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BY E-FILING

The Honorable Barbara R. Kapnick
Supreme Court of the State of New York
60 Centre Street
New York, New York 10007

Re: *In re The Bank of New York Mellon*
(Index No. 651786/2011)

Dear Justice Kapnick:

As the Court is aware, Professor Adam Levitin submitted an expert report ("Report") on behalf of one of the Objectors and is scheduled to testify on November 14. In light of your Honor's suggestion during Professor Frankel's testimony, we write concerning issues we expect to arise during Professor Levitin's testimony. Briefly stated, Professor Levitin is not qualified to testify on trustee custom and practice, stock-price event studies, or valuation/collateral loss issues; his opinions on purely legal issues are inadmissible; and his speculation about the parties' intentions, motivations and negotiations are not the proper subject of expert testimony.

I. Qualification Issues: The purpose of an expert witness is to help the factfinder understand a specialized issue. *Meiselman v. Crown Heights Hosp., Inc.*, 285 N.Y. 389, 398 (1941). An expert witness is qualified, of course, only in particular areas; expertise in one topic does not qualify a witness to testify about anything he wishes. *See, e.g.*, *Hong v. Cnty. of Nassau*, 139 A.D.2d 566, 566 (2d Dep't 1988) (mechanical engineer with experience in safety engineering of vehicles not qualified to testify as to design and development of golf courses and other recreational facilities).

A. Professor Levitin is not qualified to testify about trustee process issues: In his deposition, Professor Levitin testified repeatedly that he intends to opine on the Trustee's *process* in entering into the Settlement. Dep. at 47:22; 50:13-14 (although Professor Levitin is "not opining in this case about what any actual . . . settlement number should be," he is "definitely intending to testify about the process"); *see also* Report ¶ 95 ("These are the actions of a pet trustee trying to ensure a future business flow . . . ."); *id.* ¶ 120 ("BONY did not undertake sufficient diligence to make an informed decision"); *id.* ¶ 127 (commenting on the adequacy of the Trust Committee meeting).

Professor Levitin is not qualified to opine on trustee processes or, for that matter, any settlement-related processes. He graduated from law school in 2005, and after a one-year clerkship and a short stint at a law firm, began teaching law. Since then, he has been a professor. He has never worked for a trustee (Dep. at 52:6-7: "I've never worked at a securitization trustee.

Heavens no."), represented a trustee, or, it seems, negotiated a settlement of any type. He has never been qualified to testify as an expert witness on any topic. At his deposition, he turned down an invitation to describe himself as an expert on trustee custom and practice. Dep. 50:24-51:10 ("The custom and practice. I guess here I don't want to be playing semantic games with you, but -- but I think I just need to understand what you're meaning by – by expert. In – if you mean expert in sort of a colloquial sense of do I know more than the average -- than your average layperson, then yes. If you mean -- well, I guess I'm not quite sure exactly what sense you're using expert."). He more definitively declined to describe himself as an expert on trustee duties and responsibilities. *Id.* at 50:15-19 (Q: "Do you hold yourself out as an expert on the duties and responsibilities of trustees? A: The duties and responsibilities of trustees generally, no."). Accordingly, he is not qualified to testify about the Trustee's process or to dispute Mr. Landau's opinions on industry custom and practice.

B. Professor Levitin is not qualified to testify on economics or valuation/loss issues: Professor Levitin is not an economist or statistician, and he appears to have no experience conducting stock-price event studies. Accordingly, he should not be permitted to critique Professor Fischel's stock-price event study, as he does in his report. *E.g.*, Report ¶ 274 (doubting "faith in the efficient market . . . after the mortgage bubble"). Likewise, Professor Levitin has no experience valuing loan-repurchase obligations or collateral losses on mortgage loans. Therefore, he is not qualified to criticize the opinions of Brian Lin or Phillip Burnaman.

II. Testimony about legal issues is inadmissible: As Your Honor has held, legal determinations are reserved for the Court. *See* Tr. (Frankel) at 4669:13-15 ("I [already] made some decisions on [the duties of the trustee,] she's not the Appellate Division"); *see also, e.g.*, *Colon v. Rent-A-Center*, 276 A.D.2d 58, 61 (1st Dep't 2000) ("[E]xpert witnesses should not be called to offer opinion as to the legal obligations of parties under a contract . . . . Likewise, the interpretation of a statute is purely a question of law, and is the responsibility of the court."). That is the case even where, as here, the witness has given testimony before Congress on legal issues. *See* Tr. (Frankel) 4678:24-4679:9 ("I'm not the Congress, and they're trying to gather information. . . . And I think it's very different for people who are pre-settlement advisors . . . . But now to bring somebody in to tell me what the law in an area is, that's what you're supposed to do in your brief.").

Legal opinions pervade Professor Levitin's report. Among other things, he opines on the Trustee's legal obligations under the PSAs; whether an Event of Default occurred under the PSAs; whether BNYM's reliance on experts was authorized by the PSAs; the application of various consent decrees to the Covered Trusts; and "BofA's existing legal duties based on federal law." Report ¶ 224. His report details his interpretation of BofA's legal duties under the CFPB's Mortgage Servicing Rule, the National Mortgage Servicing Settlement, the OCC's Consent Order with BofA, and the PSAs. Such "opinion as to the legal obligations of parties under a contract" is inadmissible. *Colon*, 276 A.D.2d at 61.

III. Speculation about intentions/motives is inadmissible: "Inferences about the intent or motive of parties or others lie outside the bounds of expert testimony" and allow the expert

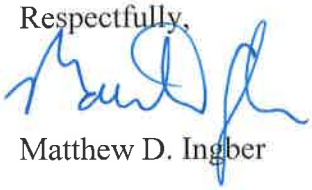
"improperly to assume the role of advocates for the [party's] case." *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 546-47 (S.D.N.Y. 2004). Professor Levitin's first and most extensive opinion is that BNYM did not act in good faith and that, therefore, all of the Trustee's witnesses and pre-settlement advisors are lying. *See* Dep. at 47:22-4 ("[M]y opinion is that [BNYM] did not negotiate the settlement in good faith."); Report ¶ 3 ("BONY's *true motivation* becomes manifest"); Dep. 26:17-18 ("[BNYM] *thought* it was getting something"); *id.* at 27:11-12 ("[BNYM] *subjectively must have believed* that the indemnity was expanded"); Report ¶ 91 (criticizing Kravitt testimony as a "self-serving[] claim[]"); *id.* ¶ 100 ("BONY *appeared to be deeply concerned* about avoiding an Event of Default."); *id.* ¶ 121 ("BONY did not engage experts to create leverage . . . ."); *see also* Dep. at 267:21-23 (the Institutional Investors "*thought* that they could . . . use the leverage of other trusts"). This is precisely the type of impermissible "expert" testimony that courts routinely preclude at trial.

IV. Speculation about negotiations is inadmissible: Finally, many of Professor Levitin's "opinions" are no more than self-assured speculation about negotiations or business generally. *See, e.g.*, Report ¶ 87 (speculating that, in trust-by-trust negotiations, BoA could have "g[otten] ratcheted into higher payments by successive settlements"); *id.* (speculating that "settlement . . . benefitted BONY because BONY will only get BofA's future business if BofA finds BONY to be a sufficiently docile trustee."); *id.* ¶ 108 (speculation about consequences of possible Event of Default notice); *id.* ¶ 114 ("BONY hired a fixer [Jason Kravitt], not a litigator."). This is not expert testimony; it is rank, unsupported speculation straight from the Objectors' briefs.

AIG has explained that "Professor Levitin is our cleanup witness" (*see* Tr. 4765:15-16), but in New York practice, counsel is responsible for "cleanup." Using experts to bolster a party's view of the evidence is improper and, at a minimum, cumulative. *See Cor Canada Rd. Co., LLC v. Dunn & Sgromo Eng'rs, PLLC*, 34 A.D.3d 1364, 1365 (4th Dep't 2006); *In re Zyprexa Prods. Liab. Litig.*, 489 F. Supp. 2d 230, 283 (E.D.N.Y. 2007) (expert testimony "should not merely reiterate arguments based on inferences that can be drawn by laypersons; those can properly be advanced by the parties in their summations").

Accordingly, if the Objectors seek to elicit testimony at trial on any of these impermissible topics, Petitioners will object and will respectfully request that the Court preclude Professor Levitin's testimony on these topics.

Respectfully,



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cc: All counsel