EXHIBIT 134

TO AFFIRMATION OF DANIEL M. REILLY IN SUPPORT OF CONSOLIDATED REPLY IN OPPOSITION TO THE PROPOSED SETTLEMENT

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.)

TABLE OF CONTENTS

"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.

[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.

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.