovery record indicates that [redacted] although it is released in the Proposed Settlement.

172. None of the Settlement Expert Reports on which BONY relied—those of Professor Adler, Professor Daines, Capstone, and RRMS—addressed BofA's direct liability for

servicing or documentation exceptions or its assumption of Countrywide's representation and warranty liability as the successor Master Servicer under PSA § 6.04. [redacted]

173. The valuation report by Brian Lin at RRMS was based solely on representation and warranty liability. Lin Report (Dep. Ex. 9). BONY's attorney Jason Kravitt stated in deposition testimony that [redacted] Kravitt Dep. at 275. Loretta Lundberg, the head of BONY's default services testified that [redacted] Lundberg Dep. at 337-338. And Robert Griffin, Lundberg's boss at BONY, testified that [redacted] Griffin Dep. at 292.

174. BONY's failure to pursue servicing and documentation claims is particularly noteworthy, as servicing claims apply directly to BofA as successor Master Servicer. PSA § 6.04. The question of successor liability does not apply to the Covered Trusts' servicing and documentation claims, nor does the PSA § 2.03(c) material and adverse clause apply.

175. Professor Fischel opines that successful claims for servicing liability would require both factual and legal determinations that he implies are not possible. Fischel Report ¶ 40. The determinations, however, *are* possible.

176. There is ample evidence of the failure of BofA to meet its servicing duties and of resultant harm to the Covered Trusts. [redacted] letters from Gibbs & Bruns to BONY set forth the various servicing violations. Dep. Exs. 18 & [redacted]. The letter sent from intervenor Triaxx funds to Justice Kapnick dated February 1, 2013, sets forth evidence of BofA's self-dealing and other misconduct in connection with loan modifications and the harm to the Covered Trusts. Similarly, the FTC's 2011 $108 million settlement with Countrywide for servicer overbilling provides significant evidence of servicing violations and harm to the Covered Trusts, as Countrywide's overbilling was paid out of foreclosure sale proceeds before any recovery to the Covered Trusts. [redacted]. Dep. Ex. 58.

177. Further, one of BONY's own advisors—[redacted] Sabry Dep. at 31-36.

178. Additionally, the document exceptions reports prepared by BONY pursuant to § 6(a) of the Proposed Settlement show [redacted]. This alone is evidence of the massive scale of [redacted]

3. <u>The Document Exception Provisions of the Proposed Settlement Are Largely Illusory</u>

179. As it stands, the Proposed Settlement amends the PSAs by requiring a much narrower cure of documentation exceptions than required by the PSAs. Section 6 of the Proposed Settlement requires BofA to cure a document exception if and only if a

foreclosure is attempted and is unsuccessful. A successful, but more expensive or delayed foreclosure due to documentation problems would result in greater losses for the certificateholders (but not for BofA), yet is not covered by the Proposed Settlement's cure requirement.

180. Astonishingly, § 6(a)(i) excludes mortgages registered with the Mortgage Electronic Registration System (MERS) from the all of the cure requirements of the Settlement. MERS registry covers around 60% of mortgages in the United States. Kate Berry, *Foreclosures Turn Up Heat on MERS*, AM. BANKER, July 10, 2007. For more recent originations and securitized mortgages, an even higher percentage are registered with MERS.

181. Moreover, the exclusion of MERS mortgages from the documentation cure requirements is shocking because problems with the MERS registry have been a central issue in a great deal of consumer foreclosure litigation.

182. MERS has also entered into consent decrees or settlements with federal bank regulators and the Delaware Attorney General for its inadequate documentation practices and systems. *See In re MERSCORP, Inc.* Consent Order (Apr. 13, 2011), *available at* http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47h.pdf; *see also* Press Release, *Biden Secures Reforms from National Mortgage Registry* (July 13, 2012), *available at* http://attorneygeneral.delaware.gov/media/releases/2012/registry7-13.pdf; Press Release, *A.G. Schneiderman Secures $136 Million For Struggling New York Homeowners In Mortgage Servicing Settlement* (Feb. 9, 2012), *available at* http://www.ag.ny.gov/press-release/schneiderman-secures-major-settlement-allows-sweeping-mortgage-investigations-proceed; Consent Order, In the Matter of MERSCORP, Inc., OCC No. AA-EC-11-20; Board of Governors Docket Nos., 11-051-B-SC-1, 11-051-B-SC-2; FDIC-11-194b; OTS No. 11-040; FHFA No. EAP-11-01, April 12, 2011; Final Stipulation and Order, Delaware v. MERSCORP Holdings, Inc., Civ. Action No. 6987-CS (Del. Ch. Ct. July 13, 2012).

183. The exclusion of MERS mortgages from the documentation cure requirement indicates that BONY and BofA have no real intention of undertaking the—expensive and sometimes impossible—cure of faulty documentation. Instead, the losses due to faulty documentation will be borne by the certificateholders.

184. Proposed Settlement also requires BofA to cure either the "Mortgage Exceptions" or the "Title Exceptions" for any given loan, not both. Proposed Settlement § 6(b). The PSAs make no such distinction between "Mortgage Exceptions" and "Title Exceptions" and require cure of both. PSA § 2.02.

185. Moreover, the Proposed Settlement requires BofA to reimburse the Covered Trusts only for uncured document exceptions for non-MERS mortgages if there is both a "Mortgage Exception" and a "Title Exception" *and* the a loss to the Covered Trust because of the exceptions following an unsuccessful attempted foreclosure. Proposed Settlement § 6(c). Even then, reimbursement may be delayed by up to a year, and there is no provision for interest. Proposed Settlement § 6(c). PSA § 2.02 does not require both exceptions or for there to be an unsuccessful attempted foreclosure or for there to be a loss to the Covered Trust. Instead, it simply requires that the document

exceptions be cured. What this means is that the Proposed Settlement's § 6 requirement for cure of document exception cure is narrower than the PSA 2.02 cure requirement.

4. The Document Exceptions Provisions of the Settlement Effect an Amendment of the PSAs without the Requisite Certificateholder Consent

186. The Proposed Settlement's amendment of the PSAs' requirement of the cure of document exception violates the PSA requirement of consent of certificateholders representing 2/3s of the Voting Rights of each individual Covered Trust. PSA § 10.01.

H. BONY Converted Trust Property During the Settlement Process by Using the Trusts' Negotiating Leverage for Its Own Benefit

187. BONY used the Covered Trusts' negotiating power to gain or attempt to gain benefits. BONY also acted to shield BofA from liability, which is consistent with its interest in remaining BofA's "preferred trustee."

188. BONY's Litigation Experts Professor Fischel, Mr. Landau, and Professor Langbein all deny that BONY had conflicts of interest, particularly in regard to the indemnity provisions in the Forbearance Letter and Side Letter and the release in the Proposed Final Order and Judgment. Fischel Report ¶¶ 27-32; Landau Report ¶¶ 37-40, 47; Langbein Report at 9-11.

189. As an initial matter, none of BONY's Litigation Experts address the incentives BONY had by virtue of its business relationship with BofA (and possibly with the Inside Investors) or its $1.5 billion equity stake in BofA. *See supra* ¶¶ 53-55. Being the "preferred trustee" is how BONY gets its business. This is clearly a financial benefit for BONY. Despite recognizing BONY's position as BofA's "preferred trustee," Professor Fischel contends in his report that there is no evidence of BONY's benefit from the settlement. Fischel Report ¶¶ 27, 32. Professor Fischel, however, refers solely to AIG's Verified Petition (Doc. No. 131). Fischel Report ¶ 27. AIG filed its Verified Petition prior to discovery, however, and substantial evidence of conflicts has been developed in discovery, as discussed in Professor Frankel's report. Professor Fischel's report does not address this evidence. None of BONY's Litigation Experts recognize BONY's incentives to act in the interest of BofA rather than the interest of the Covered Trusts.

1. The Forbearance Agreement and the Indemnity BONY Secured

190. [redacted]

191. Specifically, on [redacted]

[redacted]

Dep. Ex. 53. [redacted]

192. Ultimately, BONY did receive the indemnity [redacted]. The Forbearance Agreement of December 9, 2010 (Dep. Ex. 46) was followed by a letter, dated December 10, 2010 from BofA to BONY (Dep. Ex. 52). The letter states that [redacted] BofA was agreeing to pay BONY's expenses and indemnify it from all liability that "arise solely out of its entry into the Forbearance Agreement." Dep. Ex. 52.

193. BONY and its Litigation Experts contend that the indemnity BONY received was not truly a new indemnity, but just a confirmation of the existing indemnity under section 8.05 of the PSA. Fischel ¶¶ 28-29; Landau ¶ 39; Langbein Report at 10-11. They are wrong.

194. Section 8.05 of the PSAs provides that BONY is indemnified by BofA as Master Servicer for "any loss, liability or expense relating to (a) this Agreement, (b) the Certificates or (c) in connection with the performance of any of the Trustee's duties hereunder." PSA § 8.05. There is an exception, however, for loss, liability or expense "incurred by reason of any action of the Trustee taken at the direction of the Certificateholders…" *Id.*

195. There is evidence in the record that BONY *was* acting under the direction of certificateholders. *See* Letter from Mayer Brown to Anonymous Inside Investor, at 1 (Jan. 7, 2011) (BNYM_CW-00285677-78); Letter from Mayer Brown to Lincoln Finkenberg, at 1 (Nov. 9, 2010) (BNYM_CW-00285661-74); Hr. Tr. 7:5-34 (Sept. 9, 2011) (S.D.N.Y.). Therefore, pursuant to PSA § 8.05 it had lost its indemnity from the BofA Master Servicer. Accordingly, BONY was bargaining with BofA for an indemnity it did not have.

196. Even if BONY's Litigation Experts were correct, and there was no new indemnity, it does not matter. BONY subjectively placed some value on the indemnity language and undertook action on that basis. It is irrelevant in evaluating BONY's actions whether the indemnity language was objectively valuable. BONY traded an asset of the Covered Trusts for what it subjectively believed to be a private benefit.

197. [redacted] Exhibit 58 at 3. BONY again was using Covered Trust leverage for its own benefit, not for that of the Covered Trusts.

2. The Side Letter

198. As part of the Proposed Settlement, BONY received an additional indemnification from the BofA Master Servicer (and a guarantee of it from BAC) as part of the Side Letter (Exhibit C to BONY's Verified Petition).

199. BONY's Litigation Experts' response is that the Side Letter does not create a new indemnity.

200. The meaning of the Side Letter indemnity provision depends on whether the original indemnity of BONY by the Master Servicer under PSA § 8.05 had been extinguished. And as set forth above, the indemnity *had* been extinguished when BONY acted in response to certificateholder direction.

201. However, even if the BONY Litigation Experts were right about the operation of the indemnity provision in the Side Letter, the mere existence of the provision indicates that BONY *subjectively* believed it to be valuable. Whether the indemnity provision in the Side Letter is *objectively* valuable, the focus of BONY's Litigation Experts argument is irrelevant. BONY expended some of the Covered Trusts' finite negotiating leverage obtaining a private, subjective benefit.

202. Mr. Landau opines that indemnification is standard trust industry custom. Landau Report ¶ 38. This is only partially correct. Indemnification provisions such as those found in PSA § 8.05 are standard in securitizations. But the indemnifications at issue in this Proceeding are not those under PSA § 8.05. Any indemnification BofA may have owed to the Trustee under PSA § 8.05 was lost when the Trustee acted at the direction of the Inside Investors. [redacted] Similarly, the Side Letter is not part of PSA § 8.05 and raises a troubling specter of BofA paying the Inside Investors for their support of the Proposed Settlement by relieving them of their indemnification liability. Elimination of the "money where your mouth is" indemnification requirement for those certificateholders that demand trustee action [redacted] The indemnification requirement for certificateholder demands imposes a certificateholder buy-in, which ensures that only serious meritorious claims are brought to the Trustee's attention. The shift in indemnification liability undermines this important structure of the PSA.

3. BONY's Attempt to [redacted]

203. [redacted] Exhibit 210 (BNYM_CW-00254996 at Deleted) [redacted] *See also* Exhibit 235 [redacted]

[redacted]

204. [redacted]

Exhibit 210 (BNYM_CW-00254996 at Cmt. A5).

205. [redacted]. Mirvis Deposition Transcript at 115-16, 169; Golin Deposition Transcript at 109, 111-112.

206. Professor Langbein's report dismisses this language as nothing more than "debris on the cutting room floor." Langbein Report at 10. He is wrong. It is irrelevant that [redacted]. Not only is this problematic in itself in this instance, but it comports with the pattern of BONY seeking a deal aimed at protecting itself from liability and preserving goodwill and future business flows from BofA.

207. [redacted]

4. <u>A Release from Indemnification</u>

208. Paragraph (p) of the Proposed Final Order and Judgment contains a broad permanent injunction against any suits by the certificateholders against BONY for its actions in connection with the settlement.

209. This provision functions as a release for BofA because while paragraph (p) of the Proposed Final Order and Judgment formally enjoins suits against BONY, it actually protects BofA, by ensuring that BONY will never have to call on BofA to pay on the indemnification.

210. The release of BofA from its indemnity to BONY through the injunction is a benefit to BofA, and to BONY to the extent it is seeking to curry favor with BofA. It does *not* inure to the benefit of the Covered Trusts.

211. The fact that the release is in BofA's interest, rather than the Covered Trusts' is evident from [redacted]

I. BONY's Use of the Article 77 Proceeding Appears to Be Designed to Protect Bank of America

212. [redacted] Lundberg Dep. 222-23; Doc. No. 3 ("Proposed Settlement"). BONY is coming before this Court seeking protection for its actions, but at the same time attempting to avoid meaningful scrutiny.

213. A trustee acting in good faith could use an Article 77 proceeding to seek court guidance, rather than the court's blessing. Section 7701of the New York Civil Practice Law and Rules authorizes a special proceeding "to determine a matter relating to any express trust…" Thus, BONY had a procedural mechanism for seeking guidance, be it about whether an Event of Default had occurred, or what to do about the conflict between the 530 trusts competing for a finite pool of assets, etc. In fact, BONY's counsel told the Court that, "what trustees typically do under these circumstances—if there's a question about whether there's an event of default, they file an Article 77 proceeding and they come to court for guidance." Feb. 7, 2013 Hrg. Trnscrpt. 166:18-21.

214. The concept of seeking court guidance is one that trustees periodically use, *see e.g.*, *Wilmington Trust Co. v. Tropicana Entm't, LLC*, 2008 Del. Ch. LEXIS 30 (Del. Ch. Feb. 29, 2008). BONY's outside counsel, [redacted] Kravitt Dep. at 186-87.

215. Indeed, getting court guidance is a practice BONY as trustee has utilized recently in regard to another structured financial product case in the United Kingdom. *See Bank of New York v. Montana Board of Investments*, [2008] EWHC 1584 (Ch.). In the *Montana Board of Investments* case, BONY sought court guidance for how to resolve an inter-class conflict in a structured investment vehicle (SIV). Why BONY did not do so here is unclear, but it is worthwhile noting that the sponsor of the SIV in the *Montana Board of Investments* case was an entity called "Eiger Capital Ltd.," which is not a major repeat business generator for BONY, unlike BofA.

216. Here, BONY is not using Article 77 to obtain guidance, but instead a court order blessing past actions and providing it with a broad release for those actions.

217. Notably, BONY has fought for a limited and deferential standard of review and for limited discovery. *See* Doc. No. 228. BONY is thus seeking the Court's blessing while trying to avoid its scrutiny.

J. The Proposed Settlement's Servicing Provisions Have Zero Value Because They Replicate Bank of America's Pre-Existing Legal Duties

218. I have reviewed the Proposed Settlement's servicing provisions and conclude that the servicing provisions have virtually no material value because with one exception they merely recreate pre-existing legal duties for BofA, and the value of that exception depends on the quality of BofA's future servicing, which cannot be determined. Accordingly, the servicing provisions are largely, if not completely, illusory.

219. Moreover, the servicing provisions of the Proposed Settlement amend the PSAs without the requisite consent of a majority of certificateholders, despite (and indeed indicated by) the provision in the Proposed Settlement that deems the servicing provisions not to amend the PSAs. Settlement § 5(g).

220. Finally, the servicing provisions include a vague commercial impracticability provision that may permit BofA to avoid compliance, including on the basis of existing government regulations. Settlement § 5(h).

221. The Proposed Settlement has five major provisions dealing with mortgage servicing.[25] Mr. Burnaman's report, BONY's sole Litigation Expert report dealing with servicing, addresses only one of those five provisions, namely the Settlement § 5(a)-(b) requirement that BAC transfer the servicing of "High Risk" loans to specialty subservicers. Mr. Burnaman contends that the "the incremental out-of-pocket cost which BANA agreed to bear in order to transfer certain delinquent and defaulted loans to Subservicers is a direct and quantifiable benefit to the Covered Trusts." Burnaman Report at 7. He calculates its value as between $98 million and $411 million. *Id.*

222. Mr. Burnaman's valuation of the servicing transfer provision is incorrect. The value of the servicing transfer provision is zero.

223. It would appear that Mr. Burnaman does not impute any value to any of the other four provisions, as he does not discuss them in his report. To the extent that this is his opinion, I concur with it. None of the servicing provisions in the settlement have any certain material value to the trusts.

224. Table 1, below, presents a summary of the Proposed Settlement's servicing provisions and their valuation. It shows that all but one of the provisions have a value of zero (or close thereto) because BofA is already subject to existing legal duties based on federal law (the CFPB's Mortgage Servicing Rule), the National Mortgage Servicing Settlement, the OCC's Consent Order with BofA, or the PSA's prudent servicing standard, which is generally thought to incorporate relevant Fannie Mae/Freddie Mac servicing standards. The other provision, § 5(c), has uncertain, but possibly zero value, as explained below.

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[25] BONY's Verified Petition ¶ 46 seems to treat cures of document deficiencies in loan files as part of servicing improvements, although it is included under a separate provision in the Proposed Settlement. To the extent that the document deficiency provisions are a servicing improvements, they have no value because they merely oblige BofA to do *less* than what it is already contractually obligated to do under PSA § 2.02 and what would be consistent with prudent servicing. *See infra* ¶ 180-187.

Table 1. Summary of Servicing Provision Valuation

Settlement Provision	Summary of Settlement Provision	Value of Settlement Provision	Basis of Valuation
§ 5(a)-(b)	Requires transfer of high-risk loans to subservicers.	$0	Already required by: • Prudent Servicing Standard (PSA § 3.01); • 12 C.F.R. § 1024.38(a)-(b); • Nat'l Mtg. Settlement §§ II.A, IV.H; • OCC Consent Order §§ III(3), IV(1)(l)-(p), IX(1)(f); • Freddie Mac Seller/Servicer Guide § 51.3.
§ 5(c)	Requires benchmarking of servicing and servicing expense reimbursement recoveries adjusted.	Dependent on loan performance, BofA's servicing performance & PSA interpretation.	Express terms of Proposed Settlement.
§ 5(d)	Requires evaluation of borrowers for modifications within 60 days of receipt of documentation.	$0	Already required by: • 12 C.F.R. § 1024.38(b)(2)(v); • Nat'l Mtg. Settlement § IV.F.4.; • OCC Consent Order § IX(1)(b); • Freddie Mac Seller/Servicer Guide § 64.6(d)(5); • Fannie Mae Single Family 2012 Servicing Guide § 205.08.
§ 5(e)	Requires prudent servicing.	$0	Already required by: • Prudent Servicing Standard (PSA § 3.01) • Nat'l Mtg. Settlement, § IV.A.2; • Freddie Mac Seller/Servicer Guide § 65.1
§ 5(f)	Requires compliance attestations and audit.	$0	Already required by: • PSA §§ 3.16, 3.17 • 12 C.F.R. §§ 1024.38(a)-(b)(1)(iv).

1. <u>Subservicing of High Risk Loans, Settlement § 5(a)-(b)</u>

225. Settlement § 5(a)-(b) requires BofA to transfer certain "High Risk" loans to specialty subservicers. Settlement § 5(a)-(b). BONY's Litigation Expert Mr. Burnaman values this provision as between $98-$411 million because BofA must shoulder the costs of the subservicing. Burnaman Report at 7, 45. Mr. Burnaman's valuation is incorrect because BofA is under an existing legal duty to engage in prudent servicing, which would include use of specialty subservicers to the extent that it was incapable of adequately servicing the mortgages.

226. Mr. Burnaman correctly notes that there is no requirement in the PSAs for BofA as master servicer to use subservicers. Burnaman Report at 32. Mr. Burnaman neglects to mention, however, that BofA is under an existing legal duty to use subservicers. This existing legal duty stems from several sources: federal mortgage servicing regulations; the April 4, 2012 National Mortgage Settlement; the Office of the Comptroller of the Currency's March 29, 2011 Consent Order regarding BofA; and the PSA's prudent servicing standard (interpreted in reference to Fannie Mae/Freddie Mac servicing guidelines).

227. Regulation X under the Real Estate Settlement Procedures Act, 12 C.F.R. Pt. 1024, imposes federal regulatory requirements on mortgage servicers. Among these requirements are that servicers adopt policies and procedures that ensure that it "*Properly evaluat[es] loss mitigation applications," "provid[es] timely and accurate information," and "[f]acilitates oversight of, and compliance by, service providers*." 12 C.F.R. § 1024.38(a)-(b). In other words, federal regulations require competent servicing. To the extent that BofA cannot itself provide such servicing for High Risk loans, BofA would need to engage subservicers in order to comply with Regulation X. The cost of subservicing transfers is one that is normally borne by the Master Servicer and is a risk that a Master Servicer presumably prices into its servicing fee, as higher risk loan pools generally have higher servicing fees.

228. In February 9, 2012, BofA entered into a settlement agreement (the "National Mortgage Settlement") with the federal government and 49 states regarding its mortgage servicing practices. On April 4, 2012, the United States District Court for the District of Columbia entered an order approving the settlement. The National Mortgage Settlement requires BofA to "maintain adequate staffing and systems". NMS § IV.H.1-2. The National Mortgage Settlement further requires BofA to "oversee and manage" various subservicers and other third-party providers of servicing activities, including by (1) performing due diligence of third-party qualifications and expertise; (2) amending agreements with third-party providers to require them to comply with the attorney general settlement; (3) ensuring that all agreements provide for adequate and timely oversight; (4) providing accurate and complete information to all third-party providers; (5) conducting periodic reviews of third-party providers; and (6) implementing appropriate remedial measures when problems and complaints arise. NMS § II.A.

229. To the extent that BofA lacks the internal capacity to adequately service the High Risk loans, compliance with the National Mortgage Settlement would require the use of subservicers.

230. On March 29, 2011 BofA agreed to a Consent Order with the Office of Comptroller of the Currency regarding its mortgage servicing practices. *In the Matter of: Bank of America, N.A. Charlotte, N.C.*, AA-EC-11-12. The Consent Order requires BofA:

- "to develop and implement an adequate infrastructure to support existing and/or future Loss Mitigation and foreclosure activities";
- to have an "organizational structure, managerial resources, and staffing to support existing and/or future Loss Mitigation and foreclosure activities";
- to have "processes to ensure the qualifications of current management and supervisory personnel responsible for mortgage servicing and foreclosure processes and operations, including collections, Loss Mitigation and loan modification, are appropriate and a determination of whether any staffing changes or additions are needed;"
- to have "processes to ensure that staffing levels devoted to mortgage servicing and foreclosure processes and operations, including collections, Loss Mitigation, and loan modification, are adequate to meet current and expected workload demands;"
- to have "processes to ensure that workloads of mortgage servicing, foreclosure and Loss Mitigation, and loan modification personnel, … are reviewed and managed";
- To have "processes to ensure that the risk management, quality control, audit, and compliance programs have the requisite authority and status within the organization so that appropriate reviews of the Bank's mortgage servicing, Loss Mitigation, and foreclosure activities and operations may occur and deficiencies are identified and promptly remedied;"
- To have "appropriate training programs for personnel involved in mortgage servicing and foreclosure processes and operations, including collections, Loss Mitigation, and loan modification, to ensure compliance with applicable Legal Requirements and supervisory measures to ensure that staff are trained specifically in handling mortgage delinquencies, Loss Mitigation, and loan modifications;"

In the Matter of: Bank of America, N.A. Charlotte, N.C., AA-EC-11-12 (Mar. 29, 2011), §§ III(3), IV(1)(l)-(p), IX(1)(f).

231. Additionally, BofA is required to service the loans "in accordance with the terms of this Agreement and customary and usual servicing standards of practice of prudent mortgage loan servicers," PSA § 3.01. This includes "represent[ing] and protect[ing] the interests of the Trust Fund in the same manner as it protects its own interest in mortgage loans in its own portfolio". PSA § 3.01. The PSAs also explicitly contemplate the possibility of subservicing. PSA § 3.02 ("Subservicing; Enforcement of the Obligations of Subservicers"). Mr. Burnaman neglects to mention this in his report.

232. It is my opinion—based on my academic study of the mortgage servicing industry and government service—that prudent mortgage loan servicing would require the use of subservicers if a master servicer's own operations are inadequate to handle the task.

233. Prudent servicing standards are often measured against the requirements of Fannie Mae and Freddie Mac for their servicers. Freddie Mac, for instance, requires that servicers warrant that they "will maintain adequate facilities and experienced staff and will take all actions necessary to" properly service the mortgages. Freddie Mac Seller/Servicer Guide § 51.3.

234. BofA is under an existing legal duty (from several sources) to adequately and prudently service the mortgage loans in the Covered Trusts. Adequate or prudent servicing would include subservicing when necessary.

<u>2. Benchmark Adjusted Recovery of Servicing Advances, Settlement § 5(c)</u>

235. Section 5(c) of the Proposed Settlement requires BofA to benchmark and report its servicing performance on non-High-Risk loans. BofA's ability to recover servicing Advances is adjusted based on how its monthly performance compares with the benchmarks on a net Trust-by-Trust basis. Thus, if BofA underperforms the benchmark on some loans, those are offset against the loans for which it outperforms the benchmark to derive a net effect.

236. BofA is obligated under the PSAs to make servicing Advances. This means that if a mortgagor fails to make a required monthly payment, BofA, as Master Servicer, is obligated to advance the payment to the Trust. BofA is entitled to recover its Advances from recoveries first on the individual mortgage for which it advanced and then, if that is insufficient, from payments on other mortgages. PSA §§ 3.08(a)(ii)-(iii), (v), 4.01. No interest is paid on these servicing Advances. BofA is not required, however, to make advances that it deems nonrecoverable. PSA § 4.01, definition of "Advance".

237. If BofA's net benchmark performance for a Covered Trust in any given month is severely negative, then section 5(c) of the Proposed Settlement reduces BofA's right recover the servicing Advances it makes to the Trust that month. As servicing Advances are reimbursed prior to any payment to certificateholders, a reduction in servicing Advance reimbursement frees up more cash for the certificateholders at the bottom of the cashflow waterfall (but has no effect on other certificateholders).

238. Section 5(c) does not have any necessary value to the Covered Trusts. Its value is captured only by the junior-most in-the-money tranche of certificateholder. More importantly, its value is dependent upon both the mortgages' future performance and BofA's future servicing performance. To the extent the mortgages perform, there is no Advancing required, so section 5(c)'s value is dependent on the mortgages performing poorly.

239. Moreover, the value of section 5(c) depends on BofA's future performance on a cherry-picked group of loans relative to it's the servicing industry overall. If BofA's future servicing performance for *non-High Risk loans* reasonably matches *overall* industry performance, BofA's servicing advances will not be reduced. The exclusion of the High-Risk loans from the section 5(c) benchmarks reduces the likelihood that BofA will fail to perform up to industry benchmarks and thus reduces the potential value of section 5(c) to the Covered Trusts.

240. Furthermore, the reduction of servicing Advances under section 5(c) may well be entirely illusory, not merely contingent. PSA § 3.08(a)(v) permits BofA to recover "unreimbursed Servicing Advances" at a separate point in the cashflow waterfall than "Servicing Advances". If section 5(c) only limits recovery of Servicing Advances, BofA may still be able to recover the same advances as "unreimbursed Servicing Advances" under a separate cashflow waterfall provision that would still be paid before the certificateholders. It is unclear how section 5(c) will be interpreted by BofA and BONY in light of PSA § 3.08(a)(v), but there is a quite plausible interpretation that will effectively render section 5(c) meaningless, as BofA will be prohibited from recovering of Advances under one PSA provision and instead recover them under another PSA provision, still with priority over the certificateholders. Accordingly, no certain value can be assigned to section 5(c), and BONY's Litigation Expert Mr. Burnaman assigns no value to the provision in his report.

3. <u>Consideration of Borrowers for Loan Modifications, Settlement § 5(d)</u>

241. Section 5(d) of the Proposed Settlement requires that for all borrowers considered for loan modification programs, BofA must consider them for all modification programs available. Settlement § 5(d). It also requires that BofA make a decision regarding a loan modification within 60 days of receiving all requested documentation from the borrower. Settlement § 5(d).

242. Section 5(d) of the Proposed Settlement provides no material value to the Covered Trusts because BofA is already under an existing legal duty to make loan modification evaluations within 60 days *or less*. Regulation X under the Real Estate Settlement Procedures Act requires that a servicer "[p]roperly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible…" 12 C.F.R. § 1024.38(b)(2)(v). Regulation X also requires that

> If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall:
>
> (i) Evaluate the borrower for all loss mitigation options available to the borrower; and
>
> (ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage loan.

12 C.F.R. § 1024.41(c)(1). Given that Regulation X prohibits foreclosure procedures from commencing until a mortgage is at least 120 days delinquent, 12 C.F.R. § 1024.41(f), the borrower will always have the possibility of submitting a loss mitigation application prior to the foreclosure sale. This means section 5(d) of the Proposed Settlement merely requires BofA to comply with a less stringent rule than is required by federal law. Likewise, the National Mortgage Settlement requires that BofA "shall review the complete first lien loan modification application submitted by

borrower and shall determine the disposition of borrower's trial or preliminary loan modification request no later than 30 days after receipt of the complete loan modification application, absent compelling circumstances beyond Servicer's control." National Mortgage Settlement, § IV.F.4.

243. Similarly, the OCC Consent Order requires BofA to set "appropriate deadlines for responses to borrower communications and requests for consideration of Loss Mitigation, including deadlines for decision-making on Loss Mitigation Activities, with the metrics established not being less responsive than the timelines in the HAMP program". OCC Consent Order § IX(1)(b).

244. The HAMP program requires servicers to evaluate borrower eligibility within 30 days of receiving sufficient documentation. Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages, § 4.6. Thus, the OCC Consent Order already obligates BofA to evaluate borrowers for loan modifications within 30 days, rather than the 60 days required under section 5(d) of the Proposed Settlement.

245. The Prudent Servicing Standard also suggests that an evaluation of all possible modification options is required and must be done in a timely fashion. *See* Freddie Mac Seller/Servicer Guide § 64.6(d)(5); Fannie Mae Single Family 2012 Servicing Guide § 205.08.

246. In short, BofA is already under multiple existing legal duties to perform the evaluation required by section 5(d) of the Proposed Settlement Agreement. Accordingly, section 5(d) confers no new material value to the Covered Trusts.

<u>4. Consideration of Prudent Servicing Factors, Settlement § 5(e)</u>

247. Section 5(e) of the Proposed Settlement requires BofA to consider several factors in its loss mitigation decisions. These include maximization of the net present value of the mortgage, the likelihood of a mortgage re-performing, whether the borrower is acting strategically, alternatives to foreclosure, the requirements of the PSA, "such other factors as would be deemed prudent in its judgment" and "all requirements imposed by applicable Law." Proposed Settlement § 5(e).

248. All that section 5(e) does is spell out the Prudent Servicing Standard in more detail. BofA was already obligated to consider all of these factors under PSA § 3.01. It is also required to consider net present value under the National Mortgage Settlement, and the Freddie Mac Seller/Servicer Guide (as applied through the Prudent Servicing Standard). Nat'l Mtg. Settlement, § IV.A.2; Freddie Mac Seller/Servicer Guide § 65.1.

249. Section IV of the National Mortgage Settlement has extensive loss mitigation requirements, including that BofA: (a) send pre-foreclosure notices that will include a summary of loss mitigation options offered; (b) thoroughly evaluate lenders for all available loss mitigation options before foreclosure referral, thereby preventing "dual tracks" where a lender may be subject to foreclosure and loan modification; (c) consider the net present value of each mortgage (and specifically a requirement that banks offer a loan modification if NPV is positive); (d) possess certain loss mitigation obligations, including customer outreach and communications, time lines to respond

to loss mitigation applications, and e-portals for borrowers to keep informed of loan modification status; (e) establish an easily accessible and reliable single point of contact for each potentially-eligible first lien mortgage borrower so that the borrower has access to an employee of the servicer to obtain information; and (f) maintain adequate trained staff to handle the demand for loss mitigation relief. NMS § IV. Section 5(e) of the Settlement does not appear to add anything to this list.

250. Accordingly, section 5(e) of the Proposed Settlement provides no new material value to the Covered Trusts.[26]

5. Compliance Attestation, Settlement § 5(f)

251. Finally, section 5(f) of the Settlement requires BofA to make monthly compliance Settlement attestations to BONY and to undergo an annual compliance audit by an auditor of BofA's choice. Settlement § 5(f). This provision adds virtually nothing to BofA's existing legal duties and accordingly should be valued at zero.

252. BofA is already required to make annual compliance attestations under the PSAs. PSA § 3.16. It is also required to have an annual compliance audit.[27] PSA § 3.17. The benefit of going from annual to monthly self-attestation is virtually zero, particularly given that most failures to comply with the Settlement's servicing requirements are deemed not to be a material breach of the Settlement. Settlement § 5(j). Because of BofA's existing legal duties, the Covered Trusts receive no new material value from section 5(f) of the Proposed Settlement.

253. In all, the servicing provisions of the Proposed Settlement provide virtually no new material value to the Covered Trusts. Mr. Burnaman's estimate of the servicing provisions value is simply incorrect because he does not recognize that BofA is already legally obligated to perform the duties required by the Proposed Settlement.

K. The Proposed Settlement Improperly Passes Modification Costs and Losses to the Covered Trusts

254. One other servicing provision is worthy of note.[28] It is perhaps the most troubling

[26] Indeed, Settlement § 5(e) arguably reduces the Proposed Settlement by deeming compliance with § 5(e) sufficient to satisfy the Prudent Servicing Standard and thereby limiting BofA's liability.

[27] The recent experience with the "independent" foreclosure review mandated by the OCC Consent Order underscores the dubious value of the annual compliance audit. Under section 5(f)(i), BofA gets to select this auditor (subject to veto by BONY). This is exactly what BofA was permitted to do under the OCC Consent Order and it produced an unjustifiably favorable audit of BofA by Promontory Financial. US Gov't Accountability Office, *Foreclosure Review: Lessons Learned Could Enhance Continuing Reviews and Activities under Amended Consent Orders*, GAO-13-277, Mar. 2013. *See also* YVES SMITH, WHISTLEBLOWERS REVEAL HOW BANK OF AMERICA DEFRAUDED HOMEOWNERS AND PAID FOR A COVER UP—ALL WITH THE HELP OF "REGULATORS" (2013). Accordingly, there should be significant skepticism about the "independence" and hence value of such an outside audit. A more effective audit would involve an auditor selected by the certificateholders.

[28] Additionally, section 5(h) gives a commercially impracticable "out" to BofA to the extent that the "Law," which includes consent decrees and settlement agreements with the government changes. Thus, the Covered Trusts cannot be sure that they will in fact get the servicing "improvements" promised under the Proposed Settlement.

provision in the entire Proposed Settlement.

255. Section 5(i) places the costs of the servicing "improvements" on BofA, but contains an enormous carve-out for "any modification or loss mitigation strategy that may be required or permitted by Law" and "any Advance that is required or permitted by Law," and "any Realized Loss associated with the implementation of such modification or loss mitigation strategy." All of these costs "shall be borne by the relevant Covered Trust." Proposed Settlement § 5(i).

256. **On its face, this provision means that the Covered Trusts must bear the cost of BofA complying with its obligations under the Law—a term defined under the Settlement Agreement, to include the National Mortgage Settlement and BofA's various other settlements with the OCC and various state Attorneys General.** In other words, the Proposed Settlement makes the Covered Trusts liable for BofA's alleged wrongdoing as a mortgage servicer or as an originator *in violation of the PSAs.*

257. Thus not only do the servicing provisions in the Proposed Settlement fail to create value for the Covered Trusts, but they appear to shift enormous liability onto the Covered Trusts.

258. BofA is currently obligated to perform as much as $17.82 billion in loan modifications under various settlements:

- BofA's modification requirements under the National Mortgage Settlement are up to $7.63 billion. Nat'l Mortgage Settlement Consent Judgment ¶5.
- BofA's modification requirements under the amended OCC Consent Order are up to $1.76 billion. OCC Amended Consent Order § IV(1).
- Countrywide's 2008 settlement with state Attorneys General includes approximately $8.43 billion in loan modifications. *See* Press Release, Oct. 6, 2008, *Attorney General Brown Announces Landmark $8.68 Billion Settlement with Countrywide*, *available at* http://oag.ca.gov/news/press-releases/attorney-general-brown-announces-landmark-868-billion-settlement-countrywide.

259. While the Covered Trusts are not the entire universe of loans that BofA can modify, the Proposed Settlement actually incentivizes BofA to put as much of the modification cost on the Covered Trusts as possible. The potential cost to the Covered Trusts may exceed the $8.5 billion that BofA will contribute to the Covered Trusts under the Proposed Settlement. **Put succinctly, section 5(i) of the Proposed Settlement could potentially render the Proposed Settlement of *negative value* to the Covered Trusts.** BofA may be coming out *ahead* with the Proposed Settlement.

260. I have not seen any evidence that BONY made an attempt to value this servicing provision or even to investigate it.

III. THE SETTLEMENT WILL IMPEDE THE RECOVERY OF THE HOUSING MARKET

A. The Private Risk Capital Will Not Return to the Housing Finance Market Unless Investors Are Assured of Receiving the Benefit of Their Bargain

261. The housing market has been on government life-support since 2008. It has been five years now since the financial crisis and the private-label residential securitization market remains moribund, with only a handful of deals having been done since 2008. Adam J. Levitin & Susan M. Wachter, *The Commercial Real Estate Bubble*, 2 HARV. BUS. L. REV. (forthcoming 2013).

262. There are two primary reasons for this. First, MBS investors do not trust mortgage underwriting any more. They have learned that they cannot count on protections such as "putbacks" to shield them from underwriting mistakes because the putback mechanism is only as good as the servicers and trustees, and the servicers are frequently affiliates of the originators, while the trustees are no-doing entities that lack the motivation to act on behalf of investors.

263. Second, MBS investors have learned that losses-given-default depend heavily on the quality of servicing. Even six years into the foreclosure crisis, servicers are still not set up to deal with large volumes of defaults. What's more servicers' compensation structures fail to align their interests with investors', and investors cannot rely on trustees to monitor servicers.

264. Approval of the settlement proposed by BONY will further undermine investor confidence in the mortgage securities market. If the settlement is approved, mortgage investors—themselves often fiduciaries such as pension plans and mutual funds—will be facing a market in which they *know* that they will have to blindly trust servicers to act in *their* interest, despite years of evidence of servicers acting in their *own* interest. Approval of the Proposed Settlement will send a message to mortgage investors that securitization trustees cannot be held to accountable or relied upon to act in the interest of investors.

B. Professor Fischel's Event Study Is Flawed

265. Professor Fischel's Report contains an event study of the effect of the announcement of the Proposed Settlement on BofA's stock price. Fischel Report at ¶¶ 43-48. Professor Fischel contends that the market reaction his study finds is "inconsistent with the objectors' claim that Bank of America received a windfall in the settlement." Fischel Report at Header to ¶ 43. Professor Fischel's analysis is based on a basic logic fallacy.[29]

266. Statistical regression analysis is based on the axiomatic principle of logic that failure to disprove a proposition does not mean that the proposition is true. For example, if the proposition is that "all swans are white," confirmatory evidence in the form of lots of white swans does not mean that the proposition is true. Proving the truth of the

[29] I note that Professor Fischel repeatedly makes assertions in his report based solely on AIG's Verified Petition, rather than on the discovery record.

proposition would require showing that there are no black swans. Failure to spot a black swan does not mean that they do not exist. If we can produce evidence of a black swan, we can determine that the proposition is false. We cannot determine if the proposition is true, only whether it is false.

267. This is what statistical regression analysis does: it tests to see if a proposition can be *disproven*. Failure to disprove the proposition does *not* make the proposition true. All it means is that there was no "black swan" discernible from the data examined.

268. Professor Fischel's event study tests to see if there was a statistically significant (meaning highly likely non-random) movement in Bank of America's share price above its residual return following the announcement of the Proposed Settlement. The method Professor Fischel uses to test for statistical significance is an ordinary least squares (OLS) regression analysis. Such a test is used to determine if a proposition called the "null hypothesis" (e.g., all swans are white) can be rejected or "disproven" (by showing a "black swan").

269. The null hypothesis in Professor Fischel's experiment is that there is only a random relationship between the BofA share price and the announcement of the settlement: "In this case, we conducted a one-tailed test of whether the residual return following the Settlement announcement was positive and statistically significant to test the Objectors' claim that the Settlement was too favorable to Bank of America." Fischel at ¶ 46.

270. Professor Fischel's experiment is not able to disprove the null hypothesis. He finds that the correlation between Bank of America's share price and the announcement of the Proposed Settlement was not statistically significant:

> [O]ur event study finds that the residual return on June 29 was only 0.31 percent with a t-statistic of 0.28, which is positive but far from the minimum threshold for statistical significance. Further, both the residual return (t-statistic) on June 30 and the two-day cumulative residual return over June 29 and June 30 were negative at -2.01 percent (-1.82) and -1.70 percent (-1.09), respectively, and thus obviously not both positive and statistically significant.

271. Fischel Report at ¶ 48. This means that he is not able to *disprove* that the relationship is random. It *does not* mean that he has proven that the relationship is random. That is not within the power of an ordinary least squares regression. Confusing failure to disprove the null hypothesis with proving the null hypothesis is one of the most elementary errors in statistical interpretation. In essence, then, Professor Fischel's report says "I didn't see any black swans. Therefore all swans must be white."

272. An event study that fails to disprove the null hypothesis is basically meaningless. Such a study would not be publishable in any peer-reviewed social science journal.[30]

[30] A more robust analysis would have included controls for other possible events that could have affected BofA's share price. The use of a residual return only captures market-wide events (if done properly), not other firm-specific events. No discussion of controls or even whether Professor Fischel examined for other potentially firm-specific significant events is included in the Report. Likewise, Professor Fischel's Report does not attempt to see the impact of other settlement-related events on the BofA share price. For example, he could have considered the

273. It is also worth noting that there are numerous reasons why BofA's stock price would not have rallied following the announcement of the Proposed Settlement. Two illustrative examples:

- First, Professor Fischel's event study fails to consider the possibility that the market interpreted the Proposed Settlement as an admission by BofA that it would accept its legacy Countrywide MBS liability. BofA's position had been that it would fight every putback on a loan-by-loan basis and that for Countrywide loans, the liability was Countrywide's and not BofA's.

- Second, the participation of the Inside Investors in the settlement could well have shaped market reactions. The presence of the Inside Investors in the Proposed Settlement could well be taken by uninformed analysts as signaling that the Proposed Settlement is reasonable. Moreover, analysts' interpretation of the Proposed Settlement might well be colored by conversations with employees of the Inside Investors. A failure to understand the dynamics surrounding the role of the Inside Investors in the settlement would mean that BofA's share price might not properly reflect a true valuation of the Proposed Settlement.

274. Finally, stock market prices alone are hardly reliable proof of *anything* other than the stock market's valuation of a firm. Professor Fischel exhibits unshaken faith in the efficient market even after the mortgage bubble. Yet, if there is any lesson to be learned from MBS, it is that market prices may not be accurate. MBS were themselves difficult for the market to evaluate. *A fortiori*, it is harder for the market to evaluate a complex settlement of MBS liability, much less do so accurately within the two-day window measured by Professor Fischel.

IV. Financial Jurassic Park: BONY's Actions Follow a Playbook for Trustees Colluding with Issuers and Insiders Against Other Investors.

275. This is not the first time New York courts have been called upon to deal with this very problem. While modern mortgage securitization dates from 1971, its predecessor was the mortgage bonds issued by New York mortgage guarantee companies. These bonds financed the great Art Deco skyscrapers of Manhattan, but collapsed in scandal between 1926 and early 1930s in what Justice William O. Douglas called "one of the greatest tragedies in the history of finance". *SEC Urges Curbing Realty Bond Field,* N.Y. TIMES, June 4, 1936.

276. Numerous underwriting problems plagued the mortgages that supported these bonds, just like with today's MBS. Appraisals were inflated, documentation was incomplete, and junior mortgages were passed off as senior. The bonds backed by these mortgages were sold to investors as far sounder investments than they in fact were.

impact on the BofA share price of major rulings in the monoline insurer litigations or the filing of the various interventions in the Article 77 Proceeding, including those of the the New York and Delaware Attorneys General. There is no indication in the Report that Professor Fischel undertook such analysis, which could be used to interpret the findings of his study. Instead, he did a narrow and incomplete analysis, found nothing of statistical significance, and then declared that his finding shows that the Proposed Settlement is reasonable. Professor Fischel's event study is not a serious analysis.

277. There were also serious problems with the trustees of these mortgage bonds. The trustees would frequently permit substitutions of collateral to the detriment of the bondholders or commingle revenues from the collateral for separate bonds so as to use excess cash flow from some projects to cover shortfalls on others. Trustees also failed to notify investors of defaults. As one investment firm from the 1930s noted, "More adequate trusteeship also is a point of vital necessity—a trusteeship which, for example, would not allow a property to continue year after year in default of taxes without advising the bond holders of the situation." *Public Confidence in Realty Bonds*, N.Y. TIMES, Sept. 13, 1931.

278. The mortgage bond trustees of the 1920s permitted this malfeasance and indeed enabled it because they were hopelessly conflicted, just like BONY. As the *New York Times* reported of the '20s mortgage bonds, "The indenture trustee was practically never an independent and aggressive champion of the rights of investors, since he was usually an officer, employee or affiliate of the house of issue." *SEC Urges Curbing Realty Bond Field*, N.Y. TIMES, June 4, 1936.

279. While portraying themselves as independent representatives of the bondholders, the trustees engaged in a "process of 'window dressing' by which some banks and other institutions sold their names for a nominal fee to the issuers of such securities." *State Curb Urged on Realty Bonds*, N.Y. TIMES, Jan. 15, 1933. Thus, even when the trustee was in fact a nominally independent bank, they routinely failed in to protect bondholders, as Justice Douglas noted:

> by and large, the corporate trustee had been sitting idly by while bondholders had been exploited….And when I speak of the corporate trustees, I am speaking about some of the leading banks of the country, some of which served their proprietary interests in an issuing company before fiduciary interests were served.

SEC Asks New Law to Guard Investors under Trustees, N.Y. TIMES, June 19, 1936. Trustees received their business from the deal sponsors, so their future business flow depended upon pleasing the deal sponsors. The mortgage bond trustees were nothing short of "pocket trustees," just like BONY is today.

280. The problem of pet trustees was summed up by Charles G. Edwards, President of the Real Estate Securities Exchange:

> Until trustees actually assume the responsibility of a trustee toward the bondholders for whom they act, the bondholders will still be helpless and without control. It is difficult to understand the attitude of some of the largest banks and trust companies which accept these trusts with no sense whatsoever of the helplessness of their beneficiaries or of their own responsibility as trustees.…for while the present method may exonerate them from legal liability, it does not cover them with glory.

Points Out Evils in Bond Issues, N.Y. TIMES, May 17, 1931. Do-nothing, pocket trustees lull investors through the use of the term "trustee," but then eschewing any duties or responsibility and in fact facilitated all sorts of actions against the interests of the mortgage investors. This is precisely what BONY has done in regard to the MBS investors.

281. New York Attorneys General Albert Ottinger and John Bennett, Jr., both attempted to clean house in the mortgage bond market, but were unsuccessful in compelling compliance. The result was that the New York courts had to deal with a deluge of litigation in the aftermath of the mortgage bond houses failures. *See generally*, Note, *Present Problems in New York Guaranteed Mortgages*, 34 COLUM. L. REV. 663 (1934) (detailing litigation).

282. It took nearly 40 years before the private mortgage securities market reawakened after the scandal of the mortgage bonds. The New York Courts did not have an opportunity in the 1920s to address the failings of the mortgage bond market until the market had collapsed. All that was left for the courts was to pick up the pieces.

283. Today, courts presented with an opportunity to review trustee conduct in the wake of the mortgage crisis are uniquely situated to ensure that trustees act in the interest of trust beneficiaries with "a punctilio of honor the most sensitive." Judicial scrutiny is critical for ensuring that history does not repeat itself.

284. I reserve the right to amend and supplement this report.

APPENDIX A
DOCUMENTS RELIED ON

DEP. EX. NO.	DEPOSITION EXHIBITS
8	Brian Lin's 6/28/2011 Opinion (BNYM_CW-00120294-300)
9	Brian Lin's 6/07/2011 Opinion (BNYM_CW-00252597-605)
10	Robert Daines' 6/07/2011 Opinion (BNYM_CW-00249578-635)
11	Barry E. Adler's Report dated 5/27/11 (BNYM_CW-00120115-128)
12	Capstone Valuation Services, LLC's Countrywide's valuation analysis dated 6/07/2011 (BNYM_CW-00249770-784)
13	Pooling and Servicing Agreement dated as of July 1, 2005, Countrywide Alternative Loan Trust Mortgage Pass-Through Certificates, Series 2005-35CB (BNYM_CW-00217617-857)
15	Letter [redacted] (BNYM_CW-00008697-702)
16	Faxed Letter [redacted] (BNYM_CW-00008742-759)
18	Letter dated 10/22/10 [redacted] (BNYM_CW-00008766-768)
44	Email [redacted] (BNYM_CW-00271138-139)
46	Letter [redacted] (BNYM_CW-00271275-281)
50	Email [redacted] (BNYM_CW-00270959-960)
52	Letter [redacted] (BNYM_CW-00270587-589)
53	Email [redacted] (BNYM_CW-00270970)
58	Email [redacted] (BNYM_CW-00270570-572)
138	Email [redacted] (BNYM_CW-00273353-357)
185	Letter [redacted] (BNYM_CW-00275367-380)
210	Email [redacted] (BNYM_CW-00254990-998)
235	Email [redacted] (BNYM_CW-00261204)
368	Email [redacted] (BNYM_CW-00276323-325)
DATE	**COURT DOCUMENTS**
6/29/2011	The Bank of New York Mellon's Verified Petition and Exhibits A-F (DKT0001-DKT0007)
8/08/2011	AIG's Memorandum of Law in Support of Verified Petition to Intervene (DKT0109)
8/10/2011	AIG's Verified Petition to Intervene (DKT0131)
	II ISO Settlement (DKT 124 fed)
DATE	**DEPOSITION TRANSCRIPTS**

APPENDIX A
DOCUMENTS RELIED ON

9/19-9/20/2012	Kravitt Deposition Transcripts, September 19-20, 2012
10/02-10/03/2012	Lundberg Deposition Transcripts, October 2-3, 2012
10/16-10/17/2013	Lin Deposition Transcripts, October 16-17, 2012
11/09/2012	Crosson Deposition Transcript, November 9, 2012
11/12/2012	Golin Deposition Transcript, November 12, 2012
11/28/2012	Mirvis Deposition Transcript, November 28, 2012
11/29/2012	Robertson Deposition Transcript, November 29, 2012
12/05/2012	Waterstredt Deposition Transcript, December 5, 2012
12/05/2012	Smith Deposition Transcript, December 5, 2012
12/13/2012	Adler Deposition Transcript, December 13, 2012
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
12/03/2012	Bailey Deposition Transcript, December 3, 2012
12/4/2012	Sabry Deposition Transcript, December 4, 2012
DATE	**EXPERTS' OPINIONS**
2/28/2013	John Coates 2/28/2013 Opinion (Unredacted)
2/28/2013	Tamar Frankel's 2/28/2013 Opinion (Unredacted)
3/14/2013	Phillip Burnaman's 3/14/2013 Opinion (Unredacted)
3/14/2013	Charles Cowan's 3/14/2013 Opinion (Unredacted)
3/14/2013	Daniel Fischel's 3/14/2013 Opinion (Unredacted)
3/14/2013	Robert Landau's 3/14/2013 Opinion (Unredacted)
3/14/2013	John Langbein's 3/14/2013 Opinion (Unredacted)
DATE	**SECURITIZATION AGREEMENTS**
9/01/2004	Sale and Servicing Agreement dated as of September 1, 2004, CWABS Asset-Backed Notes Trust 2004-SD3 (BNYM_CW-00121815-904)
9/30/2004	Indenture dated as of September 30, 2004, CWABS Asset-Backed Notes Trust 2004-SD3 (BNYM_CW-00121905-122032)
	Pooling and Servicing Agreement CWALT 2005-24
	Pooling and Servicing Agreement CWALT 2005-35
	Pooling and Servicing Agreement CWALT 2005-36
	Pooling and Servicing Agreement CWALT 2007-4CB
DATE	**ARTICLES**
3/02/2013	New York Times article, *Promises, Promises at the New York Fed,* by Gretchen Morgensen
3/17/2013	New York Times article, *Don't Blink or You'll Miss Another Bailout*, by Gretchen Morgensen
10/03/2011	Thomson Reuters article, *Did Gibbs pre-empt rival investor group in BofA's MBS deal,* by Alison Frankel (http://blogs.reuters.com/alison-frankel/2011/10/03/did-gibbs-pre-empt-rival-investor-group-in-bofas-mbs-deal/)
DATE	**ADDITIONAL DOCUMENTS**
2/01/2013	Letter from John G. Moon to The Honorable Barbara R. Kapnick, Re: In re the Application of The Bank of New York Mellon, Index. No. 651786/2011 and attachments
4/28/2011	Email [redacted] (BNYM_CW-00255675-684)
4/14/2011	Email [redacted] (BNYM_CW-00255774-882)
4/27/2011	Email [redacted] (BNYM_CW-00264539-540)
3/21/2011	Email [redacted] (BNYM_CW-00267655-793)

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3/10/20122	Email [redacted] (BNYM_CW-00268125-251)
	[redacted] (BNYM_CW00285677-678; BNYM_CW00285675-676; BNYM_CW00285661-674)
	Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securitie* s, 82 S. Calif. L. Rev. 1075, 1081–84 (2009).
	Jason H.P. Kravitt, Securitization of Financial Assets (2d ed.)
	Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1 (2011).
	Robert H. Sitkoff, Trust as "Uncorporation": A Research Agenda, 2005 Ill. L. Rev. 31 (2005).
	http://www.nasdaq.com/symbol/bac/institutional-holdings
	Kate Berry, *Foreclosures Turn Up Heat on MERS,* Am. Banker, July 10, 2007
	National Mortgage Settlement
	OCC Consent Order
	Freddie Mac Seller/Servicer Guide
	Fannie Mae Single Family 2012 Servicing Guide
	Consent Order with the Office of Comptroller of the Currency regarding its mortgage servicing practices (In the Matter of: Bank of America, N.A. Charlotte, N.C., AA-EC-11-12 (Mar. 29, 2011))
	Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages
	US Gov't Accountability Office, *Foreclosure Review: Lessons Learned Could Enhance Continuing Reviews and Activities under Amended Consent Orders*, GAO-13-277, Mar. 2013
	Yves Smith, Whistleblowers Reveal How Bank of America Defrauded Homeowners and Paid for a Cover Up—All With the Help of "Regulators" (2013)
	National Mortgage Settlement Consent Judgment
	Press Release, Oct. 6, 2008, Attorney General Brown Announces Landmark $8.68 Billion Settlement with Countrywide, at http://oag.ca.gov/news/press-releases/attorney-general-brown-announces-landmark-868-billion-settlement-countrywide
	Adam J. Levitin & Susan M. Wachter, *The Commercial Real Estate Bubble*, 2 Harv. Bus. L. Rev. (forthcoming 2013)
	SEC Urges Curbing Realty Bond Field, N.Y. Times, June 4, 1936
	Public Confidence in Realty Bonds, N.Y. Times, Sept. 13, 1931
	State Curb Urged on Realty Bonds, N.Y. Times, Jan. 15, 1933
	SEC Asks New Law to Guard Investors under Trustees, N.Y. Times, June 19, 1936
	Points Out Evils in Bond Issues, N.Y. Times, May 17, 1931
	See generally, Note, *Present Problems in New York Guaranteed Mortgages*, 34 Colum. L. Rev. 663 (1934)
	February 7, 2013 Hearing Transcript
	Steven L. Schwarcz & Gregory M. Sergi, *Bond Defaults and the Dilemma of the Indenture Trustee*, 59 Alabama L. Rev. 1037-1073 (2008)
DATE	**NON-CITED**
	Ernest Allen Barbeau, The Mortgage Bond Racket (1932).
	MORTGAGE-BACKED SECURITIES: PRODUCTS, STRUCTURING, AND ANALYTICAL TECHNIQUES (2011).
	FRANK J. FABOZZI & VINOD KOTHARI, INTRODUCTION TO SECURITIZATION (2008).
	JAMES GRANT, MONEY OF THE MIND (1995)
	Vinod Kothari, Securitization: The Financial Instrument of the Future (2006).
	Thomas P. Lemke, Gerald T. Lins, & Marie E. Picard, Mortgage-Backed Securities: Developments and Trends in the Secondary Mortgage Market (2012-2013 edition).
	Bernard J. Reis, False Security: The Betrayal of the American Investor (1938).

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	Steven L. Schwarcz, *The Conflicted Trustee Dilemma* , 54 N.Y.L. School L. Rev. 707-715 (2010).
	United States Securities & Exchange Commission, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of the Protective and Reorganization Committees, Part III: Committees for the Holders of Real Estate Bonds* (June 3, 1936)
	Inside Mortgage Finance, 2012 Mortgage Market Statistical Annual
	Email [redacted] (Deposition Ex. 118, BNYM_CW-00255381-384)
	Faxed Letter [redacted] s (Deposition Ex. 143, BNYM_CW-00008697-702)
	Faxed Letter [redacted] (Deposition Ex. 184, BNYM_CW-00273465-469)
	Email dated [redacted] (Deposition Ex. 514, BNYM_CW-00264469-471)
	Email dated [redacted] (Deposition Ex. 515, BNYM_CW-00264453-454)
	Email [redacted] (Deposition Ex. 517, BNYM_CW-00264397-400)
	The Bank of New York Mellon's Consolidated Response to Objections filed 10/31/2011
	Chavez Deposition Transcript, November 30, 2012

APPENDIX B

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HARVARD LAW SCHOOL 2012-2013
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GEORGETOWN UNIVERSITY LAW CENTER 2007-present
Professor of Law (2011-present)
Associate Professor of Law (2007-2011)

CONSUMER FINANCIAL PROTECTION BUREAU, CONSUMER ADVISORY BOARD 2012-2014
Chair, Mortgage Committee

CONGRESSIONAL OVERSIGHT PANEL FOR TROUBLED ASSET RELIEF PROGRAM Nov. 2008-Dec. 2010
Special Counsel

AMERICAN BANKRUPTCY INSTITUTE Fall 2009
Robert Zinman Scholar in Residence

FEDERAL TRADE COMMISSION Summer 2008
Faculty, Division of Financial Practices Academy

WEIL, GOTSHAL & MANGES LLP, New York, New York 2006-2007
Associate, Business Finance & Restructuring Department

HON. JANE R. ROTH, THIRD CIRCUIT COURT OF APPEALS, Wilmington, Delaware 2005-2006
Judicial Clerk

EDUCATION

HARVARD LAW SCHOOL, J.D., *cum laude,* 2005
– Notes Chair, *Harvard Journal on Legislation*

COLUMBIA UNIVERSITY, M.PHIL. IN HISTORY, 2001, A.M. IN HISTORY, 2000
– Mellon Fellowship in Humanistic Studies
– President's Fellow of the University
– Richard Hofstader Fellow of the Faculty in History

HARVARD COLLEGE, A.B. IN NEAR EASTERN LANGUAGES & CIVILIZATIONS AND HISTORY, *magna cum laude with highest honors in field*, 1998
– Thomas Temple Hoopes Prize for Outstanding Senior Honors Thesis

APPENDIX B

LEGAL PUBLICATIONS

Articles

- *Bankruptcy Law and the Cost of Credit: The Impact of Cramdown on Mortgage Interest Rates* (with Joshua Goodman) (in submission)
- *Duties to Serve After the Fall: Rethinking Community Reinvestment and Housing Goals*, Harvard Joint Center of Housing working paper, 2013 (with Janneke Ratcliffe)
- *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title,* 63 DUKE L.J. (forthcoming 2013)
- *A Transactional Genealogy of Scandal from Michael Milken to Enron to Goldman Sachs*, 86 S. CAL. L. REV. (forthcoming 2013) (with William Bratton)
- *The Public Option in Housing Finance*, 46 U.C. DAVIS L. REV. (forthcoming 2013) (with Susan Wachter)
- *Skin-in-the-Game: Risk Retention Lessons from Credit Card Securitization*, 81 GEO. WASH. L. REV. (forthcoming 2013)
- *The Commercial Real Estate Bubble*, 2 HARV. BUS. L. REV. (forthcoming 2013) (with Susan Wachter)
- *The Tenuous Case for Derivatives Clearinghouses*, 101 GEO. L.J. 445 (2013)
- *Why Housing?* 23 HOUSING POL'Y DEBATE 5 (2013) (with Susan Wachter) (peer reviewed)
- *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 100 (2012)
- *Explaining the Housing Bubble*, 100 GEO. L.J. 1177 (2012) (with Susan Wachter)
- *The Dodd-Frank Act and Housing Finance: Can It Restore Private Risk-Capital to the Securitization Market?* 29 YALE J. ON REG. 101 (2012) (symposium volume) (with Andrey D. Pavlov & Susan M. Wachter)
- *Rate Jacking: Risk-Based and Opportunistic Pricing in Credit Cards*, 2011 UTAH L. REV. 339 (2011) (symposium issue)
- *Private Disordering? Payment Card Fraud Liability Rules*, 5 BROOKLYN J. OF CORP., FIN. & COMM. LAW 1 (2011) (symposium issue)
- *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011) (with Tara Twomey)
- *In Defense of Bailouts*, 99 GEO. L.J. 435 (2011)
- *Rewriting Frankenstein Contracts: The Workout Prohibition in Residential Mortgage Backed Securities*, 82 S. CAL. L. REV. 1075 (2010) (with Anna Gelpern)
- *Bankruptcy Markets: Making Sense of Claims Trading*, 4 BROOKLYN J. OF CORP., FIN. & COMM. LAW 64 (2010) (symposium issue)
- *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy,* 2009 WISC. L. REV. 565 (2009)
- *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143 (2009)
- *Priceless? The Costs of Credit Cards*, 55 UCLA L. REV. 1321 (2008)
- *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. ON LEGIS. 1 (2008)
- *Payment Wars: The Merchant-Bank Struggle for Control of Consumer Payment Systems*, 12 STAN. J. L., BUS. & FIN. 425 (2007)
- *Finding Nemo: Rediscovering the Virtues of Negotiability in the Wake of Enron*, 2007 COLUM. BUS. L. REV. 83 (2007)
- *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006) (double-blind peer-reviewed journal, published by National Conference of Bankruptcy Judges)
- *The Limits of Enron: Counterparty Risk in Bankruptcy Claims Trading*, 15 J. BANKR. L. & PRAC. 389 (2006) (peer-reviewed journal)

- *The Merchant-Bank Struggle for Control of Payment Systems*, 17 J. FIN. TRANSFORMATION 73 (2006) (peer-reviewed journal)
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- *Electronic Transfers from the Consumer's Account*, in CONSUMER BANKING AND PAYMENTS LAW (Nat'l Consumer Law Center, 5 h ed. 2013)
- *Deregulation and the Financial Crisis of 2008,* in REGULATORY BREAKDOWN? THE CRISIS OF CONFIDENCE IN U.S. REGULATION, Cary Coglianese, ed. (University of Pennsylvania Press 2012) (with Susan M. Wachter)
- *Mortgage Market Character and Trends: USA*, in THE HOUSING ENCYCLOPEDIA, Susan Smith, ed., (Cambridge University Press 2012) (with Susan Wachter)
- *American Mortgages,* in THE HOUSING ENCYCLOPEDIA, Susan Smith, ed., (Cambridge University Press 2012) (with Susan Wachter)
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- *Information Asymmetries in the U.S. Mortgage Crisis*, in THE AMERICAN MORTGAGE SYSTEM: RETHINK, RECOVER, REBUILD, Susan M. Wachter & Martin M. Smith, eds. (University of Pennsylvania Press 2011) (with Susan M. Wachter)
- *Modification of Mortgages in Bankruptcy*, LESSONS FROM THE FINANCIAL CRISIS: INSIGHTS AND ANALYSIS FROM TODAY'S LEADING MINDS, Richard W. Kolb, ed. (Wiley 2009)

Shorter Articles and Research Papers

- *An Analysis of the Proposed Interchange Fee Litigation Settlement*, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133361
- *Clearing the Mortgage Market Through Principal Reduction: A Bad Bank for Housing (RTC 2.0),* Pew Charitable Trusts Strategies to Improve the Housing Market Research Paper (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Clearing_the_Mortgage_Market.pdf.
- *What Next for Housing Finance?* 15 WHARTON REAL ESTATE REV. (forthcoming 2012) (with Susan Wachter)
- *Cross-Routing: PIN and Signature Debit Interchangeability Under the Durbin Amendment,* 2 LYDIAN J.16 (Dec. 2010)
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- *The Credit C.A.R.D. Act: Opportunities and Challenges for Credit Unions*, Research Brief #202, The Filene Research Institute, Dec. 2009
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- *The Consumer Financial Protection Agency*, Policy Analysis, Pew Charitable Trusts Financial Reform Project, Research Brief #2, July 2009

- *The Crisis Without a Face: Emerging Narratives of the Financial Crisis*, 63 U. MIAMI L. REV. 999 (2009) (invited foreword to themed volume)
- *Remote Deposit Capture: A Legal and Transactional Overview*, 126 BANKING L.J. 115 (2009) (peer-edited journal)
- *Helping Homeowners: Modification of Mortgages in Bankruptcy,* 3 HARV. L. & POL'Y REV. (online) (Jan. 19, 2009) (invited contribution), *at* http://www.hlpronline.com/Levitin_HLPR_011909.pdf
- *Reforming Mortgage* Servicing, Research Brief, American Association of Retired Persons, Dec. 2008
- *All But Accurate: A Critique of the American Bankers Association Study on Credit Card Regulation*, white paper, December 6, 2007, *at* http://papers.ssrn.com/abstract=900444
- *Gifting Plans and Absolute Priority*, 124 BANKING L.J. 722 (2007) (peer-edited journal)
- *The Problematic Case for Incentive Compensation in Bankruptcy*, 155 UNIV. PA. L. REV. PENNUMBRA 88 (2007)
- *Health Care Privacy Issues in Corporate Reorganizations*, Materials Presented Before the American Bankruptcy Institute 2007 New York City Bankruptcy Conference, May 7, 2007 (co-authored with Arthur R. Cormier & Andrew M. Troop)

LEGAL SCHOLARSHIP AWARDS AND GRANTS

- Pew Charitable Trusts, Grant for Strategies for Reviving the Housing Market, 2012
- George Washington University, Center for Law, Economics & Finance, Junior Faculty Scholarship Prize, 2011
- Walton H. Hamilton Prize for Outstanding Scholarship, Yale Journal on Regulation, 2009
- Best Professional Article, American College of Consumer Financial Services Lawyers Annual Writing Competition, 2009
- Stanford-Yale Junior Faculty Forum, 2009
- American Bankruptcy Law Journal's 2007 Editors' Prize

LEGISLATIVE TESTIMONY AND BRIEFINGS

- Testimony Before the House Judiciary Committee, Subcommittee on Intellectual Property, Competition, and the Internet, July 10, 2012 ("The Dodd-Frank Act's Effects on Financial Services Competition")
- Testimony Before the House Financial Services Committee, Subcommittee on Capital Markets and Government Sponsored Institutions, June 7, 2012 ("Investor Protection: The Need to Protect Investors from Government")
- Testimony Before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit, May 9, 2012 ("Rising Regulatory Compliance Costs and Their Impact on the Health of Small Financial Institutions")
- Testimony Before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit & Subcommittee on Capital Markets and Government Sponsored Enterprises, Nov. 16, 2011 (Joint Hearing on "H.R. 1697: The Communities First Act").
- Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs, Sept. 13, 2011 ("Housing Finance Reform: Should There Be a Government Guarantee?").
- Testimony Submitted to the House Committee on the Judiciary, Sept. 8, 2011 (H.R. 2533, the "Chapter 11 Bankruptcy Venue Reform Act of 2011").

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- Testimony Before the House Committee on Small Business, Subcommittee on Oversight, Investigations & Regulation, July 28, 2011 ("Open for Business: The Impact of the CFPB on Small Business").
- Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs, July 19, 2011 ("Enhanced Consumer Financial Protection After the Financial Crisis").
- Testimony Before the House Government Oversight and Reform Committee, Subcommittee on TARP, Financial Institutions, and Bailouts of Public and Private Institutions, May 24, 2011 ("Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau").
- Testimony Before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit, Apr. 6, 2011 ("Legislative Proposals to Improve the Structure of the Consumer Financial Protection Bureau").
- Testimony Before the House Financial Services Committee, Subcommittee on Housing and Community Opportunity, Nov. 18, 2010 ("Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing").
- Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs, Nov. 16, 2010 ("Problems in Mortgage Servicing from Modifications to Foreclosures").
- Testimony Before the Financial Crisis Inquiry Commission, Oct. 28, 2010, *at* http://fcic.law.stanford.edu/interviews/view/421.
- "Future of Housing Finance," Center for American Progress Mortgage Finance Working Group Presentation to the U.S. Department of Treasury, August 2, 2010.
- Testimony Before the House Judiciary Committee, Subcommittee on Commercial and Administrative Law, December 11, 2009 ("Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? Part II?").
- Testimony Before the Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts, July 23, 2009 ("The Worsening Foreclosure Crisis: Is It Time to Reconsider Bankruptcy Reform?).
- Testimony Before the House Judiciary Committee, Subcommittee on Commercial and Administrative Law, April 2, 2009 (re: Consumer Debt — Are Credit Cards Bankrupting Americans?).
- Testimony Before the Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts, Mar. 24, 2009 ("Abusive Credit Card Practices and Bankruptcy," re: Consumer Credit Fairness Act, S.257).
- Testimony Before the Senate Committee on Banking, Housing and Urban Affairs, Feb. 12, 2009 (re: Modernizing Consumer Protection in the Financial Regulatory System: Strengthening Credit Card Protections).
- Testimony Before the House Judiciary Committee, Jan. 22, 2009 (re: Helping Families Save Their Homes in Bankruptcy Act, H.R. 220, and the Emergency Homeownership and Equity Protection Act, H.R. 225).
- Testimony Before the Senate Judiciary Committee, Nov. 19, 2008 (re: Helping Families Save Their Homes in Bankruptcy Act, now S.61).
- "Bankruptcy Modification of Mortgages," Democratic Staff Briefing, United States House of Representatives, November 14, 2008.
- Testimony Before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit on March 13, 2008 (re: Credit Cardholders' Bill of Rights).
- Testimony Submitted to the Economic Matters Committee, Maryland State House of Delegates, March 6, 2008.
- "Credit Card Regulation," Democratic Staff Briefing, United States House of Representatives, March 5, 2008.

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PROFESSIONAL SERVICE AND ACTIVITIES

- Reporter, Advisory Committee on Multiple Debtor Cases, American Bankruptcy Institute Commission to Study the Reform of Chapter 11
- World Bank Insolvency and Debtor/Creditor Regime Task Force
- Fellow, Center for Law, Economics and Finance (C-LEAF) at George Washington University Law School
- Center for American Progress, Mortgage Finance Working Group
- Editorial Board, AMERICAN BANKRUPTCY INSTITUTE LAW REVIEW
- Manuscript reviewer for AMERICAN BANKRUPTCY LAW JOURNAL; Cambridge University Press; CITYSCAPE; Conference on Empirical Legal Studies; GEORGETOWN LAW JOURNAL; HOUSING POLICY DEBATE; JOURNAL OF EMPIRICAL LEGAL STUDIES; LAW & SOCIETY REVIEW; Netherlands Organization for Scientific Research; Oxford University Press; YALE LAW JOURNAL; Yale University Press
- Area Organizer for Bankruptcy, American Law and Economics Association (2009)
- Executive Committee Member, AALS Section on Financial Institutions & Consumer Financial Services (2009)
- United States Court of Appeals for the Third Circuit (2006)
- United States District Court for the Southern District of New York (2006)
- United States District Court for the Eastern District of New York (2006)
- New York State Courts (2006)

APPENDIX A
DOCUMENTS RELIED ON

DEP. EX. NO.	DEPOSITION EXHIBITS
8	Brian Lin's 6/28/2011 Opinion (BNYM_CW-00120294-300)
9	Brian Lin's 6/07/2011 Opinion (BNYM_CW-00252597-605)
10	Robert Daines' 6/07/2011 Opinion (BNYM_CW-00249578-635)
11	Barry E. Adler's Report dated 5/27/11 (BNYM_CW-00120115-128)
12	Capstone Valuation Services, LLC's Countrywide's valuation analysis dated 6/07/2011 (BNYM_CW-00249770-784)
13	Pooling and Servicing Agreement dated as of July 1, 2005, Countrywide Alternative Loan Trust Mortgage Pass-Through Certificates, Series 2005-35CB (BNYM_CW-00217617-857)
15	Letter [redacted] (BNYM_CW-00008697-702)
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18	Letter dated 10/22/10 [redacted] (BNYM_CW-00008766-768)
44	Email [redacted] (BNYM_CW-00271138-139)
46	Letter [redacted] (BNYM_CW-00271275-281)
50	Email [redacted] (BNYM_CW-00270959-960)
52	Letter [redacted] (BNYM_CW-00270587-589)
53	Email [redacted] (BNYM_CW-00270970)
58	Email [redacted] (BNYM_CW-00270570-572)
138	Email [redacted] (BNYM_CW-00273353-357)
185	Letter [redacted] (BNYM_CW-00275367-380)
210	Email [redacted] (BNYM_CW-00254990-998)
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DATE	**COURT DOCUMENTS**
6/29/2011	The Bank of New York Mellon's Verified Petition and Exhibits A-F (DKT0001-DKT0007)
8/08/2011	AIG's Memorandum of Law in Support of Verified Petition to Intervene (DKT0109)
8/10/2011	AIG's Verified Petition to Intervene (DKT0131)
	II ISO Settlement (DKT 124 fed)
DATE	**DEPOSITION TRANSCRIPTS**

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9/19-9/20/2012	Kravitt Deposition Transcripts, September 19-20, 2012
10/02-10/03/2012	Lundberg Deposition Transcripts, October 2-3, 2012
10/16-10/17/2013	Lin Deposition Transcripts, October 16-17, 2012
11/09/2012	Crosson Deposition Transcript, November 9, 2012
11/12/2012	Golin Deposition Transcript, November 12, 2012
11/28/2012	Mirvis Deposition Transcript, November 28, 2012
11/29/2012	Robertson Deposition Transcript, November 29, 2012
12/05/2012	Waterstredt Deposition Transcript, December 5, 2012
12/05/2012	Smith Deposition Transcript, December 5, 2012
12/13/2012	Adler Deposition Transcript, December 13, 2012
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
12/03/2012	Bailey Deposition Transcript, December 3, 2012
12/4/2012	Sabry Deposition Transcript, December 4, 2012
DATE	**EXPERTS' OPINIONS**
2/28/2013	John Coates 2/28/2013 Opinion (Unredacted)
2/28/2013	Tamar Frankel's 2/28/2013 Opinion (Unredacted)
3/14/2013	Phillip Burnaman's 3/14/2013 Opinion (Unredacted)
3/14/2013	Charles Cowan's 3/14/2013 Opinion (Unredacted)
3/14/2013	Daniel Fischel's 3/14/2013 Opinion (Unredacted)
3/14/2013	Robert Landau's 3/14/2013 Opinion (Unredacted)
3/14/2013	John Langbein's 3/14/2013 Opinion (Unredacted)
DATE	**SECURITIZATION AGREEMENTS**
9/01/2004	Sale and Servicing Agreement dated as of September 1, 2004, CWABS Asset-Backed Notes Trust 2004-SD3 (BNYM_CW-00121815-904)
9/30/2004	Indenture dated as of September 30, 2004, CWABS Asset-Backed Notes Trust 2004-SD3 (BNYM_CW-00121905-122032)
	Pooling and Servicing Agreement CWALT 2005-24
	Pooling and Servicing Agreement CWALT 2005-35
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	Pooling and Servicing Agreement CWALT 2007-4CB
DATE	**ARTICLES**
3/02/2013	New York Times article, *Promises, Promises at the New York Fed,* by Gretchen Morgensen
3/17/2013	New York Times article, *Don't Blink or You'll Miss Another Bailout* , by Gretchen Morgensen
10/03/2011	Thomson Reuters article, *Did Gibbs pre-empt rival investor group in BofA's MBS deal,* by Alison Frankel (http://blogs.reuters.com/alison-frankel/2011/10/03/did-gibbs-pre-empt-rival-investor-group-in-bofas-mbs-deal/)
DATE	**ADDITIONAL DOCUMENTS**
2/01/2013	Letter from John G. Moon to The Honorable Barbara R. Kapnick, Re: In re the Application of The Bank of New York Mellon, Index. No. 651786/2011 and attachments
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	Steven L. Schwarcz & Gregory M. Sergi, *Bond Defaults and the Dilemma of the Indenture Trustee*, 59 Alabama L. Rev. 1037-1073 (2008)
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	Ernest Allen Barbeau, The Mortgage Bond Racket (1932).
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	Faxed Letter [redacted] (Deposition Ex. 184, BNYM_CW-00273465-469)
	Email dated [redacted] (Deposition Ex. 514, BNYM_CW-00264469-471)
	Email dated [redacted] (Deposition Ex. 515, BNYM_CW-00264453-454)
	Email [redacted] (Deposition Ex. 517, BNYM_CW-00264397-400)
	The Bank of New York Mellon's Consolidated Response to Objections filed 10/31/2011
	Chavez Deposition Transcript, November 30, 2012

APPENDIX B

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LEGAL EMPLOYMENT & APPOINTMENTS

HARVARD LAW SCHOOL 2012-2013
Bruce W. Nichols Visiting Professor of Law

GEORGETOWN UNIVERSITY LAW CENTER 2007-present
Professor of Law (2011-present)
Associate Professor of Law (2007-2011)

CONSUMER FINANCIAL PROTECTION BUREAU, CONSUMER ADVISORY BOARD 2012-2014
Chair, Mortgage Committee

CONGRESSIONAL OVERSIGHT PANEL FOR TROUBLED ASSET RELIEF PROGRAM Nov. 2008-Dec. 2010
Special Counsel

AMERICAN BANKRUPTCY INSTITUTE Fall 2009
Robert Zinman Scholar in Residence

FEDERAL TRADE COMMISSION Summer 2008
Faculty, Division of Financial Practices Academy

WEIL, GOTSHAL & MANGES LLP, New York, New York 2006-2007
Associate, Business Finance & Restructuring Department

HON. JANE R. ROTH, THIRD CIRCUIT COURT OF APPEALS, Wilmington, Delaware 2005-2006
Judicial Clerk

EDUCATION

HARVARD LAW SCHOOL, J.D., *cum laude,* 2005
– Notes Chair, *Harvard Journal on Legislation*

COLUMBIA UNIVERSITY, M.PHIL. IN HISTORY, 2001, A.M. IN HISTORY, 2000
– Mellon Fellowship in Humanistic Studies
– President's Fellow of the University
– Richard Hofstader Fellow of the Faculty in History

HARVARD COLLEGE, A.B. IN NEAR EASTERN LANGUAGES & CIVILIZATIONS AND HISTORY, *magna cum laude with highest honors in field*, 1998
– Thomas Temple Hoopes Prize for Outstanding Senior Honors Thesis

APPENDIX B

LEGAL PUBLICATIONS

Articles

- *Bankruptcy Law and the Cost of Credit: The Impact of Cramdown on Mortgage Interest Rates* (with Joshua Goodman) (in submission)
- *Duties to Serve After the Fall: Rethinking Community Reinvestment and Housing Goals*, Harvard Joint Center of Housing working paper, 2013 (with Janneke Ratcliffe)
- *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title,* 63 DUKE L.J. (forthcoming 2013)
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- *The Tenuous Case for Derivatives Clearinghouses*, 101 GEO. L.J. 445 (2013)
- *Why Housing?* 23 HOUSING POL'Y DEBATE 5 (2013) (with Susan Wachter) (peer reviewed)
- *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 100 (2012)
- *Explaining the Housing Bubble*, 100 GEO. L.J. 1177 (2012) (with Susan Wachter)
- *The Dodd-Frank Act and Housing Finance: Can It Restore Private Risk-Capital to the Securitization Market?* 29 YALE J. ON REG. 101 (2012) (symposium volume) (with Andrey D. Pavlov & Susan M. Wachter)
- *Rate Jacking: Risk-Based and Opportunistic Pricing in Credit Cards*, 2011 UTAH L. REV. 339 (2011) (symposium issue)
- *Private Disordering? Payment Card Fraud Liability Rules*, 5 BROOKLYN J. OF CORP., FIN. & COMM. LAW 1 (2011) (symposium issue)
- *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011) (with Tara Twomey)
- *In Defense of Bailouts*, 99 GEO. L.J. 435 (2011)
- *Rewriting Frankenstein Contracts: The Workout Prohibition in Residential Mortgage Backed Securities*, 82 S. CAL. L. REV. 1075 (2010) (with Anna Gelpern)
- *Bankruptcy Markets: Making Sense of Claims Trading*, 4 BROOKLYN J. OF CORP., FIN. & COMM. LAW 64 (2010) (symposium issue)
- *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy,* 2009 WISC. L. REV. 565 (2009)
- *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. ON REG. 143 (2009)
- *Priceless? The Costs of Credit Cards*, 55 UCLA L. REV. 1321 (2008)
- *Priceless? The Social Costs of Credit Card Merchant Restraints*, 45 HARV. J. ON LEGIS. 1 (2008)
- *Payment Wars: The Merchant-Bank Struggle for Control of Consumer Payment Systems*, 12 STAN. J. L., BUS. & FIN. 425 (2007)
- *Finding Nemo: Rediscovering the Virtues of Negotiability in the Wake of Enron*, 2007 COLUM. BUS. L. REV. 83 (2007)
- *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006) (double-blind peer-reviewed journal, published by National Conference of Bankruptcy Judges)
- *The Limits of Enron: Counterparty Risk in Bankruptcy Claims Trading*, 15 J. BANKR. L. & PRAC. 389 (2006) (peer-reviewed journal)

- *The Merchant-Bank Struggle for Control of Payment Systems*, 17 J. FIN. TRANSFORMATION 73 (2006) (peer-reviewed journal)
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- *Electronic Transfers from the Consumer's Account*, in CONSUMER BANKING AND PAYMENTS LAW (Nat'l Consumer Law Center, 5th ed. 2013)
- *Deregulation and the Financial Crisis of 2008,* in REGULATORY BREAKDOWN? THE CRISIS OF CONFIDENCE IN U.S. REGULATION, Cary Coglianese, ed. (University of Pennsylvania Press 2012) (with Susan M. Wachter)
- *Mortgage Market Character and Trends: USA*, in THE HOUSING ENCYCLOPEDIA, Susan Smith, ed., (Cambridge University Press 2012) (with Susan Wachter)
- *American Mortgages,* in THE HOUSING ENCYCLOPEDIA, Susan Smith, ed., (Cambridge University Press 2012) (with Susan Wachter)
- *Fiscal Federalism and the Limits of Bankruptcy*, in WHEN STATES GO BROKE: ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS, Peter Conti-Brown & David A. Skeel, Jr., eds. (Cambridge University Press 2011)
- *Information Asymmetries in the U.S. Mortgage Crisis*, in THE AMERICAN MORTGAGE SYSTEM: RETHINK, RECOVER, REBUILD, Susan M. Wachter & Martin M. Smith, eds. (University of Pennsylvania Press 2011) (with Susan M. Wachter)
- *Modification of Mortgages in Bankruptcy*, LESSONS FROM THE FINANCIAL CRISIS: INSIGHTS AND ANALYSIS FROM TODAY'S LEADING MINDS, Richard W. Kolb, ed. (Wiley 2009)

Shorter Articles and Research Papers

- *An Analysis of the Proposed Interchange Fee Litigation Settlement*, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133361
- *Clearing the Mortgage Market Through Principal Reduction: A Bad Bank for Housing (RTC 2.0),* Pew Charitable Trusts Strategies to Improve the Housing Market Research Paper (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Clearing_the_Mortgage_Market.pdf.
- *What Next for Housing Finance?* 15 WHARTON REAL ESTATE REV. (forthcoming 2012) (with Susan Wachter)
- *Cross-Routing: PIN and Signature Debit Interchangeability Under the Durbin Amendment,* 2 LYDIAN J.16 (Dec. 2010)
- *Interchange Regulation: Implications for Credit Unions*, Research Brief #224, The Filene Research Institute, November 2010
- *Back to the Future with Chapter 13: A Reply to Professor Scarberry*, 37 PEPPERDINE L. REV. 1261 (2010).
- *Overdraft Regulation: A Silver Lining to the Regulatory Clouds?*, Research Brief #211, The Filene Research Institute, April 2010
- *The Credit C.A.R.D. Act: Opportunities and Challenges for Credit Unions*, Research Brief #202, The Filene Research Institute, Dec. 2009
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- *Remote Deposit Capture: A Legal and Transactional Overview*, 126 BANKING L.J. 115 (2009) (peer-edited journal)
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- *Reforming Mortgage* Servicing, Research Brief, American Association of Retired Persons, Dec. 2008
- *All But Accurate: A Critique of the American Bankers Association Study on Credit Card Regulation*, white paper, December 6, 2007, *at* http://papers.ssrn.com/abstract=900444
- *Gifting Plans and Absolute Priority*, 124 BANKING L.J. 722 (2007) (peer-edited journal)
- *The Problematic Case for Incentive Compensation in Bankruptcy*, 155 UNIV. PA. L. REV. PENNUMBRA 88 (2007)
- *Health Care Privacy Issues in Corporate Reorganizations*, Materials Presented Before the American Bankruptcy Institute 2007 New York City Bankruptcy Conference, May 7, 2007 (co-authored with Arthur R. Cormier & Andrew M. Troop)

LEGAL SCHOLARSHIP AWARDS AND GRANTS

- Pew Charitable Trusts, Grant for Strategies for Reviving the Housing Market, 2012
- George Washington University, Center for Law, Economics & Finance, Junior Faculty Scholarship Prize, 2011
- Walton H. Hamilton Prize for Outstanding Scholarship, Yale Journal on Regulation, 2009
- Best Professional Article, American College of Consumer Financial Services Lawyers Annual Writing Competition, 2009
- Stanford-Yale Junior Faculty Forum, 2009
- American Bankruptcy Law Journal's 2007 Editors' Prize

LEGISLATIVE TESTIMONY AND BRIEFINGS

- Testimony Before the House Judiciary Committee, Subcommittee on Intellectual Property, Competition, and the Internet, July 10, 2012 ("The Dodd-Frank Act's Effects on Financial Services Competition")
- Testimony Before the House Financial Services Committee, Subcommittee on Capital Markets and Government Sponsored Institutions, June 7, 2012 ("Investor Protection: The Need to Protect Investors from Government")
- Testimony Before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit, May 9, 2012 ("Rising Regulatory Compliance Costs and Their Impact on the Health of Small Financial Institutions")
- Testimony Before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit & Subcommittee on Capital Markets and Government Sponsored Enterprises, Nov. 16, 2011 (Joint Hearing on "H.R. 1697: The Communities First Act").
- Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs, Sept. 13, 2011 ("Housing Finance Reform: Should There Be a Government Guarantee?").
- Testimony Submitted to the House Committee on the Judiciary, Sept. 8, 2011 (H.R. 2533, the "Chapter 11 Bankruptcy Venue Reform Act of 2011").

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- Testimony Before the House Committee on Small Business, Subcommittee on Oversight, Investigations & Regulation, July 28, 2011 ("Open for Business: The Impact of the CFPB on Small Business").
- Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs, July 19, 2011 ("Enhanced Consumer Financial Protection After the Financial Crisis").
- Testimony Before the House Government Oversight and Reform Committee, Subcommittee on TARP, Financial Institutions, and Bailouts of Public and Private Institutions, May 24, 2011 ("Who's Watching the Watchmen? Oversight of the Consumer Financial Protection Bureau").
- Testimony Before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit, Apr. 6, 2011 ("Legislative Proposals to Improve the Structure of the Consumer Financial Protection Bureau").
- Testimony Before the House Financial Services Committee, Subcommittee on Housing and Community Opportunity, Nov. 18, 2010 ("Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing").
- Testimony Before the Senate Committee on Banking, Housing, and Urban Affairs, Nov. 16, 2010 ("Problems in Mortgage Servicing from Modifications to Foreclosures").
- Testimony Before the Financial Crisis Inquiry Commission, Oct. 28, 2010, *at* http://fcic.law.stanford.edu/interviews/view/421.
- "Future of Housing Finance," Center for American Progress Mortgage Finance Working Group Presentation to the U.S. Department of Treasury, August 2, 2010.
- Testimony Before the House Judiciary Committee, Subcommittee on Commercial and Administrative Law, December 11, 2009 ("Home Foreclosures: Will Voluntary Mortgage Modification Help Families Save Their Homes? Part II?").
- Testimony Before the Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts, July 23, 2009 ("The Worsening Foreclosure Crisis: Is It Time to Reconsider Bankruptcy Reform?).
- Testimony Before the House Judiciary Committee, Subcommittee on Commercial and Administrative Law, April 2, 2009 (re: Consumer Debt — Are Credit Cards Bankrupting Americans?).
- Testimony Before the Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts, Mar. 24, 2009 ("Abusive Credit Card Practices and Bankruptcy," re: Consumer Credit Fairness Act, S.257).
- Testimony Before the Senate Committee on Banking, Housing and Urban Affairs, Feb. 12, 2009 (re: Modernizing Consumer Protection in the Financial Regulatory System: Strengthening Credit Card Protections).
- Testimony Before the House Judiciary Committee, Jan. 22, 2009 (re: Helping Families Save Their Homes in Bankruptcy Act, H.R. 220, and the Emergency Homeownership and Equity Protection Act, H.R. 225).
- Testimony Before the Senate Judiciary Committee, Nov. 19, 2008 (re: Helping Families Save Their Homes in Bankruptcy Act, now S.61).
- "Bankruptcy Modification of Mortgages," Democratic Staff Briefing, United States House of Representatives, November 14, 2008.
- Testimony Before the House Financial Services Committee, Subcommittee on Financial Institutions and Consumer Credit on March 13, 2008 (re: Credit Cardholders' Bill of Rights).
- Testimony Submitted to the Economic Matters Committee, Maryland State House of Delegates, March 6, 2008.
- "Credit Card Regulation," Democratic Staff Briefing, United States House of Representatives, March 5, 2008.

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PROFESSIONAL SERVICE AND ACTIVITIES

- Reporter, Advisory Committee on Multiple Debtor Cases, American Bankruptcy Institute Commission to Study the Reform of Chapter 11
- World Bank Insolvency and Debtor/Creditor Regime Task Force
- Fellow, Center for Law, Economics and Finance (C-LEAF) at George Washington University Law School
- Center for American Progress, Mortgage Finance Working Group
- Editorial Board, AMERICAN BANKRUPTCY INSTITUTE LAW REVIEW
- Manuscript reviewer for AMERICAN BANKRUPTCY LAW JOURNAL; Cambridge University Press; CITYSCAPE; Conference on Empirical Legal Studies; GEORGETOWN LAW JOURNAL; HOUSING POLICY DEBATE; JOURNAL OF EMPIRICAL LEGAL STUDIES; LAW & SOCIETY REVIEW; Netherlands Organization for Scientific Research; Oxford University Press; YALE LAW JOURNAL; Yale University Press
- Area Organizer for Bankruptcy, American Law and Economics Association (2009)
- Executive Committee Member, AALS Section on Financial Institutions & Consumer Financial Services (2009)
- United States Court of Appeals for the Third Circuit (2006)
- United States District Court for the Southern District of New York (2006)
- United States District Court for the Eastern District of New York (2006)
- New York State Courts (2006)