EXHIBIT 137

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

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

In the matter of the application of

THE BANK OF NEW YORK MELLON,
(as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), et al.

Index No. 651786-2011

Kapnick, J.

Expert Reply Report of Tamar Frankel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Trustee's Powers and Duties

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

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