Exhibit 1

EXECUTION COPY

CWALT, INC.,
Depositor
COUNTRYWIDE HOME LOANS, INC.,
Seller
PARK GRANADA LLC,
Seller
PARK MONACO INC.,
Seller
PARK SIENNA LLC,
Seller
COUNTRYWIDE HOME LOANS SERVICING LP,
Master Servicer
and
THE BANK OF NEW YORK,
Trustee

POOLING AND SERVICING AGREEMENT
Dated as of August 1, 2006

ALTERNATIVE LOAN TRUST 2006-OC7

MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OC7

ARTICLE II
CONVEYANCE OF MORTGAGE LOANS; REPRESENTATIONS AND WARRANTIES

SECTION 2.01. Conveyance of Mortgage Loans.

(a) Each Seller, concurrently with the execution and delivery of this Agreement, hereby sells, transfers, assigns, sets over and otherwise conveys to the Depositor, without recourse, all its respective right, title and interest in and to the related Mortgage Loans, including all interest and principal received or receivable by such Seller, on or with respect to the applicable Mortgage Loans after the Cut-off Date and all interest and principal payments on the related Mortgage Loans received prior to the Cut-off Date in respect of installments of interest and principal due thereafter, but not including payments of principal and interest due and payable on such Mortgage Loans on or before the Cut-off Date. On or prior to the Closing Date, Countrywide shall deliver to the Depositor or, at the Depositor's direction, to the Trustee or other designee of the Depositor, the Mortgage File for each Mortgage Loan listed in the Mortgage Loan Schedule (except that, in the case of the Delay Delivery Mortgage Loans (which may include Countrywide Mortgage Loans, Park Granada Mortgage Loans, Park Monaco Mortgage Loans and Park Sienna Mortgage Loans), such delivery may take place within thirty (30) days following the Closing Date). Such delivery of the Mortgage Files shall be made against payment by the Depositor of the purchase price, previously agreed to by the Sellers and Depositor, for the Mortgage Loans. With respect to any Mortgage Loan that does not have a first payment date on or before the Due Date in the month of the first applicable Distribution Date, Countrywide shall deposit into the Distribution Account on or before the Distribution Account Deposit Date relating to the first Distribution Date, an amount equal to one month's interest at the related Adjusted Mortgage Rate on the Cut-off Date Principal Balance of such Mortgage Loan.

(b) Immediately upon the conveyance of the Mortgage Loans referred to in clause (a), the Depositor sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund together with the Depositor's right to require each Seller to cure any breach of a representation or warranty made in this Agreement by such Seller or to repurchase or substitute for any affected Mortgage Loan in accordance herewith.

(c) In connection with the transfer and assignment set forth in clause (b) above, the Depositor has delivered or caused to be delivered to the Trustee (or, in the case of the Delay Delivery Mortgage Loans, will deliver or cause to be delivered to the Trustee within thirty (30) days following the Closing Date) for the benefit of the Certificateholders the following documents or instruments with respect to each Mortgage Loan so assigned:

> (i) (A) the original Mortgage Note endorsed by manual or facsimile signature in blank in the following form: "Pay to the order of ____________ without recourse," with all intervening endorsements showing a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note (each such endorsement being sufficient to transfer all right, title and interest of the party so endorsing, as noteholder or assignee thereof, in and to that Mortgage Note); or

(B) with respect to any Lost Mortgage Note, a lost note affidavit from Countrywide stating that the original Mortgage Note was lost or destroyed, together with a copy of such Mortgage Note;

(ii) except as provided below and for each Mortgage Loan that is not a MERS Mortgage Loan, the original recorded Mortgage or a copy of such Mortgage, with recording information, (or, in the case of a Mortgage for which the related Mortgaged Property is located in the Commonwealth of Puerto Rico, a true copy of the Mortgage certified as such by the applicable notary) and in the case of each MERS Mortgage Loan, the original Mortgage or a copy of such mortgage, with recording information, noting the presence of the MIN of the Mortgage Loans and either language indicating that the Mortgage Loan is a MOM Loan if the Mortgage Loan is a MOM Loan or if the Mortgage Loan was not a MOM Loan at origination, the original Mortgage and the assignment thereof to MERS, with evidence of recording indicated thereon, or a copy of the Mortgage certified by the public recording office in which such Mortgage has been recorded;

(iii) in the case of each Mortgage Loan that is not a MERS Mortgage Loan, a duly executed assignment of the Mortgage or a copy of such assignment, with recording information, (which may be included in a blanket assignment or assignments), together with, except as provided below, all interim recorded assignments of such mortgage or a copy of such assignment, with recording information, (each such assignment, when duly and validly completed, to be in recordable form and sufficient to effect the assignment of and transfer to the assignee thereof, under the Mortgage to which the assignment relates); provided that, if the related Mortgage has not been returned from the applicable public recording office, such assignment of the Mortgage may exclude the information to be provided by the recording office; provided, further, that such assignment of Mortgage need not be delivered in the case of a Mortgage for which the related Mortgaged Property is located in the Commonwealth of Puerto Rico;

(iv) the original or copies of each assumption, modification, written assurance or substitution agreement, if any;

(v) except as provided below, the original or a copy of lender's title policy or a printout of the electronic equivalent and all riders thereto; and

(vi) in the case of a Cooperative Loan, the originals of the following documents or instruments:

(A) The Coop Shares, together with a stock power in blank;

(B) The executed Security Agreement;

(C) The executed Proprietary Lease;

(D) The executed Recognition Agreement;

(E) The executed UCC-1 financing statement with evidence of recording thereon which have been filed in all places required to perfect the applicable Seller's interest in the Coop Shares and the Proprietary Lease; and

(F) The executed UCC-3 financing statements or other appropriate UCC financing statements required by state law, evidencing a complete and unbroken line from the mortgagee to the Trustee with evidence of recording thereon (or in a form suitable for recordation).

In addition, in connection with the assignment of any MERS Mortgage Loan, each Seller agrees that it will cause, at the Trustee's expense, the MERS® System to indicate that the Mortgage Loans sold by such Seller to the Depositor have been assigned by that Seller to the Trustee in accordance with this Agreement for the benefit of the Certificateholders by including (or deleting, in the case of Mortgage Loans which are repurchased in accordance with this Agreement) in such computer files the information required by the MERS® System to identify the series of the Certificates issued in connection with such Mortgage Loans. Each Seller further agrees that it will not, and will not permit the Master Servicer to, and the Master Servicer agrees that it will not, alter the information referenced in this paragraph with respect to any Mortgage Loan sold by such Seller to the Depositor during the term of this Agreement unless and until such Mortgage Loan is repurchased in accordance with the terms of this Agreement.

In the event that in connection with any Mortgage Loan that is not a MERS Mortgage Loan the Depositor cannot deliver (a) the original recorded Mortgage or a copy of such mortgage, with recording information, or (b) all interim recorded assignments or a copy of such assignments, with recording information, or (c) the lender's title policy or a copy of lender's title policy (together with all riders thereto) satisfying the requirements of clause (ii), (iii) or (v) above, respectively, concurrently with the execution and delivery of this Agreement because such document or documents have not been returned from the applicable public recording office in the case of clause (ii) or (iii) above, or because the title policy has not been delivered to either the Master Servicer or the Depositor by the applicable title insurer in the case of clause (v) above, the Depositor shall promptly deliver to the Trustee, in the case of clause (ii) or (iii) above, such original Mortgage or a copy of such mortgage, with recording information, or such interim assignment or a copy of such assignments, with recording information, as the case may be, with evidence of recording indicated thereon upon receipt thereof from the public recording office, or a copy thereof, certified, if appropriate, by the relevant recording office, but in no event shall any such delivery of the original Mortgage and each such interim assignment or a copy thereof, certified, if appropriate, by the relevant recording office, be made later than one year following the Closing Date, or, in the case of clause (v) above, no later than 120 days following the Closing Date; provided, however, in the event the Depositor is unable to deliver by such date each Mortgage and each such interim assignment by reason of the fact that any such documents have not been returned by the appropriate recording office, or, in the case of each such interim assignment, because the related Mortgage has not been returned by the appropriate recording office, the Depositor shall deliver such documents to the Trustee as promptly as possible upon receipt thereof and, in any event, within 720 days following the Closing Date. The Depositor shall forward or cause to be forwarded to the Trustee (a) from time to time additional original documents evidencing an assumption or modification of a Mortgage Loan and (b) any other documents required to be delivered by the Depositor or the Master Servicer to the Trustee. In the event that the original Mortgage is not delivered and in connection with the payment in full of the related Mortgage Loan and the public recording office requires the presentation of a "lost instruments affidavit and indemnity" or any equivalent document, because only a copy of the Mortgage can be delivered with the instrument of satisfaction or reconveyance, the Master Servicer shall execute and deliver or cause to be executed and delivered such a document to the public recording office. In the case where a public recording office retains the original recorded Mortgage or in the case where a Mortgage is lost after recordation in a public recording office, Countrywide shall deliver to the Trustee a copy of such Mortgage certified by such public recording office to be a true and complete copy of the original recorded Mortgage.

As promptly as practicable subsequent to such transfer and assignment, and in any event, within one-hundred twenty (120) days after such transfer and assignment, the Trustee shall (A) as the assignee thereof, affix the following language to each assignment of Mortgage: "CWALT, Inc., Series 2006-OC7, The Bank of New York, as trustee", (B) cause such assignment to be in proper form for recording in the appropriate public office for real property records and (C) cause to be delivered for recording in the appropriate public office for real property records the assignments of the Mortgages to the Trustee, except that, (i) with respect to any assignments of Mortgage as to which the Trustee has not received the information required to prepare such assignment in recordable form, the Trustee's obligation to do so and to deliver the same for such recording shall be as soon as practicable after receipt of such information and in any event within thirty (30) days after receipt thereof and (ii) the Trustee need not cause to be recorded any assignment which relates to a Mortgage Loan, the Mortgaged Property and Mortgage File relating to which are located in any jurisdiction (including Puerto Rico) under the laws of which the recordation of such assignment is not necessary to protect the Trustee's and the Certificateholders' interest in the related Mortgage Loan as evidenced by an opinion of counsel delivered by Countrywide to the Trustee within 90 days of the Closing Date (which opinion may be in the form of a "survey" opinion and is not required to be delivered by counsel admitted to practice law in the jurisdiction as to which such legal opinion applies).

In the case of Mortgage Loans that have been prepaid in full as of the Closing Date, the Depositor, in lieu of delivering the above documents to the Trustee, will deposit in the Certificate Account the portion of such payment that is required to be deposited in the Certificate Account pursuant to Section 3.05.

Notwithstanding anything to the contrary in this Agreement, within thirty (30) days after the Closing Date with respect to the Mortgage Loans, Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna) shall either (i) deliver to the Depositor, or at the Depositor's direction, to the Trustee or other designee of the Depositor the Mortgage File as required pursuant to this Section 2.01 for each Delay Delivery Mortgage Loan or (ii) either (A) substitute a Substitute Mortgage Loan for the Delay Delivery Mortgage Loan or (B) repurchase the Delay Delivery Mortgage Loan, which substitution or repurchase shall be accomplished in the manner and subject to the conditions set forth in Section 2.03 (treating each Delay Delivery Mortgage Loan as a Deleted Mortgage Loan for purposes of such Section 2.03); *provided, however*, that if Countrywide fails to deliver a Mortgage File for any Delay Delivery Mortgage Loan within the thirty (30)-day period provided in the prior sentence, Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna) shall use its best reasonable efforts to effect a substitution, rather than a repurchase of, such Deleted Mortgage Loan and provided further that the cure period provided for in Section 2.02 or in Section 2.03

shall not apply to the initial delivery of the Mortgage File for such Delay Delivery Mortgage Loan, but rather Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna) shall have five (5) Business Days to cure such failure to deliver. At the end of such thirty (30)-day period the Trustee shall send a Delay Delivery Certification for the Delay Delivery Mortgage Loans delivered during such thirty (30)-day period in accordance with the provisions of Section 2.02.

(d) Neither the Depositor nor the Trust will acquire or hold any Mortgage Loan that would violate the representations made by Countrywide set forth in clause (50) of Schedule III-A hereto.

SECTION 2.02. Acceptance by Trustee of the Mortgage Loans.

(a) The Trustee acknowledges receipt of the documents identified in the Initial Certification in the form annexed hereto as Exhibit F-1 (an "***Initial Certification***") and declares that it holds and will hold such documents and the other documents delivered to it constituting the Mortgage Files, and that it holds or will hold such other assets as are included in the Trust Fund, in trust for the exclusive use and benefit of all present and future Certificateholders. The Trustee acknowledges that it will maintain possession of the Mortgage Notes in the State of California, unless otherwise permitted by the Rating Agencies.

The Trustee agrees to execute and deliver on the Closing Date to the Depositor, the Master Servicer and Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna) an Initial Certification in the form annexed to this Agreement as Exhibit F-1. Based on its review and examination, and only as to the documents identified in such Initial Certification, the Trustee acknowledges that such documents appear regular on their face and relate to the Mortgage Loans. The Trustee shall be under no duty or obligation to inspect, review or examine said documents, instruments, certificates or other papers to determine that the same are genuine, enforceable or appropriate for the represented purpose or that they have actually been recorded in the real estate records or that they are other than what they purport to be on their face.

On or about the thirtieth (30^{th}) day after the Closing Date, the Trustee shall deliver to the Depositor, the Master Servicer and Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna) a Delay Delivery Certification with respect to the Mortgage Loans in the form annexed hereto as Exhibit G-1 (a "***Delay Delivery Certification***"), with any applicable exceptions noted thereon.

Not later than 90 days after the Closing Date, the Trustee shall deliver to the Depositor, the Master Servicer and Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna) a Final Certification with respect to the Mortgage Loans in the form annexed hereto as Exhibit H-1 (a "***Final Certification***"), with any applicable exceptions noted thereon.

If, in the course of such review, the Trustee finds any document constituting a part of a Mortgage File that does not meet the requirements of Section 2.01, the Trustee shall list such as an exception in the Final Certification; provided, however that the Trustee shall not make any determination as to whether (i) any endorsement is sufficient to transfer all right, title and interest

(b) [Reserved].

(c) [Reserved].

(d) The Trustee shall retain possession and custody of each Mortgage File in accordance with and subject to the terms and conditions set forth in this Agreement. The Master Servicer shall promptly deliver to the Trustee, upon the execution or receipt thereof, the originals of such other documents or instruments constituting the Mortgage File as come into the possession of the Master Servicer from time to time.

(e) It is understood and agreed that the respective obligations of each Seller to substitute for or to purchase any Mortgage Loan sold to the Depositor by it which does not meet the requirements of Section 2.01 above shall constitute the sole remedy respecting such defect available to the Trustee, the Depositor and any Certificateholder against that Seller.

SECTION 2.03. Representations, Warranties and Covenants of the Sellers and Master Servicer.

(a) Countrywide hereby makes the representations and warranties set forth in (i) Schedule II-A, Schedule II-B, Schedule II-C and Schedule II-D hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date, (ii) Schedule III-A hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date, or if so specified therein, as of the Cut-off Date with respect to the Mortgage Loans, and (iii) Schedule III-B hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date, or if so specified therein, as of the Cut-off Date with respect to the Mortgage Loans that are Countrywide Mortgage Loans. Park Granada hereby makes the representations and warranties set forth in (i) Schedule II-B hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date and (ii) Schedule III-C hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date, or if so specified therein, as of the Cut-off Date with respect to the Mortgage Loans that are Park Granada Mortgage Loans. Park Monaco hereby makes the representations and warranties set forth in (i) Schedule II-C hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date and (ii) Schedule III-D hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date, or if so specified therein, as of the Cut-off Date with respect to the Mortgage Loans that are Park Monaco Mortgage Loans. Park Sienna hereby makes the representations and warranties set forth in (i) Schedule II-D hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date and (ii) Schedule III-E hereto, and by this reference incorporated herein, to the Depositor, the Master Servicer and the Trustee, as of the Closing Date, or if so specified therein, as of the Cut-off Date with respect to the Mortgage Loans that are Park Sienna Mortgage Loans.

(b) The Master Servicer hereby makes the representations and warranties set forth in Schedule IV hereto, and by this reference incorporated herein, to the Depositor and the Trustee, as of the Closing Date.

(c) Upon discovery by any of the parties hereto of a breach of a representation or warranty with respect to a Mortgage Loan made pursuant to Section 2.03(a) that materially and adversely affects the interests of the Certificateholders in that Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties, the NIM Insurer and the Swap Counterparty. Each Seller hereby covenants that within 90 days of the earlier of its discovery or its receipt of written notice from any party of a breach of any representation or warranty with respect to a Mortgage Loan sold by it pursuant to Section 2.03(a) that materially and adversely affects the interests of the Certificateholders in that Mortgage Loan, it shall cure such breach in all material respects, and if such breach is not so cured, shall, (i) if such 90-day period expires prior to the second anniversary of the Closing Date, remove such Mortgage Loan (a "***Deleted Mortgage Loan***") from the Trust Fund and substitute in its place a Substitute Mortgage Loan, in the manner and subject to the conditions set forth in this Section; or (ii) repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee at the Purchase Price in the manner set forth below; provided, however, that any such substitution pursuant to (i) above shall not be effected prior to the delivery to the Trustee of the Opinion of Counsel required by Section 2.05, if any, and any such substitution pursuant to (i) above shall not be effected prior to the additional delivery to the Trustee of a Request for Release substantially in the form of Exhibit N and the Mortgage File for any such Substitute Mortgage Loan. The Seller repurchasing a Mortgage Loan pursuant to this Section 2.03(c) shall promptly reimburse the Master Servicer and the Trustee for any expenses reasonably incurred by the Master Servicer or the Trustee in respect of enforcing the remedies for such breach. With respect to the representations and warranties described in this Section which are made to the best of a Seller's knowledge, if it is discovered by either the Depositor, a Seller or the Trustee that the substance of such representation and warranty is inaccurate and such inaccuracy materially and adversely affects the value of the related Mortgage Loan or the interests of the Certificateholders therein, notwithstanding that Seller's lack of knowledge with respect to the substance of such representation or warranty, such inaccuracy shall be deemed a breach of the applicable representation or warranty. Any breach of a representation set forth in clauses (45) through (64) of Schedule III-A with respect to a Mortgage Loan in Loan Group 1 shall be deemed to materially and adversely affect the Certificateholders.

With respect to any Substitute Mortgage Loan or Loans sold to the Depositor by a Seller, Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna) shall deliver to the Trustee for the benefit of the Certificateholders the Mortgage Note, the Mortgage, the related assignment of the Mortgage, and such other documents and agreements as are required by Section 2.01, with the Mortgage Note endorsed and the Mortgage assigned as required by Section 2.01. No substitution is permitted to be made in any calendar month after the Determination Date for such month. Scheduled Payments due with respect to Substitute Mortgage Loans in the month of substitution shall not be part of the Trust Fund and will be retained by the related Seller on the next succeeding Distribution Date. For the month of substitution, distributions to Certificateholders will include the monthly payment due on any Deleted Mortgage Loan for such month and thereafter that Seller shall be entitled to retain all amounts received in respect of such Deleted Mortgage Loan. The Master Servicer shall amend the Mortgage Loan Schedule for the benefit of the Certificateholders to reflect the removal of such Deleted Mortgage Loan and the substitution of the Substitute Mortgage Loan or Loans and the Master Servicer shall deliver the amended Mortgage Loan Schedule to the Trustee. Upon such substitution, the Substitute Mortgage Loan or Loans shall be subject to the terms of this

Agreement in all respects, and the related Seller shall be deemed to have made with respect to such Substitute Mortgage Loan or Loans, as of the date of substitution, the representations and warranties made pursuant to Section 2.03(a) with respect to such Mortgage Loan. Upon any such substitution and the deposit to the Certificate Account of the amount required to be deposited therein in connection with such substitution as described in the following paragraph, the Trustee shall release the Mortgage File held for the benefit of the Certificateholders relating to such Deleted Mortgage Loan to the related Seller and shall execute and deliver at such Seller's direction such instruments of transfer or assignment prepared by Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna), in each case without recourse, as shall be necessary to vest title in that Seller, or its designee, the Trustee's interest in any Deleted Mortgage Loan substituted for pursuant to this Section 2.03.

For any month in which a Seller substitutes one or more Substitute Mortgage Loans for one or more Deleted Mortgage Loans, the Master Servicer will determine the amount (if any) by which the aggregate principal balance of all Substitute Mortgage Loans sold to the Depositor by that Seller as of the date of substitution is less than the aggregate Stated Principal Balance of all Deleted Mortgage Loans repurchased by that Seller (after application of the scheduled principal portion of the monthly payments due in the month of substitution). The amount of such shortage (the "***Substitution Adjustment Amount***") plus an amount equal to the aggregate of any unreimbursed Advances with respect to such Deleted Mortgage Loans shall be deposited in the Certificate Account by Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna) on or before the Distribution Account Deposit Date for the Distribution Date in the month succeeding the calendar month during which the related Mortgage Loan became required to be purchased or replaced hereunder.

In the event that a Seller shall have repurchased a Mortgage Loan, the Purchase Price therefor shall be deposited in the Certificate Account pursuant to Section 3.05 on or before the Distribution Account Deposit Date for the Distribution Date in the month following the month during which that Seller became obligated hereunder to repurchase or replace such Mortgage Loan and upon such deposit of the Purchase Price, the delivery of the Opinion of Counsel required by Section 2.05 and receipt of a Request for Release in the form of Exhibit N hereto, the Trustee shall release the related Mortgage File held for the benefit of the Certificateholders to such Person, and the Trustee shall execute and deliver at such Person's direction such instruments of transfer or assignment prepared by such Person, in each case without recourse, as shall be necessary to transfer title from the Trustee. It is understood and agreed that the obligation under this Agreement of any Person to cure, repurchase or replace any Mortgage Loan as to which a breach has occurred and is continuing shall constitute the sole remedy against such Persons respecting such breach available to Certificateholders, the Depositor or the Trustee on their behalf.

The representations and warranties made pursuant to this Section 2.03 shall survive delivery of the respective Mortgage Files to the Trustee for the benefit of the Certificateholders.

SECTION 2.04. Representations and Warranties of the Depositor as to the Mortgage Loans.

The Depositor hereby represents and warrants to the Trustee with respect to each Mortgage Loan as of the date of this Agreement or such other date set forth in this Agreement that as of the Closing Date, and following the transfer of the Mortgage Loans to it by each Seller, the Depositor had good title to the Mortgage Loans and the Mortgage Notes were subject to no offsets, defenses or counterclaims.

The Depositor hereby assigns, transfers and conveys to the Trustee all of its rights with respect to the Mortgage Loans including, without limitation, the representations and warranties of each Seller made pursuant to Section 2.03(a), together with all rights of the Depositor to require a Seller to cure any breach thereof or to repurchase or substitute for any affected Mortgage Loan in accordance with this Agreement.

It is understood and agreed that the representations and warranties set forth in this Section 2.04 shall survive delivery of the Mortgage Files to the Trustee. Upon discovery by the Depositor or the Trustee of a breach of any of the foregoing representations and warranties set forth in this Section 2.04 (referred to herein as a "breach"), which breach materially and adversely affects the interest of the Certificateholders, the party discovering such breach shall give prompt written notice to the others and to each Rating Agency and the NIM Insurer.

SECTION 2.05. Delivery of Opinion of Counsel in Connection with Substitutions.

(a) Notwithstanding any contrary provision of this Agreement, no substitution pursuant to Section 2.02 or Section 2.03 shall be made more than 90 days after the Closing Date unless Countrywide delivers to the Trustee an Opinion of Counsel, which Opinion of Counsel shall not be at the expense of either the Trustee or the Trust Fund, addressed to the Trustee, to the effect that such substitution will not (i) result in the imposition of the tax on "prohibited transactions" on the Trust Fund or contributions after the Startup Date, as defined in Sections 860F(a)(2) and 860G(d) of the Code, respectively, or (ii) cause any REMIC created under this Agreement to fail to qualify as a REMIC at any time that any Certificates are outstanding.

(b) Upon discovery by the Depositor, a Seller, the Master Servicer, or the Trustee that any Mortgage Loan does not constitute a "qualified mortgage" within the meaning of Section 860G(a)(3) of the Code, the party discovering such fact shall promptly (and in any event within five (5) Business Days of discovery) give written notice thereof to the other parties and the NIM Insurer. In connection therewith, the Trustee shall require Countrywide (on its own behalf and on behalf of Park Granada, Park Monaco and Park Sienna) at its option, to either (i) substitute, if the conditions in Section 2.03(c) with respect to substitutions are satisfied, a Substitute Mortgage Loan for the affected Mortgage Loan, or (ii) repurchase the affected Mortgage Loan within 90 days of such discovery in the same manner as it would a Mortgage Loan for a breach of representation or warranty made pursuant to Section 2.03. The Trustee shall reconvey to Countrywide the Mortgage Loan to be released pursuant to this Section in the same manner, and on the same terms and conditions, as it would a Mortgage Loan repurchased for breach of a representation or warranty contained in Section 2.03.

SECTION 2.06. Execution and Delivery of Certificates.

The Trustee acknowledges the transfer and assignment to it of the Trust Fund and, concurrently with such transfer and assignment, has executed and delivered to or upon the order of the Depositor, the Certificates in authorized denominations evidencing directly or indirectly the entire ownership of the Trust Fund. The Trustee agrees to hold the Trust Fund and exercise

ARTICLE VII
DEFAULT

SECTION 7.01. Events of Default.

"***Event of Default***," wherever used in this Agreement, means any one of the following events:

(i) any failure by the Master Servicer to deposit in the Certificate Account or remit to the Trustee any payment required to be made under the terms of this Agreement, which failure shall continue unremedied for five days after the date upon which written notice of such failure shall have been given to the Master Servicer by the Trustee, the NIM Insurer or the Depositor or to the Master Servicer, the NIM Insurer and the Trustee by the Holders of Certificates having not less than 25% of the Voting Rights evidenced by the Certificates; or

(ii) any failure by the Master Servicer to observe or perform in any material respect any other of the covenants or agreements on the part of the Master Servicer contained in this Agreement (except with respect to a failure related to a Limited Exchange Act Reporting Obligation), which failure materially affects the rights of Certificateholders, that failure continues unremedied for a period of 60 days after the date on which written notice of such failure shall have been given to the Master Servicer by the Trustee, the NIM Insurer or the Depositor, or to the Master Servicer and the Trustee by the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates; *provided, however,* that the sixty day cure period shall not apply to the initial delivery of the Mortgage File for Delay Delivery Mortgage Loans nor the failure to substitute or repurchase in lieu of delivery; or

(iii) a decree or order of a court or agency or supervisory authority having jurisdiction in the premises for the appointment of a receiver or liquidator in any insolvency, readjustment of debt, marshalling of assets and liabilities or similar proceedings, or for the winding-up or liquidation of its affairs, shall have been entered against the Master Servicer and such decree or order shall have remained in force undischarged or unstayed for a period of 60 consecutive days; or

(iv) the Master Servicer shall consent to the appointment of a receiver or liquidator in any insolvency, readjustment of debt, marshalling of assets and liabilities or similar proceedings of or relating to the Master Servicer or all or substantially all of the property of the Master Servicer; or

(v) the Master Servicer shall admit in writing its inability to pay its debts generally as they become due, file a petition to take advantage of, or commence a voluntary case under, any applicable insolvency or reorganization statute, make an assignment for the benefit of its creditors, or voluntarily suspend payment of its obligations; or

(vi) the Master Servicer shall fail to reimburse in full the Trustee within five days of the Master Servicer Advance Date for any Advance made by the Trustee pursuant to Section 4.01(b) together with accrued and unpaid interest.

If an Event of Default described in clauses (i) to (vi) of this Section shall occur, then, and in each and every such case, so long as such Event of Default shall not have been remedied, the Trustee may, or, if an Event of Default described in clauses (i) to (v) of this Section shall occur, then, and in each and every such case, so long as such Event of Default shall not have been remedied, at the direction of either the NIM Insurer or the Holders of Certificates evidencing not less than 66-2/3% of the Voting Rights, evidenced by the Certificates; the Trustee shall by notice in writing to the Master Servicer (with a copy to each Rating Agency and the Depositor), terminate all of the rights and obligations of the Master Servicer under this Agreement and in and to the Mortgage Loans and the proceeds thereof, other than its rights as a Certificateholder hereunder. In addition, if during the period that the Depositor is required to file Exchange Act Reports with respect to the Trust Fund, the Master Servicer shall fail to observe or perform any of the obligations that constitute a Limited Exchange Act Reporting Obligation or the obligations set forth in Section 3.16(a) or Section 11.01(a)(1) and (2), and such failure continues for the lesser of 10 calendar days or such period in which the applicable Exchange Act Report can be filed timely (without taking into account any extensions), so long as such failure shall not have been remedied, the Trustee shall, but only at the direction of the Depositor, terminate all of the rights and obligations of the Master Servicer under this Agreement and in and to the Mortgage Loans and the proceeds thereof, other than its rights as a Certificateholder hereunder. The Depositor shall not be entitled to terminate the rights and obligations of the Master Servicer if a failure of the Master Servicer to identify a Subcontractor "participating in the servicing function" within the meaning of Item 1122 of Regulation AB was attributable solely to the role or functions of such Subcontractor with respect to mortgage loans other than the Mortgage Loans.

On and after the receipt by the Master Servicer of such written notice, all authority and power of the Master Servicer hereunder, whether with respect to the Mortgage Loans or otherwise, shall pass to and be vested in the Trustee. The Trustee shall thereupon make any Advance which the Master Servicer failed to make subject to Section 4.01 whether or not the obligations of the Master Servicer have been terminated pursuant to this Section. The Trustee is hereby authorized and empowered to execute and deliver, on behalf of the Master Servicer, as attorney-in-fact or otherwise, any and all documents and other instruments, and to do or accomplish all other acts or things necessary or appropriate to effect the purposes of such notice of termination, whether to complete the transfer and endorsement or assignment of the Mortgage Loans and related documents, or otherwise. Unless expressly provided in such written notice, no such termination shall affect any obligation of the Master Servicer to pay amounts owed pursuant to Article VIII. The Master Servicer agrees to cooperate with the Trustee in effecting the termination of the Master Servicer's responsibilities and rights hereunder, including, without limitation, the transfer to the Trustee of all cash amounts which shall at the time be credited to the Certificate Account, or thereafter be received with respect to the Mortgage Loans.

Notwithstanding any termination of the activities of the Master Servicer hereunder, the Master Servicer shall be entitled to receive, out of any late collection of a Scheduled Payment on a Mortgage Loan which was due prior to the notice terminating such Master Servicer's rights and obligations as Master Servicer hereunder and received after such notice, that portion thereof to which such Master Servicer would have been entitled pursuant to Sections 3.08(a)(i) through (viii), and any other amounts payable to such Master Servicer hereunder the entitlement to which arose prior to the termination of its activities under this Agreement.

If the Master Servicer is terminated, the Trustee shall provide the Depositor in writing and in form and substance reasonably satisfactory to the Depositor, all information reasonably requested by the Depositor in order to comply with its reporting obligation under Item 6.02 of Form 8-K with respect to a successor master servicer in the event the Trustee should succeed to the duties of the Master Servicer as set forth herein.

SECTION 7.02. Trustee to Act; Appointment of Successor.

On and after the time the Master Servicer receives a notice of termination pursuant to Section 7.01, the Trustee shall, subject to and to the extent provided in Section 3.04, be the successor to the Master Servicer in its capacity as master servicer under this Agreement and the transactions set forth or provided for in this Agreement and shall be subject to all the responsibilities, duties and liabilities relating thereto placed on the Master Servicer by the terms and provisions of this Agreement and applicable law including the obligation to make Advances pursuant to Section 4.01. As compensation therefor, the Trustee shall be entitled to all funds relating to the Mortgage Loans that the Master Servicer would have been entitled to charge to the Certificate Account or Distribution Account if the Master Servicer had continued to act hereunder. Notwithstanding the foregoing, if the Trustee has become the successor to the Master Servicer in accordance with Section 7.01, the Trustee may, if it shall be unwilling to so act, or shall, if it is prohibited by applicable law from making Advances pursuant to Section 4.01 or if it is otherwise unable to so act, (i) appoint any established mortgage loan servicing institution reasonably acceptable to the NIM Insurer (as evidenced by the prior written consent of the NIM Insurer), or (ii) if it is unable for 60 days to appoint a successor servicer reasonably acceptable to the NIM Insurer, petition a court of competent jurisdiction to appoint any established mortgage loan servicing institution, the appointment of which does not adversely affect the then-current rating of the Certificates and the NIM Insurer guaranteed notes (without giving any effect to any policy or guaranty provided by the NIM Insurer) by each Rating Agency as the successor to the Master Servicer hereunder in the assumption of all or any part of the responsibilities, duties or liabilities of the Master Servicer hereunder. Any successor to the Master Servicer shall be an institution which is a FNMA and FHLMC approved seller/servicer in good standing, which has a net worth of at least $15,000,000, and which is willing to service the Mortgage Loans and (i) executes and delivers to the Depositor and the Trustee an agreement accepting such delegation and assignment, which contains an assumption by such Person of the rights, powers, duties, responsibilities, obligations and liabilities of the Master Servicer (other than liabilities of the Master Servicer under Section 6.03 incurred prior to termination of the Master Servicer under Section 7.01), with like effect as if originally named as a party to this Agreement; and provided further that each Rating Agency acknowledges that its rating of the Certificates in effect immediately prior to such assignment and delegation will not be qualified or reduced as a result of such assignment and delegation and (ii) provides to the Depositor in writing, fifteen (15) days prior to the effective date of such appointment, and in form and substance reasonably satisfactory to the Depositor, all information reasonably requested by the Depositor in order to comply with its reporting obligation under Item 6.02 of Form 8-K with respect to a replacement master servicer. The Trustee shall provide written notice to the Depositor of such successor pursuant to this Section. Pending appointment of a successor to the Master Servicer hereunder, the Trustee, unless the Trustee is prohibited by law from so acting, shall, subject to Section 3.04, act in such to make an Advance under Section 4.01(b), shall have no responsibility to ascertain or confirm any information contained in any Trustee Advance Notice, and shall have no obligation to make any Advance under Section 4.01(b) in the absence of a Trustee Advance Notice or actual knowledge of a Responsible Officer of the Trustee that (A) such Advance was not made by the Master Servicer and (B) such Advance is not a Nonrecoverable Advance.

The Trustee hereby represents, warrants, covenants and agrees that, except as permitted by Article IX hereof, it shall not cause the Trust Fund to consolidate or amalgamate with, or merge with or into, or transfer all or substantially all of the Trust Fund to, another Person.

SECTION 8.02. Certain Matters Affecting the Trustee.

Except as otherwise provided in Section 8.01:

(i) the Trustee may request and rely upon and shall be protected in acting or refraining from acting upon any resolution, Officers' Certificate, certificate of auditors or any other certificate, statement, instrument, opinion, report, notice, request, consent, order, appraisal, bond or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties and the Trustee shall have no responsibility to ascertain or confirm the genuineness of any signature of any such party or parties;

(ii) the Trustee may consult with counsel, financial advisers or accountants of its selection and the advice of any such counsel, financial advisers or accountants and any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith and in accordance with such Opinion of Counsel;

(iii) the Trustee shall not be liable for any action taken, suffered or omitted by it in good faith and believed by it to be authorized or within the discretion or rights or powers conferred upon it by this Agreement;

(iv) the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, bond or other paper or document, unless requested in writing so to do by the NIM Insurer or Holders of Certificates evidencing not less than 25% of the Voting Rights allocated to each Class of Certificates;

(v) the Trustee may execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents, accountants or attorneys;

(vi) the Trustee shall not be required to risk or expend its own funds or otherwise incur any financial liability in the performance of any of its duties or in the exercise of any of its rights or powers hereunder if it shall have reasonable grounds for believing that repayment of such funds or adequate indemnity against such risk or liability is not assured to it;

(vii) the Trustee shall not be liable for any loss on any investment of funds pursuant to this Agreement (other than as issuer of the investment security);

(viii) 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; and

(ix) the Trustee shall be under no obligation to exercise any of the trusts, rights or powers vested in it by this Agreement or to institute, conduct or defend any litigation hereunder or in relation hereto at the request, order or direction of the NIM Insurer or any of the Certificateholders, pursuant to the provisions of this Agreement, unless the NIM Insurer or such Certificateholders shall have offered to the Trustee reasonable security or indemnity satisfactory to the Trustee against the costs, expenses and liabilities which may be incurred therein or thereby.

The Depositor hereby directs the Trustee to execute, deliver and perform its obligations under the Swap Administration Agreement (in its capacity as Swap Trustee). The Sellers, the Depositor, the Master Servicer and the Holders of the LIBOR Certificates by their acceptance of such Certificates acknowledge and agree that the Trustee shall execute, deliver and perform its obligations under the Swap Administration Agreement and shall do so solely in its capacity as Swap Trustee, as the case may be, and not in its individual capacity. Every provision of this Agreement relating to the conduct or affecting the liability of or affording protection to the Trustee shall apply to the Trustee's execution of the Swap Administration Agreement in its capacity as Swap Trustee, and the performance of its duties and satisfaction of its obligations thereunder.

SECTION 8.03. Trustee Not Liable for Certificates or Mortgage Loans.

The recitals contained in this Agreement and in the Certificates shall be taken as the statements of the Depositor or a Seller, as the case may be, and the Trustee assumes no responsibility for their correctness. The Trustee makes no representations as to the validity or sufficiency of this Agreement or of the Certificates or of any Mortgage Loan or related document or of MERS or the MERS® System other than with respect to the Trustee's execution and counter-signature of the Certificates. The Trustee shall not be accountable for the use or application by the Depositor or the Master Servicer of any funds paid to the Depositor or the Master Servicer in respect of the Mortgage Loans or deposited in or withdrawn from the Certificate Account by the Depositor or the Master Servicer.

SECTION 8.04. Trustee May Own Certificates.

The Trustee in its individual or any other capacity may become the owner or pledgee of Certificates with the same rights as it would have if it were not the Trustee.

SECTION 8.05. Trustee's Fees and Expenses.

The Trustee, as compensation for its activities hereunder, shall be entitled to withdraw from the Distribution Account on each Distribution Date an amount equal to the Trustee Fee for such Distribution Date. The Trustee and any director, officer, employee or agent of the Trustee shall be indemnified by the Master Servicer and held harmless against any loss, liability or deemed given when mailed, first class postage prepaid, to their respective addresses appearing in the Certificate Register.

SECTION 10.06. Severability of Provisions.

If any one or more of the covenants, agreements, provisions or terms of this Agreement shall be for any reason whatsoever held invalid, then such covenants, agreements, provisions or terms shall be deemed severable from the remaining covenants, agreements, provisions or terms of this Agreement and shall in no way affect the validity or enforceability of the other provisions of this Agreement or of the Certificates or the rights of the Holders of the Certificates.

SECTION 10.07. Assignment.

Notwithstanding anything to the contrary contained in this Agreement, except as provided in Section 6.02, this Agreement may not be assigned by the Master Servicer without the prior written consent of the Trustee and the Depositor.

SECTION 10.08. Limitation on Rights of Certificateholders.

The death or incapacity of any Certificateholder shall not operate to terminate this Agreement or the trust created hereby, nor entitle such Certificateholder's legal representative or heirs to claim an accounting or to take any action or commence any proceeding in any court for a petition or winding up of the trust created by this Agreement, or otherwise affect the rights, obligations and liabilities of the parties hereto or any of them.

No Certificateholder shall have any right to vote (except as provided in this Agreement) or in any manner otherwise control the operation and management of the Trust Fund, or the obligations of the parties hereto, nor shall anything set forth in this Agreement or contained in the terms of the Certificates be construed so as to constitute the Certificateholders from time to time as partners or members of an association; nor shall any Certificateholder be under any liability to any third party by reason of any action taken by the parties to this Agreement pursuant to any provision of this Agreement.

No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of an Event of Default and of the continuance thereof, as provided in this Agreement, and unless the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall also have made written request to the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses, and liabilities to be incurred therein or thereby, and the Trustee, for 60 days after its receipt of such notice, request and offer of indemnity shall have neglected or refused to institute any such action, suit or proceeding; it being understood and intended, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing itself or themselves of any provisions of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of the Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder or to enforce any right under this Agreement, except in the manner provided in this Agreement and for the common benefit of all Certificateholders. For the protection and enforcement of the provisions of this Section 10.08, each and every Certificateholder and the Trustee shall be entitled to such relief as can be given either at law or in equity.

SECTION 10.09. Inspection and Audit Rights.

The Master Servicer agrees that, on reasonable prior notice, it will permit and will cause each Subservicer to permit any representative of the Depositor or the Trustee during the Master Servicer's normal business hours, to examine all the books of account, records, reports and other papers of the Master Servicer relating to the Mortgage Loans, to make copies and extracts therefrom, to cause such books to be audited by independent certified public accountants selected by the Depositor or the Trustee and to discuss its affairs, finances and accounts relating to the Mortgage Loans with its officers, employees and independent public accountants (and by this provision the Master Servicer hereby authorizes said accountants to discuss with such representative such affairs, finances and accounts), all at such reasonable times and as often as may be reasonably requested. Any out-of-pocket expense incident to the exercise by the Depositor or the Trustee of any right under this Section 10.09 shall be borne by the party requesting such inspection; all other such expenses shall be borne by the Master Servicer or the related Subservicer.

SECTION 10.10. Certificates Nonassessable and Fully Paid.

It is the intention of the Depositor that Certificateholders shall not be personally liable for obligations of the Trust Fund, that the interests in the Trust Fund represented by the Certificates shall be nonassessable for any reason whatsoever, and that the Certificates, upon due authentication thereof by the Trustee pursuant to this Agreement, are and shall be deemed fully paid.

SECTION 10.11. [Reserved].

SECTION 10.12. Protection of Assets.

(a) Except for transactions and activities entered into in connection with the securitization that is the subject of this Agreement, the Trust Fund created by this Agreement is not authorized and has no power to:

(i) borrow money or issue debt;

(ii) merge with another entity, reorganize, liquidate or sell assets; or

(iii) engage in any business or activities.

(b) Each party to this Agreement agrees that it will not file an involuntary bankruptcy petition against the Trustee or the Trust Fund or initiate any other form of insolvency proceeding until after the Certificates have been paid.

SECTION 10.13. Rights of NIM Insurer

Exhibit 2

Alison Frankel's **ON THE CASE**

Do MBS trustees have power to make global put-back deals?

http://newsandinsight.thomsonreuters.com/Legal/News/2013/04_-_April/Do_MBS_trustees_have_power_to_make_global_put-back_deals_/

A new expert report assessing Bank of America's proposed $8.5 billion settlement with investors in Countrywide mortgage-backed securities, filed by **Adam Levitin**, a visiting professor at Harvard Law School and an expert on mortgage finance and the housing crisis, offers some of the most interesting explanations for why the deal should fail that I've seen in the litigation. Much of the debate over the proposed deal - in which BofA and MBS trustee Bank of New York Mellon negotiated with a group of institutions with sizable investments in 189 of the securitizations, eventually reaching a global settlement of put-back claims by 530 Countrywide MBS trusts - has taken place deep in the weeds. What exactly is a reasonable standard for a securitization trustee? How meaningful was the investigation of put-back liability by the expert BNY Mellon engaged? What are the implications of a side letter on indemnification that BNY Mellon requested and received from BofA?

Levitin's report, which is the final expert opinion on behalf of settlement opponents, details plenty of what he regards as flaws in BNY Mellon's process of determining that the settlement was reasonable. But the report also highlights what the professor considers to be systemic conflicts for securitization trustees attempting to orchestrate a broad resolution of investors' MBS breach-of-contract claims. Trustees depend on securitization sponsors for repeat business. They have no similar institutional interest in helping investors, according to Levitin. As a result, he said, "Trustees also lack any incentive to be pro-active and they are strongly incentivized to turn a blind eye.... While trustees represent the investors, their client is the sponsor."

Particularly when it comes to declaring an event of default, Levitin said, the interests of a securitization trustee lie with the MBS sponsor, not with investors. For investors, the put-back process begins with a notice of default sent to the trustee. But according to Levitin, a declaration of default imposes new duties and potential capital reserve requirements on securitization trustees. So here, said the Harvard professor (who has taught at Georgetown since 2007), BNY Mellon denied that the Countrywide MBS trusts had experienced defaults even as it agreed to begin negotiations with **Gibbs & Bruns** as counsel to the institutional investors. Trustees cannot agree to a settlement without the expanded powers they assume in the event of a default, yet those expanded powers implicate other responsibilities trustees don't want. "(BONY) cannot have its cake and eat it too," Levitin wrote.

Levitin said that Bank of New York Mellon, which was represented in negotiations by **Mayer Brown**, made an additional error when it treated all of the Countrywide MBS trusts as interchangeable even though it owed a distinct duty to each of them. But more fundamentally, he believes that as a "pocket trustee" whose interest lies with the MBS sponsor and not investors, BNY Mellon cannot reach the kind of global settlement that broadly resolves put-back liability. Levitin compares securitization trustees to the mortgage-bond trustees of the 1920s and 1930s, whose practices contributed to the collapse of the mortgage-bond market. That market remained dead for another 40 years until state and federal regulators finally cleaned up the trustee business, Levitin said.

Indeed, Levitin suggests that the very question being asked in the Article 77 proceeding to evaluate the process by which BNY Mellon reached the global Countrywide deal may be wrong. It doesn't matter whether the trustee complied with industry custom, he said, if industry standards don't protect investors. BNY Mellon should have recognized that the Gibbs & Bruns institutional investor group couldn't speak for absent investors and especially couldn't negotiate for investors in Countrywide trusts it hadn't bought into. The only clear way, within existing frameworks, for the securitization trustee to make a global deal would have been to seek court guidance through an Article 77 proceeding before - and not after - it began negotiations with investors.

Levitin said that courts today have an opportunity to right the wrongs of the securitization model, to assure that MBS trustees of the future act for the benefit of investors. "Judicial scrutiny is critical for ensuring that history does not repeat itself," he wrote.

As I said above, Levitin's argument and history context is intellectually fascinating. I'm not sure, however, that it does much good for today's MBS investors. (There's also an interesting question about whether, as a practical matter, BNY Mellon was worrying about continued securitization trustee business from BofA at the time of the 2011 settlement, when the residential MBS market had been dormant for three years.) Remember, MBS investors struggled mightily to amass the requisite voting rights to begin the process of asserting breach-of-contract claims under pooling and servicing agreements that favored sponsors. For years after the crisis, we saw only sporadic private-label put-back claims by an investor or two, none of whom made much headway in litigation. To date, more than five years after the crash of 2008, the embattled Bank of America settlement remains by far the biggest potential put-back recovery for investors in private-label mortgage-backed securities. More investors have stepped up and sued individually via trustee actions, but none of their cases have yet settled - and even if they do, money will flow only to plaintiffs, not to investors who didn't bring claims.

Realistically, most MBS investors won't be able to obtain across-the-board recoveries under the PSAs they agreed to unless trustees have the power to sign global deals. The banks that acted as MBS sponsors can and have dragged out individual cases. Only when they're faced with the prospect of broad claims will they take action. And once they do, they want broad releases. The only way to get them, at least from what we've seen so far in put-back litigation, is through MBS trustees.

We know the Gibbs & Bruns institutional investors have initiated put-back claims against several other banks that sponsored MBS. We also know that the firm regarded the BofA deal as a template for other global settlements. If Levitin's analysis is correct, Gibbs & Bruns - and the silent MBS investors whose claims would be settled along its clients' - can kiss potential deals goodbye.

Justice Barbara Kapnick, who is overseeing the proceeding to evaluate the proposed BofA deal, has scheduled a fairness hearing for May. After that we'll know if she's more interested in Levitin's intellectual exercise or in the messy deal-making that nevertheless would send $8.5 billion to investors.

(This post has been corrected. An earlier version misspelled Levitin's name.)

Exhibit 3

GIBBS & BRUNS LLP

June 17, 2010

FACSIMILE TRANSMISSION

TO: The Bank of New York
Attn: Mortgage-Back Securities Group
CWALT, CWHL, and CWL Series
Listed on the Attached Exhibit A
101 Barclay Street, 8W
Floor 4W
New York, NY 10286

Facsimile No. 212-815-3986

FROM: Kathy Patrick

TOTAL NUMBER OF PAGES: 6, INCLUDING COVER.

IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL AS SOON AS POSSIBLE.

TELECOMMUNICATOR:

TELEPHONE NUMBER: (713)650-8805 FAX NUMBER: (713)750-0903

COMMENT:

Gibbs & Bruns LLP • 1100 Louisiana • Suite 5300 • Houston, Texas 77002 • T 713.650.8805 • F 713.750.0903 • www.gibbsbruns.com

GIBBS & BRUNS LLP

Kathy Patrick, Partner
713 751 5253
kpatrick@gibbsbruns.com

June 17, 2010

Via Facsimile No. (212) 815 3986 and Federal Express

Jane Sherburne, Esq.
Senior Executive Vice-President
and General Counsel
BNY Mellon, Inc.
One Mellon Bank Center
500 Grant Street
Pittsburgh, PA 15258-0001

Mr. Scott Posner
Corporate Trust CEO
BNY Mellon, Inc.
32 Old Slip
New York, NY 10286

The Bank of New York
Attn: Mortgage-Backed Securities Group
CWALT, CWHL, and CWL Series Listed on the Attached Exhibit A
101 Barclay Street, 8W
Floor 4W
New York, NY 10286

Re: Certificateholders' Instruction to Bank of New York, as Trustee of CWALT, CWHL, and CWL Series Listed on the Attached Exhibit A, Pursuant to Applicable Pooling and Servicing Agreements

Gentlemen and Ms. Sherburne:

This firm represents the holders of more than 25% of the Voting Rights in Residential Mortgage Backed Securities (RMBS) evidenced by the Countrywide Mortgage Pass-Through Certificates listed on the attached Exhibit "A" (the "Certificates"). The aggregate outstanding balance of the 65 RMBS deals in which our client hold 25% or more of the Voting Rights exceeds $31.2 billion.

There is widespread, readily available evidence suggesting that large numbers of mortgages securing the Certificates held by our clients were sold into the RMBS pools based on false and/or fraudulent representations and warranties by the mortgage originators and sellers. This evidence includes, but is not limited to:

- excessive early default and foreclosure rates experienced in the underlying mortgage pools;

- allegations in lawsuits by various mortgage and financial guaranty insurers alleging that their audit and re-underwriting of pools of RMBS residential mortgage-backed securities demonstrates that high levels of mortgages that were ineligible at origination;[1]

- multi-billion dollar predatory lending settlements reached by Countrywide with various states attorneys general;[2] and,

- recently released emails from high level officials at Countrywide demonstrating that they were "flying blind," knew of "errors of both judgment and protocol," knew that loans had been originated "through our channels with disregard for process [and] compliance with guidelines," and also knew of a "serious lack of compliance within our origination system."[3]

Bank of New York has been aware of much of this information for some time. It has been named as a defendant in lawsuits brought by the financial guaranty insurers against Countrywide and Bank of New York, and has been served with affidavits asserting these facts. As Trustee, Bank of New York is also aware of the excessive early default rates that have been experienced in the RMBS pools that secure the Certificates. Bank of New York, however, appears to have taken no steps to compel the sellers of ineligible loans to repurchase or cure them, even though this remedy is plainly available to the Trustee under the applicable Pooling and Servicing Agreements (PSAs). *See e.g.* § 2.03 (c) of PSA for CWALT Alternative Loan Trust 2006-OA19 (providing that, "upon discovery by any of the parties hereto of a breach of a representation or warranty with respect to a Mortgage Loan…that materially and adversely affects the interests of the Certificateholders in that Mortgage Loan, the party discovering that breach ***shall*** give prompt notice thereof to the other parties," in order to trigger the Seller's contractual covenant to "cure such breach in all material respects,… or repurchase the Affected Mortgage Loan at the Purchase Price….") (emphasis added).

The Certificateholders we represent are not willing to continue to suffer losses as a result of ineligible loans held in the pools that secure their Certificates. Pursuant to Section 8 of the applicable PSAs, Bank of New York is therefore instructed to make appropriately senior legal

---

[1] MBIA has reported that 91% of defaulted loans in 15 separate Countrywide-originated pools diverged from underwriting guidelines or were otherwise defective, and United Financial Guaranty has alleged that over 55% of the loans originated by Countrywide failed to comply with Countrywide's underwriting guidelines or contained a material defect. *See* ¶ 80, Amended Complaint of MBIA against Countrywide Financial Corporation and ¶ 65, Complaint of United Financial Guaranty against Countrywide Financial Corporation.

[2] The most recent of these settlements, with the Commonwealth of Massachusetts, not only calls for loan modifications but for "significant principal forgiveness." *See* March 24, 2010 Press Release of Hon. Martha Coakley, Attorney General of the Commonwealth of Massachusetts, available at http://www.mass.gov/?pageID=cagopressrelease&L=1&L0=Home&sid=Cago&b=pressrelease&f=2010_03_24_countrywide_agreement&csid=Cago, and Final Judgment by Consent, C.A. No. 10-1169, *Commonwealth of Massachusetts v. Countrywide Financial Corp., et al.*, in the Superior Court of the Commonwealth of Massachusetts.

[3] Excerpts of these emails are available from the Securities and Exchange Commission website at http://www.sec.gov/news/press/2009/2009-129-email.htm.

and business personnel available to attend a meeting with the holders to discuss a strategy to pursue the remedies available to the Trustee under Section 2.03 and other provisions of the PSAs. The meeting will be held in New York on Tuesday, June 29, 2010 at 9:30 a.m. We can meet in Bank of New York's offices, or we can make space available in the offices of Blackrock Financial Management, Inc., 55 East 52nd Street in New York. Please advise which you prefer, and who from Bank of New York will attend the meeting.

It is imperative that Bank of New York attend this meeting. Please do not hesitate to contact me should Bank of New York require any additional information in order to comply with this instruction.

Very truly yours,

Kathy Patrick

cc: Mr. Stephen Ahrens (Blackrock Financial Management, Inc.)
Mr. James Harrington (Fortress Investments)
Mr. Gary Kosinski (Kore Capital)
Mr. William Ding (MetLife)
Mr. Terry Glomski (Neuberger Berman)
Mr. Richard LeBrun (PIMCO)

Exhibit "A"
List of Issuances Covered by June 11, 2010 Instruction

CWALT

2007-24
2007-OA7
2007-17CB
2007-5CB
2006-OA9
2006-OA17
2006-OA19
2006-OC4
2006-OC5
2006-OC6
2006-OC7
2006-OC10
2006-OC11
2006-14CB
2006-20CB
2006-J7
2006-HY12
2005-AR1
2005-74T1
2005-73CB
2005-67CB
2005-21CB
2005-J9
2005-45
2005-81
2005-35CB

CWHL

CWHL 2008-3R
CWHL 2007-12
CWHL 2007-16
CWHL 2006-HYB2
CWHL 2006-HYB5
CWHL 2006-OA5
CWHL 2006-J2
CWHL 2005-HYB9
~~CWHL 2005-18~~
CWHL 2005-14
CWHL 2005-2

CWHL 2004-HYB9
CWHL 2004-22

CWL

2007-2
2007-5
2007-7
2007-9
2007-BC1
2007-BC2
2007-BC3
2006-BC4
2006-BC5
2006-2
2006-3
2006-5
2006-7
2006-12
2006-19
2006-20
2006-21
2006-22
2006-24
2006-26
2006-SD1
2005-AB2
2005-AB3
2005-AB4
2005-16
2005-57CB

Exhibit 4

Exhibit 4 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 4 has been delivered to the Court and served on all parties of record.

Exhibit 5

pillsbury

Pillsbury Winthrop Shaw Pittman LLP
1540 Broadway | New York, NY 10036-4039 | tel 212.858.1000 | fax 212.858.1500

September 3, 2010

Kathy Patrick
Gibbs & Bruns LLP
1100 Louisiana
Suite 5300
Houston, TX 77002

Re: Purported Binding Instruction to Act to Trustee Regarding Certain Trusts

Dear Ms. Patrick:

I am writing at my client's request, in response to your letter dated August 20, 2010 (the "August 20th Letter") purporting to give a binding instruction to The Bank of New York Mellon in its capacity as trustee (the "Trustee") with respect to the Trusts identified on Exhibit A thereto (the "Trusts") on behalf of certain holders of certificates issued by the Trusts (the "Holders"). Many statements in the August 20th Letter do not accurately reflect the terms of the Agreements governing the Trusts and the communications among the parties since your initial letter to the Trustee on June 17, 2010 (the "June 17th Letter").

Overview

The August 20th letter, which among other things, seeks to have your firm engaged on a contingent fee basis, is deficient on a number of levels: it is not actually signed by the investors; the investors who you represent do not have the required percentage ownership to direct the Trustee; and the letter does not contain an indemnity satisfactory to the Trustee although several weeks ago you were furnished with the form of such indemnity.

Authority of Holders to Direct the Trustee

Section 8.02(iv) of the pooling and servicing agreements (the "PSAs") states that the Trustee is not bound to make any investigation unless requested in writing to do so by holders of certificates evidencing not less than 25% of the voting rights allocated to each class of certificates. The information provided by the Holders (which is now several months out of date) indicates that there are no Trusts in which the Holders

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own 25% of voting rights of each class of certificates in that Trust. Therefore, it is not possible for the Holders to give the Trustee a "binding direction."

The August 20th Letter Does Not Constitute a Valid Direction

In addition, the August 20th Letter is not a valid direction for the following reasons:

- No Holders signed the August 20th Letter. As you may know, it is customary for the direction to come from the beneficial holders themselves, and not their outside counsel. Moreover, although the Holders did advise us that they retained your law firm, the letters confirming such did not authorize the sweeping requests contained in the August 20th Letter. While certain holder information was provided to the Trustee in June, the Trustee requires such information to be updated, in a form that expresses the Holders' positions in dollars of principal held, and included in each direction letter since Holders' positions can change.

- The August 20th Letter does not include indemnity satisfactory to the Trustee and therefore the Trustee has no obligation to comply with it pursuant to Section 8.02(ix) of the PSAs. That section states that the Trustee is not obligated to take action at the request of the holders of certificates unless "*such Certificateholders* shall have offered to the Trustee reasonable security or indemnity *satisfactory to the Trustee* against the costs, expenses and liabilities which may be incurred therein or thereby" (emphasis added). On July 21, 2010, I sent you the Trustee's standard form of direction letter as well as two separate confidentiality agreements (the "Direction Documents"). Execution of each of the Direction Documents is required before the Trustee can commence any of the actions contemplated by the August 20th Letter. In the August 2, 2010 meeting you indicated that you found elements of the form of direction letter unsatisfactory. We invited your comments on all of the Direction Documents. To date we have not received any comments from you with respect to any of the Direction Documents.

- Your contention that the $250,000 "cost deposit" should be sufficient to defray out-of-pocket costs of the Trustee is belied by the fact that the deposit is not to be held by the Trustee to cover its potential losses, liabilities and expenses. Rather, it is intended to be held by, and defray the out-of-pocket costs of, Gibbs & Bruns LLP.

- The August 20th letter insofar as it purports to direct the Trustee to commence certain litigations in the future based on potential future events is problematic for several reasons.

- It is premature to direct litigation against the sellers of mortgage loans until the investigation has been completed, at least in part. A decision to initiate litigation must be made and directed by the Holders at that time (which may not be the same as the Holders today).

- The August 20th Letter purports to direct the Trustee to commence litigation to claim indemnity from the Master Servicer for costs associated with the proposed investigation. However, in nearly all of the relevant PSAs, Section 8.05 specifically exempts from the Master Servicer's indemnity obligations expenses incurred by reason of any action taken by the Trustee at the direction of certificateholders.

- Any direction to initiate litigation must include provision for the Trustee to retain its own independent counsel at the Holders' expense and require that all pleadings, motions and other steps in the litigation be approved in advance by the Trustee and its independent counsel.

- The Trustee does not customarily engage counsel on a contingent fee basis and would want, at a minimum, to notice all certificateholders of the proposed engagement to enable them to express any concerns that they might have. The Trustee is not ruling out a contingent fee agreement but would need a proposed engagement letter to evaluate.

Characterization of the Substance of the August 2, 2010 Meeting in the Cover Letter to the August 20th Letter

The Trustee does not agree with your characterization of our discussions regarding allegations of breaches and representations and warranties and the repurchase by Countrywide of modified mortgage loans. We quite clearly communicated that the PSAs disclaim any obligation on the Trustee's part to conduct any such investigation. Your clients - sophisticated investors - could not have been "dismayed" to learn that the Trustee has been acting in accordance with the express terms of the governing documents.

Alleged Events of Default

In the August 20th Letter you asserted that in the June 17th Letter the Holders advised the Trustee of facts and circumstances constituting Events of Default under the PSAs. The June 17th Letter purported to notify the Trustee of certain evidence suggesting breaches of representations and warranties made by the sellers of mortgage loans into the Trusts and said nothing about Events of Default. Breaches of representations and warranties by the sellers of the mortgage loans do not constitute "Events of Default" under the PSAs (see Section 7.01). Accordingly we do not view your August 20th Letter or June 17th Letter as putting the Trustee of notice of Events of Default.

There are a number of other respects in which your August 20th letter inaccurately describes the Trustee's rights and responsibilities and we reserve the right to supplement this letter.

As we mentioned in the August 2, 2010 meeting, the Trustee wishes to work cooperatively with the Holders to get this process up and running as soon as possible. However, the Trustee can not and will not move forward without an acceptable direction letter from the Holders that includes an indemnity from the Holders. We therefore urge you to review and comment on the Direction Documents and contact me to resolve any comments or questions you may have.

Very truly yours,

s/ Leo T. Crowley

Leo T. Crowley

Exhibit 6

Exhibit 6 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 6 has been delivered to the Court and served on all parties of record.

Exhibit 7

Exhibit 7 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 7 has been delivered to the Court and served on all parties of record.

Exhibit 8

Exhibit 8 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 8 has been delivered to the Court and served on all parties of record.

Exhibit 9

Kathy D. Patrick
kpatrick@gibbsbruns.com
713.751.5253

October 18, 2010

Facsimile No. 805 520 5623
Countrywide Home Loans Servicing LP
Attn. Mark Wong
400 Countrywide Way
Simi Valley, CA 93065

Facsimile No. 805 520 5623
Countrywide Home Loans Servicing LP
Attn. Mark Wong
7105 Corporate Drive
Plano, TX 75024

Facsimile No. 212 815 3986
The Bank of New York
101 Barclay Street
4 West
Attn: Mortgage Backed Securities Group
for Trusts Listed on Ex. A
New York, NY 10286

Facsimile No. 212 815 3986
The Bank of New York
101 Barclay Street
Attn: Corporate Trust MBS Administration for Trusts Listed on Ex. A
New York, NY 10286

Mr. Leo Crowley
Ms. Jeanne Naughton Carr
Pillsbury LLP
1540 Broadway
New York, NY 10036-4039

Re: HOLDERS' NOTICE TO TRUSTEE AND MASTER SERVICER OF FAILURE OF MASTER SERVICER TO PERFORM GIVEN PURSUANT TO §7.01(ii) OF POOLING AND SERVICING AGREEMENTS PERTAINING TO THE RESIDENTIAL MORTGAGE BACKED SECURITIES LISTED ON THE ATTACHED EXHIBIT "A"

Dear Sir or Madam:

Unless otherwise indicated, all capitalized terms used in this letter have the meaning ascribed to them in those certain Pooling and Servicing Agreements (PSAs) governing

Residential Mortgage-Backed Securities (RMBS) evidenced by the Countrywide Mortgage Pass-Through Certificates (Certificates) listed on the attached Exhibit "A."

The undersigned are the Holders of not less than 25% of the Voting Rights in Certificates issued by the Trusts listed on the enclosed Exhibit A.

Pursuant to Section 7.01(ii) of the applicable PSAs, the Trustee and the Master Servicer are hereby notified of the Master Servicer's failure to observe and perform, in material respects, the covenants and agreements imposed on it by the PSAs. Specifically, the Master Servicer has failed and refused to do the following, which have materially affected the rights of Certificateholders:

1. Section 2.03(c) of the PSAs states that "Upon discovery by any of the parties hereto of a breach of a representation or warranty with respect to a Mortgage Loan made pursuant to Section 2.03(a) ... that materially and adversely affects the interests of the Certificateholders in that Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties." The Master Servicer has failed to give notice to the other parties in the following respects:

    a. Although it regularly modifies loans, and in the process of doing so has discovered that specific loans violated the required representations and warranties at the time the Seller sold them to the Trusts, the Master Servicer has not notified the other parties of this breach;
    b. Although it has been specifically notified by MBIA, Ambac, FGIC, Assured Guaranty, and other mortgage and mono-line insurers of specific loans that violated the required representations and warranties, the Master Servicer has not notified any other parties of these breaches of representations and warranties;
    c. Although aware of loans that specifically violate the required Seller representations and warranties, the Master Servicer has failed to enforce the Sellers' repurchase obligations, as is required by Section 2.03; and,
    d. Although there are tens of thousands of loans in the RMBS pools that secure the Certificates, the Trustee has advised the Holders that the Master Servicer has *never* notified it of the discovery of *even one* mortgage that violated applicable representations and warranties at the time it was purchased by the Trusts.

2. In violation of its prudent servicing obligations under Section 3.01 of the applicable PSAs, the Master Servicer has:

    a. Failed to maintain accurate and adequate loan and collateral files in a manner consistent with prudent mortgage servicing standards;
    b. Failed to demand that sellers cure deficiencies in mortgage records when deficient loan files and lien records are discovered;
    c. Exacerbated losses experienced by the Trusts;

d. Incurred wholly avoidable and unnecessary servicing fees and servicing advances to maintain mortgaged property, all as a direct result of the Master Servicer's deficient record-keeping; and,
e. Prejudiced the interests of the Trusts and the Certificateholders in the mortgages by fostering uncertainty as to the timely recovery of collateral.

3. Section 3.11 (a) states that the Master Servicer "use reasonable efforts to foreclose upon or otherwise comparably convert the ownership of properties securing such of the Mortgage Loans as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments." Despite these covenants, the Master Servicer has continued to keep defaulted mortgages on its books, rather than foreclose or liquidate them, in order to wrongfully maximize its Servicing Fee, at the expense of the Certificateholders' best interests, including rights to recover from pool or financial guaranty insurance policies. In addition, the applicable provisions of the PSAs contemplate that foreclosures and liquidations of defaulted mortgages will proceed forthwith and in accordance with applicable law, provided the documentation is in order, as a matter of fairness to all parties. The Servicers' failure to proceed appropriately and their failure to maintain records in an accurate, appropriate, and adequate manner has impeded this process and caused wholly avoidable delays that have injured investors, borrowers, neighborhoods, and communities. To make matters worse, these delays have also enriched the Servicers, as they have continued to charge unearned and unwarranted servicing fees on mortgages which would have been liquidated but for the Servicers' breach of their duties;

4. Section 3.11 of the PSAs provides that "Countrywide may agree to a modification of any Mortgage Loan" in certain specified circumstances. The Holders do not seek to halt bona fide modifications of troubled loans for borrowers who need them. When, however, modifications are required to remedy predatory lending violations, Section 2.03(c) of the PSAs requires that the offending seller of the mortgage bear the costs to "cure such breach in all material respects...." Nowhere do the PSAs permit the costs of curing predatory loans to be imposed on the Trusts or the Certificateholders. Despite these provisions, the Master Servicer has breached the PSAs by agreeing to modify loans held in the Trusts for the purpose of settling predatory lending claims made by various Attorneys' General against its parent company while breaching its obligation to demand that the offending mortgage seller (its parent company) bear the costs of curing the violation, as well as the expenses reasonably incurred in enforcement of the mortgage seller's obligation to cure predatory mortgages. *Id.* at §2.03(c). The Master Servicer has also unjustly enriched its parent company by using Trust collateral to settle claims that are not, and could never be, made against the Trusts, in a manner that has "materially and adversely affected the interest of the Certificateholders..." *Id.* The Master Servicer has therefore:

a. Failed to perform its obligation to demand that Countrywide *comply* with the requirement that it cure or repurchase predatory and ineligible loans it has agreed to modify in the Attorney General settlement;
b. Failed to track or notify the Trustee concerning which specific loans the Master Servicer has modified pursuant to these provisions, even though the PSAs require that "the Modified Mortgage Loan shall be automatically be deemed transferred and assigned to Countrywide…"; and,
c. Failed to perform its obligation to "deliver to the Trustee a certification of a Servicing Officer to the effect that all requirements of this paragraph have been satisfied with respect to the Modified Mortgage Loan."

5. Section 3.14 of the PSAs provides that the Master Servicer shall be entitled to recover Servicing Advances that are "customary, reasonable and necessary 'out of pocket' costs and expenses incurred in the performance by the Master Servicer of its Servicing Obligations including but not limited to the cost of (i) the preservation, restoration, and protection of a Mortgaged Property…" Despite the requirement that Servicing Advances were to be incurred only for reasonable and necessary out of pocket costs, the Master Servicer instead utilized affiliated vendors--who marked up their services to a level 100% or more above the market price--to provide services related to the preservation, restoration, and protection of' Mortgaged Property, in a fraudulent, unauthorized, and deceptive effort to supplement its Servicing income. *See* ¶ 3(a) and (b), above.

6. Section 3.01 of the PSAs requires that the Master Servicer "shall service and administer the Mortgage Loans in accordance with the terms of this Agreement and customary and usual standards of practice of prudent mortgage servicers." Despite this requirement, the Master Servicer has repeatedly and deliberately failed to perform this covenant by:

   a. Creating Countrywide-affiliated vendors to provide maintenance, inspection, and other services with regard to defaulted mortgages that should have been undertaken *only* if they were in the Certificateholders' best interest. The Federal Trade Commission, however, found that Countrywide repeatedly and deliberately overcharged for these services by as much as 100% or more in order to increase its profits from default-related service fees; and,[1]
   b. As a result of these wrongful practices, Countrywide has increased the losses to the Trusts.

Each of these failures to perform the Master Servicer's covenants and agreements violated the prudent servicing obligations imposed on the Master Servicer by PSA §3.01. Each of these failures to perform the Master Servicer's covenants and agreements also materially affected the rights of the Certificateholders. Each of these failures to perform is continuing. If

[1] The specific details of the Master Servicers' wrongful conduct are available in a press release issued by the Federal Trade Commission, which is accessible at the following website:
http://www.ftc.gov/opa/2010/06/countrywide.shtm.

they continue for an additional sixty days from the date of this letter, each of them—independently—will constitute an Event of Default.

[INTENTIONALLY LEFT BLANK]

The undersigned Holders therefore demand that the Master Servicer immediately cure these endemic and grievous defaults in its obligations under the PSAs. By this letter, the Holders further notify the Trustee of the Master Servicer's failure to perform its covenants and agreements.

The undersigned Holders also reserve all other rights and remedies they may have, individually and under the PSAs, as a result of the matters described in this letter. We invite you to communicate with our counsel, Ms. Kathy Patrick of Gibbs & Bruns LLP, should you wish to discuss this matter further.

Very truly yours,

BlackRock Financial Management, Inc. and
its advisory affiliates

By: ______________________
Printed Name: John Vibert
Title: Managing Director

Freddie Mac Corporation

By: ______________________
Printed Name: ______________________
Title: ______________________

Kore Advisors, LP

By: ______________________
Printed Name: ______________________
Title: ______________________

The undersigned Holders therefore demand that the Master Servicer immediately cure these endemic and grievous defaults in its obligations under the PSAs. By this letter, the Holders further notify the Trustee of the Master Servicer's failure to perform its covenants and agreements.

The undersigned Holders also reserve all other rights and remedies they may have, individually and under the PSAs, as a result of the matters described in this letter. We invite you to communicate with our counsel on this matter, Ms. Kathy Patrick of Gibbs & Bruns LLP, should you wish to discuss this matter further.

Very truly yours,

Blackrock Financial Management, Inc. and
its advisory affiliates

By: ____________________
Printed Name: ____________________
Title: ____________________

Federal Home Loan Mortgage Corporation in
Conservatorship ("Freddie Mac")

By: Ray Romano
Printed Name: Ray Romano
Title: EVP Chief Credit Officer

Kore Advisors, LP

By: ____________________
Printed Name: ____________________
Title: ____________________

The undersigned Holders therefore demand that the Master Servicer immediately cure these endemic and grievous defaults in its obligations under the PSAs. By this letter, the Holders further notify the Trustee of the Master Servicer's failure to perform its covenants and agreements.

The undersigned Holders also reserve all other rights and remedies they may have, individually and under the PSAs, as a result of the matters described in this letter. We invite you to communicate with our counsel, Ms. Kathy Patrick of Gibbs & Bruns LLP, should you wish to discuss this matter further.

Very truly yours,

Blackrock Financial Management, Inc. and
its advisory affiliates

By: ______________________
Printed Name: ______________________
Title: ______________________

Freddie Mac Corporation

By: ______________________
Printed Name: ______________________
Title: ______________________

Kore Advisors, LP

By: ______________________
Printed Name: J. Gary Kosinski
Title: Principal

Maiden Lane, LLC; Maiden Lane II, LLC; and,
Maiden Lane III, LLC by
Federal Reserve Bank of New York,
Managing Member

By: ______________________
Printed Name: Zachary Taylor
Title: Assistant Vice President

Metropolitan Life Insurance Company

By: ______________________
Printed Name: ______________________
Title: ______________________

Neuberger Berman Europe, Ltd.
as investment manager to a managed account client

By: ______________________
Printed Name: ______________________
Title: ______________________

PIMCO Investment Management Company LLC

By: ______________________
Printed Name: ______________________
Title: ______________________

Western Asset Management Company,
for its clients and managed accounts

By: ______________________
Printed Name: ______________________
Title: ______________________

Maiden Lane, LLC; Maiden Lane II, LLC; and,
Maiden Lane III, LLC by
Federal Reserve Bank of New York,
Managing Member

By: ______________________
Printed Name: ______________________
Title: ______________________

Metropolitan Life Insurance Company

By: Charles Scully
Printed Name: Charles S. Scully
Title: Managing Director

Neuberger Berman Europe, Ltd.
as investment manager to a managed account client

By: ______________________
Printed Name: ______________________
Title: ______________________

PIMCO Investment Management Company LLC

By: ______________________
Printed Name: ______________________
Title: ______________________

Western Asset Management Company,
for its clients and managed accounts

By: ______________________
Printed Name: ______________________
Title: ______________________

Maiden Lane, LLC; Maiden Lane II; LLC; and,
Maiden Lane III, LLC by
Federal Reserve Bank of New York,
Managing Member

By: ______________________
Printed Name: ______________________
Title: ______________________

Metropolitan Life Insurance Company

By: ______________________
Printed Name: ______________________
Title: ______________________

Neuberger Berman Europe, Ltd.
as investment manager to a managed account client

By: ______________________
Printed Name: OPE AGBAJE
Title: EXECUTIVE DIRECTOR

PIMCO Investment Management Company LLC

By: ______________________
Printed Name: ______________________
Title: ______________________

Western Asset Management Company,
for its clients and managed accounts

By: ______________________
Printed Name: ______________________
Title: ______________________

Maiden Lane, LLC; Maiden Lane II, LLC; and,
Maiden Lane III, LLC by
Federal Reserve Bank of New York,
Managing Member

By: ______________________
Printed Name: ______________________
Title: ______________________

Metropolitan Life Insurance Company

By: ______________________
Printed Name: ______________________
Title: ______________________

Neuberger Berman Europe, Ltd.
as investment manager to a managed account client

By: ______________________
Printed Name: ______________________
Title: ______________________

PIMCO Investment Management Company LLC

By: ______________________
Printed Name: Daniel J. Ivascyn
Title: Managing Director

LEGAL

BUSINESS

Western Asset Management Company,
for its clients and managed accounts

By: ______________________
Printed Name: ______________________
Title: ______________________

Maiden Lane, LLC; Maiden Lane II, LLC; and,
Maiden Lane III, LLC by
Federal Reserve Bank of New York,
Managing Member

By: ______________________
Printed Name: ______________________
Title: ______________________

Metropolitan Life Insurance Company

By: ______________________
Printed Name: ______________________
Title: ______________________

Neuberger Berman Europe, Ltd.
as investment manager to a managed account client

By: ______________________
Printed Name: ______________________
Title: ______________________

PIMCO Investment Management Company LLC

By: ______________________
Printed Name: ______________________
Title: ______________________

Western Asset Management Company,
for its clients and managed accounts

By: C. A. R.
Printed Name: C. A. Ruys de Perez
Title: General Counsel

Exhibit "A"

Deal Name	Deal Name	Deal Name
CWALT 2004-32CB	CWHL 2004-22	CWL 2006-15
CWALT 2004-6CB	CWHL 2004-25	CWL 2006-16
CWALT 2004-J1	CWHL 2004-29	CWL 2006-19
CWALT 2005-14	CWHL 2004-HYB9	CWL 2006-2
CWALT 2005-21CB	CWHL 2005-11	CWL 2006-20
CWALT 2005-24	CWHL 2005-14	CWL 2006-22
CWALT 2005-32T1	CWHL 2005-18	CWL 2006-24
CWALT 2005-35CB	CWHL 2005-19	CWL 2006-25
CWALT 2005-36	CWHL 2005-2	CWL 2006-26
CWALT 2005-44	CWHL 2005-3	CWL 2006-3
CWALT 2005-45	CWHL 2005-30	CWL 2006-5
CWALT 2005-56	CWHL 2005-9	CWL 2006-7
CWALT 2005-57CB	CWHL 2005-HYB3	CWL 2006-9
CWALT 2005-64CB	CWHL 2005-HYB9	CWL 2006-BC2
CWALT 2005-72	CWHL 2005-R3	CWL 2006-BC3
CWALT 2005-73CB	CWHL 2006-9	CWL 2006-BC4
CWALT 2005-74T1	CWHL 2006-HYB2	CWL 2006-BC5
CWALT 2005-81	CWHL 2006-HYB5	CWL 2006-SD1
CWALT 2005-AR1	CWHL 2006-J2	CWL 2006-SD3
CWALT 2005-J5	CWHL 2006-OA5	CWL 2006-SD4
CWALT 2005-J9	CWHL 2006-R2	CWL 2006-SPS2
CWALT 2006-14CB	CWHL 2007-12	CWL 2007-2
CWALT 2006-20CB	CWHL 2007-16	CWL 2007-5
CWALT 2006-37R	CWHL 2008-3R	CWL 2007-6
CWALT 2006-41CB	CWL 2005-10	CWL 2007-7
CWALT 2006-HY12	CWL 2005-11	CWL 2007-9
CWALT 2006-OA11	CWL 2005-13	CWL 2007-BC1
CWALT 2006-OA16	CWL 2005-16	CWL 2007-BC2
CWALT 2006-OA17	CWL 2005-2	CWL 2007-BC3
CWALT 2006-OA6	CWL 2005-4	CWL 2007-QH1
CWALT 2006-OA9	CWL 2005-5	CWL 2007-S3
CWALT 2006-OC10	CWL 2005-6	
CWALT 2006-OC2	CWL 2005-7	
CWALT 2006-OC4	CWL 2005-8	
CWALT 2006-OC5	CWL 2005-9	
CWALT 2006-OC6	CWL 2005-AB2	
CWALT 2006-OC7	CWL 2005-AB3	
CWALT 2007-17CB	CWL 2005-AB4	
CWALT 2007-23CB	CWL 2005-BC5	
CWALT 2007-24	CWL 2005-IM1	
CWALT 2007-OA7	CWL 2006-10	
CWALT 2008-2R	CWL 2006-12	

Exhibit 10

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

November 4, 2010

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Re: <u>Gibbs & Bruns Letter Dated October 18, 2010</u>

Dear Ms. Patrick:

We have received your letter addressed to Countrywide Home Loans Servicing LP ("Countrywide HLS") and dated October 18, 2010, entitled "Holders' Notice to Trustee and Master Servicer of Failure of Master Servicer to Perform Given Pursuant to §7.01(ii) of Pooling and Servicing Agreements Pertaining to the Residential Mortgage Backed Securities Listed on the Attached Exhibit 'A'," purportedly delivered on behalf of eight signatories.

We are reviewing your letter, and if, upon receipt of your clients' documentation, we determine that they meet the required ownership threshold with respect to any of the referenced trusts, will respond further based on any contractual obligations we may have.

Even on an initial review, however, some things are glaringly evident:

- Your letter fails to set forth a single fact in support of *any* of your allegations, but rather relies solely on conclusory and often misleading statements. For example, your claim that loan modifications are evidence of breach, rather than a proper response to an unprecedented housing crisis and in furtherance of the stated policy of the federal government, is utterly baseless. We note with surprise your claim that Countrywide HLS breached its obligations by entering into a settlement with the states' Attorneys General that favored loan modifications. That settlement only committed Countrywide HLS to modifications that are economically beneficial to both investors *and* homeowners.

- We are taken aback that your letter attacks Countrywide HLS for not foreclosing on homeowners quickly enough and for making loan modifications that may keep borrowers in their homes. Unsurprisingly, you and your clients failed to even mention this aspect of your attack when commenting publicly on the letter.

- At least one of your clients, Freddie Mac, consistent with the policy of the federal government, repeatedly has stated publicly that it is "deeply committed to helping troubled homeowners keep their homes." Your demands to hasten foreclosures and to reduce loan modifications are patently inconsistent with that stated aim.

- Your letter makes no attempt to show how any of the purported servicing issues have caused any loss or damage to any Holder. This is particularly true for those Holders who bought the Certificates at distressed prices, well aware of the economic difficulties that many homeowners currently face, and now evidently seek short-term profits at homeowners' expense.

- Your letter also fails to specify anywhere how Countrywide HLS has acted other than in good faith -- a showing that would have to be made to hold Countrywide HLS liable.

These and other troubling aspects of your letter strongly suggest that it was written for an improper purpose, or in furtherance of a ulterior agenda.

In order for us to determine whether any investigation of your allegations is warranted, your clients need to establish that they: i) meet the requisite ownership threshold to assert an Event of Default under the PSAs and ii) have a sufficient factual basis for their allegations. Exhibit A to your letter lists 115 different Trusts for which Countrywide HLS acts as the Master Servicer. Each Trust is governed by its own Pooling and Servicing Agreement ("PSA"). The 115 PSAs contain material differences, including with respect to the obligations of the Master Servicer thereunder. Thus, any notice of an alleged failure by the Master Servicer to perform its obligations under the PSA of a particular Trust must identify the specific provisions of the specific PSA that is alleged to have been breached. Likewise, any such notice must be submitted by the Holders of at least 25% of the Voting Rights evidenced by the Certificates of that Trust.

Please provide the following information for each of the 115 Trusts listed in Exhibit A:

1. Identification of the specific provisions of the PSA for that Trust that were allegedly breached by Countrywide HLS.

2. Specify the factual basis for each allegation of failure to perform with respect to that Trust.

3. Identification of which of the Holders listed in your letter are claimed to be Holders of at least 25% of the Voting Rights in that Trust.

4. For each Holder identified in response to Request No. 3: the class, certificate number, denomination, registered owner, acquisition date, and purchase price for each Certificate evidencing that Holder's Voting Rights in that Trust.

5. For each Holder identified in response to Request No. 3 that you claim to represent: (i) the names of the individuals who authorized the Holder's signature on the letter, (ii) whether the Holder's board of directors (or equivalent body) authorized the letter, and (iii) whether any controlling owner(s) of the Holder authorized the letter, and if so, the identities of the individuals who gave such authorization.

We reserve all rights with respect to costs, fees and damages that may arise from your baseless allegations.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Brian E. Pastuszenski

Brian E. Pastuszenski
Goodwin Procter LLP

Marc T.G. Dworsky
Munger, Tolles & Olson LLP

cc: The Bank of New York, Corporate Trust MBS Administration

Exhibit 11

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---X

In the Matter of the Application of

Case No. 11-cv-5988(WHP)

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

Petitioners,

v.

WALNUT PLACE LLC, et al.,

Intervenor-Respondents.

---X

VOLUME I

VIDEOTAPED DEPOSITION

OF

JASON H.P. KRAVITT, ESQUIRE

New York, New York

Wednesday, September 19, 2012

Reported by:
ANNETTE ARLEQUIN, CCR, RPR, CCR, CLR
JOB NO. 53618

either the Bank of America or Ms. Patrick or any of her colleagues?")

MR. GONZALEZ: I'm going to object to that question to the extent it assumes that an event of default occurred.

With that objection, you can answer.

A. We -- the three -- I'm going to just refer to each of us as a party, okay? The three parties discussed the notice of noncompliance, it's a fact and what to do about it many times.

Q. And that's how the forbearance agreement came about, correct?

A. The forbearance agreement grew out of two things; it grew out of our discussions that I just described and it grew out of the fact that once the three parties started meeting together, they realized that there was a reasonably good chance of having a settlement.

Q. And when did that happen?

A. When did what happen?

Q. When did it became apparent to the three parties there was a reasonably good chance of having a settlement?

A. Well, of course one's estimation of

Jason H.P. Kravitt

whether a settlement will occur changes over time.

Sometimes you have really good meetings and you think ah, we're going to have a settlement.

Sometimes you have frustrating meetings and you wonder will we ever have a settlement.

The very first meeting that the three of us had together quickly went to a discussion of what a settlement might look like, so from the very first meeting where the three parties were actually in a room together, the possibility of a settlement came up and people thought about it.

Q. Okay. And when was that meeting, if you know?

A. You know, I'm having trouble remembering the date. I was looking at the chart that you gave me?

Q. Right. Exhibit 128.

A. Exhibit 128.

Q. And if you can for just a second, I see a typo on the fifth entry. It says,

Jason H.P. Kravitt

filing a lawsuit?

MR. GONZALEZ: Instruct the witness not to answer to the extent the question, which apparently it does, calls for his mental impression and any other communication he might have had with his client regarding that mental impression.

MR. MADDEN: You're talking about at the meeting what he understood.

MR. REILLY: I'm broadening at this point.

MR. MADDEN: Okay. Well, I'm going to object to the broadening as to the common interest privilege.

A. Could you repeat the question?

Q. Sure. Let's focus on the meeting first of all.

Did you get the impression in the November 18th meeting that Gibbs & Bruns had not contemplated filing a lawsuit?

MR. GONZALEZ: Objection to form.

A. I wasn't thinking about that issue. The impression that I got is the two sides made a pro forma defense of their positions and what

Jason H.P. Kravitt

they could do, and then they got serious talking about what a settlement might look like.

Q. So the focus very quickly became how could we settle these issues.

A. The focus very quickly became how can we proceed constructively, okay? There may not be a settlement, but a settlement was certainly a part of it.

Q. Well, if it wasn't -- if proceeding constructively didn't include a settlement --

A. Well, it might be --

Q. Wait, wait, wait.

A. I'm sorry.

Q. If proceeding constructively could include a settlement and something else, what else could it include but a lawsuit?

A. I'm sorry for interrupting.

MR. GONZALEZ: Objection to form. Argumentative.

A. I'm so old that people always let me speak when I speak so I'm just used to it. I'm sorry. Other than my wife.

Again, an investigation was the first step that was discussed.

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

-------------------------------------X

In the Matter of the Application of

Index No. 651786/

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

Assigned to Kapnick, J.

Petitioners,

for an order, pursuant to C.P.L.R. Rule 7701, seeking judicial instructions and approval of a proposed settlement.

-------------------------------------X

* C O N F I D E N T I A L *

VOLUME II

VIDEOTAPED DEPOSITION

OF

JASON H.P. KRAVITT, ESQUIRE

New York, New York

Thursday, September 20, 2012

Reported by:
ANNETTE ARLEQUIN, CCR, RPR, CCR, CLR
JOB NO. 53619

Jason H. P. Kravitt - Confidential

But in my discussions with Gibbs & Bruns, both before November 18th and after November 18th, Ms. Patrick never threatened, to the best of my memory, never threatened to sue Bank of New York over any action in connection with these matters.

Q. Did you see any media coverage before November 18th that suggested that she was considering a suit against Bank of New York Mellon?

MR. GONZALEZ: Objection. Asked and answered.

A. All I remember reading was an article on the letter of non -- notice of noncompliance that she had sent.

I don't -- at this point I don't recall whether in that article there was any speculation or quotation on whether she was going to sue the Bank of New York.

Q. So were you -- is your testimony that from November 18th, 2010 until June 29th, 2011, that in every conversation you had on an almost daily basis with Ms. Patrick you were aligned on the same issues?

Q. Not much. Not much. Less than you think.

A. You know, everyone is negotiating. You sense when people are getting near their real numbers, and I didn't sense Kathy's numbers in the 20s to 50s being real and I didn't sense Terry's 4-and-a-half being real, okay?

I'm not saying in their own minds they weren't real, but I sensed there was still movement in the parties.

Then I believe I saw one more session and nobody would reveal what number they had, but each indicated they had room to move, okay?

And then ultimately they came out with the 8.5 number, which was the number that was actually put into the settlement.

But I want to emphasize that when we asked our experts to analyze the proper number, we did not tell them that what had been tentatively negotiated was 8.5.

Q. Why didn't you tell them that?

A. Because we wanted -- and the instructions we gave them was tell us your real number. We don't want a number that you

Jason H. P. Kravitt - Confidential

quite rationally that using that as a model was at least as good as sampling and probably better.

(Mr. Madden not present.)

Q. Now, you've been asked a number of questions regarding the forbearance agreement.

Do you recall generally those questions?

A. Yes.

Q. Now, were there any discussions among the parties to the forbearance agreement regarding whether the forbearance agreement had any effect on the ability of any certificate holder to send its own notice of an event of default?

A. As we discussed among the parties, there is nothing in the forbearance agreement which prevented any group of certificate holders with the requisite percentage of holdings in any trust from giving the same notice to the trustee that Ms. Patrick's clients had done, waiting for the period to -- notice period to expire, and then give an instruction to the trustee to take action and sue if the trustee didn't.

To do so, of course, they might have to offer an indemnity, but that's the right the trustee has.

Q. And was there -- in connection with the forbearance agreement, was there any discussion among the parties regarding whether the forbearance agreement had any effect on the right or ability of certificate holders, any certificate holder, to sue the trustee?

A. As we discussed, there was no -- there's no restriction on -- contained in the forbearance agreement on the right of any certificate holders to sue the trustee.

Q. Just change -- I have maybe one or two more questions.

You were asked by Mr. Reilly a number of questions regarding the numbers that the different parties to the settlement discussions provided to the other parties.

Do you recall those questions generally?

A. I do.

Q. And in describing numbers in the 20 to 50 billion dollar range that the Gibbs &

Exhibit 12

Exhibit 12 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 12 has been delivered to the Court and served on all parties of record.

Exhibit 13

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

December 9, 2010

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Jason H.P. Kravitt, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019

Re: Agreement of Forbearance

Dear Ms. Patrick and Mr. Kravitt:

We write in reference to Ms. Patrick's letter of October 18, 2010. It is hereby stipulated and agreed by and among the undersigned counsel on behalf of their respective clients:

1. To the extent that Ms. Patrick's letter commenced any time period under the Pooling and Servicing Agreements of the 115 Trusts listed in Exhibit A to Ms. Patrick's letter (the "Original Trusts"), such period shall be tolled starting at the end of the 59th day (that is, at the end of December 16) until 45 days thereafter (that is, at the end of January 30). Any statutes of limitation, repose, or laches applicable to the claims

asserted in Ms. Patrick's letter shall also be tolled for a period of forty-five (45) days (to the extent that any such statutes of limitation, repose or laches have not already expired).

2. The 52 Trusts listed in Exhibit A to this letter (the "Additional Trusts") shall be treated as if a letter equivalent to Ms. Patrick's letter of October 18, 2010 ("October 18 Letter") was received with respect to those trusts by our client and The Bank of New York Mellon as Trustee (the "Trustee") — and as if a letter equivalent to our letter of November 4, 2010 was received with respect to those trusts by Ms. Patrick and the Trustee on December 1, 2010. Any statutes of limitation, repose, or laches applicable to claims relating to the Additional Trusts shall be tolled until January 30, 2011 (to the extent that any such statutes of limitation, repose or laches have not already expired).

In consideration of this forbearance agreement, BAC Home Loans Servicing, LP and the Trustee agree that Ms. Patrick's clients will not bear the legal fees, costs and expenses incurred by the Trustee in connection with the Trustee's counsel's participation in the parties' ongoing discussions concerning the October 18 Letter.

Except as noted above with respect to the payment of legal fees, costs and expenses, nothing herein is intended to limit, modify, supersede, or in any way affect any indemnity rights already available to the Trustee under each PSA for each trust identified in Exhibit A to this letter or to the October 18 Letter.

BAC Home Loans Servicing, LP expressly reserves all rights, arguments and defenses, including but not limited to all rights, arguments and defenses with respect to certificateholder voting rights and interest requirements under the Pooling and Servicing Agreements for each of the Trusts covered by this agreement, including all rights, arguments and defenses with respect to Ms. Patrick's letters of October 18, 2010 and November 12, 2010, except that BAC Home Loans Servicing LP and Trustee shall not dispute that they received those letters on their dates, and shall be deemed to have received the same communications on the Additional Trusts as of December 1, 2010. Any client represented by Ms. Patrick that owns or holds any interest in a certificate in any of these Trusts likewise reserves all rights, arguments and defenses. The Trustee likewise reserves all rights, arguments and defenses.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Brian E. Pastuszenski
Goodwin Procter LLP

Marc T.G. Dworsky
Munger, Tolles & Olson LLP

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B, hereto

By:____________________________
Kathy D. Patrick

MAYER BROWN LLP

By:____________________________
Jason H.P. Kravitt

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Brian E. Pastuszenski
Goodwin Procter LLP

Marc T.G. Dworsky
Munger, Tolles & Olson LLP

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B, hereto

By: Kathy Patrick
Kathy D. Patrick

MAYER BROWN LLP

By:__________________________
Jason H.P. Kravitt

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Brian E. Pastuszenski
Goodwin Procter LLP

Marc T.G. Dworsky
Munger, Tolles & Olson LLP

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B, hereto

By:______________________________
Kathy D. Patrick

MAYER BROWN LLP

By: Jason H. P. Kravitt
Jason H.P. Kravitt

Exhibit "A"
Additional Trusts for Forbearance Agreement

Deal Name
CWALT 2004-14T2
CWALT 2004-29CB
CWALT 2004-35T2
CWALT 2004-J6
CWALT 2005-16
CWALT 2005-19CB
CWALT 2005-48T1
CWALT 2005-53T2
CWALT 2005-59
CWALT 2005-65CB
CWALT 2005-6CB
CWALT 2005-82
CWALT 2005-85CB
CWALT 2006-21CB
CWALT 2006-23CB
CWALT 2006-39CB
CWALT 2006-46
CWALT 2006-OA21
CWALT 2006-OC8
CWALT 2007-15CB
CWALT 2007-22
CWALT 2007-5CB
CWALT 2007-7T2
CWALT 2007-8CB
CWALT 2007-HY5R
CWALT 2007-J2
CWHL 2004-13
CWHL 2004-HYB2
CWHL 2004-HYB5
CWHL 2004-HYB6
CWHL 2005-J1
CWHL 2006-14
CWHL 2006-15
CWHL 2006-20
CWHL 2006-3
CWHL 2006-HYB1
CWHL 2006-J4
CWHL 2006-OA4
CWHL 2007-10

Deal Name
CWHL 2007-11
CWHL 2007-14
CWHL 2007-HYB2
CWHL 2007-J1
CWHL 2007-J3
CWL 2004-SD1
CWL 2004-SD2
CWL 2004-SD3
CWL 2004-SD4
CWL 2005-12
CWL 2006-S9
CWL 2007-10
CWL 2007-4

Exhibit B to Forbearance Agreement

1. Blackrock Financial Management and its Advisory Affiliates
2. Pacific Investment Management Company LLC
3. Maiden Lane LLC, Maiden Lane II, LLC, Maiden Lane III LLC
4. Kore Advisors, L.P.
5. Neuberger Berman Europe, Ltd.
6. Freddie Mac
7. Western Asset Management Company
8. Metropolitan Life Insurance Company
9. Trust Company of the West and the Affiliated Companies controlled by The TCW Group, Inc.
10. Goldman Sachs Asset Management L.P. on behalf of its funds and accounts
11. Teachers Insurance and Annuity Association of America (TIAA-CREF)
12. Invesco Advisers, Inc.
13. Thrivent Financial for Lutherans
14. LBBW (Landesbank Baden-Wurttemberg)
15. ING Entities[1]
16. New York Life Entities[2]
17. Nationwide Insurance Entities

---

[1] "ING Entities" means ING Life Insurance and Annuity Co.; ING USA Annuity and Life Insurance Co.; Midwestern United Life Insurance Co.; ReliaStar Life Insurance Co.; ReliaStar Life Insurance Co. of New York; Security Life of Denver Insurance Co.; Whisperingwind III, LLC; Lion Custom Investments LLC; ING Funds Services LLC on behalf of ING Intermediate Bond Fund, a series of ING Investors Trust; ING Balanced Portfolio (Global Bond Sleeve), a series of ING Balanced Portfolio, Inc.; and ING Intermediate Bond Portfolio, a series thereof; ING Investment Trust Co., Plan for Employee Benefit Investment Funds for an on behalf of its Core Fixed Income Fund (SepCo.587) and its Core Plus Fixed Income Fund (SpeCo. 548); ING Investment Mangement Co. on behalf of various managed accounts; ING Bank, fsb; and, ING Financial Holdings Corp.

[2] "New York Life Entities" means New York Life Insurance Co.; New York Life Insurance And Annuity Corp. Institutionally Owned Life Insurance Separate Accounts BOLI 13, BOLI 13-2, BOLI30C, BOLI30D, and BOLI30E; New York Life Insurance Separate Account 25; and, New York Life Insurance Co. Separate Account #17D-Autoliv.

Exhibit 14

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

January 28, 2011

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Jason H.P. Kravitt, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019

Re: Extension of Agreement of Forbearance

Dear Ms. Patrick and Mr. Kravitt:

We write in reference to the December 9, 2010 Agreement of Forbearance. Capitalized terms used in this Agreement shall have the meanings that they have in that Agreement. It is hereby stipulated and agreed by and among the undersigned counsel on behalf of their respective clients:

1. All time periods with respect to the Original Trusts that were tolled by the Agreement of Forbearance shall be tolled until March 1, 2011. Any analogous time periods with respect to the Additional Trusts shall likewise be tolled until March 1, 2011.

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for a period of 30 days (in addition to the tolling period set forth in the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The 60 Trusts listed in Exhibit A to this letter shall be treated in all respects as if they had been included as Additional Trusts in the Agreement of Forbearance.

4. All other provisions of the Agreement of Forbearance shall continue as if set forth herein.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B, hereto

By: ______________________
Kathy D. Patrick

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for a period of 30 days (in addition to the tolling period set forth in the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The 60 Trusts listed in Exhibit A to this letter shall be treated in all respects as if they had been included as Additional Trusts in the Agreement of Forbearance.

4. All other provisions of the Agreement of Forbearance shall continue as if set forth herein.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B, hereto

By: ______________________
Kathy D. Patrick

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Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B, hereto

By:______________________________
Kathy D. Patrick

MAYER BROWN LLP

By:______________________________
Jason H.P. Kravitt

Exhibit A

CWALT 2004-J5	CWALT 2005-25T1	CWALT 2006-27CB	CWALT 2006-OA1	CWALT 2007-OH1	CWHL 2004-HYB8	CWHL 2005-HYB2	CWHL 2007-HY6
CWALT 2004-12CB	CWALT 2005-26CB	CWALT 2006-34	CWALT 2006-OA14	CWHL 2004-11	CWHL 2004-J4	CWHL 2005-HYB5	CWHL 2007-HY7
CWALT 2004-15	CWALT 2005-27	CWALT 2006-36T2	CWALT 2006-OA19	CWHL 2004-14	CWHL 2005-13	CWHL 2005-HYB6	CWL 2005-14
CWALT 2004-9T1	CWALT 2005-30CB	CWALT 2006-40T1	CWALT 2006-OC11	CWHL 2004-15	CWHL 2005-15	CWHL 2005-J2	CWL 2007-1
CWALT 2005-11CB	CWALT 2005-58	CWALT 2006-42	CWALT 2007-12T1	CWHL 2004-20	CWHL 2005-27	CWHL 2006-10	
CWALT 2005-12R	CWALT 2005-70CB	CWALT 2006-5T2	CWALT 2007-OA3	CWHL 2004-23	CWHL 2005-28	CWHL 2006-6	
CWALT 2005-17	CWALT 2005-77T1	CWALT 2006-9T1	CWALT 2007-OA4	CWHL 2004-24	CWHL 2005-31	CWHL 2006-HYB3	
CWALT 2005-23CB	CWALT 2006-12CB	CWALT 2006-HY13	CWALT 2007-OA8	CWHL 2004-7	CWHL 2005-6	CWHL 2007-HY1	

Exhibit B to Forbearance Agreement

1. Blackrock Financial Management and its Advisory Affiliates
2. Pacific Investment Management Company LLC
3. Maiden Lane LLC, Maiden Lane II, LLC, Maiden Lane III LLC
4. Kore Advisors, L.P.
5. Neuberger Berman Europe, Ltd.
6. Freddie Mac
7. Western Asset Management Company
8. Metropolitan Life Insurance Company
9. Trust Company of the West and the Affiliated Companies controlled by The TCW Group, Inc.
10. Goldman Sachs Asset Management L.P. on behalf of its funds and accounts
11. Teachers Insurance and Annuity Association of America (TIAA-CREF)
12. Invesco Advisers, Inc.
13. Thrivent Financial for Lutherans
14. LBBW (Landesbank Baden-Wurttemberg)
15. ING Entities[1]
16. New York Life Entities[2]
17. Nationwide Insurance Entities
18. AEGON Entities[3]
19. Federal Home Loan Bank of Atlanta
20. Bayerische Landesbank

---

[1] "ING Entities" means ING Life Insurance and Annuity Co.; ING USA Annuity and Life Insurance Co.; Midwestern United Life Insurance Co.; ReliaStar Life Insurance Co.; ReliaStar Life Insurance Co. of New York; Security Life of Denver Insurance Co.; Whisperingwind III, LLC; Lion Custom Investments LLC; ING Funds Services LLC on behalf of ING Intermediate Bond Fund, a series of ING Investors Trust; ING Balanced Portfolio (Global Bond Sleeve), a series of ING Balanced Portfolio, Inc.; and ING Intermediate Bond Portfolio, a series thereof; ING Investment Trust Co., Plan for Employee Benefit Investment Funds for an on behalf of its Core Fixed Income Fund (SepCo.587) and its Core Plus Fixed Income Fund (SpeCo. 548); ING Investment Mangement Co. on behalf of various managed accounts; ING Bank, fsb; and, ING Financial Holdings Corp.

[2] "New York Life Entities" means New York Life Insurance Co.; New York Life Insurance And Annuity Corp. Institutionally Owned Life Insurance Separate Accounts BOLI 13, BOLI 13-2, BOLI30C, BOLI30D, and BOLI30E; New York Life Insurance Separate Account 25; and, New York Life Insurance Co. Separate Account #17D-Autoliv.

[3] "AEGON Entities" means Transamerica Life Insurance Company; AEGON Financial Assurance Ireland Limited; Transamerica Life International (Bermuda) Ltd.; Monumental Life Insurance Company; Transamerica Advisors Life Insurance Company; AEGON Global Institutional Markets, plc; LIICA Re II, Inc.; Pine Falls Re, Inc.; Transamerica Financial Life Insurance Company; Stonebridge Life Insurance Company; Western Reserve Life Assurance Co. of Ohio

Document Number: 212311

Exhibit 15

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

February 28, 2011

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Jason H.P. Kravitt, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019

Re: Extension of Agreement of Forbearance

Dear Ms. Patrick and Mr. Kravitt:

We write in reference to the December 9, 2010 Agreement of Forbearance. Capitalized terms used in this Agreement shall have the meanings that they have in that Agreement. It is hereby stipulated and agreed by and among the undersigned counsel on behalf of their respective clients:

1. All time periods with respect to the Original Trusts that were tolled by the Agreement of Forbearance shall be tolled until March 31, 2011. Any analogous time periods with respect to the Additional Trusts shall likewise be tolled until March 31, 2011.

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 30 days (in addition to the tolling period set forth in the Agreement of Forbearance and in the January 28, 2011 Extension to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The 60 Trusts listed in Exhibit A to this letter shall be treated in all respects as if they had been included as Additional Trusts in the Agreement of Forbearance.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B, hereto

By:______________________
Kathy D. Patrick

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 30 days (in addition to the tolling period set forth in the Agreement of Forbearance and in the January 28, 2011 Extension to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The 60 Trusts listed in Exhibit A to this letter shall be treated in all respects as if they had been included as Additional Trusts in the Agreement of Forbearance.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP
on behalf of its clients listed on Ex. B, hereto

By: ____________________
Kathy D. Patrick

MAYER BROWN LLP

By: Jason H.P. Kravitt
Jason H.P. Kravitt

Exhibit 16

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

March 31, 2011

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Jason H.P. Kravitt, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019

Re: Extension of Agreement of Forbearance

Dear Ms. Patrick and Mr. Kravitt:

We write in reference to the December 9, 2010 Agreement of Forbearance. Capitalized terms used in this Agreement shall have the meanings that they have in that Agreement. It is hereby stipulated and agreed by and among the undersigned counsel on behalf of their respective clients:

1. All time periods with respect to the Original Trusts that were tolled by the Agreement of Forbearance shall be tolled until April 22, 2011. Any analogous time periods with respect to the Additional Trusts shall likewise be tolled until April 22, 2011.

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 22 days (in addition to the tolling period set forth in the Agreement of Forbearance and in the January 28 and February 28, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The trust listed in Exhibit A to this letter shall be treated in all respects as if it had been included as an Additional Trust in the Agreement of Forbearance.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Ted Mirvis (epg)
Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B, hereto

By:______________________________
Kathy D. Patrick

MAYER BROWN LLP

By: ____________________
Jason H.P. Kravitt

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 22 days (in addition to the tolling period set forth in the Agreement of Forbearance and in the January 28 and February 28, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The trust listed in Exhibit A to this letter shall be treated in all respects as if it had been included as an Additional Trust in the Agreement of Forbearance.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Ted Mirvis (EPG)

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B, hereto

By: Kathy Patrick
Kathy D. Patrick

MAYER BROWN LLP

By: ____________________
Jason H.P. Kravitt

Exhibit A

CWALT 2004-5CB

Exhibit B to Forbearance Agreement

1. Blackrock Financial Management and its Advisory Affiliates
2. Pacific Investment Management Company LLC
3. Maiden Lane LLC, Maiden Lane II, LLC, Maiden Lane III LLC
4. Kore Advisors, L.P.
5. Neuberger Berman Europe, Ltd.
6. Freddie Mac
7. Western Asset Management Company
8. Metropolitan Life Insurance Company
9. Trust Company of the West and the Affiliated Companies controlled by The TCW Group, Inc.
10. Goldman Sachs Asset Management L.P. on behalf of its funds and accounts
11. Teachers Insurance and Annuity Association of America (TIAA-CREF)
12. Invesco Advisers, Inc.
13. Thrivent Financial for Lutherans
14. LBBW (Landesbank Baden-Wurttemberg)
15. ING Entities[1]
16. New York Life Entities[2]
17. Nationwide Insurance Entities
18. AEGON Entities[3]
19. Federal Home Loan Bank of Atlanta
20. Bayerische Landesbank
21. Prudential

---

[1] "ING Entities" means ING Life Insurance and Annuity Co.; ING USA Annuity and Life Insurance Co.; Midwestern United Life Insurance Co.; ReliaStar Life Insurance Co.; ReliaStar Life Insurance Co. of New York; Security Life of Denver Insurance Co.; Whisperingwind III, LLC; Lion Custom Investments LLC; ING Funds Services LLC on behalf of ING Intermediate Bond Fund, a series of ING Investors Trust; ING Balanced Portfolio (Global Bond Sleeve), a series of ING Balanced Portfolio, Inc.; and ING Intermediate Bond Portfolio, a series thereof; ING Investment Trust Co., Plan for Employee Benefit Investment Funds for an on behalf of its Core Fixed Income Fund (SepCo.587) and its Core Plus Fixed Income Fund (SpeCo. 548); ING Investment Mangement Co. on behalf of various managed accounts; ING Bank, fsb; and, ING Financial Holdings Corp.

[2] "New York Life Entities" means New York Life Insurance Co.; New York Life Insurance And Annuity Corp. Institutionally Owned Life Insurance Separate Accounts BOLI 13, BOLI 13-2, BOLI30C, BOLI30D, and BOLI30E; New York Life Insurance Separate Account 25; and, New York Life Insurance Co. Separate Account #17D-Auto-liv.

[3] "AEGON Entities" means Transamerica Life Insurance Company; AEGON Financial Assurance Ireland Limited; Transamerica Life International (Bermuda) Ltd.; Monumental Life Insurance Company; Transamerica Advisors Life Insurance Company; AEGON Global Institutional Markets, plc; LIICA Re II, Inc.; Pine Falls Re, Inc.; Transamerica Financial Life Insurance Company; Stonebridge Life Insurance Company; Western Reserve Life Assurance Co. of Ohio

Document Number: 212311

Exhibit 17

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

April 19, 2011

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Jason H.P. Kravitt, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019

Re: Extension of Agreement of Forbearance

Dear Ms. Patrick and Mr. Kravitt:

We write in reference to the December 9, 2010 Agreement of Forbearance. Capitalized terms used in this Agreement shall have the meanings that they have in that Agreement. It is hereby stipulated and agreed by and among the undersigned counsel on behalf of their respective clients:

1. All time periods with respect to the Original Trusts that were tolled by the Agreement of Forbearance shall be tolled until May 2, 2011. Any analogous time periods with respect to the Additional Trusts shall likewise be tolled until May 2, 2011.

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 10 days (in addition to the tolling period set forth in the Agreement of Forbearance and in the January 28, February 28, and March 31, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Ted Mirvis/CNR

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B
to the March 31, 2011 Extension of
Agreement of Forbearance

By:______________________________
Kathy D. Patrick

MAYER BROWN LLP

By:__________________________________
Jason H.P. Kravitt

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 10 days (in addition to the tolling period set forth in the Agreement of Forbearance and in the January 28, February 28, and March 31, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Ted Mirvis/CNR

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B
to the March 31, 2011 Extension of
Agreement of Forbearance

By: [signature]
Kathy D. Patrick

MAYER BROWN LLP

By: Jason H.P. Kravitt
Jason H.P. Kravitt
on behalf of BONY Mellon, as Trustee

Exhibit 18

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

May 2, 2011

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Jason H.P. Kravitt, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019

Re: Extension of Agreement of Forbearance

Dear Ms. Patrick and Mr. Kravitt:

We write in reference to the December 9, 2010 Agreement of Forbearance. Capitalized terms used in this Agreement shall have the meanings that they have in that Agreement. It is hereby stipulated and agreed by and among the undersigned counsel on behalf of their respective clients:

1. All time periods with respect to the Original Trusts that were tolled by the Agreement of Forbearance shall be tolled until May 9, 2011. Any analogous time periods with respect to the Additional Trusts shall likewise be tolled until May 9, 2011.

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 7 days (in addition to the tolling period set forth in the Agreement of Forbearance and in the January 28, February 28, March 31 and April 19, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The Trusts listed in Exhibit A to this letter shall be treated in all respects as if they had been included as Additional Trusts in the Agreement of Forbearance.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B
to the March 31, 2011 Extension of
Agreement of Forbearance

By:________________________
Kathy D. Patrick

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 7 days (in addition to the tolling period set forth in the Agreement of Forbearance and in the January 28, February 28, March 31 and April 19, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The Trusts listed in Exhibit A to this letter shall be treated in all respects as if they had been included as Additional Trusts in the Agreement of Forbearance.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B
to the March 31, 2011 Extension of
Agreement of Forbearance

By: Kathy D. Patrick
Kathy D. Patrick

MAYER BROWN LLP

By: [signature]
Jason H.P. Kravitt

Exhibit A

Deal Name
CWHL 2005-4
CWALT 2005-38
CWALT 2005-J7
CWHL 2007-5
CWHL 2004-HYB3
CWHL 2004-6
CWHL 2007-HY4
CWL 2007-11
CWALT 2005-9CB
CWALT 2006-43CB
CWHL 2005-24
CWHL 2007-4
CWALT 2005-43
CWHL 2005-8R
CWALT 2007-9T1
CWHL 2004-HYB1
CWALT 2004-30CB
CWHL 2007-1
CWALT 2005-61
CWHL 2005-1
CWHL 2006-1
CWALT 2006-OA22
CWHL 2004-16

Exhibit B to Forbearance Agreement

1. Blackrock Financial Management and its Advisory Affiliates
2. Pacific Investment Management Company LLC
3. Maiden Lane LLC, Maiden Lane II, LLC, Maiden Lane III LLC
4. Kore Advisors, L.P.
5. Neuberger Berman Europe, Ltd.
6. Freddie Mac
7. Western Asset Management Company
8. Metropolitan Life Insurance Company
9. Trust Company of the West and the Affiliated Companies controlled by The TCW Group, Inc.
10. Goldman Sachs Asset Management L.P. on behalf of its funds and accounts
11. Teachers Insurance and Annuity Association of America (TIAA-CREF)
12. Invesco Advisers, Inc.
13. Thrivent Financial for Lutherans
14. LBBW (Landesbank Baden-Wurttemberg)
15. ING Entities[1]
16. New York Life Entities[2]
17. Nationwide Insurance Entities
18. AEGON Entities[3]
19. Federal Home Loan Bank of Atlanta
20. Bayerische Landesbank
21. Prudential

---

[1] "ING Entities" means ING Life Insurance and Annuity Co.; ING USA Annuity and Life Insurance Co.; Midwestern United Life Insurance Co.; ReliaStar Life Insurance Co.; ReliaStar Life Insurance Co. of New York; Security Life of Denver Insurance Co.; Whisperingwind III, LLC; Lion Custom Investments LLC; ING Funds Services LLC on behalf of ING Intermediate Bond Fund, a series of ING Investors Trust; ING Balanced Portfolio (Global Bond Sleeve), a series of ING Balanced Portfolio, Inc.; and ING Intermediate Bond Portfolio, a series thereof; ING Investment Trust Co., Plan for Employee Benefit Investment Funds for an on behalf of its Core Fixed Income Fund (SepCo.587) and its Core Plus Fixed Income Fund (SpeCo. 548); ING Investment Mangement Co. on behalf of various managed accounts; ING Bank, fsb; and, ING Financial Holdings Corp.

[2] "New York Life Entities" means New York Life Insurance Co.; New York Life Insurance And Annuity Corp. Institutionally Owned Life Insurance Separate Accounts BOLI 13, BOLI 13-2, BOLI30C, BOLI30D, and BOLI30E; New York Life Insurance Separate Account 25; and, New York Life Insurance Co. Separate Account #17D-Autoliv.

[3] "AEGON Entities" means Transamerica Life Insurance Company; AEGON Financial Assurance Ireland Limited; Transamerica Life International (Bermuda) Ltd.; Monumental Life Insurance Company; Transamerica Advisors Life Insurance Company; AEGON Global Institutional Markets, plc; LIICA Re II, Inc.; Pine Falls Re, Inc.; Transamerica Financial Life Insurance Company; Stonebridge Life Insurance Company; Western Reserve Life Assurance Co. of Ohio

Document Number: 212311

Exhibit 19

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

May 9, 2011

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Jason H.P. Kravitt, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019

Re: Extension of Agreement of Forbearance

Dear Ms. Patrick and Mr. Kravitt:

We write in reference to the December 9, 2010 Agreement of Forbearance. Capitalized terms used in this Agreement shall have the meanings that they have in that Agreement. It is hereby stipulated and agreed by and among the undersigned counsel on behalf of their respective clients:

1. All time periods with respect to the Original Trusts that were tolled by the Agreement of Forbearance shall be tolled until May 26, 2011. Any analogous time periods with respect to the Additional Trusts shall likewise be tolled until May 26, 2011.

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 17 days (in addition to the tolling periods set forth in the Agreement of Forbearance and in the January 28, February 28, March 31, April 19, 2011 and May 2, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The Trusts listed in Exhibit A to this letter shall be treated in all respects as if they had been included as Additional Trusts in the Agreement of Forbearance.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B
to the May 2, 2011 Extension of Agreement
of Forbearance

By: ______________________
Kathy D. Patrick

2. Any statute of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 17 days (in addition to the tolling periods set forth in the Agreement of Forbearance and in the January 28, February 28, March 31, April 19, 2011 and May 2, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. The Trusts listed in Exhibit A to this letter shall be treated in all respects as if they had been included as Additional Trusts in the Agreement of Forbearance.

Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B
to the May 2, 2011 Extension of Agreement
of Forbearance

By: ____________________
Kathy D. Patrick

MAYER BROWN LLP

By: Jason H.P. Kravitt /MGT
Jason H.P. Kravitt

Exhibit A

Deal Name	
CWALT 2004-13CB	CWL 2004-9
CWALT 2004-18CB	CWL 2004-BC2
CWALT 2004-4CB	CWL 2005-17
CWALT 2004-J12	CWL 2005-3
CWALT 2004-J7	CWL 2005-AB5
CWALT 2004-J9	CWL 2005-BC4
CWALT 2005-18CB	CWL 2005-IM2
CWALT 2005-20CB	CWL 2005-IM3
CWALT 2005-42CB	CWL 2006-11
CWALT 2005-47CB	CWL 2006-6
CWALT 2005-86CB	CWL 2006-8
CWALT 2005-J12	CWL 2006-ABC1
CWALT 2005-J6	CWL 2006-S10
CWALT 2006-19CB	CWL 2006-SD2
CWALT 2006-OA12	
CWALT 2006-OA8	
CWALT 2006-OC1	
CWALT 2007-11T1	
CWALT 2007-15CB	
CWALT 2007-3T1	
CWALT 2007-AL1	
CWALT 2007-HY8C	
CWALT 2007-OA2	
CWHL 2004-3	
CWHL 2004-J2	
CWHL 2004-J9	
CWHL 2006-13	
CWHL 2006-16	
CWHL 2006-17	
CWHL 2007-13	
CWHL 2007-15	
CWL 2004-1	
CWL 2004-12	
CWL 2004-13	
CWL 2004-14	
CWL 2004-15	
CWL 2004-2	
CWL 2004-7	
CWL 2004-8	

Exhibit 20

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

May 25, 2011

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Jason H.P. Kravitt, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019

Re: <u>Extension of Agreement of Forbearance</u>

Dear Ms. Patrick and Mr. Kravitt:

We write in reference to the December 9, 2010 Agreement of Forbearance. Capitalized terms used in this Agreement shall have the meanings that they have in that Agreement. It is hereby stipulated and agreed by and among the undersigned counsel on behalf of their respective clients:

1. All time periods with respect to the Original Trusts that were tolled by the Agreement of Forbearance shall be tolled until June 14, 2011. Any analogous time periods with respect to the Additional Trusts shall likewise be tolled until June 14, 2011.

2. Any statutes of limitation, repose or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 19 days (in addition to the tolling periods set forth in the Agreement of Forbearance and in the January 28, February 28, March 31, April 19, 2011, May 2, 2011 and May 9, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B
to the May 2, 2011 Extension of Agreement
of Forbearance

By:______________________
Kathy D. Patrick

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 19 days (in addition to the tolling periods set forth in the Agreement of Forbearance and in the January 28, February 28, March 31, April 19, 2011, May 2, 2011 and May 9, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP.
on behalf of its clients listed on Ex. B
to the May 2, 2011 Extension of Agreement
of Forbearance

By: ____________________
Kathy D. Patrick

MAYER BROWN LLP

By: Jason H.P. Kravitt

Exhibit 21

WACHTELL, LIPTON, ROSEN & KATZ

51 WEST 52ND STREET
NEW YORK, N.Y. 10019-6150
TELEPHONE: (212) 403-1000
FACSIMILE: (212) 403-2000

June 13, 2011

Kathy D. Patrick, Esq.
Gibbs & Bruns, LLP
1100 Louisiana Street
Suite 5300
Houston, TX 77002

Jason H.P. Kravitt, Esq.
Mayer Brown LLP
1675 Broadway
New York, NY 10019

Re: Extension of Agreement of Forbearance

Dear Ms. Patrick and Mr. Kravitt:

We write in reference to the December 9, 2010 Agreement of Forbearance. Capitalized terms used in this Agreement shall have the meanings that they have in that Agreement. It is hereby stipulated and agreed by and among the undersigned counsel on behalf of their respective clients:

1. All time periods with respect to the Original Trusts that were tolled by the Agreement of Forbearance shall be tolled until June 30, 2011. Any analogous time periods with respect to the Additional Trusts shall likewise be tolled until June 30, 2011.

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 16 days (in addition to the tolling periods set forth in the Agreement of Forbearance and in the January 28, February 28, March 31, April 19, 2011, May 2, 2011, May 9, 2011 and May 25, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS, LLP,
on behalf of its clients listed on Ex. B
to the May 2, 2011 Extension of Agreement
of Forbearance

By:______________________________
Kathy D. Patrick

2. Any statutes of limitation, repose, or laches applicable to the claims asserted in Ms. Patrick's October 18 letter shall be tolled with respect to both the Original and the Additional Trusts for an additional period of 16 days (in addition to the tolling periods set forth in the Agreement of Forbearance and in the January 28, February 28, March 31, April 19, 2011, May 2, 2011, May 9, 2011 and May 25, 2011 Extensions to the Agreement of Forbearance) (to the extent that any such statutes of limitation, repose or laches have not already expired).

3. Please acknowledge your agreement by countersigning this letter in the space provided below and returning a copy to us.

Sincerely,

Theodore N. Mirvis
Wachtell, Lipton, Rosen & Katz

Accepted and Agreed to:

GIBBS & BRUNS LLP,
on behalf of its clients listed on Ex. B
to the May 2, 2011 Extension of Agreement
of Forbearance

By: Kathy D. Patrick

MAYER BROWN LLP

By: Jason H.P. Kravitt
Jason H.P. Kravitt

Exhibit 22

Exhibit 22 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 22 has been delivered to the Court and served on all parties of record.

Exhibit 23

Exhibit 23 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 23 has been delivered to the Court and served on all parties of record.

Exhibit 24

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and among (i) The Bank of New York Mellon (f/k/a The Bank of New York) in its capacity as trustee or indenture trustee of certain mortgage-securitization trusts identified herein ("BNY Mellon" or the "Trustee"), and (ii) Bank of America Corporation ("BAC"), and BAC Home Loans Servicing, LP ("BAC HLS") (collectively, "Bank of America") and Countrywide Financial Corporation ("CFC") and Countrywide Home Loans, Inc. ("CHL") (collectively, "Countrywide").

WHEREAS, BNY Mellon is the trustee or indenture trustee for the trusts corresponding to the five hundred and thirty (530) residential mortgage-backed securitizations listed on Exhibit A hereto (the "Covered Trusts");

WHEREAS, Countrywide sold Mortgage Loans, which served as collateral for the Covered Trusts;

WHEREAS, the Trustee, CHL, and/or BAC HLS are parties to the Pooling and Servicing Agreements and in some cases Sale and Servicing Agreements and Indentures governing the Covered Trusts (as amended, modified, and supplemented from time-to-time, the "Governing Agreements"), and CHL, Countrywide Home Loans Servicing, LP, and/or BAC HLS has acted as Master Servicer for the Covered Trusts ("Master Servicer");

WHEREAS, certain significant holders of certificates or notes representing interests in certain of the Covered Trusts and investment managers of accounts holding such certificates or notes (the "Institutional Investors," as defined in more detail in the Institutional Investor Agreement) have entered into a separate Institutional Investor Agreement with the Trustee, Bank of America and Countrywide, the due execution of which is a condition to the effectiveness of this Settlement Agreement;

WHEREAS, allegations have been made of breaches of representations and warranties contained in the Governing Agreements with respect to the Covered Trusts (including alleged failure to comply with underwriting guidelines (including limitations on underwriting exceptions), to comply with required loan-to-value and debt-to-income ratios, to ensure appropriate appraisals of mortgaged properties, and to verify appropriate owner-occupancy

(b) Withdrawal From Settlement. In the event that one or more Covered Trusts, holding, in the aggregate, Mortgage Loans with unpaid principal balances as of the first Trustee report after the Signing Date aggregating in excess of a confidential percentage of the total unpaid principal balance of the Covered Trusts as of that date, such percentage having been provided to the Trustee by Bank of America and Countrywide prior to the execution of this Settlement Agreement, shall become Excluded Covered Trusts, Bank of America and Countrywide shall have the option, in their sole discretion, to withdraw from the Settlement with like effect as if Final Court Approval had become legally impossible. For purposes of calculating the unpaid principal balance of Excluded Covered Trusts in connection with this Subparagraph 4(b), the unpaid principal balance of Covered Trusts that become Excluded Covered Trusts at the election of Bank of America or Countrywide pursuant to Subparagraph 3(d)(iv) shall not be included.

5. Servicing. The Master Servicer shall implement the following servicing improvements (the "Servicing Improvements"). Material compliance with the provisions of this Paragraph 5 shall satisfy the Master Servicer's obligation to service the Mortgage Loans prudently in accordance with the relevant provisions of the Governing Agreements:

(a) Subservicer Selection and Assignment. In conformity with the subservicing provisions of the Governing Agreements:

(i) Within thirty (30) days of the Signing Date, the Institutional Investors and the Master Servicer shall agree on a list (the "Agreed List") of no fewer than eight and no more than ten subservicers (each a "Subservicer" and together the "Subservicers") to service High Risk Loans (as defined in Subparagraph 5(b)) and submit the Agreed List to the Trustee for review. If agreed by the Institutional Investors and the Master Servicer, the Master Servicer or an affiliate of the Master Servicer may serve as a Subservicer (in addition to the eight to ten to be otherwise agreed) and be included on the Agreed List. Within forty-five (45) days of receipt of the Agreed List, the Trustee, after consulting with an expert of its choice (whose advice shall be deemed full and complete authorization and protection in respect of the Trustee's decision), may object to any of the Subservicers on the Agreed List or reduce the maximum number of Mortgage Loans from the Covered Trusts that any such Subservicer may service at any one time to less than

30,000; provided that the Trustee may object to a Subservicer, or reduce the maximum number of Mortgage Loans from the Covered Trusts that any such Subservicer may service at any one time, only on the grounds listed in Exhibit D hereto and none other. The Trustee shall act in good faith in its approval decisions and shall include in any decision to object to a particular Subservicer the grounds for such objection. In the absence of an objection by the Trustee, all of the Subservicers on the Agreed List shall be deemed to be approved. If the Trustee objects to one or more Subservicers, all of the Subservicers on the Agreed List as to which there has been no objection shall be deemed approved. The Subservicers approved, or deemed approved, by the Trustee shall make up the "Approved List."

(ii) If the Trustee objects to a Subservicer on the Agreed List, or if a Subservicer on the Approved List at any time fails to meet, or ceases to meet, any of the qualifications described in Subparagraph 5(a)(iii), the Master Servicer shall remove such Subservicer from the Agreed List and/or the Approved List, as applicable, and may: (A) propose to replace any such Subservicer with a new subservicer by written notice to the Trustee, subject to such new subservicer meeting the qualifications described in Subparagraph 5(a)(iii) or (B) if applicable, re-submit such Subservicer to the Trustee for approval, provided that the Master Servicer has a commercially reasonable basis for believing that the grounds for the Trustee's objection to the subservicer are no longer applicable. Within fourteen (14) days of receipt of such notice or re-submission, the Trustee, after consulting with an expert of its choice (whose advice shall be deemed full and complete authorization and protection in respect of the Trustee's decision), may object to the proposed subservicer or reduce the maximum number of Mortgage Loans from the Covered Trusts that such proposed subservicer may service at any one time to less than 30,000; provided that the Trustee may object to a proposed subservicer or reduce the maximum number of Mortgage Loans from the Covered Trusts only on the grounds listed in Exhibit D hereto and none other. In the absence of an objection, the proposed subservicer shall be deemed approved and included on the Approved List. If the Trustee objects to a proposed subservicer, the Master Servicer may propose another subservicer pursuant to the process set out above, which process may be repeated multiple times. If the Trustee, pursuant to this Subparagraph 5(a)(ii), reduces the maximum number of Mortgage Loans that a Subservicer may service at any one time to less than 30,000, the Master Servicer may request from time to time that the Trustee lift or revise any such reduction of the maximum number of Mortgage Loans that that Subservicer may service (subject to the maximum of 30,000 outstanding Mortgage Loans at any one time established by this Paragraph 5), and the Trustee, after consulting with an expert of its choice (whose advice shall be deemed full and complete authorization and protection in respect of the Trustee's decision), may agree or disagree, provided that the Trustee shall make such decision only on the grounds listed in Exhibit D hereto and none other. Nothing herein shall be construed as requiring the Master Servicer to obtain the Trustee's approval prior to terminating a Subservicer for cause.

(iii) To qualify for the transfer of loans for subservicing, a Subservicer must: (1) possess and maintain all material state and local licenses and registrations and be qualified to do business in the relevant jurisdictions, (2) agree to comply, and comply, with any laws, regulations, orders, mandates, or rulings of any Governmental Authority and/or any agreement or settlement between the Master Servicer or any of the other Bank of America Parties with any Governmental Authority applicable to subservicing, (3) maintain sufficient capable staff and facilities located in the United States, agree to meet, and meet, specified service level and performance requirements, and meet reasonable financial criteria, (4) agree to indemnify and hold harmless the Master Servicer for any servicing failures or breaches committed by it, (5) be eligible to service in accordance with the Home Affordable Modification Program ("HAMP") either pursuant to a Servicer Participation Agreement or an Assignment and Assumption Agreement with the U.S. Department of Treasury, (6) meet, and otherwise be subject to, all relevant third-party provider requirements of the Office of the Comptroller of the Currency, (7) meet, and otherwise be subject to, the Master Servicer's vendor management policies, provided that such policies are of general application and do not address the specific requirements for performance under this Settlement Agreement, any agreement for the transfer of loans to subservicing, or any agreement for the sale of servicing rights, and (8) otherwise meet the requirements of the subservicing provisions of the Governing Agreements. In determining whether a Subservicer meets the qualifications described in this Subparagraph 5(a)(iii), the Master Servicer shall act in good faith and shall use commercially reasonable standards. Notwithstanding any other provision of this Settlement Agreement, the Master Servicer shall have no obligation to, and shall not, enter into a subservicing contract with, or transfer any Mortgage Loan for subservicing to, any Subservicer that does not meet the qualifications described in this Subparagraph 5(a)(iii) at the relevant time. Any Subservicer on the Approved

List that, at any time, does not meet the qualifications described in this Subparagraph 5(a)(iii) and that subsequently has a commercially reasonable basis for believing that it can meet the qualifications described in this Subparagraph 5(a)(iii), can request that the Master Servicer re-evaluate whether it meets the qualifications described in this Subparagraph 5(a)(iii), and if the Master Servicer determines that the Subservicer meets the qualifications described in this Subparagraph 5(a)(iii), such Subservicer shall be considered eligible for the transfer of High Risk Loans (subject to, if applicable, negotiation of a subservicing contract pursuant to Subparagraph 5(a)(iv)).

(iv) Beginning on the date of the Trustee's approval (or deemed approval, as applicable) of at least four Subservicers, the Master Servicer shall negotiate a servicing contract that includes commercially reasonable terms (including without limitation the right to terminate the Subservicer for cause) and map the computer-transfer of Mortgage Loans with not less than one Subservicer per quarter until all of the Subservicers on the Approved List are operational. The terms on which the Subservicers are compensated shall be commercially reasonable pool-performance incentives and/or activity-based incentives substantially similar to, and not materially less favorable than, those set forth on Exhibit E hereto. The servicing contract with each Subservicer shall prohibit the Subservicer from subcontracting the servicing, subservicing, selling the servicing rights, or otherwise transferring the servicing rights of any of the High Risk Loans to another party, provided that nothing herein shall be construed to limit the right of the Subservicers to engage third-party vendors or subcontractors to perform tasks that prudent mortgage banking institutions commonly engage third party vendors or subcontractors to perform with respect to mortgage loans and related property, including, but not limited to, tax monitoring, insurance monitoring, property inspection, reconveyance, services provided by licensed field agents, and brokering REO property ("Routinely Outsourced Tasks").

(v) The Master Servicer will complete the contract negotiation and computer-transfer mapping for each Subservicer in a three-month time period running from the commencement of computer-transfer mapping with that Subservicer, provided, however, that the Master Servicer shall have no obligation to contract with any Subservicer that does not meet the qualifications described in Subparagraph 5(a)(iii) or on terms that are not commercially reasonable, and shall incur no liability whatsoever nor be subject to any other form of remedy if it cannot comply with any provision of this Paragraph 5 because it is unable to contract with such a Subservicer on commercially reasonable terms (provided, however, that the other provisions of this Paragraph 5 shall remain in force).

(vi) If the Master Servicer exceeds the three month time frame to complete the required computer mapping specified in Subparagraph 5(a)(v), the Master Servicer shall retain a competent third party, at its own expense, to complete the computer mapping as soon as reasonably practical (and shall have no other liability for exceeding the time frame provided that it retains such third party and proceeds diligently to complete the computer mapping).

(vii) After at least one Subservicer is operational, the Master Servicer shall initiate the transfer of Mortgage Loans to at least one Subservicer per quarter; provided, however, that each Subservicer shall have no more than 30,000 outstanding Mortgage Loans from the Covered Trusts at any one time. If each operational Subservicer has 30,000 outstanding Mortgage Loans from the Covered Trusts (or such lesser maximum number as the Trustee directs pursuant to Subparagraphs 5(a)(i) and (ii), as applicable), the Master Servicer shall have no obligation to transfer any Mortgage Loans until such time as an operational Subservicer has enough less than 30,000 outstanding Mortgage Loans from the Covered Trusts (or such lesser maximum number as the Trustee directs pursuant to Subparagraphs 5(a)(i) and (ii), as applicable) so as to make a transfer of Mortgage Loans commercially reasonable.

(viii) Only one Subservicer shall be assigned to each Covered Trust.

(ix) Any Mortgage Loan in subservicing for which twelve (12) consecutive timely payments have been made by or on behalf of the borrower shall be transferred back to the Master Servicer. The Master Servicer shall include a provision to this effect in the subservicing contract with each Subservicer. This provision shall not apply to any Mortgage Loan for which the Master Servicer has sold the servicing rights.

(x) All costs associated with implementation of these subservicing provisions shall be borne by the Master Servicer and/or the Subservicers, as applicable; provided, however, that the costs of the Subservicer compensation described in Subparagraph 5(a)(iv) and on Exhibit E hereto shall be borne by the Master Servicer. For the avoidance of doubt, if a Mortgage Loan is transferred to subservicing, the Master Servicer shall retain all rights to receive payment for accrued but unpaid Master Servicing Fees and to be reimbursed for outstanding Advances at the same time and in the same manner as if the Master Servicer had retained the servicing function.

(xi) Beginning on the date of the Trustee's approval or deemed approval of at least four Subservicers, the Master Servicer may, at its option, sell the servicing rights on High Risk Loans to any Subservicer on the Approved List, provided that: (1) such sale complies with the applicable provisions of the applicable Governing Agreements; (2) the Subservicer possesses all material state and local licenses and registrations and is qualified to do business in the relevant jurisdictions; (3) the Subservicer maintains sufficient capable staff and facilities located in the United States, meets specified service level and performance requirements, and meets reasonable financial criteria; (4) the Subservicer complies with applicable laws, regulations, orders, mandates, or rulings of any Governmental Authority; (5) the Master Servicer ensures that the terms of the contract of sale include terms not materially less favorable than, similar to, and designed to substantially maintain the effect of, the commercially reasonable pool performance incentives and/or activity-based incentives set forth on Exhibit E hereto; (6) the total number of outstanding Mortgage Loans from the Covered Trusts serviced by any Subservicer, whether as a result of a sale of servicing rights or of a transfer to subservicing, shall not exceed 30,000 at any one time; (7) the Master Servicer covenants to provide Advance financing on commercially reasonable terms or otherwise guarantee such payment, if necessary to ensure the creditworthiness of the Subservicer in connection with Advances; (8) the Master Servicer ensures that the terms of the contract of sale prohibit the Subservicer from subcontracting the servicing, subservicing, selling the servicing rights, or otherwise transferring the servicing rights of any of the High Risk Loans to another party, provided that the Master Servicer is not required to restrict the Subservicer's ability to engage third-party vendors or subcontractors to perform Routinely Outsourced Tasks; (9) the Master Servicer shall enforce its rights under any contract of sale in good faith; (10) the Master Servicer ensures that the terms of the contract of sale include provisions similar to, and that are designed to substantially maintain the effect of, Subparagraphs 5(d) and 5(e); and (11) the Master Servicer obtains whatever powers of attorney may be necessary from the Trustee (which power of attorney shall not be unreasonably withheld) and the Subservicer so that the Master Servicer may cure document exceptions and comply with its obligations pursuant to Paragraph 6. For the avoidance of doubt, (1) nothing in this

Settlement Agreement shall limit in any way the Master Servicer's rights, if any, under the Governing Agreements, to sell servicing rights on current Mortgage Loans; (2) the Master Servicer's sale of servicing rights in conformity with this Subparagraph 5(a)(xi) shall be the equivalent of transferring High Risk Loans to subservicing for the purposes of satisfying the obligation of the Master Servicer under this Paragraph 5 to transfer High Risk Loans; and (3) in any quarter in which the Master Servicer is obligated to transfer High Risk Loans to subservicing, the Master Servicer shall remain obligated to do so unless it sells servicing rights on High Risk Loans pursuant to this Subparagraph 5(a)(xi).

(xii) Nothing in this Settlement Agreement shall limit in any way the Master Servicer's right to sell, transfer, or assign the servicing rights for the loans in the Covered Trusts, including High Risk Loans, to a bank affiliate of the Master Servicer reasonably expected to be capable of performing the obligations of the Master Servicer under this Settlement Agreement and the Governing Agreements, and the provisions of Subparagraph 5(a)(xi) shall not apply to such a sale, transfer, or assignment. Upon the sale, transfer, or assignment of servicing rights for any loans in the Covered Trusts to such a bank affiliate of the Master Servicer, it shall be deemed to be a Master Servicer for purposes of this Settlement Agreement and all provisions of this Settlement Agreement applicable to the Master Servicer shall be fully applicable to it.

(b) Subservicing Implementation for High Risk Loans. Mortgage Loans in groups (i) through (v) below shall be termed "High Risk Loans" for the purposes of this Settlement Agreement. High Risk Loans shall be transferred to subservicing in the following priority, provided that Mortgage Loans from groups (i), (ii), and (iii) below may be grouped together for transfer and treated as a single group for priority purposes:

(i) Mortgage Loans that are 45+ days past due without right party contact (*i.e.*, the Master Servicer has not succeeded in speaking with the borrower about resolution of a delinquency);

(ii) Mortgage Loans that are 60+ days past due and that have been delinquent more than once in any rolling twelve (12) month period;

(iii) Mortgage Loans that are 90+ days past due and have not been in the foreclosure process for more than 90 days and that are not actively performing on trial modification or in the underwriting process of modification;

(iv) Mortgage Loans in the foreclosure process that do not yet have a scheduled sale date; and

(v) Mortgage Loans where the borrower has declared bankruptcy regardless of days past due.

(c) <u>Servicing Improvements for Mortgage Loans ***Not*** in Subservicing</u>. Beginning five (5) months after the Signing Date or on the Approval Date, whichever is later, the servicing improvements set forth below shall apply to all Mortgage Loans that are (i) <u>***not***</u> in subservicing pursuant to Subparagraphs 5(a) and 5(b) or (ii) for which the servicing rights have not been sold to a Subservicer; except that for Mortgage Loans secured by collateral in the state of Florida, the Industry Standard benchmark set forth in Subparagraph 5(c)(i)(B) and any associated Master Servicing Fee Adjustment shall not apply until the Approval Date or until twenty-four (24) months after the Signing Date, whichever is later; provided, however, that the Master Servicer shall have no liability under this Subparagraph 5(c) until such time as eight Subservicers have been approved or been deemed approved by the Trustee.

(i) The Master Servicer shall, on a monthly basis, benchmark its performance against the following industry standards (the "Industry Standards"). For the avoidance of doubt, only one Industry Standard shall apply to each Mortgage Loan:

(A) <u>First-lien Mortgage Loans Only</u>: Delinquency status of borrower at time of referral to the Master Servicer's foreclosure process: 150 days. This benchmark will exclude for each Mortgage Loan all time periods during which the borrower is in bankruptcy.

(B) <u>First-lien Mortgage Loans Only</u>: Time period between referral to the Master Servicer's foreclosure process and foreclosure sale or other liquidation event: The relevant state timeline in the most current (as of the time of each calculation) FHFA referral to foreclosure timelines. This benchmark will exclude for each Mortgage Loan all time periods during which any further obligations with respect to such Excluded Covered Trust under Subparagraph 5(a) or under Subparagraph 5(b) and Subparagraphs 5(c) and 5(f) shall be null and void with respect to such Excluded Covered Trust; Subparagraphs 5(d) and 5(e) shall remain binding upon the Master Servicer and the Trustee as to such Excluded Covered Trust.

6. Cure of Certain Document Exceptions.

(a) Initial Exceptions Report Schedule. Not later than six (6) weeks after the Signing Date, the Master Servicer shall submit to the Trustee an "Initial Exceptions Report Schedule" as provided for below. Subject to Paragraph 12, the Trustee shall use reasonable best efforts to make the Initial Exceptions Report Schedule available on the Trustee's Global Corporate Trust Investor Reporting website (https://www.gctinvestorreporting.bnymellon.com, or any successor thereto) within five (5) business days of its receipt of such report.

(i) The Initial Exceptions Report Schedule shall be prepared in good faith, after reasonable diligence, and shall include each Mortgage Loan in the Covered Trusts (including, for the avoidance of doubt, Mortgage Loans for which the servicing rights are sold following the Signing Date) that, on the Trustee's Loan-Level Exception Reports (as defined below), is subject to both (A) a document exception relating to mortgages coded "photocopy" (CO), "copy with recording information" (CR), "document missing" (DM), "county recorded copy with comments" (IN), "certified copy not recorded" (NR), "original with comments" (OO), "unrecorded original" (OX), "pool review pending" (PR), "contract" (CONT), and "certified copy-issuer" (CI) on the Trustee's Loan-Level Exception Reports, ("Mortgage Exceptions") and (B) a document exception relating to title policies or their legal equivalent coded "document missing" (DM), "title commitment" (CM), or "preliminary title report" (PL) on the Trustee's Loan-Level Exception Reports, ("Title Policy Exceptions"), provided that it shall exclude any such Mortgage Loan registered on the Mortgage Electronic Registration Systems ("MERS"). Mortgage Loans paid in full or liquidated as of the Signing Date shall not be included in the Initial Exceptions Report Schedule.

(ii) The Master Servicer may elect, in its sole discretion, to resolve any Mortgage Exception or Title Policy Exception listed on the Initial Exceptions Report Schedule, in which case the Trustee shall cooperate in good faith with the Master Servicer to resolve any such Mortgage Exception or Title Policy Exception.

(iii) If any Mortgage Loan is Cured (as defined below), the Master Servicer shall promptly provide evidence of such cure to the Trustee.

(iv) "Trustee's Loan-Level Exception Reports" shall mean the loan level exception reports for the Covered Trusts provided by the Trustee to the Master Servicer on April 14, 2011, April 27, 2011, and April 28, 2011.

(b) Monthly Exceptions Report. Beginning the first month following the month in which the Master Servicer submits the Initial Exceptions Report Schedule, the Master Servicer shall provide to the Trustee on the last business day of each month a Monthly Exceptions Report listing all Mortgage Loans on the Initial Exceptions Report Schedule exclusive of any Mortgage Loan that has been Cured and shall separately list all Mortgage Loans that have been Cured.

(i) A Mortgage Loan listed on the Initial Exceptions Report Schedule shall be considered "Cured" for all purposes if (A) either the Mortgage Exception or Title Policy Exception associated with that Mortgage Loan has been resolved, (B) the Mortgage Loan has been paid in full or otherwise satisfied as a first lien, (C) the Mortgage Loan has been liquidated as a first lien on the Mortgaged Property, or (D) pursuant to Subparagraph (6)(c), the Master Servicer has reimbursed the Covered Trust for 100% of any related Realized Loss associated with that Mortgage Loan's liquidation.

(ii) Within fifteen (15) business days of receipt of each Monthly Exceptions Report, the Trustee shall determine whether reasonable evidence has been provided in respect of each Mortgage Loan listed as Cured in such report. In the event that the Trustee determines that a decision by the Master Servicer to list a loan as Cured is not supported by reasonable evidence, after consultation with the Master Servicer regarding the reasonableness of such evidence, the Trustee shall direct the Master Servicer to issue a revised Monthly Exceptions Report. All of the Trustee's reasonable costs and expenses associated with performing its obligations under this Subparagraph 6(b)(ii) that exceed the Trustee's ordinary costs and expenses in connection with its record-keeping duties under the Governing Agreements shall be borne by the Master Servicer.

(iii) The Master Servicer shall continue providing Monthly Exceptions Reports until such time as all Mortgage Loans listed in the Initial Exceptions Report Schedule have been Cured.

(iv) Subject to Paragraph 12, the Trustee shall use reasonable best efforts to make each Monthly Exceptions Report available on its Global Corporate Trust Investor Reporting website (https://www.gctinvestorreporting.bnymellon.com or any successor thereto) within five (5) business days of its receipt of such report.

(c) Remedy for Uncured Exceptions. If, at the time of liquidation, a Mortgage Loan (including, for the avoidance of doubt, Mortgage Loans for which the servicing rights are sold following the Signing Date) is listed on the then-current Monthly Exceptions Report as having an outstanding Mortgage Exception and an outstanding Title Policy Exception, the Master Servicer shall promptly provide notice to the Trustee and shall reimburse the trust that owns the Mortgage Loan for 100% of any Realized Loss (as defined in the applicable Governing Agreements) (i) if the Master Servicer is prevented from foreclosing as a first-lien holder by reason of an outstanding Mortgage Exception and the trust is not made whole by a title policy or equivalent by reason of an outstanding Title Policy Exception within the earlier of (A) twelve (12) months after the denial of such foreclosure or (B) thirty (30) days after the Master Servicer determines that no insurance will be payable or (ii) if a court of competent jurisdiction denies foreclosure as a first-lien holder by reason of an outstanding Mortgage Exception and the trust is not made whole by a title policy or equivalent by reason of an outstanding Title Policy Exception within the earlier of (A) twelve (12) months after the denial of such foreclosure or (B) thirty (30) days after the Master Servicer determines that no insurance will be payable. In the event that the Master Servicer makes the trust whole with respect to any Mortgage Loan pursuant to this Subparagraph 6(c), the Master Servicer shall be entitled to reimbursement for such make-whole payment from any proceeds that it or the trust subsequently receives from any title policy or equivalent with respect to such Mortgage Loan.

(d) If Final Court Approval becomes legally impossible, then at such time, neither the Master Servicer nor the Trustee shall have any further obligations or rights under this Paragraph 6 and the remedy provisions of Subparagraph 6(c) shall be null and void. Likewise, if the trust in which the Mortgage Loan is held is designated an Excluded Covered Trust pursuant to Subparagraph 4(a), then at such time, neither the Master Servicer nor the Trustee shall have any further obligations or rights under this Paragraph 6 and the remedy provisions of Subparagraph 6(c) shall be null and void with respect to such Mortgage Loan. Notwithstanding the foregoing, the Master Servicer may elect in its sole discretion to resolve any Mortgage Exception or Title Policy Exception that is outstanding, in which case the Trustee shall cooperate in good faith with the Master Servicer to resolve any such Mortgage Exception or Title Policy Exception.

7. **Extension of Forbearance; Tolling**. The Parties agree (and the Institutional Investors have so agreed in the Institutional Investor Agreement) that the Agreement of Forbearance entered into by certain of the Parties on December 9, 2010 and extended on January 28, 2011, February 28, 2011, March 31, 2011, April 19, 2011, May 2, 2011, May 9, 2011, May 25, 2011, and June 13, 2011 (the "Forbearance Agreement") is hereby extended and shall remain in effect in all respects until the first to occur of: (a) the Approval Date, (b) a date ninety (90) days after Final Court Approval shall become legally impossible, (c) a date ninety (90) days after the Settlement Agreement has been terminated in accordance with its terms, or (d) a date ninety (90) days after the cure period has expired for any uncured material breach of the Settlement Agreement by Bank of America and Countrywide for which notice has been provided (the cure period being the ninety (90) days following such notice of such breach provided by a party to this Settlement Agreement or the Institutional Investor Agreement). For Covered Trusts not subject to the Forbearance Agreement, all statutes of limitation, repose, or laches related to the Trust Released Claims shall be tolled, for the benefit of the Precluded Persons, to the same extent that they are tolled under the Forbearance Agreement; provided that, except as set forth in this Settlement Agreement, all Parties expressly reserve all rights, arguments, and defenses, including all rights, arguments, and defenses with respect to Investor voting rights and interest requirements under the Governing Agreements. If the Forbearance Agreement is extended pursuant to Subparagraphs 7(b) or 7(c) herein, the Parties agree (and the Institutional Investors have so agreed in the Institutional Investor Agreement) during the first eighty (80) days of such time periods to use their reasonable best efforts to negotiate an alternate settlement of the Trust Released Claims on terms that are economically substantially equivalent to the Settlement and not inconsistent with any final ruling of the Settlement Court or on any appeal therefrom, and (during the same time periods) not to pursue any non-consensual actions or remedies with respect to the Covered Trusts except as the Trustee may be directed by the Settlement Court.

8. **Retraction of Notice**. The Trustee agrees (and the Institutional Investors have so agreed in the Institutional Investor Agreement) that, as of the Approval Date, any notice that may have been contained in the letters sent by and on behalf of certain of the Institutional Investors on June 17, 2010, October 18, 2010, and November 12, 2010 and addressed to the Trustee and/or the Master Servicer, as well as any notice that may have been contained in a letter deemed to have been provided under the Forbearance Agreement and its extensions (the "Letters"), is and shall be rendered null and void. The Letters themselves shall thereafter be rendered inoperative, as if never sent, and shall be deemed for all purposes to be withdrawn with prejudice (the Institutional Investors have so agreed by the Institutional Investor Agreement).

9. **Release**.

(a) Effective as of the Approval Date, except as set forth in Paragraph 10, the Trustee on behalf of itself and all Investors, the Covered Trusts, and/or any Persons claiming by, through, or on behalf of any of the Trustee, the Investors, or the Covered Trusts or under the Governing Agreements (collectively, the Trustee, Investors, Covered Trusts, and such Persons being defined together as the "Precluded Persons"), irrevocably and unconditionally grants a full, final, and complete release, waiver, and discharge of all alleged or actual claims, counterclaims, defenses, rights of setoff, rights of rescission, liens, disputes, liabilities, Losses, debts, costs, expenses, obligations, demands, claims for accountings or audits, alleged Events of Default, damages, rights, and causes of action of any kind or nature whatsoever, whether asserted or unasserted, known or unknown, suspected or unsuspected, fixed or contingent, in contract, tort, or otherwise, secured or unsecured, accrued or unaccrued, whether direct, derivative, or brought in any other capacity that the Precluded Persons may now or may hereafter have against any or all of the Bank of America Parties and/or Countrywide Parties arising out of or relating to (i) the origination, sale, or delivery of Mortgage Loans to the Covered Trusts, including the representations and warranties in connection with the origination, sale, or delivery of Mortgage Loans to the Covered Trusts or any alleged obligation of any Bank of America Party and/or Countrywide Party to repurchase or otherwise compensate the Covered Trusts for any Mortgage

Exhibit 25

Attorney Work Product
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capstone

Countrywide Financial Corp.

Valuation Analysis Prepared at the Request of Counsel

CAPSTONE VALUATION SERVICES, LLC

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I. Summary and Conclusions

Capstone Valuation Services, LLC ("Capstone") was retained by The Bank of New York Mellon ("BNYM" or the "Trustee"), the trustee to Countrywide Financial Sponsored Trusts (the "Trusts"). We have been asked to opine on the maximum economic value that BNYM could recover from Countrywide Financial Corporation ("the Company", "Countrywide" or "CFC") on behalf of the Trusts assuming a hypothetical judgment (the "Judgment") against the Company for certain claims (the "Claims"). We have been asked to prepare our opinion as of March 31, 2011 (the "Valuation Date").

In performing the procedures and analysis contained in this report, we have accepted certain assumptions regarding legal findings for which we express no opinion as they are outside the scope of our engagement. We prepared our analysis with access to the information contained in Exhibit A, as well as information gathered from our discussions with certain senior members of CFC management without independent verification. Our opinion is valid only as of the Valuation Date.

In estimating the economic value available to satisfy the Judgment, we have estimated the value of CFC's assets in conformance with the *fair market value* ("FMV") standard. FMV is defined in IRS Revenue Ruling 59-60 as the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. Based on the analysis performed by Capstone, as described below, it is our opinion that value of the assets of CFC would enable a maximum recovery of no more than $4.8 billion as of the Valuation Date, excluding any liquidation costs required to convert all loans, leases, and other assets to cash.

II. Countrywide's Description and History

Countrywide Financial Corporation is a holding company which was engaged in mortgage lending and other real estate finance-related businesses, including mortgage banking, mortgage warehouse lending, dealing in securities and insurance underwriting through its subsidiaries since 1969.

On July 1, 2008, Countrywide merged into a wholly-owned subsidiary of Bank of America Corporation ("BAC").[1] Under the terms of the agreement, the shareholders of Countrywide received .1822 of a share of BAC stock in exchange for each share of Countrywide. The January 11, 2008 announced deal value of $4.15 billion[2] dropped to $2.52 billion by July 1, 2008 due to a decline in the market value of BAC's common equity between announcement and closing. Immediately following the closing, BAC purchased two pools of mortgage loans for approximately $9.4 billion in cash and promissory notes. These transactions closed on July 1, 2008 and July 3, 2008 in the amounts of $6.9 billion and $2.5 billion respectively.

On July 2, 2008, Countrywide Home Loans, Inc. ("CHL"), a subsidiary of CFC, sold its membership interests in Countrywide GP, LLC and Countrywide LP, LLC in exchange for a $19.7 billion promissory note to NB Holdings, a subsidiary of BAC. CFC also sold a pool of residential mortgages to BAC for slightly less than $10 billion. In addition, there was a transaction in which certain commercial mortgage loans were also sold to BAC for an amount of less than $250 million.

On November 7, 2008 BAC acquired CFC's equity in Effinity Financial Corporation, its subsidiaries, as well as dozens of other direct and indirect subsidiaries of CFC for promissory notes of $3.6 billion and assumption of $16.6 billion of Countrywide public debt which was subsequently retired. In addition, CHL sold to BAC a pool of residential mortgage loans, real property, technology platform, servicing rights and other items for a $1.76 billion promissory note after certain purchase price adjustments.

[1] Bank of America Corporation Form 8-K filed 7/1/2008.
[2] Capital IQ.

III. Key Assumptions and Premise of Recovery

We have been asked to opine on the maximum economic value that BNYM could recover from CFC on behalf of the Trusts assuming a hypothetical Judgment against the Company for the Claims. We have based our analysis on the following assumptions regarding legal findings for which we express no opinion:

- There is no basis on which a court could pierce the corporate veil of CFC relating to its acquisition (the "Acquisition") by and subsequent transactions (the "Subsequent Transactions") with BAC.
- CFC and its subsidiaries were solvent and received reasonably equivalent value for any transfers made or obligations incurred at the time of the Acquisition and Subsequent Transactions.

In order to reach our conclusion, Capstone has analyzed the amount which the Trustee could expect to recover from CFC given a hypothetical Judgment and the subsequent orderly liquidation of CFC's assets. Capstone has not analyzed the probability of a positive outcome for the Trustee in litigating the Claims or attempted to quantify the amount of any potential Judgment. We have assumed that as a result of any Judgment, the Trustee would recover value from CFC as a general unsecured creditor. To quantify the potential recovery, we have assumed that there would be an orderly liquidation of CFC's assets following the hypothetical Judgment and that the Judgment would be sufficient to cause the Trustee to become 99.9% of the total unsecured creditors of CFC.

The calculations contained in this report have been prepared to estimate the Trustee's recovery as an unsecured creditor in the hypothetical orderly liquidation based on the current FMV of CFC's assets.

To quantify the maximum economic value available to the Trustee, the value of CFC's assets has not been reduced for readily foreseeable expenses and losses that would be incurred through the hypothetical orderly liquidation of CFC. Such adjustments include, but are not limited to, legal fees incurred by CFC in defending itself from these claims, run rate expenses for managing its obligations related to discontinued operations, and losses from loans which are forced to be repurchased under other repurchase agreements. The net effect of excluding these expenses and losses most likely overstates the value of CFC's assets at the hypothetical orderly liquidation and, as such, quantifies the maximum potential recovery for the Trustee.

IV. Approaches to Value

Traditionally a valuation is performed by considering three established valuation approaches: (i) market approach, (ii) income approach, and (iii) asset approach.

Market Approach

Guideline Company Method

The Guideline Company method utilizes market multiples derived from the market price of stocks of similar publicly-traded companies. The multiples are reviewed and analyzed for possible adjustment, and then applied to the operating results of the subject company to determine an indication of value for the subject company.

Comparable Transaction Method

The Comparable Transaction method, also known as the merger and acquisition method, estimates the value of the subject company based on multiples paid for a controlling interest in similar businesses, both public and private. Market sales are an indicator of the market value since it is assumed that market transactions are conducted between willing buyers and willing sellers at an arm's length transaction. These multiples are reviewed and analyzed for possible adjustment, and then applied to the operating results of the subject company to determine an indicated value of the subject company.

Income Approach

The Income Approach provides an indication of net present value based upon the anticipated future income streams associated with the target business or grouping of assets, considering the remaining life of the business or assets, the average annual rate of return anticipated, and market rates of return. The projected income streams are discounted along with a terminal value at an appropriate risk rate to express an opinion of the present value of the future benefits of ownership.

Asset Approach

The Asset Approach is a general way of determining a value indication of a business, business ownership interest, or security using one or more methods based on the value of the assets net of liabilities.

Selection of Valuation Approach

Applying the Market Approach to CFC as a consolidated entity does not provide meaningful indications of value because CFC has negative earnings and minimal operating revenues. As of the Valuation Date CFC does not originate, securitize, or service real estate loans, and therefore is not a comparable investment to any of the publicly traded financial services firms that would be used to develop market multiples. Capstone is not aware of any plans for CFC to restart these operations in any capacity or to participate in any activities beyond the contractual obligations related to discontinued operations. Similarly, applying the Income Approach to CFC is not possible due to a lack of cash flow projections. Because CFC has no operations that by themselves are economically viable on a go-forward basis, the value of CFC's assets is best reflected in the FMV of the financial and real assets it owns. Therefore, Capstone utilized the Adjusted Balance Sheet method for determining the total value of CFC's assets.

V. Valuation of CFC's Assets – Adjusted Balance Sheet Method

The Adjusted Balance Sheet method adjusts the book value of all assets (including off-balance-sheet, intangible and contingent items) to their FMV. For purposes of this analysis we have assumed that the value of CFC's assets as stated on the March 31, 2011 balance sheet are reasonable approximations of their FMV as of the Valuation Date. As of the Valuation Date, CFC lacked any operations except for managing its obligations under certain servicing agreements which remained at CFC and certain repurchase agreements for assets sold prior to the Acquisition. CFC management has indicated that there are no intangible assets (including contractual rights, trademarks and trade names, technical knowhow, technology, patents, copyrights, assembled workforce, or customer lists) with any value material to this analysis as of the Valuation Date.

CFC March 31, 2011 Balance Sheet

CFC's balance sheet as of March 31, 2011 consisted of the following line items:[3]

Assets

1. Cash and Cash Equivalents
2. Securities
   - Securities are classified as available for sale and are marked at fair value.
3. Loans and Leases
   - This account consists of repurchased loans, loans owned by consolidated home equity loan securitization trusts, and certain other loans. Repurchased loans are classified as loans held for investment and are carried at cost (the fair value at repurchase) less any allowance included in the allowance for loans and leases. CFC consolidated certain home equity loan securitization trusts, in which it had a controlling financial interest as a Variable Interest Entity ("VIE"). Loans in the VIE are marked at historical cost adjusted for FFIEC charge-offs. In Bank of America Home Loan Servicing ("BAC HLS") role as the servicer, BAC HLS has the authority to manage the loans held in the trusts. In addition, the Company may have a financial interest that could potentially be significant to the trusts through retaining interests in senior or subordinate securities or the trusts' residual interest, providing a guarantee to the trusts, or funding to the trusts during a rapid amortization event. For these reasons, the Corporation is the primary beneficiary of and consolidates these trusts for accounting purposes.
4. Allowance for Loans and Leases
5. Premises and Equipment, net

[3] Support for line item detail for all assets and liabilities are sourced from Countrywide Financial Corporation Selected Consolidated Financial Information (Unaudited) March 31, 2011.

6. Loans Held-for-Sale ("LHFS")
   - The Company holds LHFS at fair value in accordance with ASC 820 Fair Value Measurements and Disclosures (formerly SFAS 157). Portions of the LHFS portfolio secure certain liabilities also held on the balance sheet.
7. Loans Eligible for Repurchase
   - Government insured loans that were sold by CHL but meet certain delinquency thresholds are eligible for repurchase by either the originator or servicer of the loans. ASC 860, Transfers and Servicing, requires that loans that meet this criteria be reflected on the balance sheet of the seller of the loans when the seller of the loans, or its affiliates, has the right but not the obligation to repurchase the loan. If the servicer exercises its option to repurchase the delinquent loans, the current servicer, BAC HLS, will execute the repurchase and reflect the loans on its books.
8. Mortgage Servicing Rights
   - Mortgage servicing rights represent owned servicing rights on a number of HELOC securitizations. The owners of the securities have taken overt action to prohibit CHL from selling the related servicing rights. CHL has mortgage serving rights valued at a loss of $26 million in consumer home equity as of March 31, 2011. BAC HLS subservices these loans on behalf of CHL.
9. Intercompany Receivables
   - The intercompany receivables primarily reflect capital infusions which have not yet been settled in cash.
10. Other Assets

<u>Liabilities</u>

1. Long Term Debt – VIE
   - CFC consolidated certain home equity loan securitization trusts, in which it had a controlling financial interest as a VIE. The outstanding debt of the securitization trusts exceeds the asset value due to FFIEC charge-offs taken against the HELOCs.

2. Debt- FAS 140
   - CHL elected to account for certain debt classified under SFAS 140, which are asset-backed secured financings, under the fair value option. Election of the fair value option allows CFC to reduce the accounting volatility that would otherwise result by accounting for the asset-backed secured financings at historical cost and the corresponding mortgage LHFS securing these financings at fair value.
3. Short Term Borrowings
   - This account offsets the loans eligible for CHS's repurchase asset account. This liability is equivalent to the asset balance and represents the cost that the company would incur if it did repurchase the loans.
4. Representations and Warranties
   - During 2010, BAC agreed to assume the full cost of certain representation and warranty liability associated with certain government sponsored entity portfolios originated by CFC. As of March 31, 2011, substantially all of this provision is associated with the exposure to monoline insurers.
5. Taxes Payable
   - As of March 31, 2011, CFC showed a negative account balance for Taxes Payable. We understand that CFC is generating tax losses, which will result in a reduction of BAC's future tax liability. BAC is contractually obligated to reimburse CFC for BAC's tax savings as a result of CFC's losses.
6. Intercompany Payables
7. Accrued Expenses and Other Liabilities
   - Consists mainly of legal, insurance and other reserves.

Adjustments to March 31, 2011 Balance Sheet

Based on the above, we made the following adjustments to CFC's March 31, 2011 balance sheet, as displayed on Exhibit B:

- Based on discussions with CFC management, we deconsolidated the assets and liabilities of the HELOC VIE and increased book value of equity by $430 million.

These assets are not owned by CFC but are consolidated due to possible liabilities related to their performance.

- Under ASC 860, CFC is required to show certain loans eligible for repurchase on its balance sheet along with an offsetting liability. CFC does not own these assets, nor is the offsetting liability outstanding. As such, we have adjusted the balance sheet to remove the impact of this item under ASC 860.
- Explanation 4 to CFC March 31, 2011 balance sheet indicates FAS 140 debt of $726 million is marked at fair value, and has a principal balance of $1.3 billion. Capstone has adjusted the Debt to its principal balance and reduced retained earnings by $574 million. Capstone has also assumed that the whole amount of $1.3 billion is secured by the assets of CFC and its subsidiaries.

Adjusted Balance Sheet Indication of Value and Amount Available for Recovery

The most economically advantageous recovery for unsecured creditors would be through an orderly liquidation of CFC's assets due to the lack of any foreseeable revenues in future years to offset expenses and expected losses. Based on the adjusted book value of CFC's assets plus taxes payable, the FMV of CFC's assets are $6.1 billion excluding any liquidation costs required to convert all loans, leases, and other assets to cash. From that total value, we have deducted the principal balance of the Pre-petition secured claims in the amount of $1.3 billion. The residual value of CFC's assets would be $4.8 billion as shown in Exhibit C. This analysis assumes that secured creditors would be repaid in full by the Company.

VI. Ability to Recover Economic Value

Based on the assumptions contained in this report, it is our opinion that BNYM, acting on behalf of the Trusts as Trustee, would recover no more than $4.8 billion through litigating the Claims and collecting any hypothetical Judgment from CFC as of the Valuation Date. This amount reflects the maximum recovery, as is does not take into consideration any litigation costs or other losses accruing to CFC between March 31, 2011 and the date of any future hypothetical recovery. It is likely that the value of CFC's assets decline following the Valuation Date based on the cash burn of the Company in the fiscal year 2010 and the first quarter of 2011.

Respectfully Submitted,

Bruce B. Bingham, FASA
Executive Director, Capstone Valuation Services, LLC
6 June 2011

Exhibit A

Countrywide Financial Corporation
Documents Considered

Bank of America 8-K Filed January 11, 2008
Bank of America 8-K Filed April 21, 2008
Bank of America 8-K Filed May 29, 2008
Bank of America 8-K Filed July 1, 2008
Bank of America 8-K Filed July 8, 2008
Bank of America 8-K Filed July 21, 2008
Bank of America 8-K Filed October 6, 2008
Bank of America 8-K Filed November 10, 2008
Bank of America 8-K Filed November 12, 2008
Bank of America 8-K Filed March 3, 2009
Countrywide Financial Corporation 2004 10-K
Countrywide Financial Corporation 2005 10-K
Countrywide Financial Corporation 2006 10-K
Countrywide Financial Corporation 2007 10-K
Countrywide Financial Corporation 10-Q as of June 30, 2008
Countrywide Financial Corporation selected consolidated financial information (unaudited) as of December 31, 2010
Countrywide Financial Corporation selected consolidated financial information (unaudited) as of March 31, 2011
Countrywide Home Loan selected consolidated financial information (unaudited) as of December 31, 2010
Countrywide Home Loan selected financial information (unaudited) as of March 31, 2011
Countrywide Financial Corporation Organization Chart as of March 2008
BAC/CFC Organization Chart as of July 2008
BAC/CFC Organization Chart as of October 2008
BAC/CFC Organization Chart as of January 2011
Master Mortgage Loan Purchase and Subservicing Agreement between CHL and NB Holdings Corporation dated July 1, 2008
Purchase and Sale Agreement between CHL & NB Holdings Corporation dated July 2,
Asset Purchase Agreement (APA) between BAC & CHL dated November 7, 2008
Stock Purchase Agreement (SPA) between BAC & CFC dated November 7, 2008
Amendment #1 to the APA between BAC and CHL dated January 5, 2009
Amendment #1 to the SPA between BAC and CFC dated January 5, 2009
Supplemental Agreement #1 to APA dated March 6, 2009
Supplemental Agreement #1 to SPA dated March 6, 2009
CHL Resolution dated July 1, 2008
CFC Resolution dated October 3, 2008
CHL Resolution dated October 14, 2008
CHL Resolution Approval - Asset Purchase Agreement dated October 14, 2008
Bank of America 10-Q dated September 30, 2008

Exhibit B

Countrywide Financial Corporation
Consolidated Balance Sheet

($ in millions)		3/31/2011		Adjustments		Adjusted 3/31/2011
Assets						
Cash and Cash Equivalents	$	782	$	-	$	782
Securities		305		-		305
Loans and Leases		4,535		(3,370) (a)		1,165
Allowance for Loans and Leases		(339)		308 (a)		(31)
Loans and Leases, net of Allowance		4,196		(3,062)		1,134
Premises and Equipment, net		10		-		10
Loans Held-for-Sale		803		-		803
Loans Eligible for Repurchase		2,871		(2,871) (b)		-
Mortgage Servicing Rights		(26)		-		(26)
Intercompany Receivables		1,516		-		1,516
Other Assets		216		-		216
Total Assets	$	10,673	$	(5,933)	$	4,740
Liabilities						
Short Term Borrowings	$	2,871	$	(2,871) (b)	$	-
Debt -FAS 140		726		574 (c)		1,300
Representations and Warranties		2,887		-		2,887
Long Term Debt -VIE		3,492		(3,492) (a)		-
Taxes Payable		(1,359)		- (d)		(1,359)
Intercompany Payables		347		-		347
Accrued Expenses and Other Liabilities		2,045		-		2,045
Total Liabilities	$	11,009	$	(5,789)	$	5,220
Shareholders' Equity						
Capital	$	6,241	$	-	$	6,241
Other Comprehensive Income (Loss)	$	20		-		20
Retained Earnings (Deficit)		(6,597)		(144) (e)		(6,741)
Total Shareholders' Equity	$	(336)	$	(144)	$	(480)
Total Liabilities and Shareholders Equity	$	10,673	$	(5,933)	$	4,740

(a) Based on discussions with CFC management, Capstone has deconsolidated the assets and liabilities of the HELOC VIE and increased retained earnings by $430.

(b) Under ASC 860, CFC is required to show certain loans eligible for repurchase on its balance sheet along with an offsetting liability. CFC does not own these assets, nor is the offsetting liability outstanding. As such, we have adjusted the balance sheet to remove the impact of ASC 860.

(c) Explanation 4 to CFC March 31, 2011 balance sheet indicates FAS 140 debt of $726 million is marked at fair value, and has a principal balance of $1.3 billion. Capstone has adjusted the debt to its principal balance and reduced retained earnings by $574 million.

(d) Negative account balance reflects reimbursement by BAC for future tax savings and is treated as an asset for purposes of this analysis.

(e) Adjustment of $144 million reflects the combined effect on book value of equity of footnotes (a) and (c).

Exhibit C

Countrywide Financial Corporation
Hypothetical Trustee Recovery from Litigating Claims

($ in millions)

FMV of Countrywide Assets at Valuation Date (rounded)	$	6,100	(a)
Secured Claims		1,300	(b)
FMV of Assets for Unsecured Creditors		4,800	
Trustee Participation as % of Unsecured Class		99.9%	(c)
Maximum Recovery to Trustee (rounded)	$	4,800	(d)

(a) FMV of CFC assets as of the Valuation Date assumed equal to adjusted book value as shown on March 31, 2011 balance sheet plus taxes payable.

(b) Principal balance of FAS 140 debt assumed to be a secured claim.

(c) Assumes Judgment is sufficient to cause the trustee to participate as 99.9% of unsecured creditors class.

(d) Assumes Judgment recovery is immediate and does not reflect any litigation costs or other losses accruing to CFC in the interim. CFC paid $720 million in personnel, professional fees, insurance, and other expenses in 2010. Also, this recovery does not reflect the present value of any sums received in the future.

Exhibit 26

Jason H. P. Kravitt
Sean T. Scott
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606

Matthew D. Ingber
Mayer Brown LLP
1675 Broadway
New York, NY 10019-5820

Dear Gentlemen:

You have asked for my opinion in connection with a potential settlement (the "Potential Settlement") involving securitization trusts (the "Trusts") for which Mayer Brown's client, The Bank of New York Mellon ("BNY Mellon" or the "Trustee") is trustee or indenture trustee. In particular, I have been asked to consider two legal theories (veil piercing and successor liability) under which the Trustee could potentially seek to recover money from Bank of America Corporation ("BAC") if certain BAC subsidiaries were liable for damages to the Trusts and unable to meet their respective obligations. In particular, you have asked me to focus on certain business combination transactions between Countrywide Financial Corporation ("CFC"), Countrywide Home Loans, Inc. ("CHL") and Countrywide Home Loans Servicing ("CHLS") on the one hand, and BAC and its subsidiary, NB Holdings Corporation ("NB Holdings") on the other, in 2008, and whether such transactions provide a basis for the Trustee to recover from BAC under either a veil piercing or successor liability theory. Below are my general views of how those doctrines likely would come into play.

This memo describes in general terms the law of veil-piercing and successor liability in Delaware, New York and California (as described in Appendix A, any of these could apply) and describes how these laws may apply to a potential case against BAC. This does not constitute legal advice, but gives my general opinions as an academic interested in corporate law and is limited by the available factual record and certain assumptions I make. Both veil piercing and successor liability are fact-intensive legal theories; any ultimate judicial determination may turn on documents or testimony that would be produced at trial that I haven't seen. Much of my understanding comes from review of public filings and transaction documents as well as from discussions with BAC and legacy Countrywide personnel. I have not independently verified the accuracy of any facts discussed or assumed. This opinion is intended solely for your information, and I make no recommendation regarding the Settlement to either Mayer Brown or the Trustee.

Rob Daines

Robert Daines
Pritkzer Professor of Law and Business
Stanford Law School

Contents

SUMMARY

Based on my understanding of the facts, and as further explained below:

- A veil piercing claim would likely fail.
  - First, from a policy perspective, it is generally not a good idea to pierce the veil for contractual claims (like a breach of warranty claim against CHL). To be blunt, the mere fact that creditors, including judgment creditors, will otherwise not be paid in full is no reason to pierce the veil. If investors in the trust certificates (the "Investors") agreed to bear the risk that Countrywide would someday fail, they presumably charged for this risk.
  - The mere fact that BAC bought Countrywide is no reason to pay creditors with BAC's assets that they were not relying on when they invested. Unless the value of Countrywide's assets was materially reduced in the Transactions (as defined below), Investors were not harmed by either the Transactions or the Acquisition of Countrywide and there is no reason to overturn the original bargain.
  - The general presumption against veil piercing for sophisticated contract creditors (like Investors) is a foundational legal rule. It is in fact extremely valuable and one of the few things on which commentators almost universally agree. To pierce the corporate veil simply because creditors would otherwise lose money would destroy this valuable and fundamental rule of corporate law.
  - Moreover, most veil piercing claims fail in the face of proper observance of corporate formalities. Based on my discussion with BAC management and review of corporate disclosures, it appears they did take steps to ensure that formalities were observed sufficiently to make a veil piercing claim difficult, as would be expected.
  - Thus, BAC very likely has a valid defense to claims that it lacked corporate separateness and it is highly unlikely that Investors' losses would qualify as injustice or the result of BAC's actions.

- To succeed on a piercing claim, the Trustee would probably need to show that BAC siphoned off value from Countrywide by materially underpaying for the assets it purchased in the Transactions. If it could show this, then both precedent and policy would support veil-piercing (as well as other claims against BAC, including successor liability and fraudulent conveyance).
  - Based on my understanding of the facts, however, this may not be easy to show. As discussed later in this memorandum:
    - According to BAC representatives, the pricing for the Transactions was based on valuations initially done in connection with the Acquisition, which was an arm's-length transaction between two unrelated parties. If this is true, it may be difficult for the Trustee to prove that BAC gave less than fair consideration in the Transactions.

        - There was a plausible business purpose for the Transactions.
        - I have seen no evidence to support a claim of asset stripping.

- The outcome of a successor liability claim is uncertain and would depend on where the case was brought, whether BAC underpaid in the Transactions, and other factual findings. Based on the facts as I understand them, BAC has a reasonable argument that any successor liability claim would be defeated.
    - Policy arguments seem to favor BAC and to argue against a finding of successor liability. Moreover, if BAC <u>did</u> pay a fair price for the assets, there is little reason for a court to find successor liability. Indeed doing so would undermine valuable corporate law rules.
        - In general, buyers do not (and should not) become liable for the seller's debts, especially if the seller's creditors were sophisticated and informed about the risks they faced at the time of their investment.
        - There are exceptions to this general policy, but they are aimed at deterring fraud and protecting creditors' reasonable expectations about the risks they took.
        - If BAC paid a fair price for the assets, the sales did not hurt Investors and there would be no reason to hold BAC entities liable for losses that Investors agreed to bear. Thus, absent potential fraudulent underpayment, there would be little policy justification for invoking successor liability based on the Transactions.
        - A finding of successor liability in this case would effectively grant Investors a windfall based on BAC's acquisition. If Investors knowingly accepted Countrywide credit risk, they should have access to Countrywide assets and no more. The mere fact that BAC subsequently bought Countrywide, after the alleged contractual breaches, is no reason to impose additional financial cost on BAC and would not plausibly deter the losses the Investors now face.
    - If the Trustee can show that BAC paid an unfair price that materially reduced the assets available to satisfy Investor claims, successor liability (or a similar theory) could well succeed.
    - Nonetheless, as a matter of practice, successor liability claims are rarely successful.
    - It appears that BAC likely has valid defenses to successor liability claims (especially under Delaware law).
    - The more difficult question is whether BAC would be liable under the de facto merger doctrine. Though I think the economic arguments and bulk of the case law favor BAC, I cannot ignore the stream of case law in New York and elsewhere that is something of a wildcard -- the relatively wooden application of which could theoretically hold BAC liable. The recent MBIA decision in New York is an example of this. A simple reading of some New York cases may lead to a conclusion that

BAC would be liable under a de facto merger theory. But as I conclude below, I do not believe that New York law will apply. Moreover, while the ultimate outcome is a difficult question, turning on unknown facts and developing law, in the end, I think a successor liability case would be difficult to win if a court concluded that BAC paid a fair price in the Transactions. At the very least, as discussed in more detail below, BAC has a reasonable argument that a successor liability claim would be defeated.

BACKGROUND

LEGACY BANK OF AMERICA

BAC is a Delaware corporation, a bank holding company and a financial holding company, with its principal executive offices in Charlotte, NC. Prior to its acquisition of Countrywide, BAC had approximately $1.7 trillion in assets, and employed approximately 210,000 people across three primary business segments, (i) Global Consumer and Small Business Banking, (ii) Global Corporate and Investment Banking, and (iii) Global Wealth and Investment Management.[1]

LEGACY COUNTRYWIDE

Prior to the Acquisition, (as defined below) Countrywide was engaged in real estate finance-related businesses, including mortgage banking, banking and mortgage warehouse lending, dealing in securities and insurance underwriting. As of June 30, 2008, Countrywide had assets with a book value of $172 billion, and employed approximately 44,000 people.

COUNTRYWIDE ACQUISITION

On January 11, 2008, BAC announced the acquisition of Countrywide for approximately $4 billion in an all stock transaction. On July 1, 2008, in accordance with the terms of the merger, Countrywide shareholders received .1822 of a share of Bank of America in exchange for each share of Countrywide stock (the "Acquisition"). BAC also cancelled $2 billion of Countrywide's Series B convertible preferred shares that it held prior to the Acquisition. BAC's initial purchase price allocation indicated that the fair value of net assets acquired was negative $0.2 billion, resulting in associated goodwill of approximately $4.4 billion.[2] Over the next few months, BAC and Countrywide entities entered into several transactions, which, I understand from discussions with BAC personnel, were anticipated as of the merger date and which served to integrate Countrywide's operations with those of BAC (the "Transactions").

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[1] Bank of America Corporation, Form 10-K for the year ended December 31, 2007.

[2] Bank of America Corporation, Form 10-K for the year ended December 31, 2008, p. 125.

Analysis and Understanding of Facts

I have reviewed certain documents, public filings, and have spoken with Bank of America management familiar with the Transactions.[3] This section describes my understanding of the details surrounding the Acquisition and Transactions, as well as the operations, corporate structure and governance of the Countrywide entities.

After the announcement of the Acquisition in January of 2008, BAC determined that it would integrate Countrywide's operations with its existing operations, and determined that certain operations could be integrated immediately after the Acquisition, while others required third-party consent from regulators and contractual parties. To accomplish this, it planned a series of transactions:

- Shortly after the merger closed, CHL would sell to NB Holdings:
    a. two pools of mortgage loans (the "Initial Loan Sales"); and
    b. the vast majority of Countrywide's mortgage servicing rights and related assets.

These transactions did occur shortly following the merger and are referred to as the "LD-2 Transactions" (for Legal Day 2, or day 2 following the Acquisition's legal closing).

- Following the necessary consents and approvals, BAC would buy:
    a. substantially all of CHL's remaining assets, including its mortgage origination operations (the "Asset Purchase Agreement"); and
    b. the stock of significant CFC subsidiaries, including its interest in Countrywide Bank, FSB (the "Stock Purchase Agreement"). These transactions occurred on November 7, 2008, 100 days following the merger, and are referred to as the "LD-100 Transactions."

The LD-2 Transactions

The Initial Loan Sales

The Initial Loan Sales consisted of the transfers of two pools of mortgage loans from CHL to NB Holdings in exchange for approximately $9.4 billion in cash and promissory notes. These transfers were made pursuant to the Master Mortgage Loan Purchase and Subservicing Agreement, which was executed on July 1, 2008. Deal No. 2008-1 was effectuated through a purchase confirmation and was closed on July 1, 2008 for approximately $6.9 billion.[4] Deal No. 2008-002 was also effectuated through a purchase confirmation and closed on July 3, 2008 for approximately $2.5 billion.[5]

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[3] Appendix B contains a list of documents I have received in connection with this engagement. I have also relied on certain assertions made by BAC management, although I have not verified those assertions.
[4] BACMBIA-C0000161250-1257.
[5] BACMBIA-C0000161224-1231.

July 2, 2008 - LD-2

On July 2, 2008, NB Holdings entered into the Purchase and Sale Agreement with CHL whereby NB Holdings acquired CHL's membership interests in Countrywide GP, LLC and Countrywide LP, LLC, whose sole assets were equity interests in Countrywide Home Loans Servicing LP ("Servicing LP"). Servicing LP was the operating entity which serviced the vast majority of residential mortgage loans for the Countrywide entities. As consideration for this valuable asset, NB Holdings issued a promissory note to CHL for approximately $19.7 billion. My understanding is that the primary assets of Servicing LP were mortgage servicing rights and reimbursable servicing advances.[6]

In addition to the LD-2 Transactions, on July 3, 2008, Countrywide Commercial Real Estate Finance ("CCREF") sold a pool of commercial real estate loans to NB Holdings for approximately $237 million.[7]

Valuation

In my conversations with BAC representatives, they said that the valuation used to determine the consideration for the Acquisition was also used to determine the consideration for the Initial Loan Sales and LD-2. This is supported by Countrywide's Form 10-Q for the quarter ended June 30, 2008.

Note 2 to the financial statements described the Acquisition as well as several of the Transactions. The note stated, "The Company [CFC] expects to record no material gain or loss on these transactions after giving effect to purchase price adjustments." Under purchase price accounting, all assets and liabilities of CFC would be adjusted to fair value in connection with the Acquisition. Since the Transactions took place immediately subsequent to the Acquisition, and CFC did not record any material gain or loss in connection with the Transactions, it may be difficult for the Trustee or some other potential plaintiff to demonstrate that the consideration paid in connection with the Initial Loan Sales and LD-2 did not represent the fair value of the net assets transferred.

Approval and Execution

From what I have seen, it appears that the Initial Loan Sales and LD-2 were documented, approved, and executed properly. Both sales were approved by the Board of Directors of CHL through a unanimous written consent dated July 1, 2008, and executed by Andrew Gissinger, III. Mr. Gissinger was a legacy Countrywide employee, served as President, Chief Operating Officer and Head of Mortgage Lending for Countrywide. It is my understanding that Mr. Gissinger stayed on with Countrywide for a short time after the Acquisition. The Purchase and Sale Agreement and the Master Mortgage Loan Purchase and Subservicing Agreement were each executed by Gissinger on behalf of CHL, and by Joe Price, Chief Financial Officer, on behalf of NB Holdings. The purchase confirmation for Deal No. 2008-1 was executed by Mr. Gissinger on behalf of CHL and by Mr. Price on behalf of NB Holdings. The purchase confirmation for

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[6] Countrywide Financial Corporation, Form 10-Q for June 30, 2008, p. 6.

[7] BACMBIA-C0000161613-1628.

Deal No. 2008-2 was executed by Monica Brudenell, Senior Vice President, on behalf of CHL and Jeffrey Brown, Treasurer, on behalf of NB Holdings.

THE LD-100 TRANSACTIONS

On November 7, 2008, BAC entered into a series of transactions with Countrywide entities, including the Stock Purchase Agreement and the Asset Purchase Agreement. Through the Stock Purchase Agreement and the Asset Purchase Agreement, BAC entities purchased substantially all of the remaining operating assets of legacy Countrywide, including its mortgage origination business and Countrywide Bank, FSB.

In connection with the Stock Purchase Agreement, BAC issued a promissory note to CFC for approximately $3.6 billion and assumed approximately $16.6 billion in CFC's public debt in exchange for CFC's equity interest in Effinity Financial Corporation ("Effinity"), its subsidiaries, as well as dozens of other direct and indirect subsidiaries of CFC.

In connection with the Asset Purchase Agreement, BAC issued a promissory note to CHL for approximately $1.76 billion in exchange for all assets utilized in CHL's mortgage business, including, but not limited to, (i) a pool of residential mortgages, (ii) remaining mortgage servicing rights, (iii) securities, (iv) real estate acquired through foreclosure on mortgage loans, (v) the technology platform, (vi) furniture fixtures and equipment, (vii) third party contract rights, (viii) real property owned by CHL, and (ix) mortgage servicing advance receivables.[8]

Valuation

BAC managers informed me that the price for the LD-100 purchases was determined using the same methods and assumptions they used to value Countrywide at the time of BAC's initial acquisition, with the exception of a change to account for the interest rate environment. It is also my understanding that no material gain or loss was recorded in connection with LD-100. While I cannot verify these claims, if BAC essentially purchased all of Countrywide's assets at prices largely based on the original third-party negotiations, then BAC may have overpaid for these assets given the severe deterioration in the markets between July and November of 2008.

While the mortgage industry was already in a state of decline at the time of the Acquisition, the mortgage industry and financial markets nearly collapsed between the Acquisition in July and LD-100 (in November). Specifically, on September 6, 2008, the U.S. Treasury placed government sponsored enterprises Fannie Mae and Freddie Mac into conservatorship. On September 15, 2008, Lehman Brothers filed for bankruptcy protection, becoming the largest bankruptcy in U.S. history with $600 billion in assets. On September 25, 2008, in the largest bank failure in U.S. history, Washington Mutual was seized by its regulator, the Office of Thrift Supervision, and the FDIC was appointed receiver. Any one of these events by itself could have had a significant negative impact on the mortgage industry, and therefore on valuations of mortgage industry assets and participants. In combination, the effects were devastating.

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[8] Asset Purchase Agreement, Schedule 2.2.

Therefore, if BAC bought the stock and assets in November at prices that roughly approximate a value set in third party negotiations in July, this would suggest that BAC over-paid (rather than underpaid) for those stock and assets at LD-100.

Approval and Execution

The Asset Purchase Agreement was approved by the sole stockholder of CHL via written consent, executed on October 14, 2008 by Anne McCallion, Chief Financial Officer. I understand that Ms. McCallion was a legacy Countrywide finance executive and remained with Countrywide for approximately six months after the Acquisition. Further, the Asset Purchase Agreement was approved by the Board of Directors of CHL via unanimous written consent dated October 14, 2008, and executed by Board members Jack Schakett and Kevin Bartlett, each of whom were legacy Countrywide senior executives. The Asset Purchase Agreement was executed by Ms. McCallion on behalf of CHL and by Mr. Price on behalf of BAC.

The Stock Purchase Agreement was approved by the Board of Directors of CFC via unanimous written consent dated October 3, 2008 by Helga Houston, Greg Hobby, and Helen Eggers. I understand that all three directors were legacy BAC employees. The Stock Purchase Agreement was executed by Ms. McCallion on behalf of CFC and by Mr. Price on behalf of BAC.

OTHER INTERCOMPANY ACTIVITY POST ACQUISITION

There is other evidence that would appear to contradict any potential claim of asset stripping on the part of BAC.

First, in connection with the Transactions, BAC and NB Holdings issued numerous promissory notes to CFC and CHL in an aggregate amount exceeding $30 billion. Based on discussions with Bank of America management, I understand that all of these promissory notes were settled, either in cash or as part of an offset for items paid by BAC and or NB Holdings on behalf of Countrywide. While I have not had the opportunity to independently verify this through a review of BAC's books and records, public filings are consistent with this assertion.

Second, based on my discussions with Bank of America management, no dividends have been paid up to any BAC entities from the Countrywide entities. Again, while I have not been able to verify this in BAC's books and records, this assertion is consistent with the standalone Countrywide financial statements I have reviewed.

Third, BAC has made capital contributions exceeding $3 billion since the Acquisition. If an entity were engaged in fraudulent asset stripping, I would expect to see quite a different set of facts.

Fourth, intercompany transactions appear to be fairly limited, and ostensibly seem to favor Countrywide in their application. BAC utilizes certain Countrywide employees, and is charged for their services, but because CFC is in "wind down," BAC does not allocate corporate expenses to CFC or its subsidiaries. This practice is consistent with how BAC treats other similarly situated subsidiaries.

CORPORATE STRUCTURE AND GOVERNANCE OF COUNTRYWIDE

BAC may well have had legitimate business purposes for integrating the mortgage business of Countrywide, including its servicing operations, with BAC's existing operations. BAC managers assert that the Transactions made business sense given: (i) BAC's lower cost of funding, (ii) management experience, (iii) tax-related issues, and (iv) efficiencies.

BAC and the Countrywide entities appear to have observed corporate formalities. Based on my discussions with BAC management, I understand that CFC and CHL had their own officers and directors, held regular Board meetings and maintained minutes documenting those meetings.

Since the date of the Acquisition, CFC and its subsidiaries, including CHL, have maintained separate accounting systems, and have produced balance sheet and profit and loss statements at the subsidiary level.

Since the Acquisition, CFC and its subsidiaries have maintained separate bank accounts from BAC and its other subsidiaries.

At the time of the Acquisition, Countrywide employed approximately 44,000 people. Approximately 20,000 of those employees have remained on with BAC in some capacity. Countrywide entities currently employ approximately 600 employees, primarily dedicated to resolving representation and warranty claims. After the Acquisition, BAC's own management team began to run the combined operations.

Continuation of Countrywide's Business

With the exception of Balboa Insurance, BAC has discontinued use of Countrywide's trade names. Further, Countrywide's mortgage origination business had declined dramatically as of the Acquisition date. Further, BAC announced that it would not originate "pay option arm mortgages," which represented a significant percentage of loans originated by Countrywide.

In late 2007, Countrywide discontinued lending and sales of subprime mortgage loans, and prior to June 30, 2008, Countrywide discontinued lending and sales of home equity loans, except for additional draws under existing loan agreements and securitizations. Following is a comparison of revenue from Countrywide's Loan Production segment for the first two quarters of 2007 compared to 2008.

- Three months ended March 31, 2007 - $1.2 billion
- Three months ended June 30, 2007 - $1.5 billion
- Three months ended March 31, 2008 - $1.1 billion
- Three months ended June 30, 2008 - $762 million

The volume of loans sold was also in decline:

- Three months ended June 30, 2007 - $109 billion
- Three months ended June 30, 2008 - $57 billion

THE LEGAL RISKS: WHEN SHOULD BAC BE LIABLE FOR THE DEBTS OF A SUBSIDIARY?

THE BENEFITS OF LIMITED LIABILITY

As a general matter, a firm (including a holding company or wholly-owned subsidiary) is liable for its own debts and no others. There are good reasons for this rule, even when it results in unpaid creditors and even when the firm's shareholders could afford to pay the debt themselves.

First, this rule allows individuals and firms to limit the amount of capital they will risk in any one venture: if a venture in Firm A goes bad, creditors will not be able to dismantle a successful Firm B or claim all of the owner's assets. This encourages firms to make the risky investments that are necessary for economic growth, which benefits shareholders and society.

Second, this rule makes it easier for creditors to monitor the creditworthiness of the debtor. Creditors of Subsidiary B need only keep track of Subsidiary B's activities and financial condition, and do not need to worry that creditors from Subsidiary A will swoop in and lay a claim to Subsidiary B assets on which they had been relying. Thus, they can save money by effectively ignoring Subsidiary A's assets, liabilities and activities as well as the assets of Subsidiary A creditors. Creditors pass these cost savings on to borrowers and shareholders in the form of a lower interest rate, better terms or more available credit.

Commentators point out a host of other potential benefits arising from limited liability, including vibrant and accurate capital markets, and offer enthusiastic praise, calling limited liability "the greatest single discovery of modern times."[9] Thus, there is a robust presumption against piercing the corporate veil or holding a successor liable for another firm's debts. This presumption is so important that it has been widely recognized as "the essential role of organizational law."[10] Refusing to pierce the corporate veil is simply the court's way of enforcing the terms of the original bargain between a corporation and its voluntary creditors.

WHEN TO IGNORE LIMITED LIABILITY

When should we ignore this general rule against veil piercing or successor liability? For contractual creditors, the answer is: not often. Contractual creditors are free to protect themselves from the risk of loss by insisting on additional protections (guarantees, security interests, or restrictive covenants), charging higher prices to compensate for this risk or by refusing to deal with the firm. Thus, absent some form of misrepresentation or opportunism that defeats a creditor's reasonable expectations about the assets available to satisfy a debt, there is relatively little reason to overturn the default rule.[11]

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[9] NICHOLAS MURRAY BUTLER, WHY SHOULD WE CHANGE OUR FORM OF GOVERNMENT 82 (1912).

[10] These arguments are outlined in Henry Hansmann and Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. J. 387 (2000).

[11] By contrast, tort victims (involuntary creditors) do not do business with the firm voluntarily and cannot protect themselves against the risk of non-payment that comes from limited liability. Thus, there is a much stronger public

Because the Trustee's potential claims against Countrywide are contract claims, there is a relatively weak policy justification for piercing the veil. The Investors voluntarily assumed a risk that Countrywide would be unable to meet its obligations if it breached any representations and warranties or other contractual terms, and they could take that risk into account and charge accordingly. When a contractual creditor is misled about a corporation's financial condition, this argument is less persuasive. However, in this case, misstatements to Investors, if any, would have been made before BAC's involvement. Therefore, from a pure policy perspective, there is generally no reason to pierce the corporate veil merely because CHL is a BAC subsidiary, even if it is insolvent and BAC is not.[12] I think the cases are generally consistent with this reasoning; a veil-piercing claim is highly unlikely to succeed based simply on BAC's ownership of Countrywide.

This analysis would change if it could be shown that Bank of America skimmed the cream off Countrywide and left Investors with the dregs, thus siphoning off value for itself. If BAC bought substantially all of Countrywide's assets at an unfair price, this would obviously rob Countrywide's creditors of the protection they bargained for. In such circumstances, there would be sound legal and economic reasons to hold BAC liable under veil-piercing, successor liability, or similar theories.

Note, though, that there is a difference between value-reducing asset stripping, which unexpectedly increases investors' credit risks by diluting the assets to which they had claim, and either (a) asset sales - for which a buyer pays a fair value and leaves creditors unharmed; or (b) careful legal planning and acquisition structuring, such as a buyer who takes steps to limit its exposure to creditor claims by, for example, purchasing the assets with a corporation instead of a general partnership. The Trustee or other litigants would likely have to attack the value paid by BAC in the LD-2 or LD-100 Transactions under any asset-stripping theory, and show that the consideration was materially less than fair value.

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interest in veil piercing or finding successor liability if that is necessary to protect involuntary creditors, although even in such circumstances, the presumption against veil piercing is robust.

[12] This is generally true for contract creditors; I am excluding, as beyond the scope, any arguments unique to the housing crisis or systemic financial risk.

VEIL PIERCING

Veil piercing law is notoriously difficult to characterize and has been described as "a doctrinal mess,"[13] perhaps in part because of its rare and relatively unpredictable application. Prominent corporate law scholars (and now Federal Judge) Frank Easterbrook and (former Dean of Chicago Law School) Daniel Fischel famously observed that:

> '[p]iercing' seems to happen freakishly. Like lightening, it is rare, severe and unprincipled. There is consensus that the whole area of limited liability, and conversely of piercing the corporate veil, is among the most confusing in corporate law.[14]

Even the doctrine's most ardent defenders say it is "a scourge on corporate law,"[15] "troublesome and mysterious" and "applied by courts in an extremely discretionary manner, in accordance with the individual consciences of judges[.]"[16]

The test for this rare exception to the general rule of limited liability is deceptively simple. The common formulation is that courts will hold a shareholder liable for the corporation's debts when: (1) the debtor corporation is completely dominated or controlled by its shareholder; and (2) when failing to pierce would result in a fraud, injustice or a wrong. This rule is easy to state, but hard to apply:

(1) *Domination/control*: It is difficult to know what factors a court will consider important in determining whether a parent dominated and controlled a wholly owned subsidiary. Courts look to a long list of factors – as many as nineteen – to answer this question. Frustratingly, none of these factors is dispositive and there is little guidance about which factor is important, necessary, sufficient or frankly even relevant. Nevertheless, there are some general patterns which I describe below.

(2) *Fraud/Injustice/Wrong*: What counts as a fraud or injustice? This is another wildcard and often differs from judge to judge; what one considers injustice, another may find a bargained-for risk. Generally, however, the injustice or wrong must be significant, even if it does not rise to the level of fraud.

Finally, courts sometimes vacillate about whether <u>both</u> domination and fraud/wrong are required or whether fraud alone is enough.

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[13] Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 84 (2010).

[14] Frank H. Easterbrook and Daniel Fischel, *Limited Liability and the Corporation*, 52 U. CHI. LAW REV. 89, 89 (1985).

[15] Oh, *supra* at 81.

[16] STEPHEN PRESSER, PIERCING THE CORPORATE VEIL §1.1 (2010).

Successful veil piercing claims are relatively uncommon. For instance, one study of reported cases found that veil piercing succeeded in only 8% of cases where, as seems likely here, the parent did not make any misrepresentations.[17] Moreover, courts are reportedly less likely to pierce the veil when the shareholder is a corporation than they are when the shareholder is a person.

Below, I describe generally the law of Delaware, New York and California.

PIERCING THE CORPORATE VEIL IN DELAWARE

Although Delaware is recognized as the center of corporate law, it lacks any simple rules for when it will pierce. In 1968, the Delaware Supreme Court laid down the broad principle that they would pierce only "in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved."[18] Lower courts expressly decline to clarify the vague standard ("the legal test . . . cannot be reduced to a single formula.") and reserve the power to pierce as needed to avoid inequitable results.[19] Because of this uncertainty, influential Delaware judges sometimes prefer to avoid veil piercing and to instead use alternative legal theories, such as fraudulent conveyance or tortious interference with contract, that better focus on the key question: is the parent culpable for the losses of its subsidiary's creditors?

In spite of the indeterminacy of Delaware's formal law, it is important to note that Delaware courts have traditionally been conservative on veil piercing and sensitive to transaction planners' need for certainty. Recent surveys rank Delaware as one of the states that is least likely to pierce. In the words of the *Harco* court, "It should be noted at the outset that persuading a Delaware Court to disregard the corporate entity is a difficult task."[20]

Below I discuss factors that Delaware courts have examined in veil piercing cases.

Mere Instrumentality or "Exclusive Domination and Control"

Delaware courts sometimes refuse to pierce unless the owner exerts "exclusive domination and control" over the debtor corporation, such that it becomes a "mere instrumentality" or establishes that the parent and the subsidiary operated as a "single economic entity."

It is well-settled that the parent-subsidiary relationship, by itself, is not enough to justify piercing the corporate veil and that a parent corporation does not necessarily dominate and control even a wholly owned subsidiary. Moreover, a plaintiff must show "exclusive" control by the parent corporation (and not simply by employees of the parent corporation). For example, in *Hart Holding Co. v. Drexel Burnham Lambert, Inc*, the intercorporate connections between the California partnerships and the Delaware corporation were thick: only Drexel Burnham employees were permitted to own partnership assets; the partnerships had none of their own

[17] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1064 n.141 (1991).

[18] *Pauley Petroleum Inc. v. Continental Oil Co.*, 239 A.2d 629, 633 (Del. Ch. 1968).

[19] *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 989 (Del Ch. 1987).

[20] *Harco Nat'l Ins. Co. v. Green Farms. Inc.*, 1989 WL 110537, at *4 (Del. Ch. Sept. 19, 1989).

employees; and senior Drexel Burnham employees performed all of the work for these partnerships. Despite all this, Chancellor Allen held that while "the partnership may indeed have been dominated and controlled by certain employees of Drexel," the plaintiffs had not shown that Drexel Burnham itself "controlled and directed the operations of the partnerships."[21]

The common test used to examine whether the corporation was dominated and controlled is to ask whether the subsidiary adheres to corporate formalities: whether it maintains its own board of directors and separate books and records, and documents any transfers between the corporation and its shareholders.[22] Following these formalities weighs against piercing "because it demonstrates that those in control of a corporation treated the corporation as a distinct entity and had a reasonable expectation that the conventional attributes of corporateness, including limited liability, would be accorded to it."[23] Failure to keep records and maintain formalities is penalized in part because it can make it harder for creditors to verify that the firm's assets remained available to repay their debts.

As noted above, the Countrywide subsidiaries appear to have adhered to corporate formalities with respect to the LD-2 and LD-100 Transactions, which would tend to weigh against veil piercing here. The Transactions were well documented, each entity maintained their own officers and directors, and each entity maintained separate books and records.

Fraud or something like it

In Delaware, the failure to observe corporate formalities, by itself, is probably not enough to justify piercing the corporate veil. Even after a gross failure to observe corporate formalities and after unreported asset transfers, the *Harco* court refused to pierce until plaintiffs could demonstrate that the transfers were done with the intent to defraud the corporation's creditors and not for some other valid corporate purpose.

Thus, "mere domination and control" are insufficient; Delaware courts typically refuse to pierce the corporate veil unless there is also some element of fraud, deceit or asset-stripping: "Beyond according respect for the formalities some weight, however, the cases inevitably tend to evaluate the specific facts with a standard of 'fraud' or 'misuse' or some other general term of reproach in mind."[24] Thus, plaintiffs must show that the corporation is "a sham and exist[s] for no other purpose than as a vehicle for fraud."[25]

Delaware courts have the power to pierce if there is a wrong or injustice that falls short of outright fraud, including a "contravention of law or contract, public wrong, or . . . equitable consideration among members of the corporation."[26] In particular, applying Delaware law, the

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[21] *Hart Holding Co. v. Drexel Burnham Lambert, Inc.*, C.A. No. 11514, 1992 WL 127567, at *11 (Del. Ch. May 28, 1992).
[22] *Harco Nat'l Ins. Co.*, 1989 WL 110537, at *6.
[23] *See Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 989 (Del. Ch. 1987).
[24] *Id.*
[25] *Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1183–84 (Del. Ch. 1999).
[26] *Pauley Petroleum Inc. v. Cont'l Oil Co.*, 239 A.2d 629, 633 (Del. 1968); *see also Harco Nat'l Ins. Co.*, 1989 WL 110537, at *5 ("It is not necessary in Chancery, therefore, to show that a defendant accused of fraud has to have known or believed that his statement was false or to have proceeded in reckless disregard of the truth.").

District of Delaware noted that under the "alter ego" inquiry, if the corporation fails to observe corporate formalities, undercapitalization, or asset-stripping, the plaintiff need only show an element of injustice or unfairness rather than fraud.

The mere fact of nonpayment does not count as an injustice, however. A host of cases state that mere insolvency is not enough to allow piercing of the corporate veil. Instead, the fraud or injustice must consist of something more than the alleged wrong in the complaint and relate to a misuse of the corporate structure.

Asset-Stripping

Courts are most likely to pierce when shareholders engage in asset-stripping -- siphoning off the firm's assets and providing little or no (or inadequate) consideration in return.[27] Observance of corporate formalities will not save a corporation from piercing where the corporation engaged in asset-stripping. In this case, courts need not find common law fraud (or an investor's reliance on a misstatement), but something less – even an element of wrong.

The reason that asset-stripping alone may justify veil piercing is that: (a) Delaware cases explicitly state that fraud on its own may justify veil piercing; and (b) the fact of asset-stripping may serve double duty, as it may show both prongs of the test. The logic is that asset-stripping typically occurs when a shareholder so dominated and controlled the corporation that the corporation agreed to a transaction that made the firm materially worse off (and the shareholder better off, presumably), which by definition works a fraud or injustice on the corporation and its creditors. Thus, transactions that suggest fraud at the corporation's expense go a long way to showing the "mere instrumentality" test.

Successful asset stripping cases are often egregious. For example, in *Pereira v. Cogan*,[28] the court dismissed defendant's motion to dismiss plaintiff's veil piercing claim after finding a pattern of extreme asset-stripping and other fraudulent conveyances was sufficient injustice to warrant piercing the corporate veil, even though the defendants observed corporate formalities. In *Geyer v. Ingersoll Publications Co.*,[29] the court found three conveyances intended to benefit the parent corporation's other business partners were sufficient to support an instrumentality theory of piercing the corporate veil. Other cases involve transfers to a parent corporation for inadequate consideration.

While extremely rare, Delaware courts have pierced on "public policy" grounds before. The Chancery Court appears to have applied this justification in *David v. Mast*, No. 1369-K, 1999 WL 135244, at *1 (Del. Ch. Mar. 2, 1999) where it pierced even though the shareholder followed corporate formalities when an almost-insolvent roofing company owned by a single individual shareholder violated Delaware's consumer protection policies when it advertised ten-year roofing guarantees that it knew it wouldn't be able to pay out. This "public policy" exception creates some additional uncertainty on the merits of a veil-piercing claim here given the importance of the underlying dispute.

[27] *Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, 1988 WL 5492, at *1-4 (Del. Ch., Jan. 27, 1988) (together with soft assurances that the parent corporation would be liable for the subsidiaries' debt); *United States v. Golden Acres, Inc.*, 702 F. Supp. 1097, 1106 (D. Del. 1988) (applying federal common law and including failure to observe corporate formalities); *Harco Nat'l Ins. Co.*, 1989 WL 110537, at *2 (together with operation of the business "in an informal and cavalier manner").

[28] No. 00 CIV. 619(RWS), 2001 WL 243537, at *21 (S.D.N.Y. Mar. 8, 2001).

[29] *Geyer v. Ingersoll Publications Co.*, 621 A.2d 784, 793 (Del. Ch. 1992).

An extreme case of undercapitalization or asset-stripping is more likely to suggest fraudulent intent and to justify veil-piercing which gives the debtor full relief. For a more moderate case, less suggestive of fraudulent intent to avoid a judgment, the doctrine of fraudulent conveyance and simply recapturing any value reduction makes more sense.

Here, the facts as I understand them seem to weigh against a successful asset-stripping claim under Delaware law: (1) BAC paid very substantial consideration for the assets acquired in the LD-2 and LD-100 Transactions, and the resulting intercompany debt was paid in full by BAC; (2) that price was based on prices determined by the Acquisition, which was presumably adequate because it was approved by the Countrywide shareholders, (3) BAC did not take any dividends from the subsidiaries at issue, and instead has made additional capital contributions to support the operations of those subsidiaries; and (4) there were ostensibly valid corporate purposes for the Transactions at the time, and I have seen not seen evidence that the purpose of the Transactions was to render Countrywide entities judgment-proof. Most importantly, BAC managers say that they paid for the assets based on fair-value accounting and subsequent disclosures in Countrywide's public financial statements do not recognize any substantial gains or losses from those transactions. If true, this is a strong defense against asset stripping, particularly when the value of Countrywide's assets were likely dropping during this time. (See the valuation subsection of The LD-100 Transactions section, on page 10.)

PIERCING THE CORPORATE VEIL IN NEW YORK

Commentators describe New York's law as obscure, but generally agree that it is relatively difficult to pierce the corporate veil in New York state courts. Commentators have described its laws as "'nearly impregnable'"[30] and "somewhat more restrictive on piercing than cases from the rest of the country."[31] Moreover, some federal courts (interpreting New York law) appear even less willing to pierce for contract creditors who do business with the corporation voluntarily and who have agreed to bear the risk. The courts note that "There is a general tendency not to pierce the corporate veil..., particularly in contract cases where the complaining party has chosen to deal with the protected party and has had the opportunity to negotiate the terms of liability, thereby protecting himself from the harmful effects of wrongdoing."[32]

The New York rule is easier to state than Delaware's; piercing is permissible when: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud wrong against the [petitioner] which resulted in [that petitioner's] injury."[33]

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[30] William D. Harrington, *Business Associations*, 43 SYRACUSE L. REV. 25, 65 (1992).

[31] Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1052 (1992) ("As a group, the New York decisions seem somewhat more restrictive on piercing than cases from the rest of the country.").

[32] *See, e.g.*, *Matter of Tax Indebtedness of Coppola*, 91-CV-0919(JBW), 1994 WL 159525, at *4 (E.D.N.Y. Jan. 10, 1994) (citing *Carte Blanche (Singapore) PTE., Ltd. v. Diners Club Int'l, Inc.*, 758 F. Supp. 908, 913 (S.D.N.Y. 1991)).

[33] *In re Morris v. N.Y. State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993).

Because both elements of the test must be shown, New York's rule is arguably stricter than Delaware (where only fraud is required). This distinction may be illusory, however; a court that finds that the Transactions constituted a fraud or wrong is also very likely to be able to find that CHL was dominated or controlled; that is, "fraudulent" related-party transfers between wholly owned subsidiaries are very likely to be the product of dominated boards, even if formalities were followed and records were kept.

Complete Domination

To evaluate whether owners have exercised "complete domination of the corporation," New York courts typically look to a long list of factors, many of which focus on the whether the owner observed corporate formalities.

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arm's length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.[34]

The list of factors is longer in New York, but there is little analysis to guide their application; none of these factors is dispositive and no weights are given for the individual factors. Several factors (like "undercapitalization" and "common ownership") may be unhelpful truisms; a firm that can't pay its debts is by definition undercapitalized and there is almost always some common ownership link in a veil piercing case.

The most important factors are probably those focusing on whether corporate formalities were observed (separate board meetings held, separate records kept) and whether the separate identity of the firm was respected by its owner. The use of interlocking directors and similar facts "in and of themselves [are] insufficient facts to justify the imposition of such liability on the parent corporation,"[35] absent a showing of other failings like shared bank accounts, addresses, and records or the personal use of corporate funds. Examples of activity considered domination include the following: the absence of formalities such as corporate meetings and records, inadequate capitalization of the subsidiary; the intermingling of personal and corporate funds, and the use of corporate property for other purposes, including the formation of a second

[34] *Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991).

[35] *Pebble Cove Homeowners' Ass'n, Inc. v. Fid. N.Y. FSB*, 153 A.D.2d 843, 843 (2d Dep't 1989).

corporation with overlapping ownership, officers, directors, and personnel; and inadequate documentation of intercompany transfers.[36]

Careful observance of corporate formalities limits many veil piercing claims, even if the formalities are observed solely for the purpose of limiting predictable exposure to creditors. However, the courts often blend unity of interest tests (prong 1) with tests about whether asset transfers harmed creditors (prong 2). As a result, simple observance of formalities is alone probably insufficient to insulate BAC from any veil piercing claims. If a court found that BAC fraudulently paid a materially unfair price in the Transactions, thereby reducing the value of CFC and/or CHL, a court could probably find something in the above list of 10 factors to justify piercing. Absent that, the observance of formalities may provide BAC with an important defense.

Fraud or Wrong

Even if a creditor is able to show that a corporation was completely dominated and controlled by its owner, New York courts typically refuse to pierce the corporate veil unless a creditor can also show that "such domination was used to commit a fraud or wrong against the [petitioner] which resulted in [that petitioner's] injury."[37]

It is not always clear, of course, what counts as a "fraud" or "wrong." Generally speaking, it takes more than nonpayment or breach of contract to count as a "wrong"; if nonpayment and breach were enough to justify veil piercing, every valid claim on an insolvent corporation would succeed and the exceptions to limited liability would completely swallow the rule.

Thus, New York courts require something like fraud, deception or "bad-faith" actions, such as knowingly collecting fees from customers when performance was impossible or attempting to avoid federal regulation. This wrong need not amount to full-blown common law fraud and very often actions that amount to misrepresentation or deceit are sufficient. Insolvency itself is not a fraud or a wrong.

Asset Stripping

Although many aspects of the fraud test are unclear, it is clear that "stripping of corporate assets by shareholders to render the corporation judgment proof constitutes a fraud or wrong justifying piercing the corporate veil."[38] Examples include cases where parent corporations

[36] *See, e.g., Commercial Sites, Co. v. Prestige Photo Studios, Inc.*, 272 A.D.2d 360 (2d Dep't 2000); *Anderson St. Realty Corp. v. RHMB New Rochelle Leasing Corp.*, 243 A.D.2d 595, 596 (2d Dep't 1997); *Simplicity Pattern Co. v. Miami Tru-Color Off-Set Serv.*, 210 A.D.2d 24, 25 (1st Dep't 1994).

[37] *Lederer v. King*, 214 A.D.2d 354, 354 (1st Dep't 1995) ("Plaintiff was not required to plead or prove fraud in order to pierce the corporate defendant's corporate veil, but only that the individual defendant's control of the corporate defendant was used to perpetrate a wrongful or unjust act toward plaintiff") (citing *In re Morris v. N.Y. State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141, 623 N.E.2d 1157 (1993)).

[38] For example of in-depth analysis of incriminating facts in federal asset-stripping cases, *see Carte Blanche (Singapore) PTE, Ltd. v. Diners Club Int'l, Inc.*, 758 F. Supp. 908 (S.D.N.Y.1991); *Smoothline Ltd. v. N. Am. Foreign Trading Corp.*, 00 CIV. 2798 DLC, 2002 WL 31885795 (S.D.N.Y. Dec. 27, 2002); *Matter of Arbitration between Holborn Oil Trading Ltd. & Interpol Bermuda Ltd.*, 774 F. Supp. 840 (S.D.N.Y. 1991); *United Rubber,*

denude subsidiaries of their assets in order to render them unable to honor their obligations, particularly in advance of a contemplated judgment.[39] Such transfers often are without consideration and are tantamount to fraudulent conveyances. Pending litigation is not a requirement, however; courts may pierce when owners strip assets from a corporation in order to make it judgment-proof, even if owners were simply on notice of impending litigation.[40]

This focus on whether the debtor received fair consideration is evident in cases that show veil piercing is unavailable when the "evidence establishe[s] that the challenged transfers were made for fair consideration or to satisfy an antecedent debt and also that the net effect of the transfers was not to prefer any creditor over plaintiffs."[41]

Thus, NY courts often sensibly and implicitly apply the norms of fraudulent conveyance law to claims of asset-stripping as they arise in veil piercing claims. Even asset sales from dominated and undercapitalized corporations will not justify veil piercing absent proof that the value of assets removed was greater than the value of the contributed services.[42]

In my opinion, is very unlikely that the mere fact that BAC acquired Countrywide and operates it as a wholly-owned subsidiary would justify veil piercing. BAC is likely to have observed the corporate formalities and maintained the separate corporate identity of CHL with sufficient care and rigor to succeed on the "complete domination" prong.[43] Moreover, BAC did not own, much less control, CHL at the time the underlying liabilities were created – and New York law requires that an owner exercised domination "*in respect to the transaction attacked*"[44] and that the attacked transaction harmed creditors. Thus, veil piercing on these grounds alone is very unlikely. To succeed on veil piercing in New York, I think the Trustee would have to prove that BAC paid too little in the Transactions, thus fraudulently removing value from CHL to the detriment of its creditors. I do not have any reason to think that would be an easy task and it may in fact be very difficult. As noted above, I understand that the prices paid in the Transactions

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Cork, Linoleum & Plastic Workers of Am., AFL-CIO v. Great Am. Indus., Inc., 479 F. Supp. 216, 240 (S.D.N.Y. 1979); *Directors Guild of Am., Inc. v. Garrison Productions, Inc.*, 733 F. Supp. 755, 762 (S.D.N.Y. 1990).

[39] *888 7th Ave. Assocs. Ltd. P'ship v. Arlen Corp.*, 172 A.D.2d 445, 445 (1st Dep't 1991); *see* also *Chase Manhattan Bank (Nat. Ass'n) v. 264 Water St. Assocs.*, 174 A.D.2d 504, 505 (1st Dep't 1991).

[40] *See, e.g., Godwin Realty Assocs. v. CATV Enters.*, 275 A.D.2d 269, 270 (1st Dep't 2000) ("The stripping of corporate assets by shareholders to render the corporation judgment proof constitutes a fraud or wrong justifying piercing the corporate veil. Although no action had been commenced at the time of liquidation, there was evidence that defendant was nonetheless on notice of the presently asserted claims by building owners with respect to building damage and unauthorized use of electricity.") (citing *Matter of Arbitration between Holborn Oil Trading Ltd. & Interpol Bermuda Ltd.*, 774 F. Supp. 840, 847 (S.D.N.Y. 1991), which quotes *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.*, 758 F.Supp. 908, 917 (S.D.N.Y.1991)).

[41] *See, e.g., Rebh v. Rotterdam Ventures Inc.*, 277 A.D.2d 659, 661 (3d Dep't 2000).

[42] *Ravens Metal Products Inc. v. McGann*, 267 A.D.2d 527, 528-29 (3d Dep't 1999).

[43] *Pebble Cove Homeowners' Ass'n, Inc.*, 153 A.D.2d at 843. *See also A. W. Fiur Co., Inc. v. Ataka & Co., Ltd.*, 71 A.D.2d 370, 374 (1st Dep't 1979) ("A subsidiary corporation over which the parent corporation exercises control in everyday operations may be deemed an instrumentality or agent of the parent. The determinative factor is whether the subsidiary corporation is a dummy for the parent corporation." (citations omitted)); *Feszczyszyn v. Gen. Motors Corp.*, 248 A.D.2d 939, 940 (4th Dep't 1998) (company "substantially responsible for its own day-to-day operations and the hiring and termination of most of its employees," with different directors on the board, is not dominated by parent).

[44] *See In re Morris*, 82 N.Y.2d at 141.

were based on arm's length prices paid in connection with the Acquisition. (See the valuation discussions related to the LD-2 and LD-100 transactions on pages 9 and 10.)

PIERCING THE CORPORATE VEIL IN CALIFORNIA

The general standard for veil piercing in California is familiar: a plaintiff must prove both (1) unity of interest and ownership between the corporation and its shareholder, and (2) that there will be an inequitable result if the veil is not pierced.[45] In my view, California courts are actually fairly conservative about veil piercing in practice.

Not to be outdone by New York's list of ten factors, California courts consider a list of nineteen that can inform one or both prongs of the test:[46]

- "Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses;
- The treatment by an individual of the assets of the corporation as his own;
- The failure to obtain authority to issue stock or to subscribe to or issue the same;
- The holding out by an individual that he is personally liable for the debts of the corporation;
- The failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities;
- The identical equitable ownership in the two entities;
- The identification of the equitable owners thereof with the domination and control of the two entities;
- Identification of the directors and officers of the two entities in the responsible supervision and management;
- Sole ownership of all of the stock in a corporation by one individual or the members of a family;
- The use of the same office or business location;
- The employment of the same employees and/or attorney;
- The failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization;
- The use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation;
- The concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities;
- The disregard of legal formalities and the failure to maintain arm's length relationships among related entities;

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[45] *Automotriz Del Golfo De Cal. S.A. De C.V. v. Resnick*, 47 Cal.2d 792, 796 (1957).

[46] *Associated Vendors, Inc. v. Oakland Meat Co., Inc.*, 210 Cal. App. 2d 825, 838-41 (Cal. Ct. App. 1962) (bullets added; citations omitted).

- The use of the corporate entity to procure labor, services or merchandise for another person or entity;
- The diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another;
- The contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and
- The formation and use of a corporation to transfer to it the existing liability of another person or entity."

How a court will apply a nineteen-factor test is perhaps anybody's guess. The *Associated Vendors, Inc.* court noted that while several factors usually support a trial court's decision to pierce, that determination is a factual one, and an appellate court approaches it with a deferential standard of review. Below I describe how these factors are usually considered (some regularities emerge).

Unity of Interest

Failure to Observe Corporate Formalities

The typical tests apply in California, including "failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities . . . the failure to obtain authority to issue stock or to subscribe to or issue the same . . . [and] the disregard of legal formalities and the failure to maintain arm's length relationships among related entities[.]"[47] Failing to observe these corporate formalities can go a long way towards satisfying the unity of interest prong. As discussed above, it appears that BAC and CHL observed corporate formalities. CHL had its own officers and directors, and its board of directors held meetings and maintained minutes of those meetings.

Identification of a Shareholder with the Corporation

Courts ask whether the corporation and the shareholder are, in all but legal name, the same entity. A leading case, *Associated Vendors, Inc.*, lists factors such as "the identical equitable ownership in the two entities . . . the identification of the equitable owners thereof with the domination and control of the two entities . . . identification of the directors and officers of the two entities in the responsible supervision and management . . . sole ownership of all of the stock in a corporation by one individual or the members of a family . . . the use of the same office or business location . . . the employment of the same employees and/or attorney . . . [and] the holding out by an individual that he is personally liable for the debts of the corporation."[48]

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[47] *Id.* at 840.
[48] *Id.* at 838.

While this list of factors suggests that a parent-subsidiary relationship would almost always meet the "unity of interest" prong, in practice the courts avoid this outcome by blurring this test with the second prong of the *Automotriz* test and generally requiring facts that show manipulation or bad faith even when a subsidiary is wholly owned and controlled by the parent.[49] Thus, failure on this prong alone is insufficient to justify piercing; courts tend to look also for deception or manipulation. Conversely, even consolidated financial statements and interlocking directors show unity of interest where there is asset stripping that suggests bad faith.

Control and Domination: "Mere Instrumentality" or Single-Enterprise Liability

Finally, a California court may find a unity of interest where it determines that a subsidiary corporation is a "mere instrumentality" of the parent corporation. Obviously, in practice, a wholly-owned subsidiary will act as its sole shareholder directs, so the term "mere instrumentality" must mean more than this: typically it is used when there is an element of asset-stripping, deception, manipulation or fraud (and the shareholder simply uses the debtor corporation as a pawn in some underlying wrong).[50] Thus, the focus is not on corporate formalities as much as whether creditors were deceived about the risks they were taking.

California courts examine whether the subsidiary is financially independent and consider financial dependence as a factor indicating control. However, even financial dependence is not enough to justify veil piercing unless it is done "'for the purpose of perpetrating a fraud.'"[51] Thus, the test primarily focuses on times when the debtor engaged in fraud with the assistance of affiliates or when the debtor was grossly and intentionally undercapitalized (rather than due to economic distress). In *Las Palmas Associates v. Las Palmas Center Associates*, which is probably the leading case on single-enterprise liability in California, the court explained, "[I]t would be unjust to permit those who control companies to treat them as a single or unitary enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity."[52] In such cases, the same facts that lead the court to conclude that there is unity of interest will also suggest fraud or asset-stripping sufficient to satisfy the inequity prong of the test.

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[49] *Id.* at 839. In *Pathology, Inc. v. Cal. Health Laboratories, Inc.*, the court held that "intercorporate connections" between a parent and its wholly-owned subsidiary did not rise to the level of "manipulative control" required to meet the unity of interest prong even when the parent and subsidiary had interlocking directors and officers, the parent kept the subsidiary's books at its corporate headquarters, and employees often transferred between the two corporations. *Institute of Veterinary Pathology, Inc. v. Cal. Health Laboratories, Inc.*, 116 Cal. App. 3d 111, 120 (Cal. Ct. App. 1981) (requiring "direct evidence of manipulative control of its subsidiaries which would require imposition of liability.").

[50] *Electro Lock, Inc. v. Core Indus., Inc.*, No. B134386, 2002 WL 1057468, at *17–18 (Cal. Ct. App. May 28, 2002) (piercing to parent corporation where parent corporation's management treated subsidiary's president as a "puppet," provided all administrative assistance and legal advice, and forced the subsidiary to sell products at a loss to the parent corporation); *ADO Finance, A.G. v. McDonnell Douglas Corp.*, 931 F. Supp. 711, 717–18 (C.D. Cal. 1996) (piercing for jurisdictional purposes to sole individual shareholder who appointed the board, directed business decisions, managed daily operations, spun off subsidiaries for less than their true value, and loaned substantial sums of money to the parent); *Institute of Veterinary Pathology, Inc.*, 116 Cal.App.3d at 120.

[51] *Sonora Diamond Corp. v. The Superior Court of Tuolomne Cnty.*, 83 Cal. App. 4th 523, 539 (Cal. Ct. App. 2000).

[52] *Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1250 (Cal. Ct. App. 1991); *see also Electro Lock*, 2002 WL 1057468, at *19; *ADO Finance, A.G.*, 931 F. Supp. at 718.

Inequitable Result

Undercapitalization

Inadequate capitalization may lead to an "inequitable result" to justify piercing; however, in practice, courts find this only when a corporation's woefully inadequate financing suggests an intent to evade liability for debts that the corporation could reasonably expect to incur in the ordinary course of business.[53] California generally does not infer "misconduct or injustice" from a corporation's mere "inability to meet the balance of its [debts]."[54] Thus, once again the cases are generally consistent with the idea that piercing is inappropriate to overturn bargained-for risks.

In imputing bad faith from a corporation's undercapitalization, the industry standards for capitalization are relevant. Courts may also consider whether normal business or industry risks led to the company's inability to pay debts in the future.

Siphoning off Corporate Assets

A finding of asset stripping or a diversion of assets may itself (if sufficiently egregious) justify a veil-piercing claim. *Associated Vendors* lists "the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another" and "the failure to maintain arm's length relationships among related entities" as factors to consider.[55]

The fact of asset-stripping may serve double duty, as it is considered under both prongs of the *Automotriz* test. As discussed above, the logic is that because the corporation's shareholder so dominated and controlled the corporation, the corporation agreed to a transaction that made the firm worse off (and the shareholder better off, presumably). Such a transfer may have worked a fraud or injustice on the corporation and its creditors. Thus, courts have found unity of interest in the parent corporation's control of the subsidiary, and injustice in the parent's siphoning assets from the subsidiary in certain cases.[56] Conversely, courts have refused to pierce

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[53] *Automotriz Del Golfo De Cal. S.A. De C.V.*, 47 Cal. 2d at 796-97; *Minton v. Cavaney*, 56 Cal. 2d 576, 580 (1961); *Carlesimo v. Schwebel*, 87 Cal. App. 2d 482, 493 (Cal. Ct. App. 1987) ("[I]nadequate financing, where such appears, is a factor, and an important factor, in determining whether to remove the insulation to stockholders normally created by the corporate method of operation."). The Ninth Circuit held in 1988 that "the California Supreme Court has held that undercapitalization alone will justify piercing the corporate veil," but this reading of California law is disputed. *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1544 (9th Cir. 1988). *But see* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 2.5 (2010); *Carlesimo*, 87 Cal. App. 2d at 493 (refusing to pierce because plaintiffs did not show that "the financial setup of the corporation is just a sham, and accomplishes injustice").

[54] *Sonora Mining Corp.*, 83 Cal. App. 4th at 539 ("The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form."); *see also Pearl v. Shore*, 17 Cal. App. 3d 608, 617 (Cal. Ct. App. 1971) (holding that where undercapitalization resulted not from a bad faith "initial undercapitalization" but from poor management, undercapitalization alone was not sufficient to justify piercing).

[55] *Associated Vendors, Inc.*, 210 Cal. App. 2d at 838.

[56] *Electro Lock, Inc.*, 2002 WL 1057468, at *19; *ADO Finance, A.G.*, 931 F. Supp. at 718.

where the parent company was found not to have drained its subsidiary of assets,[57] or even when a sole shareholder liquidated his wholly-owned corporation and started a new corporation, but did not pay inadequate consideration.[58]

I have not seen any evidence that BAC or its subsidiaries drained the Countrywide entities of their assets. See sections titled LD-2 Transactions and LD-100 Transactions above.

SUMMARY

Based on what I understand, in my opinion courts likely would not pierce the corporate veil to allow the Trustee to recover money from BAC. From an economic perspective, the Investors agreed to bear the risk that Countrywide would someday fail and they presumably charged for this risk. The fact that BAC bought Countrywide is no reason to pay creditors with BAC's assets; Investors were not relying on BAC's assets when they invested.

Unless the value of Countrywide's assets was materially reduced in the Transactions, Investors were not harmed by either the Transactions or the Acquisition of Countrywide and there is no reason to overturn the original bargain. Based on what BAC managers have said about how the prices were determined, it may be difficult to establish that Countrywide did not receive fair value.

I believe Delaware law is likely (but not certain) to apply. Though there is no simple rule in Delaware, adherence to corporate form and standard procedures are important and help to defeat veil piercing claims. And unless the Trustee can prove that the Transactions harmed creditors, I do not think the Delaware courts will pierce the veil.

The same is also probably true in New York and California, given the importance that they place on corporate formalities (which I understand BAC will be able to show). Given the unpredictability of veil-piercing law, it is impossible to know for sure, but I would be reasonably confident that a veil piercing claim is unlikely to succeed; a sensible opinion would not pierce in this case, absent unexpected and highly unusual facts, such as BAC significantly underpaying in the Transactions.

SUCCESSOR LIABILITY

Generally speaking, a corporation which acquires the assets of another corporation is not liable for the seller's debts. This is not surprising: when you buy a used car from a neighbor, you don't have to start paying his mortgage as well. The corporate equivalent of this rule is well-established and comes from the idea that corporations are persons and therefore liable for their debts and not the debts of others (not even of their affiliates). This rule is taught in every introductory corporate law class and relied on every day by business planners. Thus, it is indisputable that BAC would not normally become liable for Countrywide's debts when it bought Countrywide assets.

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[57] *Cf. Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101 (C.D. Cal. 2003).

[58] *Katzir's Floor & Home Design v. M-MLS.Com*, 394 F.3d 1143, 1149 (9th Cir. 2004).

There are four main exceptions to this general rule. The buyer may be liable if: 1) it agrees to assume liability; 2) the buyer is a mere continuation of the selling company; 3) there is fraud; or 4) the asset sale is a de facto merger between the buyer and seller.

The reason for the first exception is obvious: a buyer can agree to take on a debt and the law will enforce it. The other exceptions are generally intended to protect third parties from bearing credit risk they did not agree to. Courts often protect creditors, and hold buyers liable, when there is an opportunistic use of the corporate form to defeat a creditor's reasonable expectations about the assets available to satisfy a debt.

As with veil piercing, successor liability is not used simply to prevent creditors from losing money. There is nothing wrong with a corporation selling assets and retaining the liabilities; as long as the seller receives equivalent value in return, its creditors have a claim on the proceeds and should in theory be unharmed. Moreover, if contractual creditors do not like this rule, they are free to bargain for additional protections (security interests, change of control provisions, etc).

Successor liability is thus often invoked as something of a backstop, when a court believes that a third party has been harmed or forced to bear credit risk they didn't bargain for. Many of the cases enforce essentially the same basic policy as fraudulent conveyance law and support or complement the goal.[59] This logic is evident in the recent decision *Maine State Retirement System v. Countrywide Financial Corporation,* where the court dismissed a successor liability claim against BAC on the grounds that plaintiffs had not alleged that the Transactions harmed creditors.

There are two more points before jumping into the law. First, these exceptions are relatively uncommon; claims for successor liability are "overwhelming[ly] reject[ed]" by courts. The fact that I spend more time discussing the exceptions (than the rule) should not imply there are more exceptions. Second, I don't believe that New York or Delaware courts have actually ever held a buyer liable on facts similar to those here; California has already ruled that Delaware law applies. Existing cases generally involve unrelated buyers and sellers, while here the buyers and sellers were both wholly-owned subsidiaries of the same firm; although the doctrine should apply to corporate affiliates.[60] The common ownership of affiliates may actually increase the risk of harm to creditors that the doctrine was designed to prevent, and so the doctrine could apply.

SUCCESSOR LIABILITY IN DELAWARE

The law on successor liability in Delaware follows the general common law principles: "Absent unusual circumstances 'a successor corporation is liable only for liabilities it expressly

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[59] Scholars and commentators sometimes justify successor liability in tort as a possible way to deter misbehavior: if buyers are liable for the seller's tort liabilities, it will reduce the price it pays to acquire the seller's business (which should give sellers an incentive to avoid tort liability). This justification does not work for contractual debts and thus isn't relevant in this case.

[60] This is true even though, as one commentator has stated, "[i]t should be obvious that successor liability will apply to transactions between related corporations as well as between unrelated sellers and purchasers." Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Successorship in United States Law*, 10 FLA. J. INT'L L. 365, 414 (1996).

assumes[.]'"[61] However, this rule "'is not absolute'" as 'in some limited situations where an avoidance of liability would be unjust, a purported sale of assets for cash or other consideration may be found to transfer liabilities of the predecessor corporation.'"[62] Although the cases are ultimately fact intensive, a review of the law suggests that it would be an uphill battle to hold BAC liable as a successor to CHL.

Delaware recognizes the same four general exceptions, which are reviewed below.

Assumption of Liability

Delaware courts read this exception strictly and typically find assumption of liability only expressly stated by the asset purchase agreement. Absent a buyer's express assumption of liability, Delaware courts are reluctant to find a buyer did so implicitly. For example, in *Fountain,* a buyer's agreement to conclude all of its predecessor's work was found not to be an implicit assumption of corporate liabilities.[63] Delaware courts focus on the language of the contract rather than intent or even the buyer's statements to third parties.

According to the terms of the Asset Purchase Agreement executed in connection with the LD-100 Transaction, the assumed liabilities included certain obligations related to public debt securities, and "liabilities with respect to the ownership and operation of Purchased Assets only to the extent arising from or relating to any event, circumstance or condition occurring on or after the Closing…"[64] In fact, the Asset Purchase Agreement specifically describes liabilities to be retained by CHL, including, inter alia,

> …all Liabilities of Seller or any of its Subsidiaries arising in connection with any litigation, complaint, claim, demand, action, cause of action, suit, arbitration, inquiry, proceeding, or investigation by or before any Government Authority, except to the extent arising from Buyer's ownership and operation of the Purchased Assets after Closing…[65]

Similarly, the Purchase and Sale Agreement executed in connection with the LD-2 Transaction states:

> Seller [CHL] assumes all debts, liabilities, commitments and obligations of any kind, whether fixed, contingent or absolute, matured or unmatured, liquidated or unliquidated, accrued or not accrued, asserted or not asserted, known or unknown, determined, determinable or otherwise, of GP, LP or Servicing LP to the extent such debt, liabilities, commitments or obligations attributable to any action or inaction prior to the date of Closing.[66]

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[61] *Mason v. Network of Wilmington, Inc.*, No. A. 19434-NC., 2005 WL 1653954, at *5 (Del. Ch. July 2005) (quoting *Fell v. S.W.C. Corp.*, 433 F. Supp. 939, 945 (D. Del. 1977)).
[62] *Fell*, 433 F .Supp. at 945; *see also Mason*, 2005 WL 1653954, at *5.
[63] *Fountain v. Colonial Chevrolet Co*, 1988 WL 40019, at *8 (Del. Super. Ct. 1988).
[64] Asset Purchase Agreement, Section 2.3.
[65] Asset Purchase Agreement, Schedule 2.4-1.
[66] Purchase and Sale Agreement, Section 1.3.

Based on the foregoing language, it appears unlikely that the Trustee could successfully argue that BAC expressly assumed liability on the Investors' claims here.

Mere Continuation

Delaware courts interpret this exception narrowly. In order to recover under this theory, "it must appear that the former corporation is the same legal entity as the latter."[67] In other words, "it must be the same legal person, having a continued existence under a new name."[68] As the *Elmer* court stated, "[t]he test is not the continuation of the business operation, but rather the continuation of the corporate entity."[69]

Obviously, purchased assets will typically continue in their same use after a sale, without triggering a finding that the buyer was a "mere continuation" of the seller. Therefore, this is essentially a test for fraud and the emphasis appears to be on the word "mere": the new buyer may not be merely the seller in new clothes. If the buyer has the seller's same business, same workforce, same owners, same officers and directors, same customers, it is unlikely that the asset sale had an real economic purpose and more likely that it was motivated by the desire to leave seller's creditors with fewer assets to claim (what else would justify the expense and tax consequences of an asset sale to an identical entity?).

This concern about the buying entity being a sham does not apply here. It is my understanding from the transaction documents that with respect to the LD-100 Transactions, the buyer was BAC, a large public firm and independent legal entity that has significantly more assets and operations than those which it acquired in the Transactions at issue. Further, as described on page 13, Countrywide's business had changed dramatically in the months leading up to the Acquisition, and BAC, while still in the mortgage business, was ceasing to originate the type of mortgages which contributed to Countrywide's prior operating results. The combination of legacy BAC and legacy Countrywide, two publicly held entities, could not be construed as a mere continuation of legacy Countrywide. In fact, I am not aware of a case finding a publicly held buyer to be a mere continuation of the assets of a publicly held seller.

In *Elmer*, one of the leading cases on this issue, the court suggested that related party transactions might be treated differently than arms-length transactions. In reaching the determination that the successor corporation was not the "mere continuation" of the predecessor, the *Elmer* court relied in part on the fact that the sale between predecessor and successor occurred on an arms-length basis and that each corporation had different owners.[70] Although this weighs in favor of holding BAC liable, I found no precedent for courts actually holding a successor liable on these grounds.

Fraud

I have not found any Delaware case that analyzed fraud in the successor liability context, so it seems unlikely that they would hold BAC liable under this theory. Other states that have

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[67] *Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 542 (D. Del. 1988); *see also Fountain,* 1988 WL 40019, at *8.
[68] *Elmer*, 698 F. Supp. at 542.
[69] *Id.*
[70] *Id.*

found successor liability on this ground generally follow the standards of fraudulent conveyance law, although what counts as fraud or valuable consideration in such a case is very fact specific.

Thus, it seems unlikely that Delaware courts would hold BAC liable under this exception, unless the Trustee were able to establish that the Transactions effectively constituted a fraudulent conveyance.

De Facto Merger

It seems unlikely that Delaware courts would grant successor liability under this exception as well. I have not found Delaware cases that actually use the de facto merger doctrine to protect creditors following an asset sale. Cases typically only refer to the possibility and suggest it would be applied narrowly at any rate and only "for the protection of creditors or stockholders who have suffered by reason of failure to comply with the statute governing such sales."[71] Because I have seen no allegations or facts that BAC failed to comply with Delaware law governing asset sales and harmed creditors by re-directing the purchase price to another BAC entity, it would be difficult for a court to impose liability on BAC under the Delaware de facto merger exception.

There are two additional reasons I believe Delaware courts would not apply the doctrine here:

Uncertainty

Delaware courts are loathe to characterize a sale of assets as a de facto merger because it would create a great deal of uncertainty, making it hard to make reliable plans and execute complex transactions, which is Delaware law's bread and butter. Delaware is the corporate law capital of the US in large part because it facilitates enormously complex transactions by offering predictable rules where possible. A broad de facto merger doctrine negates this advantage because dealmakers would not be able to reliably plan on what rights a court would enforce (i.e. when will a court say that the sale was "really" a de facto merger?). This would reduce the value of Delaware law.

This concern sometimes arises in a different context (i.e. when shareholders assert rights that they would have in a merger, but not in an asset sale) but the court's response is instructive: Delaware rejects shareholder de facto merger claims in favor of rules that allow for legal certainty in transaction planning. Delaware vigorously defends the idea that "action taken under one section of [the General Corporation Law] is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections under which the same final result might be attained by different means."[72] As a leading treatise has summarized, the doctrine of independent legal significance and its accompanying reluctance to find a de facto

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[71] *Heilbrunn v. Sun Chem. Corp.*, 150 A.2d 755, 758 (Del. 1959); *see also Finch v. Warrior Cement Corp.*, 141 A. 54 (Del. Ch. 1928); *Drug, Inc. v. Hunt*, 168 A. 87 (Del. Ch. 1933). These older cases demonstrate that the de facto merger doctrine may be applied when the transaction is structured to permit the consideration to be distributed directly to the stockholders without coming into the possession of the selling corporation.

[72] *Rauch v. RCA Corp.*, 861 F.2d 29, 31 (2d Cir. 1988) (quoting *Rothschild Int'l Corp. v. Liggett Group*, 474 A.2d 133, 136 (Del. 1984)).

merger, "has become a keystone of Delaware corporate law and is continually relied upon by practitioners to assure that transactions can be structured under one section of the General Corporation Law without having to comply with other sections which could lead to the same result."[73]

Although such shareholder de facto merger claims are quite different from the claim the Trustee would bring, Delaware's determined and total resistance to these shareholder claims suggests that the Trustee would face an uphill battle. Delaware courts are likely to recognize the significant uncertainty that such a novel ruling would impose if they were to find a de facto merger under the circumstances here.

Economic Harm

Secondly, Delaware courts are likely to apply the de factor merger test somewhat conservatively. As the *Maine State Retirement System v. Countrywide Financial Corporation* suggests, Delaware courts sensibly focus on the underlying economic realities: they reject de facto merger claims unless plaintiffs can show that the selling firm received inadequate compensation, thereby damaging creditors. This would lead them to avoid some of the unpredictable and formal legal tests New York courts sometimes apply.

Thus, in my opinion, it is highly unlikely that a de facto merger claim would succeed in Delaware absent a showing that the Transactions materially reduced the value of the selling corporations. As discussed earlier, given the facts and circumstances surrounding the LD-2 and LD-100 Transactions as I understand them, it would be unlikely that a plaintiff could demonstrate that these transactions materially reduced the value of CHL. (See the valuation discussions related to the LD-2 and LD-100 transactions on pages 9 and 10.)

SUCCESSOR LIABILITY IN NEW YORK

New York's successor liability law is more developed than Delaware's, though it too follows the general rule that a buyer is not charged with the seller's preexisting liabilities unless: 1) it agrees to assume liability; 2) the buyer is a mere continuation of the selling company; 3) there is fraud; or 4) the asset sale is a de facto merger between the buyer and seller.[74] This standard applies for both tort and contract debts.

The law is generally consistent with the general description given above, but since it is applied by judges of widely different exposure to and experience with business claims, it is less predictable than decisions by the Delaware judiciary and there are decisions that grant successor liability more readily than Delaware courts would.

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[73] JESSE A. FINKELSTEIN & R. FRANKLIN BALOTTI, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 9.4 (2010).

[74] *See Schumacher v. Richards Shear Co.*, 59 N.Y.2d 239, 244 (1983).

Assumption of liability

A corporation can expressly assume the liability of its predecessor, but courts will not impose liability when a buyer explicitly disclaims it. Most New York courts focus on the language of the contract, even when determining implied liability.[75]

Although a buyer might implicitly assume liability by its words or actions, there are few cases that actually find this, so the standard is unclear. One might argue that Brian Moynihan, BAC's CEO, implicitly assumed liabilities by promising to honor Countrywide's liabilities[76] and by paying certain of CFC's and/or CHL's liabilities in settlements.[77] I doubt this would ultimately work, however. First, to my knowledge, no New York court has ever found such a statement to be sufficient basis for successor liability. Second, courts are clear that a seller's payments to one creditor do not imply it has assumed liability to other parties.[78] Third, most courts focus on the contract rather than what is implied by statements or payments to third parties. Finally, even cases that look to verbal statements often require that someone was misled by the statement and relied to their detriment. A federal court, applying New York law, has held that "[w]hile no precise rule governs the finding of implied liability, the authorities suggest that the conduct or representations relied upon by the party asserting liability must indicate an intention on the part of the buyer to pay the debts of the seller."[79] The Trustee's claims against BAC do not fit this pattern: I haven't seen a claim that Investors were misled by these statements or payments.

Mere continuation

A buyer can be liable for the seller's debts if "the purchasing corporation was a mere continuation of the selling corporation."[80] For the "mere continuation" doctrine to apply, the "purchasing corporation must represent merely a 'new hat' for the seller."[81] It is not enough to allege that the seller's president became one of several of the successor's vice presidents and that the buyer and seller shared customers.

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[75] *See City of N.Y. v. Charles Pfizer & Co.*, 260 A.D.2d 174, 175 (1st Dept. 1999); *Grant-Howard Assocs. v. General Housewares Corp.*, 115 Misc.2d 704, 707 (N.Y. Sup. Ct. N.Y. Cty. 1982).

[76] Mike Taylor, *BofA Gets Pugilistic With Mortgage Putback Crowd*, N.Y. OBSERVER, Nov. 16, 2010, available at http://www.observer.com/2010/wall-street/bofa-gets-pugilistic-mortgage-putback-crowd.

[77] BAC made approximately $2 billion in capital contributions to CFC, who in turn made contributions to CHL to reimburse CHL for amounts paid to the GSE's in connection with representation and warranty liabilities. Under the terms of the agreements with the GSE's the seller and the servicer were jointly and severally liable for the obligations under the reps and warranties given to the GSE's.

[78] *See Hayes v. Equality Specialities*, 740 F. Supp. 2d 474, 482 (S.D.N.Y. 2010); *Marenyi v. Packard Press Corp.*, No. 90-cv-4439, 1994 WL 16000129, at *6 (S.D.N.Y. June 9, 1994) (settlement of one claim did not amount to an assumption of all debts of seller).

[79] *Beck v. Roper Whitney, Inc.* 190 F. Supp. 2d 524, 537 (W.D.N.Y. 2001). Two unreported cases go into more detail, citing "factors such as whether the buyer's conduct or representations indicate such an intent, including admissions of liability by officers or other spokesmen of the buyer, and the effect of the transfer upon creditors of the seller corporation." *Vasquez v. Ranieri Cheese Corp.*, No. 07-CV-464, 2010 WL 1223606, at *11 (E.D.N.Y. Mar. 26, 2010).

[80] *Schumacher*, 59 N.Y.2d at 245.

[81] *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 839 (S.D.N.Y. 1977) (citations omitted).

Thus, this exception has been described as essentially that of a corporate reorganization, where one corporation is dissolved and another, essentially identical corporation, survives.[82] Courts thus often refuse to find "mere continuation" when the selling corporation continues to exist after the asset sale; the "fact that the vendor corporation continued to exist after the sale and apparently received fair consideration for its assets [was] sufficient to take this case out of the 'mere continuation' exception."[83] A shell corporation shorn of its assets continuing for a year was sufficient to avoid the finding of "mere continuation."[84]

This concern should not apply here because, as I understand:

- The buyer in LD-100 was BAC, at the time an enormous public company that could not in any way be viewed as simply a continuation of Countrywide.
- The business operations changed following the purchase:
    - As discussed on page 13, Countrywide's business had changed dramatically in the months leading up to the Acquisition – loan production and sales were down approximately 50% in the second quarter of 2008 compared to the second quarter of 2007.
    - The Acquisition combined Countrywide's operations with those of BAC, and BAC phased in its own management team to run the combined operations.
    - Over 50% of legacy Countrywide employees were severed subsequent to the Acquisition.

Fraud

Although NY courts, in theory, recognize the fraud exception, the only published cases on this are from 1865 and 1892.[85] Given the lack of precedent, it seems unlikely that NY courts would hold BAC liable under this exception unless the Trustee was able to show that the LD-2 and LD-100 Transactions were unfair and not bona fide. Based on the facts as I understand them, this would be a very difficult showing to make. Other states that have found successor liability on this ground generally follow the standards of fraudulent conveyance.

De facto merger

The concept of de facto merger in New York is frequently litigated. It has been described as a "judge-made device for avoiding patent injustice that might befall a party simply because a

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[82] *In re Seventh Jud. Dist. Asbestos Litig.*, 788 N.Y.S.2d 579, 581 (N.Y. Sup. Ct. Ont. Cty. 2005).

[83] *Ladjevardian*, 431 F. Supp. at 839.

[84] For instance, in *Douglas v. Stamco*, 363 Fed. Appx. 100, 102 (2d Cir. 2010), the fact that the Seller was not dissolved for more than a year made the "mere continuation" doctrine inapplicable; the creditor retained a claim only against the bankrupt Seller. Thus, in New York, the "mere continuation" doctrine may be more formalistic than the "quick dissolution" standard in de facto mergers. The "quick dissolution" under a de facto merger "may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity is shorn of its assets and has become, in essence, a shell.'" *In re N.Y. City Asbestos Litig.*, 15 A.D.3d 254, 257 (1st Dep't 2005).

[85] *See* George W. Kuney, *Successor Liability in New York*, N.Y. ST. B.A. J. 24, 22–27 (September 2007) (stating that no New York court has used fraud to find successor liability). Professor Kuney must mean in the modern era, as two cases from the 19th century have done so. *See Cole v. Millerton Iron Co.*, 133 N.Y. 164 (1892); *Booth v. Bunce*, 33 N.Y. 139 (1865).

merger has been called something else."[86] However, the test is nevertheless unpredictable in practice, in part because judges differ as to what constitutes "patent injustice" and some courts apply the tests in a way that would allow the exception to swallow the rule of buyer non-liability.

There are four tests for de facto merger:

1. continuity of ownership;
2. the seller ceasing ordinary business operations and dissolving as soon as possible after the transaction;
3. the buyer assuming liabilities ordinarily necessary to continue the seller's business uninterrupted; and
4. the buyer continuing the successor's management, personnel, physical location, assets and general business operation.

Frustratingly, these tests sound a lot like the first three exceptions (express assumption, mere continuation or fraud), rather than tests for a new fourth exception. Indeed, some courts have observed that "the mere-continuation and de-facto-merger doctrines are so similar that they may be considered a single exception."[87] The doctrine is thus unpredictable and there is even a disagreement about how the four-factor test should be applied: several decisions suggest that the courts apply a "flexible" standard: i.e., they consider all of the factors and that any of these factors could trigger a de facto merger.[88] However, recently, federal courts, applying New York law, have tried to identify factors that were a prerequisite for a finding of de facto merger.[89] Given this uncertainty, it is impossible to predict with confidence what would happen. But as discussed, BAC certainly has a reasonable argument that the de facto merger doctrine would not apply.

Continuity of Ownership

Continuity of ownership exists "where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction."[90] Although in practice, this is typically found only when the assets are sold for stock (which didn't happen here), this test would likely be satisfied in a case against BAC given that both the seller

[86] *Cargo Partner AG v. Albatrans Inc.*, 207 F. Supp. 2d 86, 104 (S.D.N.Y. 2002) (citations omitted).
[87] *Cargo Partner AG v. Albatrans Inc.*, 352 F.3d 41, 45, n.3 (2d Cir. 2003) (hereinafter "*Cargo Partner AG II*").
[88] *Sweatland v. Park Corp.*, 181 A.D.2d 243, 246 (4th Dep't 1992) ("[w]hile factors such as shareholder and management continuity will be evidence that a de facto merger has occurred, those factors alone shall not be determinative.").
[89] *Cargo Partner AG II*, 352 F.3d at 47. More recently, then-Judge Sotomayor held, for a Second Circuit panel in *National Service Industries*, that the same is true in the tort context. "The continuity-of-ownership element 'is designed to identify situations where the shareholders of a seller corporation retain some ownership interest in their assets after cleansing those assets of liability.'" *N.Y. v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 211 (2d Cir. 2006) The one New York state court to discuss *National Service Industries* does so approvingly. *Morales v. City of N.Y.*, 849 N.Y.S.2d 406, 411 (N.Y. Sup. Ct. Kings Cty. 2007).
[90] *In re N.Y. City Asbestos Litig.*, 15 A.D.3d at 256.

and buyer were wholly owned subsidiaries. However, this obviously isn't enough to justify a finding of de facto merger.

Quick dissolution

The second element of a de facto merger "may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity is shorn of its assets and has become, in essence, a shell."[91] This would ultimately turn on a factual determination. Countrywide and its subsidiaries continue to exist – and it has been longer than the year courts sometimes use in the "mere continuation" test – which would argue against de facto merger. However, they are no longer active businesses and appear to be winding up their affairs in preparation for dissolution, which could favor a de facto merger.

Buyer assumes liabilities necessary to sustain the enterprise

The third element of a de facto merger examines the "assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation."[92] This is obviously similar to the first theory of successor liability, the assumption of liability, and so courts focus on the language of the contracts.[93] To my knowledge, this element has, however, never been the decisive factor in a finding of successor liability.[94] This factor cuts both ways: the contractual language clearly disclaims various liabilities, including those arising from the Trustee's and Investors' likely claims here, but BAC also likely did assume most of the liabilities necessary to continue the Countrywide business, which would weigh in favor of the Trustee's claim.

Continuity of management and personnel

This factor is heavily fact dependent, and will hinge on the extent to which the management, personnel, and physical plant between the predecessor and successor overlap. However, there is no clear standard applied to determine whether this factor has been satisfied.[95]

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[91] *Buja v. KCI Konecranes Intern. Plc.*, 815 N.Y.S.2d 412, 412 (N.Y. Sup. Ct. Monroe Cty. 2006) (citing *In re N.Y. City Asbestos Litig.*, 15 A.D.3d at 257; *In re AT&S Transp., LLC v. Odyssey Logistics & Technology Corp.*, 22 A.D.3d 750, 753 (2d Dep't 2005); *Fitzgerald v. Fahnestock & Co., Inc.*, 286 A.D.2d 573, 575 (1st Dep't 2001).

[92] *Fitzgerald*, 286 A.D.2d at 574.

[93] *See Morales*, 849 N.Y.S.2d at 412-413 (explaining that this element was already addressed under the section of the case explaining the defendant's express assumption of its predecessors' royalty obligations to the plaintiffs.); *Trystate Mechanical, Inc. v. Tefco, LLC*, No. 7343/10, 2010 WL 3960604 (N.Y. Sup. Ct. Kings Cty. Oct. 2010); *Buja*, 815 N.Y.S.2d at 417 (looking at the "contract between the parties, 'Acquisition of Assets of Shepard Niles Inc by Konecranes, Inc.'").

[94] Indeed, the fact that the defendant has assumed some of its predecessor's liabilities was ruled insufficient, in light of the other missing elements of the de facto merger analysis, to ultimately result in a finding of successor liability. *In re N.Y. City Asbestos Litig.*, 15 A.D.3d at 258-59.

[95] Compare *Trystate*, 2010 WL 3960604, (which found that the plaintiff had appropriately pled successor liability, citing affirmatively the continuity of some key personnel, namely, the fact that the COO in the successor corporation was the President of the predecessor corporation) to *Buja*, 815 N.Y.S.2d at 417 (where continuity of equipment, inventories, accounts receivable, naming rights, customer lists, intellectual property, phone numbers, and goodwill were not sufficient to reach "continuity of management").

That said, "[t]he mere hiring of some of the predecessor's employees is insufficient to raise a triable issue as to continuity of management."[96] Nor does the continued use of a predecessor's name or goodwill constitute the necessary continuity.[97] Whatever extra is needed is left undefined, and thus to the judgment of the court.

This test is uncertain in part because buyers will often (and appropriately) want to use the seller's assets in the same business, and in mergers with synergies there will often be overlap between the buyer's and seller's operations. Therefore, some overlap and continuity should be expected, and absent the sort of concerns discussed in connection with the "mere continuation" test (i.e. where the buying entity is identical to the selling entity and appears to be a simple attempt to defraud creditors), there is no reason to penalize buyers by taxing them with seller's liability just because they continue to employ the assets in a similar business. Moreover, such a rule would be wasteful to the degree that it discouraged valuable mergers or prohibited valuable integration; society and even creditors are no better off if sellers simply acquire the buyer, but operate it as a stand-alone entity without integrating its operations.

As discussed on page 13, BAC not only transitioned in its own management team, but over half of the legacy Countrywide employees were severed subsequent to the Acquisition, and approximately 600 have remained with Countrywide.

In the end, although I think the economic arguments and bulk of the case law weigh against a claim for successor liability based on de factor merger, there is uncertainty as to how a New York court would rule on such a claim. As discussed, however, BAC's position that the de facto merger doctrine would not apply is certainly reasonable.

SUCCESSOR LIABILITY IN CALIFORNIA

This memo does not discuss the law of successor liability in California. The recent decision by a Federal District court judge, *Maine State Retirement System v. Countrywide Financial Corporation,* suggests that California courts would apply Delaware law (reviewed above).

Summary

Based on my understanding of the facts, it would probably be a bad idea for courts to hold BAC liable as a successor, especially if it paid a fair price in the Transactions; if Investors were not harmed by the Transactions, there is no reason to hold BAC entities liable. A finding of successor liability would effectively grant Investors a windfall based on BAC's acquisition and would undermine valuable corporate law rules. This would be costly for society and discourage valuable transactions that will be deterred by the possibility of an adverse ruling. Imposing additional liabilities on BAC would function as something of an unexpected tax on its merger. Given the importance of mergers (and asset sales and subsequent integration) to a recovering banking and mortgage industry, such a rule could have harmful effects.

If Delaware law applies, as I think it would, BAC would probably not be liable unless the Trustee could show that BAC materially underpaid in the Transactions. Assumption of liability

[96] *Kretzmer v. Firesafe Prods. Corp.*, 24 A.D.3d 158, 159 (1st Dep't 2005).
[97] *Buja*, 815 N.Y.S.2d at 417.

arguments will likely fail given the express language to the contrary in the Transaction Documents; "mere continuation" is unlikely because the primary purchaser was BAC, an entity that that had approximately $1.7 trillion in assets prior to the transactions at issue; and a de facto merger is unlikely because Delaware courts eschew the kind of uncertainty such a holding would bring and tend to focus on whether the sale harmed creditors.

The more difficult question is whether BAC would be liable under the de facto merger doctrine under New York law. I think the economic arguments and bulk of the case law favor BAC, but it is possible – though not likely – that the Trustee could succeed on this. New York case law on this is sometimes erratic and a number of cases interpret the law in a way that would make BAC liable. New York courts could follow the lead of the recent decision in *MBIA v. Countrywide* and find that de facto merger allegations are plausible enough to survive a motion to dismiss. The Trustee's best chance to recover under this theory would be to appeal to the strain of cases that look at simple tests and ignore the underlying economic reality (the benefits of consolidating operations, the need for legal certainty, and the need to focus on whether creditors were harmed in the Transaction). The potential for a favorable ruling however is muted by the fact that New York law may not even apply.

While the ultimate outcome is a difficult question, turning on unknown facts and developing law, in the end, I believe that a successor liability case would be difficult to win unless the Transactions materially reduced the value of the legacy Countrywide subsidiaries. It is simply too hard to explain why BAC should be liable – and a fundamental rule of corporate transactions set aside – if the Transactions caused no harm to Investors.

Dated: June 7, 2011

Rob Daines

Professor Robert Daines

Appendix A Choice of Law

Veil piercing and successor liability are matters of state (rather than federal) law and each state has its own laws. Therefore, you have asked me to consider which state laws might apply to a veil piercing or successor liability claim against BAC. I describe the likely outcomes if a suit is brought in New York, in Delaware (where Bank of America and Countrywide are incorporated), or in California (Countrywide's physical headquarters).

As described below, I expect a court would probably apply Delaware law.

New York as Forum State

If suit is brought in New York, New York's choice of law rules will determine which state's substantive law governs. Typically, New York courts (and federal courts applying New York law) simply apply the law of the state of incorporation to veil piercing and successor liability claims.[98] Thus, a New York court would likely apply Delaware law because Countrywide and Bank of America are both incorporated in Delaware.

First, some argue this is dictated by the "internal affairs" rule, which holds that the internal affairs of a firm are governed by the state of incorporation (internal affairs include the relationship between managers, officers and shareholders, shareholder rights the rules governing mergers, limited liability and the duties of control shareholders).

Second, Delaware may have a greater interest in having its laws apply. New York courts typically apply "the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation."[99] New York courts typically find that the state of incorporation has a stronger interest in veil piercing and successor liability claims. For example, in *Soviet Pan Am v. Travel Committee, Inc.*, 756 F. Supp. 126 (S.D.N.Y. 1991), the court (applying New York's choice of law doctrine) found that the state of incorporation (Maryland) had the greatest interest in deciding successor liability and corporate veil piercing claims even though New York had the greater interest in deciding the underlying breach of contract claims.[100] Thus, "[b]ecause a

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[98] *See Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (affirming that, under New York's choice of law rules, "'[t]he law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders.'"); *see also Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132-33 (2d Cir. 1993) (applying Texas law to corporate veil piercing and alter ego claims against a Texas corporation, even though "the debentures for which Appellant [Kalb] seeks to hold Appellee [AFC] liable were issued, purchased, and payable in New York," "the underwriters were based in New York," and "the debentures contained a clause stating that New York law should govern"); *Time Warner Cable, Inc. v. Networks Groups, LLC*, No. 09 Civ. 10059(DLC), 2010 WL 3563111, at *3-4 (S.D.N.Y. Sept. 9, 2010) (explaining that, in a case where Time Warner sued Networks Groups and TMG (corporations incorporated in Colorado), under New York's choice of law principles, "the law of Colorado governs the plaintiff's veil-piercing claim"); *U.S. Fid. & Guar. Co. v. Petroleo Brasileiro S.A.-Petrobras*, No. 98 Civ. 3099(THK), 2005 WL 289575, at *5 (S.D.N.Y. Feb. 4, 2005) ("The question of successor liability in this proceeding . . . should be governed by the law of . . . the jurisdiction of the relevant entities' incorporation," meaning that the New York court applied Brazilian law since the defendant corporation was incorporated in Brazil).

[99] Interest analysis follows the court's determination that there is "actual conflict" between the states' laws that could apply. *Burnett v. Columbus McKinnon Corp.*, 69 A.D.3d 58, 60 (4th Dep't 2009).

[100] *Soviet Pan Am*, 756 F. Supp. at 131.

corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away," and therefore Maryland had the greater interest in applying its law to the successor liability claim.

However, there are several ways that New York law could apply. First, both parties may consent (either explicitly or implicitly by failing to raise the issue) and New York law may be judged "substantially similar" to Delaware's.[101] This was the case in the recent *MBIA v. Countrywide* case.[102] Although the New York Supreme Court did not explain its choice of law decision or discuss why it presumed the application of New York's substantive law, the decision might influence other New York courts.[103]

Second, a court might decide that the rights of creditors and third parties should not be governed by the "internal affairs rule." The United States Supreme Court held, for instance, that "the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation" but that "[d]ifferent conflicts principles apply . . . where the rights of third parties *external* to the corporation are at issue."[104] Such a rule may make sense as a policy matter: shareholders may select a state of incorporation based on the protection it offers them, but there is less reason to think that shareholders will select (or incorporation states provide) rules that provide the right protection for creditors.[105]

Third, it is always possible that, despite general precedent, a court could decide that New York has a unique interest in having its law apply to this particular case, as it is my understanding that most, if not all, of the Pooling and Servicing Agreements relating to the original loan transfers were governed by New York law, as were the vast majority of the

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[101] For example, in *Wausau Business Ins. Co. v. Turner Constr. Co.*, 141 F. Supp. 2d 412 (S.D.N.Y. 2001), a New York construction company sought to pierce the corporate veil of a Delaware corporation to reach the parent corporation based on sums owed for breach of contract. *Id.* at 415. The court noted that even though New York choice of law principles would require the application of Delaware law (the state of incorporation), "some courts . . . have adopted the law the parties agree to employ rather than the law of the state of incorporation where there is no substantive difference between the two state law approaches to piercing the corporate veil." *Id.* at 417. The court applied New York law, since both parties relied on New York law in their briefs and "the standards for piercing the corporate veil are substantially similar under Delaware and New York law." *Id; see also In re Saba Enter., Inc.*, 421 B.R. 626, 648-52 (Bankr. S.D.N.Y. 2006) (discussing line of cases that allows for application of New York's substantive law if parties have consented to New York law and substantial similarity between laws exists).

[102] *See* Order on Countrywide and BAC's Motion to Dismiss *MBIA Insurance v. Countrywide Home Loans*, Index No. 602825/2008 (N.Y. Sup. Ct. N.Y Cty. Apr. 27, 2010).

[103] *See id* at 11-12.

[104] *First Nat'l City Bank v. Banco paro el Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983) (emphasis in original). Plaintiffs in *Maine State*, involving similar claims against Bank of America, argued that in "matters that affect[s] the rights of third parties, such as creditors" interest analysis should apply. Brief for Plaintiff at 14 *Maine State Ret. System v. Countrywide Fin. Corp., et al.*, No. 2:10-CV-00302 (C.D. Cal. Sept. 16, 2010), 2010 WL 4774120.

[105] The comments to Restatement (Second) of Conflict of Laws Section 302 could also be persuasive (even though New York is not a "Restatement" state), since they indicate that "[t]he reasons for applying the local law of the state of incorporation carry less weight when the corporation has little or no contact with this state other than the fact that was incorporated there. In such situations, some other state will almost surely have a greater interest than the state of incorporation in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 302 cmt. g (1971).

operative agreements relating to the Transactions at issue. A recent case hinted that New York law rather than the law of the firm's domicile might apply to corporate claims "in the rare circumstance where the corporation has no contacts with its state of incorporation, other than the fact of incorporation, and has more significant contacts with the forum state."[106,107]

I do not expect this, however. Delaware, contracting parties and capital markets generally all have a strong interest in the clarity offered by a bright line rule (like following the law of the state of incorporation), while an ad hoc "state's interest" analysis would generate a great deal of uncertainty and I have seen no argument that New York or California have a unique interest in applying their choice of law here..[108]

Delaware as Forum State

If Delaware is the forum state, in my opinion Delaware courts are likely to apply Delaware law. Delaware has adopted the Second Restatement's approach to analyzing choice of law problems and therefore will attempt to determine the state with the "most significant relationship" to the issues.[109]

The Restatement (Second) of Conflicts creates a strong presumption that the law of the state of incorporation governs a firm's "internal affairs" - including matters that affect creditors.[110] Oddly, there is not much precedent about whether veil piercing claims and successor liability are "internal affairs" subject to Delaware substantive law or, instead, other

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[106] *See Sokol v. Ventures Educ. Systems Corp.*, No. 602856/02, 2005 Slip Op 51963U, at *4 (N.Y. Sup. Ct. N.Y. Cty. 2005). However, even in this case the court still applied Delaware law even though all the significant contacts (besides incorporation) were with New York.

[107] If New York courts considered creditors' claims as rooted in tort (fraud) or contract (breach of warranty or misrepresentation), it is unclear which law would instead apply. In tort cases, "the court should focus almost exclusively on the parties' domiciles and the locus of the tort." *See Roselink Investors, LLC v. Shenkman*, 386 F. Supp. 2d 209, 225 (S.D.N.Y. 2004); *see also Padula v. Lilarn Prop. Corp.*, 620 N.Y.S.2d 310, 311 (1994) (discussing New York choice of law principles in tort).

If New York contract analysis is applied, the court applies a "center of gravity" test, which will be fact specific and may point to New York rather than Delaware law. *See Matter of Allstate Ins. Co (Stolarz)*, 81 N.Y.2d 219, 226 (1993) ("The 'center of gravity' or 'grouping of contacts' choice of law theory applied in contract cases enables the court to identify which law to apply without entering into the difficult, and sometimes inappropriate, policy thicket. Under this approach, the spectrum of significant contacts—rather than a single possibly fortuitous event—may be considered. Critical to a sound analysis, however, is selecting the contacts that obtain significance in the particular contract dispute. As we have noted, the traditional choice of law factors should be given 'heavy weight' in a grouping of contacts analysis.").

[108] In *Sokol*, the court did not apply New York law, even though the firm's principal place of business was in New York and it had "no office, employees, or contacts in Delaware, and conduct[ed] no business there." 2005 Slip Op 51963U, at *4. Instead, it ultimately applied Delaware law because the parties had previously "agreed to govern [the firm's] internal affairs in accordance with the laws of Delaware" and because the firm conducted business across the United States outside of New York. As a result, Delaware law governed the firm's internal affairs, but New York governed other claims. *Id.* at *5.

[109] *Liggett Group Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 (Del. Super. Ct. 2001). See factors set out in Section 6 of the Restatement (Second), as well as specialized sections depending on the matter at hand. *See Travelers Indem. Co. v. Lake*, 594 A.2d 38, 45-47 (Del. 1991).

[110] Restatement (Second) of Conflicts § 302 cmt. A (1971). However, "corporate acts that can also be done by individuals" are subject to the "most significant relationship" test. The test is set out in Section 6 of the Restatement (Second) of conflicts. *Id.*

corporate acts subject to the "most significant relationship" test. In either case, however, Delaware courts are likely to apply Delaware law.

First, given Delaware's special place in corporate law, Delaware courts are especially vigorous in protecting the "internal affairs doctrine" and tend to construe it broadly.[111] Second, Delaware courts are likely to decide that Delaware has more significant interests in resolving claims of veil piercing and successor liability here, involving as they do the questions of limited liability, shareholder liability for corporate debts, rules governing acquisitions, and the role of officers, directors and control shareholders. Sophisticated contracting parties and investors benefit from the clarity offered by a bright line rule like following the law of the state of incorporation.[112] The Supreme Court has noted that "a corporation - except in the rarest situations - is organized under, and governed by, the law of a single jurisdiction."[113]

California as Forum State

Under California choice of law rules, Delaware's substantive law could apply in one of two ways.[114] First, as the Central District of California recently found in the *Maine State* case, successor liability claims against Bank of America could be considered an internal corporate affair.[115] Second, a court could decide that Delaware's law "would be more impaired [than

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[111] In *In re Washington Mutual, Inc.*, the U.S. Bankruptcy Court for the District of Delaware (applying Delaware's choice of law rules) rejected the plaintiff mortgage holder's attempt to pierce the corporate veil between Washington Mutual, Inc., the Washington-incorporated savings and loan holding company, and Washington Mutual Bank, its Washington-incorporated subsidiary after the latter was taken over by the FDIC and the former filed for Chapter 11 bankruptcy. *In re Washington Mutual, Inc.*, No. 08–12229 (MFW), 2010 WL 3238903, at *1 (Bankr. D. Del. Aug. 13, 2010). The court found that "Delaware's choice-of-law rules require a court sitting in Delaware to look to a company's state of incorporation to determine the relationship between the corporate entity and its shareholders. Because both WMI and WMB are incorporated in the state of Washington, the Court applies Washington law in deciding whether WMI can be held liable for WMB's actions." *Id*, at *11 (citation omitted)." *See also Maine State Ret. System v. Countrywide Fin.*, No. 2:10-CV-0302, 2011 WL 1765509, at *4 (C.D. Cal. Apr. 20, 2011) (applying Delaware law in a case involving identical parties to the one at hand after discussing Section 302 of the Restatement (Second) of Conflict of Laws and finding that "[t]he particular issue . . . is successor liability by virtue of *de facto* merger. Mergers, reorganizations, and matters that may affect the interests of the corporation's creditors all fall within the scope of Section 302, which prescribes the law of the state of incorporation.").

[112] In addition, "[a]pplication of the local law of the state of incorporation will usually be supported by those choice-of-law factors favoring the needs of the interstate and international systems, certainty, predictability and uniformity of result, protection of the justified expectations of the parties and ease in the application of the law to be applied"; this sort of "[u]niform treatment . . . can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law." Restatement (Second) of Conflict of Laws § 302 cmt. e.

[113] *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987); *see Examen, Inc. v. VantagePoint Venture Partners 1996*, 873 A.2d 318, 324 (Del. Ch. 2005); *McDermott, Inc. v. Lewis*, 531 A.2d 206, 216-17 (Del. 1987). (quoting *CTS* and emphasizing the importance of having a single state govern the internal affairs of a corporation).

[114] *Love v. Assoc. Newspapers, Ltd.*, 611 F.3d 601, 610 (9th Cir. 2010) (setting out California's approach to interest analysis).

[115] *Maine State Ret. System*, 2011 WL 1765509, at *4 ("The particular issue in this case is successor liability by virtue of *de facto* merger . . . because the issue of whether an asset transfer constitutes a *de facto* merger is peculiar to corporations, Delaware law applies.") California has adopted the internal affairs doctrine and "[i]n general, courts in California follow this rule and apply the law of the state of incorporation in considering claims relating to internal corporate affairs." *In re Sagent Tech., Inc., Derivative Litig.*, 278 F. Supp. 2d 1079, 1087 (N.D. Cal. 2003). As noted above, however, whether successor liability and corporate veil piercing, in particular, are internal affairs when third parties are involved is disputed. In *Oncology Therapeutics Network Connection v. Virginia Hematology Oncology*

California's] if its law were not applied."[116] It is possible that the issues could be characterized as "external" to corporate affairs or that California has a more substantial interest given that Countrywide and potential claimants are there.[117] However, it seems more likely that a California court would apply Delaware law given (1) the precedent set by the recent Federal court decision applying Delaware law to similar claims on these facts,; and (2) the public's interest in predictability, uniformity of results, and protecting the expectations of parties.[118] I have not seen any evidence or arguments that California has a unique interest in having its law apply.

PLLC, No. C 05-3033 WDB, 2006 WL 334532, at *12 (N.D. Cal. Feb. 10, 2006), the court discussed which law would apply to defendant Oncology Networks' proposed alter ego claims against a second Virginia corporation, allegedly created by the plaintiff to avoid liability. The court distinguished the facts of that case from prior applications of the internal affairs by noting that prior cases "do[] not involve an effort by an *outsider* to pierce the corporate veil based on alter ego. Moreover, it is not clear to us that an 'alter ego' claim such as that asserted by plaintiff involves 'internal' affairs of the corporation, as opposed to affairs 'external' to the corporation." *Id.* at *17. Instead, the court found that the interests of the state of incorporation would factor into a broader interest analysis. *Id.*

[116] *See Love*, 611 F.3d at 610 (quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001)).

[117] *See Wilson v. Louisiana-Pacific Resources, Inc.*, 187 Cal. Rptr. 852, 858 (Cal. Ct. App. 1982) (noting, although in a context unrelated to corporate veil piercing or successor liability, that the internal affairs doctrine has never been "followed blindly in California").

[118] In *Schlumberger Logelco, Inc. v. Morgan Equip. Co.*, No. C 94-1776 MHP, 1996 WL 251951, at *3 (N.D. Cal. May 3, 1996), the court held that Austrian law would apply to an alter ego claim to pierce the corporate veil of an Austrian corporation to reach its parent corporation for unpaid debts. Citing the Second Circuit's decision in *Kalb*, discussed above, the court found "that the law of Austria, as the state of incorporation, governs plaintiffs' alter ego claim" and that "Austria has a substantial interest in determining whether to pierce the corporate veil of one of its corporations. *Id; see also Sunnyside Dev. Co., LLC v. Opsys Ltd.*, No. C 05-0553 MHP, 2005 WL 1876106, at *3 (N.D. Cal. 2005) (finding "no reason to depart from the analysis set forth in the *Schlumberger*" and applying British law to determine whether to pierce the corporate veil based on an alter-ego theory of liability against a British corporate defendant).

Appendix B Materials reviewed

SEC Filings

Bank of America

Bank of America Corporation, Form 10-K, for the year ended December 31, 2008, filed February 27, 2009.

Bank of America Corporation, Form 10-Q, for the three months ended June 30, 2008, filed August 7, 2008.

Bank of America Corporation, Form 10-Q, for the three months ended September 30, 2008, filed November 6, 2008.

Bank of America Corporation, Form 10-Q, for the three months ended March 31, 2011, filed May 5, 2011.

Bank of American Corporation, Form 8-K, Current Report for January 11, 2008.

Bank of American Corporation, Form 8-K, Current Report for April 21, 2008.

Bank of American Corporation, Form 8-K, Current Report for May 28, 2008.

Bank of American Corporation, Form 8-K, Current Report for July 1, 2008.

Bank of American Corporation, Form 8-K, Current Report for July 21, 2008.

Bank of American Corporation, Form 8-K, Current Report for October 6, 2008.

Bank of American Corporation, Form 8-K, Current Report for November 7, 2008.

Bank of American Corporation, Form 8-K, Current Report for November 12, 2008.

Bank of American Corporation, Form 8-K/A, Current Report for December 31, 2008.

Bank of American Corporation, Form 8-K, Current Report for February 27, 2009.

Bank of American Corporation, Form 8-K, Current Report for March 3, 2009.

Bank of American Corporation, Form 8-K, Current Report for May 28, 2009.

Bank of American Corporation, Form 8-K, Current Report for October 16, 2009.

Countrywide

Countrywide Financial Corp., Form 10-K, for the year ended December 31, 2004, filed March 15, 2005.

Countrywide Financial Corp., Form 10-K, for the year ended December 31, 2005, filed March 1, 2006.

Countrywide Financial Corp., Form 10-K, for the year ended December 31, 2006, filed March 1, 2007.

Countrywide Financial Corp., Form 10-K, for the year ended December 31, 2007, filed February 29, 2008.

Countrywide Financial Corp., Form 10-K/A, for the year ended December 31, 2007, filed April 24, 2008.

Countrywide Financial Corp., Form 10-Q, for the three months ended March 31, 2008, filed May 12, 2008.

Countrywide Financial Corp., Form 10-Q, for the three months ended June 30, 2008, filed August 11, 2008.

Countrywide Financial Corp., Form 10-Q, for the three months ended June 30, 2007, filed August 9, 2007.

Countrywide Financial Corp., Form 8-K, Current Report for January 9, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for January 11, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for January 17, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for January 30, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for January 31, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for February 15, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for March 13, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for April 3, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for April 30, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for June 2, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for June 25, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for July 8, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for September 17, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for October 14, 2008.

Countrywide Financial Corp., Form 8-K, Current Report for October 21, 2008.

Countrywide Financial Corp., Form 11-K, for the fiscal year ended December 31, 2007, filed June 30, 2008.

Financial Statements

Countrywide Financial Corporation, Selected Consolidated Financial Information (Unaudited) March 31, 2011.

Countrywide Financial Corporation, Selected Consolidated Financial Information (Unaudited) December 31, 2010.

Countrywide Home Loans, Selected Financial Information (Unaudited) March 31, 2011.

Countrywide Home Loans, Selected Financial Information (Unaudited) December 31, 2010.

Corporate Organization Charts

Countrywide Financial Corp Organization Chart, dated March 31, 2008.

Bank of America Corporation, Organization Chart with Countrywide entities, dated July 31, 2008.

Bank of America Corporation, Organization Chart with Countrywide entities, dated October 31, 2008.

Bank of America Corporation, Organization Chart with Countrywide entities, dated January 31, 2011.

Other Documents

Demand Note dated July 1, 2008 (BACMBIA-C0000161141 – 145).

Repayment Demand Notice dated July 2, 2008 (BACMBIA-C0000161146 – 147).

Repayment Demand Notice dated July 2, 2008 (BACMBIA-C0000161148 – 149).

Demand Note dated July 3, 2008 (BACMBIA-C0000161219 – 223).

Demand Note dated July 2, 2008 (BACMBIA-C0000161271 – 275).

Amendment to Mortgage Servicing Rights Purchase Agreement dated July 1, 2008 (BACMBIA-C0000161200 – 202).

Minutes to a Special Meeting of the Board of Directors of Countrywide Commercial Real Estate Finance, Inc., dated June 30, 2008 (BACMBIA-C0000161010 – 012).

Countrywide Home Loans, Inc. Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated July 1, 2008 (BACMBIA-C0000161322 – 324).

Amendment No. 3 to Limited Partnership Agreement of Countrywide Home Loans Servicing LP, dated June 26, 2008 (BACMBIA-C0000161216 – 218).

Amendment No. 1 to Operating Instrument of Countrywide GP, LLC, dated July 2, 2008 (BACMBIA-C0000161595 – 597).

Amendment No. 1 to Operating Instrument of Countrywide LP, LLC, dated July 2, 2008 (BACMBIA-C0000161598 – 600).

Amendment No. 2 to Operating Instrument of Countrywide GP, LLC, dated July 2, 2008 (BACMBIA-C0000161601 – 602).

Amendment No. 2 to Operating Instrument of Countrywide LP, LLC, dated July 2, 2008 (BACMBIA-C0000161603 – 604).

Master Services Agreement, dated July 2, 2008 (BACMBIA-C0000161203 – 215).

Countrywide Home Loans Servicing LP Action by Written Consent of the General Partner, dated July 1, 2008 ((BACMBIA-C0000160997 – 999).

Countrywide GP, LLC Action by Written Consent of Sole Member, dated July 1, 2008 (BACMBIA-C0000161000 – 001).

Countrywide LP, LLC Action by Written Consent of Sole Member, dated July 1, 2008 (BACMBIA-C0000161002 – 003).

Assignment (GP), dated July 1, 2008 (BACMBIA-C0000161244 – 245).

Assignment (LP), dated July 1, 2008 (BACMBIA-C0000161246 – 247).

Assignment (SLP), dated July 1, 2008 (BACMBIA-C0000161248 – 249).

Bailment Agreement, dated July 1, 2008 (BACMBIA-C0000161258 – 264).

Bailment Agreement, dated July 1, 2008 (BACMBIA-C0000161265 – 270).

Bailment Agreement, dated July 3, 2008 (BACMBIA-C0000161276 – 282).

Bailment Agreement, dated July 3, 2008 ((BACMBIA-C0000161283 – 288).

Purchase and Sale Agreement, dated July 2, 2008 (BACMBIA-C0000161342 – 350).

Commercial Real Estate Loan Purchase and Sale Agreement, dated July 3, 2008 (BACMBIA-C0000161613 – 628).

Master Mortgage Loan Purchase and Subservicing Agreement, dated July 1, 2008 (BACMBIA-C0000161028 – 140).

Countrywide Home Loans, Inc. Amended and Restated Mortgage Loan Subservicing Agreement, dated July 2, 2008 (BACMBIA-C0000161150 – 174).

Countrywide Home Loans Servicing LP Amended and Restated Mortgage Loan Subservicing Agreement, dated July 2, 2008 (BACMBIA-C0000161175 – 199).

Purchase Confirmation Deal No. 2008-002, dated July 3, 2008 (BACMBIA-C0000161224 – 231).

Purchase Confirmation Deal No. 2008-001, dated July 1, 2008 (BACMBIA-C0000161250 – 257).

State of Florida Certification for Countrywide Capital Markets, dated June 5, 2009 (BACMBIA-C0000168098 – 123).

GlobaLoans International Technology Limited Partnership, Limited Partnership Act 1907 dated January 16, 2009 (BACMBIA-C0000168639 – 642).

Plan of Conversion of Balboa Insurance Group, Inc. into CW Insurance Group, LLC, dated October 31, 2008 (BACMBIA-C0000168054 – 058).

Balboa Insurance Group, Inc. Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated October 31, 2008 (BACMBIA-C0000168059 – 062).

Balboa Insurance Group, Inc. Action by Written Consent of Sole Shareholder, dated October 31, 2008 (BACMBIA-C0000068063 – 065).

CW Insurance Group, LLC Action by Written Consent of the Manager, dated October 31, 2008 (BACMBIA-C0000168066 – 069).

Plan of Conversion of Countrywide Capital Markets, Inc. into Countrywide Capital Markets, LLC, dated October 31, 2008 (BACMBIA-C0000168076 – 080).

Countrywide Capital Markets, Inc. Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated October 31, 2008 (BACMBIA-C0000168081 – 086).

Countrywide Capital Markets, Inc. Action by Written Consent of the Sole Shareholder, dated October 31, 2008 (BACMBIA-C0000168087 – 089).

Countrywide Capital markets, LLC Action by Written Consent of the Manager, dated October 31, 2008 (BACMBIA-C0000168090 – 092).

CW Insurance Group, Inc. Action by Written Consent of the Manager, dated October 31, 2008 (BACMBIA-C0000168128 – 131).

Countrywide Capital Markets, LLC Action by Written Consent of the Manager, dated October 31, 2008 (BACMBIA-C0000168133 – 135).

Demand Note, dated November 7, 2008 (BACMBIA-C0000168237 – 241).

Purchase and Sale Agreement, dated November 7, 2008 (BACMBIA-C0000168406 – 416).

Demand Note, dated November 7, 2008 (BACMBIA-C0000168417 – 421).

Purchase and Sale Agreement, dated November 7, 2008 (BACMBIA-C0000168422 – 436).

Demand Note, dated November 7, 2008 (BACMBIA-C0000168437 – 442).

Demand Note, dated November 7, 2008 (BACMBIA-C0000168502 – 507).

Certificate of Ownership Merging Countrywide Financial Holding Company, Inc. with and into Countrywide Financial Corporation, dated October 31, 2008 (BACMBIA-C0000168044 – 046).

Amendment No. 1 to the Asset Purchase Agreement, dated January 5, 2009 (BACMBIA-C0000168230 – 232).

Termination of Asset Contribution Agreement, dated November 7, 2008 (BACMBIA-C0000168311 – 312).

Termination of Mortgage Loan Subservicing Agreement, dated November 7, 2008 (BACMBIA-C0000168313 – 314).

Termination of Master Services Agreement, dated November 7, 2008 (BACMBIA-C0000168315 – 316).

Termination Agreement for Management Agreement, dated November 7, 2008 (BACMBIA-C0000168317 – 318).

Termination Agreement for Designation Agreement, dated November 7, 2008 (BACMBIA-C0000168332 – 333).

Amendment No. 1 to the Amended and Restated Mortgage Loan Subservicing Agreement, dated November 7, 2008 (BACMBIA-C0000168376 – 377).

Supplemental Agreement No. 1 to the Asset Purchase Agreement, dated March 6, 2009 (BACMBIA-C0000168233 – 236).

Amendment No. 1 to the Demand Note, dated March 6, 2009 (BACMBIA-C0000168242 – 245).

Amendment No. 1 to the Stock Purchase Agreement, dated January 5, 2009 (BACMBIA-C0000168495 – 497).

Supplemental Agreement No. 1 to the Stock Purchase Agreement, dated March 6, 2009 (BACMBIA-C0000168498 – 501).

Amendment No. 1 to the Demand Note, dated March 6, 2009 (BACMBIA-C0000168508 – 511).

Countrywide International Consulting Services, LLC Action Written Consent of the Managers, dated January 16, 2009 (BACMBIA-C0000168634 – 637).

Countrywide Financial Holding Company, Inc. Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated October 31, 2008 (BACMBIA-C0000168047 – 048).

Countrywide Financial Corporation Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated October 31, 2008 (BACMBIA-C0000168049 – 052).

Countrywide Financial Corporation Action by Unanimous Written Consent of Directors in Lieu of Meeting with Directors, dated October 31, 2008 (BACMBIA-C0000168167 – 170).

Effinity Financial Corporation Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated October 31, 2008 (BACMBIA-C0000168141 – 143).

Countrywide Servicing Exchange Written Consent of the Other Member of Countrywide International Consulting Services, dated November 7, 2008 (BACMBIA-C0000168144 – 146).

Effinity Financial Corporation Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated October 31, 2008 (BACMBIA-C0000168152 – 154).

Countrywide GP, LLC Action by Written Consent of Director, dated November 1, 2008 (BACMBIA-C0000168601 – 603).

Countrywide LP, LLC Action by Written Consent of the Manager, dated November 1, 2008 (BACMBIA-C0000168604 – 606).

Countrywide Home Loans Servicing, LP Action by Written Consent of the General Partner, dated November 1, 2008 (BACMBIA-C0000168607 – 609).

Effinity Financial Corporation Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated December 31, 2008 (BACMBIA-C0000168614 – 616).

Countrywide Servicing Exchange Action by Unanimous Written Consent of Directors in Lieu of Meeting with Directors, dated December 31, 2008 (BACMBIA-C0000168617 – 622).

Countrywide Servicing Exchange Action by Unanimous Written Consent of Directors in Lieu of Meeting with Directors, dated December 31, 2008 (BACMBIA-C0000168628 – 633).

Operating Instrument of CW Insurance Group, LLC, dated October 31, 2008 (BACMBIA-C0000168070 – 074).

Operating Instrument of Countrywide Capital Markets, LLC, dated October 31, 2008 (BACMBIA-C0000168093 – 097).

Assignment and Assumption Agreement for Technology License Agreement, dated November 7, 2008 (BACMBIA-C0000168279 – 281).

Assignment and Assumption Agreement for Hedge Participation Agreement, dated November 7, 2008 (BACMBIA-C0000168282 – 284).

Contribution Agreement, dated November 1, 2008 (BACMBIA-C0000168124 – 126).

Contribution Agreement, dated November 1, 2008 (BACMBIA-C0000168136 – 139).

Contribution Agreement, dated November 1, 2008 (BACMBIA-C0000168147 – 150).

Contribution Agreement, dated November 1, 2008 (BACMBIA-C0000168162 – 166).

Contribution Agreement, dated November 7, 2008 (BACMBIA-C0000168573 – 576).

Contribution Agreement, dated November 7, 2008 (BACMBIA-C0000168577 – 579).

Contribution Agreement, dated December 31, 2008 (BACMBIA-C0000068610 – 613).

Contribution Agreement, dated January 16, 2009 (BACMBIA-C0000168624 – 627).

Management Services Agreement, dated November 1, 2008 (BACMBIA-C0000168319 – 331).

Management Services Agreement, dated November 1, 2008 (BACMBIA-C0000168334 – 346).

Management Services Agreement, dated November 1, 2008 (BACMBIA-C0000168347 – 359).

Management Services Agreement, dated November 1, 2008 (BACMBIA-C0000168360 – 375).

Notice of Termination of Intercompany Account Agreement, dated November 7, 2008 (BACMBIA-C0000168285 – 310).

NB Holdings Corporation Termination of the subservicing provision in the Master Mortgage Loan Purchase and Subservicing Agreement, dated November 10, 2008 (BACMBIA-C0000168378 – 405).

Asset Purchase Agreement by and between Bank of America Corporation and Countrywide Home Loans, Inc., dated November 7, 2008 (BACMBIA-C0000168172 – 229).

Bill of Sale, dated November 7, 2008 (BACMBIA-C0000168246 – 247).

Assignment and Assumption Agreement, dated November 7, 2008 (BACMBIA-C0000168248 – 250).

Stock Purchase Agreement by and between Bank of America Corporation and Countrywide Financial Corporation, dated November 7, 2008 (BACMBIA-C0000168443 – 494).

Countrywide Home Loans, Inc Action by Unanimous Written Consent of Directors in Lieu of Meeting Directors, dated October 14, 2008 (BACMBIA-C00000168260 – 277).

Countrywide Financial Corporation Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated October 3, 2008 (BACMBIA-C0000168521 – 542).

Countrywide Home Loans, Inc. Action by Unanimous Written Consent of Directors in Lieu of Meeting of Directors, dated October 14, 2008 (BACMBIA-C0000168543 – 560).

GlobaLoans International Technology Limited Partnership, Limited Partnership Act 1907 dated November 3, 2008 (BACMBIA-C0000168158 – 161).

State of California Limited Liability Company Articles of Organization Conversion, dated October 31, 2008 (BACMBIA-C0000168053).

State of California Limited Liability Company Articles of Organization Conversion, dated October 31, 2008 (BACMBIA-C0000168075).

Secretary's Certificate of CW Insurance Group LLC, dated November 1, 2008 (BACMBIA-C0000168127).

Secretary's Certificate of Countrywide Capital Markets, LLC, dated November 1, 2008 (BACMBIA-C0000168132).

Consent to Assignment of Interest in GlobaLoans International Technology Limited Partnership, dated October 31, 2008 (BACMBIA-C0000168155).

The London Gazette, dated November 3, 2008 (BACMBIA-C0000168156).

Form of Adherence, dated November 1, 2008 (BACMBIA-C0000168157).

Action by Written Consent of the Sole Stockholder of Countrywide Home Loans, Inc., dated October 14, 2008 (BACMBIA-C0000168278).

Countrywide Servicing Exchange Written Consent of the Other Member of Countrywide International Consulting Services, LLC, dated December 31, 2008 (BACMBIA-C0000168623).

Form of Adherence, dated January 16, 2009 (BACMBIA-C0000168638).

CASES

PIERCING THE CORPORATE VEIL

DELAWARE

David v. Mast, No. 1369-K, 1999 WL 135244 (Del. Ch. Mar. 2, 1999)

Geyer v. Ingersoll Publications Co., 621 A.2d 784 (Del. Ch. 1992)

Harco Nat'l Ins. Co. v. Green Farms. Inc., 1989 WL 110537 (Del. Ch. Sept. 19, 1989)

Hart Holding Co. v. Drexel Burnham Lambert, Inc., C.A. No. 11514, 1992 WL 127567 (Del. Ch. May 28, 1992)

Irwin & Leighton, Inc. v. W.M. Anderson Co., 532 A.2d 983 (Del Ch. 1987)

Mabon, Nugent & Co. v. Texas Am. Energy Corp., 1988 WL 5492 (Del. Ch., Jan. 27, 1988)

Pauley Petroleum Inc. v. Continental Oil Co., 239 A.2d 629 (Del. Ch. 1968)

United States v. Golden Acres, Inc., 702 F. Supp. 1097 (D. Del. 1988)

Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood, 752 A.2d 1175 (Del. Ch. 1999)

Pereira v. Cogan, No. 00 CIV. 619(RWS), 2001 WL 243537 (S.D.N.Y. Mar. 8, 2001)

NEW YORK

888 7th Ave. Assocs. Ltd. P'ship v. Arlen Corp., 172 A.D.2d 445 (1st Dep't 1991)

A. W. Fiur Co., Inc. v. Ataka & Co., Ltd., 71 A.D.2d 370 (1st Dep't 1979)

Anderson St. Realty Corp. v. RHMB New Rochelle Leasing Corp., 243 A.D.2d 595 (2d Dep't 1997)

Carte Blanche (Singapore) PTE., Ltd. v. Diners Club Int'l, Inc., 758 F. Supp. 908 (S.D.N.Y. 1991)

Chase Manhattan Bank (Nat. Ass'n) v. 264 Water St. Assocs., 174 A.D.2d 504 (1st Dep't 1991)

Commercial Sites, Co. v. Prestige Photo Studios, Inc., 272 A.D.2d 360 (2d Dep't 2000)

Directors Guild of Am., Inc. v. Garrison Productions, Inc., 733 F. Supp. 755 (S.D.N.Y. 1990)

Feszczyszyn v. Gen. Motors Corp., 248 A.D.2d 939 (4th Dep't 1998)

Godwin Realty Assocs. v. CATV Enters., 275 A.D.2d 269 (1st Dep't 2000)

In re Morris v. N.Y. State Dept. of Taxation & Fin., 82 N.Y.2d 135 (1993)

Lederer v. King, 214 A.D.2d 354 (1st Dep't 1995)

Matter of Arbitration between Holborn Oil Trading Ltd. & Interpol Bermuda Ltd., 774 F. Supp. 840 (S.D.N.Y. 1991)

Matter of Tax Indebtedness of Coppola, 91-CV-0919(JBW), 1994 WL 159525 (E.D.N.Y. Jan. 10, 1994)

Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131 (2d Cir. 1991)

Pebble Cove Homeowners' Ass'n, Inc. v. Fid. N.Y. FSB, 153 A.D.2d 843 (2d Dep't 1989)

Ravens Metal Products Inc. v. McGann, 267 A.D.2d 527 (3d Dep't 1999)

Rebh v. Rotterdam Ventures Inc., 277 A.D.2d 659 (3d Dep't 2000)

Simplicity Pattern Co. v. Miami Tru-Color Off-Set Serv., 210 A.D.2d 24 (1st Dep't 1994)

Smoothline Ltd. v. N. Am. Foreign Trading Corp., 00 CIV. 2798 DLC, 2002 WL 31885795 (S.D.N.Y. Dec. 27, 2002)

United Rubber, Cork, Linoleum & Plastic Workers of Am., AFL-CIO v. Great Am. Indus., Inc., 479 F. Supp. 216 (S.D.N.Y. 1979)

Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1052 (1992)

William D. Harrington, *Business Associations*, 43 SYRACUSE L. REV. 25 (1992)

CALIFORNIA

ADO Finance, A.G. v. McDonnell Douglas Corp., 931 F. Supp. 711 (C.D. Cal. 1996)

Associated Vendors, Inc. v. Oakland Meat Co., Inc., 210 Cal. App. 2d 825 (Cal. Ct. App. 1962)

Automotriz Del Golfo De Cal. S.A. De C.V. v. Resnick, 47 Cal.2d 792 (1957)

Carlesimo v. Schwebel, 87 Cal. App. 2d 482 (Cal. Ct. App. 1987)

Electro Lock, Inc. v. Core Indus., Inc., No. B134386, 2002 WL 1057468 (Cal. Ct. App. May 28, 2002)

Institute of Veterinary Pathology, Inc. v. Cal. Health Laboratories, Inc., 116 Cal. App. 3d 111 (Cal. Ct. App. 1981)

Katzir's Floor & Home Design v. M-MLS.Com, 394 F.3d 1143 (9th Cir. 2004)

Las Palmas Assocs. v. Las Palmas Ctr. Assocs., 235 Cal. App. 3d 1220 (Cal. Ct. App. 1991)

Minton v. Cavaney, 56 Cal. 2d 576 (1961)

Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101 (C.D. Cal. 2003)

Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988)

Pearl v. Shore, 17 Cal. App. 3d 608 (Cal. Ct. App. 1971)

Sonora Diamond Corp. v. The Superior Court of Tuolomne Cnty., 83 Cal. App. 4th 523 (Cal. Ct. App. 2000)

Pereira v. Cogan, No. 00 CIV. 619(RWS), 2001 WL 243537 (S.D.N.Y. Mar. 8, 2001)

STEPHEN PRESSER, PIERCING THE CORPORATE VEIL (2010)

SUCCESSOR LIABLILITY

DELAWARE

Drug, Inc. v. Hunt, 168 A. 87 (Del. Ch. 1933)

Elmer v. Tenneco Resins, Inc., 698 F. Supp. 535 (D. Del. 1988)

Fell v. S.W.C. Corp., 433 F. Supp. 939 (D. Del. 1977)

Finch v. Warrior Cement Corp., 141 A. 54 (Del. Ch. 1928)

Fountain v. Colonial Chevrolet Co, 1988 WL 40019 (Del. Super. Ct. 1988)

Heilbrunn v. Sun Chem. Corp., 150 A.2d 755 (Del. 1959)

Mason v. Network of Wilmington, Inc., No. A. 19434-NC., 2005 WL 1653954 (Del. Ch. July 2005)

Rauch v. RCA Corp., 861 F.2d 29 (2d Cir. 1988)

Rothschild Int'l Corp. v. Liggett Group, 474 A.2d 133 (Del. 1984)

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15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 7125 (1973 Rev. Vol.)

JESSE A. FINKELSTEIN & R. FRANKLIN BALOTTI, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS (2010)

NEW YORK

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Maine State Ret. System v. Countrywide Fin., No. 2:10-CV-0302, 2011 WL 1765509 (C.D. Cal. Apr. 20, 2011)

Exhibit 27

Exhibit 27 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 27 has been delivered to the Court and served on all parties of record.

Exhibit 28

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Exhibit 29

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., Petitioners, for an order, pursuant to C.P.L.R. 7701, seeking judicial instructions and approval of a proposed settlement.	Index No. 651786/2011

VIDEOTAPED DEPOSITION OF BRIAN LIN

New York, New York

October 16, 2012

JOB NO. 53622
Reported by:

KRISTIN KOCH, RPR, RMR, CRR, CLR

Lin

answered.

A. From the scope of my assignment, I did not.

Q. The same thing is true with respect to success rate; right?

MR. INGBER: Asked and answered.

A. Yes.

Q. Okay. When was the first time that you learned that the proposed settlement amount was 8 and a half billion dollars?

A. I think after when it was settled.

Q. Well, give me a time frame.

A. After my report was issued.

Q. Do you have any more specific time frame than that?

A. I would say spring of 2011.

Q. How do you remember learning that this proposed settlement amount was 8 and a half billion dollars?

A. I am trying to remember which source. This was all over the news, so -- maybe in an article, maybe I heard it from someone.

Q. So you didn't hear it from Trustee's

Exhibit 30

MATERIAL AND ADVERSE OPINION
OF PROFESSOR BARRY E. ADLER

I have been retained by Mayer Brown LLP ("Mayer Brown") to provide an expert opinion on issues of contract interpretation in connection with a potential settlement (the "Potential Settlement") involving securitization trusts for which Mayer Brown's client, The Bank of New York Mellon ("BNY Mellon") is trustee. I have not been retained as a lawyer in connection with this matter, nor do I owe any duty to Mayer Brown or BNY Mellon in connection with this matter. In this opinion, I make no recommendation to Mayer Brown or BNY Mellon. My compensation is based on hours worked and does not depend on the content of my opinion.

1. Qualifications

I am the Bernard Petrie Professor of Law and Business, New York University ("NYU"). I have taught at NYU since 1996. I have also held permanent or visiting appointments at Columbia University School of Law, Emory University School of Law, George Mason University School of Law, University of Virginia School of Law, and Yale Law School. I am the director of the annual NYU Workshop on Bankruptcy and Business Reorganizations and have been a director of the American Law and Economics Association. I teach or have taught Contracts, Bankruptcy, and Corporations, and have been the convener of the Contracts and Commercial Law Area Group at NYU School of Law. I have written a casebook and an edited reader in bankruptcy law, and have written numerous articles in the fields of bankruptcy, commercial, and corporate law.

Below are my general views on the above-quoted language from §2.03(c) of the Pooling and Servicing Agreement and on the above-referenced Bank of America position. 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.

3. Opinion

An interpretive issue is presented by the phrase "materially and adversely affects the interests of the Certificateholders in that Mortgage Loan" as used in §2.03(c) of the Pooling and Servicing Agreement between Countrywide and BNY Mellon. Because the phrase applies to a breach of a representation or warranty used by the seller to induce a sale of a mortgage loan under the agreement, one might say that "material and adverse" refers to the mortgage buyer's purchase decision. Under this interpretation, if at the time of the sale a purchaser would not have accepted the mortgage had it been aware of facts inconsistent with a representation or warranty, then the breach is "material and adverse" to the interests of the purchaser (or owner), which could then demand that the seller buy back a mortgage subject to a repurchase obligation in the event of such breach.* (For simplicity here and hereafter, I ignore the possibility that a seller might satisfy its obligations under the Pooling

* Functionally, a warranty is a promise to make a promisee whole in the event that a factual assertion is false. So one might prefer to think of a warranty breach as a failure to cure or to provide compensation in the event of such falsity rather than as the falsity itself. That said, it is common for a breach of warranty to mean merely that a factual assertion is false and this the sense in which I use the term here.

making process," quoting, *U.S. ex rel. Roman v. Schlesinger*, 404 F.Supp 77, 85 (E.D.N.Y. 1975)).

The court's opinion in *Laureate* is not entirely clear on the question of how one is to interpret "material and adversely affects." The court observed that Lehman had designated evidence that the alleged breach "had an adverse effect on Lehman as it remains undisputed that Lehman lost $13 million on the transaction." *Laureate*, 2007 WL 2904591, at *13. This observation raises the possibility that the court believed "material" goes to the loan purchase decision while "adverse" goes to the loan outcome. Such a reading is awkward and may not have been intended. Still, *Laureate* suggests that a court might determine that there is a repurchase obligation at least in part by reference to how a breach could have affected the initial purchase decision.

The contractual language at issue in *Laureate* is similar to that in §2.03(c) of the Pooling and Servicing agreement between Countrywide and BNY Mellon and so the court's interpretation of the repurchase obligation in *Laureate* may suggest a similar interpretation of the Pooling and Servicing Agreement. But the *Laureate* approach, or one like it, is not the only word on how to interpret such language. For example, in *Wells Fargo Bank N.A. v. LaSalle Bank Nat'l Ass'n*, 643 F. Supp. 2d 1014 (S.D. Ohio 2009), as in *Laureate*, a court was asked to address alleged breaches of representations and warranties in connection with the sale of mortgage loans placed in a trust on behalf of certificateholders. Although the reported opinion is somewhat opaque on the point, apparently the related pooling and servicing agreement provided that the seller could be subject to a repurchase obligation if

The rejection by *Wells Fargo* of a purchase-decision approach to "material and adverse" suggests that whether a breach of a representation or warranty materially and adversely affects the interests of a purchaser (or owner) turns on whether the breach caused a significant loss to the purchaser (or owner). And this is presumably what the court intended in a related jury instruction, which provided that the plaintiff must "prove by a preponderance of the evidence" that a breach of a representation or warranty "caused a material and adverse effect on the value of the loan, the value of the property, or the interests of the investors." General Jury Charge at 22, *Wells Fargo Bank N.A. v. LaSalle Bank Nat'l Ass'n,* Case No. 3:07-cv-0049-MRM (Nov. 24, 2009) (Doc. # 351).

It is possible to distinguish *Laureate* from *Wells Fargo* based on the contractual language applicable in each case. As noted, the language in *Laureate* refers to a breach that materially and adversely affects the interest of the owner of a mortgage loan. In contrast, the comparable language in *Wells Fargo* refers to a breach that materially and adversely affects "the value of" a mortgage loan, the related mortgaged property or the interests of the trustee or any certificateholder in the mortgage loan or the related mortgaged property. *Cf., e.g., LaSalle Bank Nat'l Ass'n v. Citicorp Real Estate, Inc.*, 2002 WL 181703 (S.D.N.Y. Feb. 5, 2002) (addressing similar language). The difference between the two provisions and between the respective interpretations may suggest that unless a repurchase obligation is expressly conditioned on a material and adverse effect on "value" such obligation may be triggered by a mere determination that the purchaser would not have accepted the loan but for the breach. This would mean that §2.03(c) of Pooling and Servicing agreement between addressed the buyer's purchase decision if they meant for an influence on that decision to be the basis for a determination that a breach materially and adversely affects the interests of a mortgage owner. Thus, the *Wells Fargo* approach may, but need not, depend on a reference to "value" in the applicable contractual language.

Turning now to the merits of the alternative approaches, an advantage of the *Wells Fargo* approach is that it can limit purchaser opportunism. This point may be illustrated by the following hypothetical case.

Assume that a seller of mortgage loans represents that the origination practices used by the seller have in all material respects met customary industry standards. Imagine that a seller substantially disregards such standards in the origination of a loan sold to a purchaser on behalf of certificateholders but that the breach does not significantly diminish the value of the loan. Imagine further that subsequent to this transaction, the real estate market crashes and as a consequence of this external event the loan declines precipitously in value. Now consider the question of how to interpret a provision in the contract between the seller and the buyer that gives the latter an option to insist on a repurchase if a breach in a representation or warranty with respect to a mortgage loan materially and adversely affects the interests of the certificateholders.

(Continued . . .)

not necessarily interpret a contract to give every term meaning. As explained by a leading treatise, although the law "prefers an interpretation which gives effect to all parts of the contract rather than one which leaves a portion of the contract ineffective or meaningless ... sometimes particular words or provisions of a contract will be disregarded in order to give effect to the general meaning of a contract." 11 Williston on Contracts §32:9 (4th ed.) (database updated 2011).

testimony of the seller's expert, who concluded, in the court's words, "that the decline in the housing and real estate markets in Las Vegas in 2007-2009 caused material and adverse affects, not a breach of any representation." *Id.* at *4. This expert's conclusion, while perhaps not a legal opinion, does put forward the merit in an interpretation of "material and adverse" that precludes a repurchase obligation when the buyer's motivation to invoke the clause is not a loss caused by the seller's breach.

Although not directly on point here, the interpretive approach adopted in *Wells Fargo* also parallels aspects of the common law material breach doctrine. That doctrine addresses the situation where a party breaches a contract but nevertheless seeks to hold her counterparty to the agreement. In general terms (and at the risk of oversimplification), if the party's breach is material and uncured, she may not insist on her counterparty's performance. If the party's breach is not material, however, although the party is liable in damages for her breach, her counterparty is not released from the contract and the breaching party can thus enjoy the benefit of her bargain despite her breach. *See, e.g.*, Restatement (Second) Contracts §§ 237; 241; 242; 243; 250 (1981). A virtue of this common law rule is that the counterparty is unable to use a trivial breach as an excuse to free himself from what turns out to be—for reasons unrelated to the breach—a burdensome bargain. Similarly, the *Wells Fargo* interpretation of a provision such as §2.03(c) of the Pooling and Servicing Agreement could 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.

Dated: May 27, 2011

Barry Adler

Professor Barry E. Adler

***** Different jurisdictions have different rules and standards regarding contract interpretation and the admissibility of evidence. I offer no opinion on such differences or on the particular rules or standards that would apply to this case.

Exhibit 31

RRMS ADVISORS
Tactical Mortgage Strategists
10 East 40th Street New York, NY 10016
www.rrmsco.com

Brian Lin
Managing Director
RRMS Advisors
10 East 40th Street
New York, NY 10016

June 28, 2011

The Bank of New York Mellon
One Wall Street, 11th Floor
New York, NY 10286

Subject: Opinion Concerning Contemplated Settlement Agreement - Mortgage Loan Servicing and Loan Administration

Gentlemen:

Attached please find my opinion regarding the mortgage loan servicing and loan administration components of the contemplated settlement agreement for 530 Trusts rendered at the request of your counsel, Mayer Brown.

Should you have any question, please feel free to contact me at (212) 843-9413.

Yours truly,

Brian Lin

Brian Lin
Managing Director

Sub-Prime, Alt "A", Prime and Pay Option Arm residential mortgage loans, with originations occurring between the years 2004 through 2008.

High default rates and large loss severities have occurred pertaining to the underlying collateral. Breaches of loan servicing obligations and failure to cure documentation defects have been alleged against BofA. These and other alleged breaches are the subject of the Settlement Agreement. In the Agreement, the parties have decided to institute a transparent mortgage servicing and loan administration model. This model utilizes qualifying subservicers to optimize loan servicing performance and defines criteria and guidelines for the transfer of mortgage loan assets to selected qualifying subservicer and/or sale of MSRs. In addition, loss mitigation requirements and considerations are set forth in the Agreement as well as administration guidelines relating to document deficiencies and cure processes. In addition, the Settlement Agreement mandates monthly reporting and annual attestation reports with respect to the servicing and loan administration improvements.

My review and assessment of the Settlement Agreement encompassed the servicing and loan administration provisions of the agreement. It is my understanding that these provisions have been designed by the parties to ensure compliance with the servicing and loan administration terms of the underlying PSAs and SSAs.

Set out below is my opinion with respect to these provisions.

Transfer to Subservicing or Sale of MSRs of Non-Performing Assets from BofA to Qualifying Subservicers

A great amount of focus and attention is included in the Settlement Agreement relating to the transfer of non-performing or high risk residential mortgage loans from BofA to selected qualifying subservicers whose incentive compensation is dependent on servicing competency and quality. In my opinion, this arrangement is in line with and supports the goal of improving individual asset performance in order to positively impact overall pool performance.

Key components of the Settlement Agreement relating to the transfer of non-performing assets to qualifying subservicers include, among other things, the following:

- A detailed selection process for "qualifying mortgage subservicers";
- The Trustee has the ability to veto any proposed subservicer (selected by the institutional investor and BofA) after consultation with an expert of its choice, on the basis of specific grounds summarized in the Settlement Agreement;

Brian Lin
RRMS Advisors
Managing Director
Telephone: 212-843-9413
10 East 40th Street New York, NY 10016

Agreement. Specifically, BofA's servicing performance shall be measured and evaluated, on a monthly basis, against defined industry benchmark metrics relating to:

- Loss mitigation referral timelines to foreclosure (first lien mortgage loans);
- Liquidation or foreclosures per FHFA guidelines (first lien mortgage loans);
- Delinquency status of borrower at the time reporting of charge-off to Trustee (second lien mortgage loans); and
- Comparative Trustee pool statistics with monthly reporting vs. industry standards.

With respect to any month in which BofA fails to meet the agreed-upon industry benchmark, the Settlement Agreement provides for deficient performance payments payable by BofA. These payments relate specifically to servicing timeline failures associated with certain loss mitigation activities.

Based on my review and consistent with the summary above, I have concluded that the portions of the Settlement Agreement dealing with the servicing of assets by BofA are reasonable and meet industry standards.

Loss Mitigation Requirements and Considerations

I have reviewed the loss mitigation requirements and considerations for the mortgage loans in the Covered Trusts as stated in the Settlement Agreement. The Settlement Agreement is intended to create a framework for utilization of all reasonable avenues of recovery for the full principal of the mortgage balance other than through foreclosure or liquidation actions. I note the following provisions with respect to the mortgage loss mitigation servicing activities by BofA and/or each of the qualifying subservicers:

- Borrower's eligibility shall be evaluated simultaneously for all applicable loan modifications in accordance with the principles set forth in each of these programs and the applicable servicing entity must render a decision within sixty days of receiving all requested documentation from the borrower;
- Modifications and/or loss mitigation strategies shall consider the following factors: (i) NPV based recoveries, (ii) return of delinquent mortgage loans to permanent performing status, (iii) assessment of borrower's ability to make payments, (iv) alternative recovery strategies to minimize foreclosure or liquidation, (v) adherence to all applicable governing agreements and law, and (vi) consideration of other judgment factors that a prudent mortgage servicer would utilize;
- No principal modification shall reduce the principal amount due on any mortgage loan below the current market value using third party valuation sources; and

- The Trustee will use reasonable best efforts to make the monthly exception reports available on its website within five business days of its receipt of such report.

BofA may elect, at its sole discretion, to resolve any document exception that is identified in the monthly exception reports. Failure to do so will subject BofA to reimburse the trust 100% of the mortgage loan's realized loss as defined in the applicable governing agreement.

Based on my review and consistent with the summary above, I conclude that the portions of the Settlement Agreement dealing with administration and cure of document deficiencies are reasonable and industry precedent setting.

* * * *

As summarized at the beginning of this opinion, based upon the documentation provided and the work performed by RRMS related to the mortgage loan servicing and administration portion of the Settlement Agreement, I find the approaches as outlined for both first and second lien mortgage assets to be reasonable and in accordance with or exceeding customary and usual standards of practice for prudent mortgage loan servicing and administration. It is my opinion that this settlement can be viewed as an industry precedent setting, pro-active approach in regard to establishing a framework to enhance recovery efforts for underperforming loan pools.

Yours truly,

Brian Lin

Brian Lin
Managing Director

Exhibit 32

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Exhibit 33

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Exhibit 34

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

---X
In the Matter of the Application of

Index No. 651786/

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

Assigned to Kapnick, J.

Petitioners,

for an order, pursuant to C.P.L.R. Rule 7701, seeking judicial instructions and approval of a proposed settlement.
---X

* C O N F I D E N T I A L *

VOLUME I

VIDEOTAPED DEPOSITION

OF

LORETTA A. LUNDBERG

New York, New York

Tuesday, October 2, 2012

Reported by:
ANNETTE ARLEQUIN, CCR, RPR, CCR, CLR
JOB NO. 53620

court reporter what position you hold at Bank of New York Mellon?

A. I'm a managing director in the Corporate Trust Division.

Q. And what does that mean? What job responsibilities do you have?

A. I have three groups that report to me; default services, default management and mortgage-backed securities.

Q. And in your role as the managing partner signing the verified petition in this case, did those responsibilities fall within one of those three departments?

A. Yes, but I'm not a managing partner. I'm a managing director.

Q. Okay. And what is a managing director?

A. It's an official title at BNY Mellon. It's between vice president and executive vice president.

Q. And as it related to your responsibilities in signing the verified petition here, did that fall into the mortgage-backed securities department or group?

L. Lundberg - Confidential

A. No, it did not.

Q. What did it fall within?

A. Default services, also known as default administration.

Q. Okay. And can you tell me, then, what's the difference between default services and default management and mortgage-backed securities?

A. Mortgage-backed securities administers transactions that are trusts that hold residential mortgage secur -- residential mortgages within the trust.

The default management group is a group that administers CDO trusts that have gone into default.

And the default admin or default services team consults on matters where we serve as a corporate trustee or indenture trustee and there is a default associated with the transaction or there is litigation associated with the transaction.

Q. And as it relates to your role in signing the verified petition, was it within the default administration services -- is it a group

L. Lundberg - Confidential

[redacted]

L. Lundberg - Confidential

[redacted]

L. Lundberg - Confidential

[redacted]

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

--X

In the Matter of the Application of

Index No. 651786/

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

Assigned to Kapnick, J.

Petitioners,

for an order, pursuant to C.P.L.R. Rule 7701, seeking judicial instructions and approval of a proposed settlement.

--X

* C O N F I D E N T I A L *

VOLUME II

VIDEOTAPED DEPOSITION

OF

LORETTA A. LUNDBERG

New York, New York

Wednesday, October 3, 2012

Reported by:
ANNETTE ARLEQUIN, CCR, RPR, CCR, CLR
JOB NO. 53621

L. Lundberg - Confidential

[redacted]

L. Lundberg - Confidential

[redacted]

L. Lundberg - Confidential

[redacted]

Exhibit 35

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

---X

In the Matter of the Application of

Index No. 651786/

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

Assigned to Kapnick, J.

Petitioners,

for an order, pursuant to C.P.L.R. Rule 7701, seeking judicial instructions and approval of a proposed settlement.

---X

* C O N F I D E N T I A L *

VIDEOTAPED DEPOSITION

OF

ROBERT E. BAILEY

New York, New York

Monday, December 3, 2012

Reported by:
ANNETTE ARLEQUIN, CCR, RPR, CCR, CLR
JOB NO. 55069

R. E. Bailey - Confidential

[redacted]

Asked and answered. Calls for speculation.

A. I don't believe Ms. Patrick ever said or threatened to bring suit against the trustee. I just want to make that clear, right? To my knowledge, that was never raised by Ms. Patrick. She had a view as to what the trustee was required to do and the trustee had a different view.

Q. And without, assuming that's true, without ever even threatening a lawsuit, Bank of New York Mellon recognized it could be sued by Ms. Patrick and her certificate holders?

MR. GONZALEZ: Objection to form. Asked and answered.

BY MR. REILLY:

Q. Correct?

MR. GONZALEZ: You can answer that question, again, to the extent it doesn't require you to reveal attorney/client or work product communication.

A. As I said before, any certificate holder can sue the trustee at any point whether it threatens litigation, doesn't threaten litigation, whether the suit is meritorious or

R. E. Bailey - Confidential

[redacted]

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Exhibit 38

SUPREME COURT OF THE STATE OF NEWYORK
COUNTY OF NEWYORK

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.* Petitioners, for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.	Index No. 651786/2011 Assigned to: Kapnick, J.

EXPERT REPORT OF DANIEL R. FISCHEL

I. QUALIFICATIONS

1. I am President of Compass Lexecon, a consulting firm that specializes in the application of economics to a variety of legal and regulatory issues. I am also the Lee and Brena Freeman Professor of Law and Business Emeritus at The University of Chicago Law School. I have served previously as Dean of The University of Chicago Law School, Director of the Law and Economics Program at The University of Chicago, and as Professor of Law and Business at The University of Chicago Graduate School of Business, the Kellogg School of Management at Northwestern University, and at the Northwestern University Law School.

2. Both my research and my teaching have concerned the economics of corporate law and financial markets. I have published approximately fifty articles in leading legal and economics journals and am coauthor, with Judge Frank Easterbrook of

the Seventh Circuit Court of Appeals, of the book *The Economic Structure of Corporate Law* (Harvard University Press). Courts of all levels, including the Supreme Court of the United States and the Delaware Supreme Court, have cited my articles as authoritative. My curriculum vitae, which contains a list of my publications, is attached hereto as Exhibit A.

3. I have served as a consultant or adviser on economic issues to, among others, the United States Department of Justice, the United States Securities and Exchange Commission, the National Association of Securities Dealers, the New York Stock Exchange, the Chicago Board of Trade, the Chicago Mercantile Exchange, the New York Mercantile Exchange, the United States Department of Labor, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, and the Federal Trade Commission.

4. I am a member of the American Economic Association and the American Finance Association. I am also a former member of the Board of Directors of the Center for the Study of the Economy and the State at The University of Chicago, and former Chairman of the American Association of Law Schools' Section on Law and Economics. I have testified as an expert witness in multiple proceedings in federal and state courts across the country, as detailed in Exhibit A.

II. BACKGROUND

5. The Bank of New York Mellon ("BNY Mellon," "Trustee," or "BNYM") is the trustee for 530 residential mortgage-securitization trusts (the "Trusts").[1]

1. Verified Petition In the matter of the application of The Bank of New York Mellon, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee

The Trusts acquired portfolios of residential mortgages ("Mortgage Loans") from an entity known as a "Depositor" who in turn acquired the Mortgage Loans from Countrywide Home Loans Inc. ("CHL") and/or entities associated with CHL (collectively "Countrywide").[2] CHL was a wholly owned subsidiary of Countrywide Financial Corp. ("CFC").[3] On July 1, 2008, Bank of America acquired CFC.[4]

6. The money to pay for the Mortgage Loans was raised by selling certificates (the "Certificates") to investors ("Certificateholders").[5] The Certificates provide rights to the cash flows generated by the Mortgage Loans.[6] Collecting debt service payments on the Mortgage Loans is the responsibility of the Master Servicer, BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP ("BAC Servicing").[7]

7. The Trusts are evidenced by various pooling and servicing agreements, sale and servicing agreements, and indentures (the "Governing Agreements").[8] While the Governing Agreements for each Trust were individually negotiated, they each contain similar representations and warranties made by

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under various Indentures), Petitioner, for an order, pursuant to CPLR §7701, seeking judicial instructions and approval of a proposed settlement dated June 28, 2011 (the "BNYM Petition") at 1.

2. *Id.* ¶¶ 2 & 9.
3. Countrywide Financial Corporation Form 8-K dated July 8, 2008.
4. *Id.*
5. BNYM Petition ¶ 2.
6. *Id.*
7. *Id.* ¶¶ 2 & 9.
8. *Id.* ¶ 3.

Countrywide for the benefit of the Trusts.[9] Countrywide warranted, among other things, that:

- Each Mortgage Loan was underwritten in all material respects in accordance with the underwriting guidelines described in the Prospectus Supplement;
- The information set forth on [the Mortgage Loan Schedule] with respect to each Mortgage Loan is true and correct in all material respects as of the Closing Date; and
- The Mortgage Loans, individually and in the aggregate, conform in all material respects to the descriptions thereof in the Prospectus Supplement.[10]

Countrywide agreed to repurchase any mortgage for its unpaid balance if a breach of a representation and/or warranty was discovered that materially and adversely affected the interests of the Certificateholders and the breach could not be cured within ninety days.[11] The Governing Agreements also impose obligations on the Master Servicer to, among other things, administer the Mortgage Loans in accordance with the terms of the Governing Agreements and the customary and usual standards of practice of prudent mortgage loan servicers.[12]

8. Beginning in June 2010, a group of Certificateholders (the "Institutional Investors") alleged breaches of representations and warranties in the Governing Agreements and violations of prudent servicing obligations by the Master Servicer.[13] As of June 2011, the Institutional Investors' holdings of the Certificates were

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9. *Id.* ¶¶ 4 & 25.
10. *Id.* ¶ 24.
11. *Id.* ¶ 26.
12. *Id.* ¶¶ 4-5.
13. *Id.* ¶¶ 6-7. The Institutional Investors include nine independent investment advisors (Blackrock, PIMCO, TCW (Trust Company of the West), Western Asset Management (WAMCO), Invesco, Neuberger Berman, Goldman Sachs Asset Management, ING Investment Management LLC, and Prudential Investment Management), seven

in the tens of billions of dollars.[14] From November 2010 through June 2011, the Institutional Investors, with the participation of the Trustee, negotiated with Countrywide and Bank of America.[15]

9. The negotiations culminated in the Trustee's decision to enter into a settlement (the "Settlement").[16] Under the Settlement, \$8.5 billion (the "Settlement Payment") will be paid to the Trusts.[17] Moreover, BAC Servicing will implement, among other things, servicing improvements to improve its own performance as servicer and to transfer high-risk loans to subservicers for more individualized attention (the "Servicing Improvements").[18] In addition, the Settlement includes agreed-upon procedures to cure certain document deficiencies in the loan files (the "Document Remedy").[19]

10. The Trustee evaluated the reasonableness of the Settlement by, among other things, retaining and receiving opinions from various outside experts.[20] The Trustee filed a petition dated June 28, 2011 (the "Petition Date") stating that it had found

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insurance companies and annuity investors (MetLife, TIAA-CREF, Nationwide Insurance, New York Life, AEGON Insurance, ING, and Thrivent Financial for Lutherans), two European banks (Landesbank Baden-Wurttemberg (LBBW), Bayerische Landesbank (BayernLB) and their affiliates) and four other investors and financial institutions (the New York Fed's Maiden Lane Portfolios, Freddie Mac, the Federal Home Loan Bank of Atlanta and Kore Capital). Institutional Investors' Statement In Support Of Settlement And Consolidated Response To Settlement Objections, dated October 31, 2011 ("Institutional Investors' Statement") ¶ 69.

14. BNYM Petition ¶¶ 7-8.
15. *Id.* ¶ 10.
16. *Id.*
17. *Id.* ¶ 11.
18. *Id.*
19. *Id.* ¶ 46.
20. *Id.* ¶ 61.

the Settlement to be reasonable and seeking an order approving the Settlement.[21]

11. Certain Certificateholders have intervened in the Settlement proceeding and/or filed notices of potential intent to object and have expressed criticism of the Settlement. Opposition to the Settlement has been led by a Steering Committee of the Intervenor-Respondents and Objectors (collectively, the "Objectors").

12. AIG has filed the Expert Report of Professor John C. Coates IV dated February 28, 2013 ("Coates Report"). Professor Coates opines that "the Trustee had available to it many steps that would have enabled it to engage in an adequate evaluation of the Claims, many of which it did not take at all, and some of which it did take but in such a constrained and limited fashion as to undermine significantly their value for arriving at an objective understanding of the potential value of the Claims, and thus for an objective evaluation of the Settlement."[22] He further opines that had the Trustee sought to do more it would have learned that the successor liability elements of the Trusts' claims "had a materially greater chance of success than the Trustee appears to have believed," and that there were "additional categories of Claims (fraudulent conveyance, fiduciary duty, and contract-based servicing Claims) that warranted at least some evaluation."[23]

III. SUMMARY OF CONCLUSIONS

13. I have been retained by counsel for the Trustee to form an independent opinion of the reasonableness of the Trustee in entering into the Settlement

21. *Id.* at 1 & ¶ 16.
22. Coates Report at 24.
23. *Id.* at 3.

as of the Petition Date.[24] I have also been asked to review the expert report submitted by Professor Coates. In connection with my analysis, I have been assisted by members of Compass Lexecon's professional staff. Exhibit B lists the documents upon which my opinions rely.

14. Based on this review, and my general background and expertise, I have reached the following principal conclusions, all of which are supportive of the view that the Settlement was reasonable and adequate as of the Petition Date[25]:

- The behavior of the Institutional Investors supports the reasonableness and adequacy of the Settlement;
- The allegations that The Bank of New York Mellon is conflicted are fundamentally flawed;
- The Settlement is reasonable and adequate in light of:
    - The uncertainty about the value of the claim and the ability to recover in litigation;
    - The delay that would accompany litigation.
- The market reaction to the announcement of the Settlement is inconsistent with the Objectors' claim that Bank of America received a windfall in the Settlement;

I elaborate upon and explain the bases for these conclusions in the remainder of this report.

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24. I am being compensated at my usual rate of $1250 per hour. My compensation in no way depends on the content of my opinions or the outcome of this proceeding.

25. My conclusion that the Settlement was reasonable and adequate would be the same if the relevant date was the date of this report rather than the Petition Date. In fact, I refer to events that occurred after the Petition Date such as judicial decisions, settlements, and experience in other litigation involving similar claims as part of my analysis in this report.

IV. THE ECONOMICS OF THE SETTLEMENT DECISION

15. At the outset, I want to emphasize that the context of my report is evaluating the reasonableness of the Trustee's decision to enter into the Settlement. Any settlement by definition involves a proposed resolution of a dispute at some stage short of a final disposition. A party faced with a settlement offer always has the ability to reject the offer in the hope of getting a more favorable outcome at a later stage in the proceedings. This will frequently be the right strategy as is obvious because many settlement offers are rejected. But the reverse is also true because rejecting a settlement offer based on the possibility of obtaining a better outcome after further information gathering and investigation is not costless. Most obvious are the direct costs in resources spent in further fact finding and legal wrangling and time loss necessitated by rejecting a settlement and extending the proceeding. Less obvious but potentially more important is that there is no guarantee that an additional expenditure of resources and time will produce a more favorable outcome – it may produce the opposite result. In such a case, the decision to reject a settlement offer and engage in additional information gathering and investigation produces the dual bad outcome of wasted time and money only to get a worse outcome as a result.

16. These principles have direct applicability to the present controversy. The Trustee made a decision to settle for $8.5 billion plus the Servicing Improvements and the Document Remedy following more than seven months of negotiations and an agreement between highly sophisticated commercial adversaries.[26]

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26. At the time that it was entered, the Settlement was the "second-biggest legal settlement in American history, trailing only the 1998 tobacco master

In doing so, the Trustee gave up the possibility of getting a better outcome by refusing to settle and litigating or collecting additional information by, for example, hiring additional experts to perform a detailed analysis of loan files, a comprehensive solvency analysis, and a more detailed valuation of asset transfers between Countrywide and Bank America. But in making the decision to settle, the Trustee avoided (i) the costs of time necessary to conduct these further investigations[27] (during which Countrywide's assets might erode further leaving less available to satisfy any judgment[28]) (ii) the costs of litigating on potentially hundreds of Trusts and (iii) the risk that extending the proceedings would result in developments that would not improve the ultimate outcome but rather the opposite, a result less favorable than the $8.5 billion plus the Servicing Improvements and the Document Remedy, in the extreme case a recovery of zero. That is the framework in which the Trustee's decision to settle must be evaluated.

17. Professor Coates completely ignores this framework in the report he filed in this case. His report is replete with inflammatory rhetoric about asset

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settlement." Nathan Vardi, Forbes.com, "Wall Street's New Nightmare," October 17, 2011.

27. It is well settled that parties may settle even when they lack information necessary to evaluate the merits of the relevant claims because of the costs and delays involved in litigation. *See* e.g., W.F. Schwartz & A.L. Wickelgren. (2009) "Credible discovery, settlement, and negative expected value suits," 40 RAND Journal of Economics 40 (Winter 2009), 636-657; K. Spier, Litigation, in A. Polinsky & S. Shavell, Handbook of Law and Economics (2007) at 268 (settlements occur because "[t]he pursuit of litigation is expensive, time-consuming, and distracting. In short, trials are a decidedly inefficient way for private parties to resolve their disputes."). When parties are similarly situated in terms of their costs of litigating and view of the merits, "the reasonable settlement equals the expected judgment at trial." R. Cooter & T. Ulen, Law & Economics (2007) at 445.

28. At the Petition Date "CFC [was] in the process of winding down its mortgage banking and other real estate finance-related businesses" and was also a defendant in other lawsuits. *See* Countrywide Financial Corporation, Selected Consolidated Financial Information, March 31, 2011, at 5-7 BNYM_CW-00004476 at 81-83.

stripping, fraudulent conveyance, breach of fiduciary duty, successor liability, etc.[29] However, he himself concedes that he has not "reached any bottom-line conclusions" about any of these issues nor has he conducted a solvency analysis or "any valuation" of Countrywide's assets.[30] Rather, he (1) criticizes the Trustee for not gathering sufficient information to evaluate these claims; and (2) criticizes as insufficient the expert reports and information he claims the Trustee did rely on.[31] These criticisms are really one criticism – that the Trustee was wrong to accept a settlement that provided $8.5 billion plus the Servicing Improvements and the Document Remedy when it did not have the necessary information to make an informed decision and should have conducted further investigation.

18. Professor Coates' opinions are fundamentally flawed because he considers only a state of the world in which the agreed Settlement Payment of $8.5 billion would be proven to be too low. Every allegation he makes is premised on the assumption that further investigation and delay of the proceeding would only have increased the Settlement Payment, i.e., that the expected outcome of doing so would have produced an outcome higher than $8.5 billion, even though he himself reaches no conclusions on the issues he addresses. But, in making this assumption, Professor Coates completely ignores the possibility (as discussed above) that delay and further investigation is not costless in terms of expenditures, time, and possible outcomes. For example, Professor Coates does not consider the possibility (one that the Trustee would certainly be entitled to consider) that delay and further investigation might have caused

29. Coates Report at 1-2.
30. *Id.* at 7, 9-10 & 24 and Exhibit C to Coates Report at 68-77.
31. *Id.* at 1-3.

Bank of America to withdraw its settlement offer altogether and make the expected outcome of any settlement lower than $8.5 billion. Professor Coates has offered no rational explanation for why the possible adverse outcomes from delay and further investigation should be ignored. And he certainly cannot guarantee that any of the steps he claims the Trustee should have taken would have resulted in a more favorable settlement for the Trusts.

19. Similarly, Professor Coates' criticism that the Trustee's experts were given "a very short amount of time" (less than two months) which "limited [their] capacity … to conduct analysis and investigation relevant to their work"[32] also proves nothing because he never considers the increased costs and possible adverse outcomes from giving the experts more time to conduct further investigation. Ironically, the Coates Report (filed February 28, 2013) relies heavily on information he obtained in another case involving Bank of America and contained in a report he filed dated June 22, 2012 – information he criticizes the Trustee for not obtaining.[33] Yet even with this information and time to investigate, he has conducted no further analyses and reached no conclusions on the very same claims and transactions he criticizes the Trustee for not adequately investigating.

20. Finally, Professor Coates' support for his critique of the Trustee often consists of nothing more than parroting allegations in the case with no supporting evidence. For example, Professor Coates repeats AIG's claim that the Trusts could have successor liability claims under the Pooling and Servicing Agreements ("PSAs") due to

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32. *Id.* at 19-20.
33. *See e.g.,* Coates Report 3 & 23 and Exhibit C to Coates Report at 1 & 81.

obligations that Countrywide Home Loan Servicing "allegedly failed to perform."[34] However, he provides no evidence of these alleged failures to perform. Likewise, Professor Coates repeats AIG's claim that Bank of America could have exposure to the Trusts stemming from its own servicing conduct.[35] However, the only evidence he offers in support of this claim is that "the institutional investor group represented by Gibbs & Bruns asserted in court pleadings that BAC servicing was the worst in the industry and identified how BAC's servicing caused harm to the Trusts."[36] But repeating allegations by the same investor group and their counsel who negotiated the Settlement and are now supporting its implementation—i.e., publicly stating that they view the Settlement as a desirable outcome and remedy for any faults in, among other things, Bank of America's servicing—clearly provides no basis for criticizing the Trustee for settling with Bank of America.[37]

V. THE BEHAVIOR OF THE INSTITUTIONAL INVESTORS SUPPORTS THE REASONABLENESS AND ADEQUACY OF THE SETTLEMENT

21. The Trustee in this case did not make the decision to settle unilaterally. The Settlement was also the product of negotiations involving sophisticated financial institutions that own, or are the advisors to entities that own, Certificates with a face value of billions of dollars. Significantly, the Objectors have not alleged, let alone provided any evidence, that any of the Institutional Investors were misled into supporting the Settlement.

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34. Compare AIG Petition to Intervene dated August 8, 2011 ("AIG Petition") ¶ 41 with Coates Report at 10-11.
35. Compare AIG Petition ¶ 42 with Coates Report at 11.
36. Coates Report at 11.
37 Institutional Investors' Statement at 1-2 & ¶¶ 44-48.

22. Exhibit C [redacted]

Consequently, the Institutional Investors had a significant interest in reaching a reasonable and adequate settlement.

23. The total amount of assets owned or managed by the Institutional Investors is a proxy for their sophistication. We collected information on assets owned or managed from various sources including the SEC's Investment Adviser Public Disclosure website, 10-Qs filed with the SEC, Annual Reports, and press reports. Exhibit D shows that just prior to the Petition Date, the institutions for which we found data owned or managed a combined total of more than $8.4 trillion. Individually, the Institutional Investors reported assets owned or managed of between $13.9 billion and $3.6 trillion with a median of $336 billion. That these sophisticated institutional investors support the Settlement is powerful economic evidence of its reasonableness and adequacy.

24. Objector AIG claims "[t]here is evidence that the Inside Institutional Investors were conflicted when negotiating the proposed settlement."[38] But AIG only points to one of the 22 Institutional Investors that allegedly was conflicted, Blackrock.[39] AIG nowhere explained why, even assuming Blackrock had a conflict, the other 21 Institutional Investors would defer to Blackrock's allegedly conflicted view.

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38. AIG Petition ¶ 49.
39. *Id.*

Like AIG, the other objectors claim that that "[m]any of the twenty-two corporate investors that negotiated the Proposed Settlement appear to have significant ongoing business dealings with Bank of America, raising conflict-of-interest concerns."[40] This claim, however, is unpersuasive because these objectors provide no evidence about what these "apparent" relationships are or why they would lead the Institutional Investors to act contrary to their economic best interests.

25. Moreover, other investors in the Trusts covered by the Settlement have recognized that the Institutional Investors represent a diverse group of market participants with a strong interest in maximizing recoveries. The Federal Housing Finance Agency ("FHFA"), as conservator for Fannie Mae and Freddie Mac, for example, has stated that the FHFA "is aware of no basis upon which it would raise a substantive objection to the proposed settlement at this time. ... Additionally, FHFA is encouraged that a number of significant market participants support the proposed settlement."[41] Along the same lines, Monarch Alternative Capital LP ("Monarch"), an investment advisor for funds that hold certificates in original face amount in excess of $630 million in twenty of the Trusts but did not participate in the Settlement negotiations, sent a letter to the Court in this matter stating its support for the Settlement:

> Monarch believes the Settlement will provide significant immediate benefits to the beneficiaries of the Trusts and should be approved expeditiously. Certificateholders should not be held hostage to a legal battle that threatens to delay (and potentially destroy) the entire Settlement based on the actions of what appears to be a small minority

40. Pension Funds Petition to Intervene dated July 6, 2011 ¶ 3.
41. Federal Housing Finance Agency, "Federal Housing Finance Agency Action Regarding Court Consideration of Proposed Bank of America Settlement," August 30, 2011.

of objecting holders. We urge the Court to approve the Settlement promptly for the benefit of all of the Trusts' Certificateholders.[42]

26. Finally, AIG also criticizes the Trustee's reliance on the Settlement Amount Opinion of Brian Lin dated June 7, 2011 (the "Lin Report")[43] because Mr. Lin purportedly "adopted loss assumptions that are far more favorable to [Bank of America] than those the [Institutional Investors] presented" and "blindly adopted the critical breach and success rate metrics proposed by [Bank of America] as opposed to higher rates he says a third party forensic underwriting project revealed."[44] But this claim makes no sense because these supposedly "more favorable" loss assumptions and higher "breach and success rate metrics" were presented in a spreadsheet provided by the very same Institutional Investors who support the Settlement.[45] Presumably, these highly sophisticated Institutional Investors – who possessed these allegedly higher loss assumptions but nevertheless requested that the Trustee enter into the Settlement – 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.

VI. THE ALLEGATIONS THAT THE TRUSTEE IS CONFLICTED ARE FUNDAMENTALLY FLAWED

27. Allegations of conflict are particularly important to address because they affect how much deference should be accorded the Trustee in its decision to

42. Letter from Adam R. Sklar, Managing Principal, Monarch Alternative Capital, to The Honorable Barbara R. Kapnick, dated February 4, 2013.
43. The Bank of New York Mellon's Consolidated Response To Objections, Exhibit D-5.
44. AIG Petition ¶ 39.
45. Lin Report pp. 1-3. Mr. Lin describes the source of these rates as "the Investor Group represented by Gibbs & Bruns." *Id.* at 1.

enter into the Settlement. The Objectors in this case claim that this decision by BNY Mellon was tainted by a disabling conflict of interest because it had "much to gain" from the Settlement.[46] Significantly, however, the Objectors do not and apparently cannot point to any financial benefit, direct or indirect, that BNY Mellon received from entering into the Settlement.

28. Rather, the Objectors' allegations of conflict are based in part on a side letter to the proposed Settlement Agreement (the "Side Letter") in which BAC Servicing confirms certain aspects of the indemnities in the Governing Agreements.[47] AIG claims the Side Letter provides the Trustee with indemnification (the "Indemnification") that is "broader that [sic] it would have been entitled to under the trust agreements," specifically indemnification "for its actions taken and/or omissions to act in response to ... [a] letter from the Inside Institutional Investors ... which, 60 days later, triggered an Event of Default and heightened trustee duties under the trust agreements."[48] The Objectors also point to BNY Mellon's "significant ongoing business relationship with [Bank of America] that, as a result, further calls into question [BNY Mellon's] purported impartiality" with respect to the Settlement.[49]

29. These claims are misguided. First, assuming for the sake of argument that the Side Letter expands the scope of the Trustee's indemnification agreement,[50] this would not necessarily create a conflict. In fact, the opposite is more

46. *See,* e.g. AIG Petition ¶ 22.
47. *Id.* ¶ 26 and Exhibit C to the Settlement Agreement.
48. AIG Petition ¶ 26.
49. *Id.* ¶ 27.
50. BNY Mellon argues the Side Letter does not expand the indemnities in the PSAs at all. The Bank of New York Mellon's Consolidated Response to Objections, at 9-

likely to be true, particularly if the relevant indemnification provision is narrowly tailored to carve out claims of intentional and other wrongdoing. The reason is that in the absence of indemnification protection, trustees might be overly risk adverse and be more concerned about their own personal liability than acting in the interests of their beneficiaries, the Trusts. For this reason, indemnification provisions for fiduciaries in other contexts have been found to have benefitted the beneficiaries they represent.[51]

30. The same is true here. We have reviewed all 530 Governing Agreements for the Trusts. As Exhibit E demonstrates, the indemnities for every Trust carve out willful misfeasance/misconduct, bad faith, and negligence from the scope of the indemnification protection. The Side Letter does not eliminate any of these carve-outs. In the absence of its contractual indemnities, the Trustee might not have been willing to enter into the Settlement (or any settlement) or take other actions it deemed to be in the best interest of the Trusts because the safer course in avoiding its liability would be to do nothing or, alternatively, refuse to act without taking wasteful and costly steps to avoid any of its decisions being challenged.[52] At the same time, the carve-out provisions ensure

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10. Obviously if BNY Mellon is correct, the Side Letter cannot create any conflict.

51. S. Bhagat, J.A. Brickley and J.L. Coles, 1987, "Managerial Indemnification and Liability Insurance: The Effect on Shareholder Wealth," 54 *The Journal of Risk and Insurance*, 721-736 at 733 ("In fact, if anything, the empirical evidence suggests that the effect of D&O insurance on shareholder wealth is positive. Moreover, using the best available methodology, no significant negative effect on shareholder wealth from increasing the level of indemnification was found.") Significantly, D&O insurance policies typically do not provide a carve-out for negligence, unlike the Trust indemnities. *See*, e.g., M.E. Parry & A.E. Parry (1991), "The Purchase of Insurance by a Risk-Neutral Firm for a Risk-Averse Agent," 58 *The Journal of Risk and Insurance* 30-46, at 33. Hence, the Trustee here has less indemnification protection than corporate fiduciaries.

52. There is an obvious analogy to the relationship between the fear of liability and defensive medicine.

that neither the Trust indemnities nor the Side Letter would protect the Trustee if it is found to be negligent or to have engaged in more serious wrongdoing. In sum, there is no basis to conclude that either the Trust indemnities or the Side Letter created a conflict in this case. And because the indemnities did not create a conflict, it necessarily follows that the Trustee's negotiation to obtain an indemnity also does not create a conflict.

31. Because indemnification provisions are beneficial, it is not surprising that they are the norm in RMBS Trusts. We reviewed the governing agreements for a sample of 146 RMBS trusts issued between 2004 and June 28, 2011 (the "Selected Other Trusts").[53] Exhibit F shows that every single one of the Selected Other Trusts' agreements contains a section addressing indemnification of the trustee for fees and expenses that it incurs in the course of performing its duties, including heightened duties. In 98 percent of the Selected Other Trusts, the indemnification language explicitly specifies that it includes costs associated with legal proceedings relating to the trustees' performance of the duties prescribed by the trust, typically noting that the indemnifying party shall "hold [the trustee] harmless against any and all losses, liabilities, damages, claims or expenses (including legal fees and expenses) of whatsoever kind arising out of or in connection with the performance of its duties hereunder other than those resulting from negligence or bad faith."[54]

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53. For each year from 2004 through 2011 (ending June 28, 2011), we used data and research vendor ABSNet to identify 30 RMBS trusts (excluding the Trusts) for which governing agreements were publicly filed with the SEC. For the years in which 30 or fewer RMBS were issued (2008 through 2011), we selected every RMBS trust issued in that year for which governing agreements were publicly filed with the SEC.

54. *See*, e.g., Centex Home Equity Loan Trust 2004-A (CXHE 2004-A), Pooling & Servicing Agreement, January 1, 2004, Section 10.13 (Indemnification and Liability

32. AIG also claims the Trustee "has a significant ongoing business relationship with [Bank of America] that, as a result, further calls into question [the Trustee's] purported impartiality and the proper discharge of its fiduciary duties."[55] AIG ignores, however, that the Trustee's relationship with Bank of America is commonplace because trustees and issuers routinely have business relationships. For example, Citigroup has been JPMorgan's preferred trustee on its ABS and MBS securitizations and HSBC has had a similar favored position on Wells Fargo's ABS and MBS securitizations.[56]

VII. THE SETTLEMENT IS REASONABLE AND ADEQUATE IN LIGHT OF UNCERTAINTY ABOUT THE VALUE OF THE CLAIM INCLUDING THE AMOUNT RECOVERABLE IN LITIGATION AND THE DELAY THAT WOULD ACCOMPANY LITIGATION

A. The Value of the Claim and the Ability to Collect is Uncertain

33. Uncertainty regarding the value of the Trusts' claims and their ability to collect on any judgment is further support for the adequacy and reasonableness of the Settlement. As I explain further below, there is even substantial uncertainty in this case about the number of Trusts that would even be able to bring a claim in the absence of the Settlement. And even if the claims could be brought, their value is unclear because of the difficulty of determining whether a breach existed and if so whether it had a material and adverse effect on the interests of the Certificateholders and the circumstances under which, if such a breach existed, it could be cured. The existence and

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of the Trustee).

55. AIG Petition ¶ 27.

56. Issuer/Trustee Combos for US ABS and MBS Issuance, 2004-2011, Asset-Backed Alert.

content of any causation requirement creates further uncertainty about the value of any claim that could be asserted.

34. If the Settlement were rejected, it appears that investors in the Trusts can only instruct the Trustee to pursue claims if they control 25% of the votes, and that the Institutional Investors control less than 25% of the votes, in 341 of the Trusts at issue.[57] If the Settlement is rejected, therefore, these 341 Trusts could not be guaranteed to receive anything even if their claims are assumed to be meritorious.

35. Moreover, assuming claims would be brought, predicting whether a court for any given loan would determine that a breach existed and if so, whether the breach had a material and adverse effect on the interests of Certificateholders would be difficult, particularly if the alleged breach had to be evaluated in the context of the entire loan file. For example, many of the underwriting guidelines relevant to the deals in this case allowed an exception to be made for a borrower or loan that did not meet particular criteria in the underwriting guidelines, if there are compensating factors.[58] Since there are likely always going to be judgmental factors in determining whether a borrower was

57. Institutional Investors' Statement ¶ 5.

58. *See*, e.g., Countrywide Home Loans, Alternative Loan Trust 2006-OA10, Prospectus Supplement, dated 6/29/06 at S-88 ("Exceptions to Countrywide Home Loans' underwriting guidelines may be made if compensating factors are demonstrated by a prospective borrower") *and* Countrywide Home Loans, Asset-Backed Certificates, Series 2004-1, Prospectus Supplement at S-22 ("On a case by case basis, Countrywide Home Loans may determine that, based upon compensating factors, a prospective borrower not strictly qualifying under the underwriting risk category guidelines described below warrants an underwriting exception. Compensating factors may include low loan-to-value ratio, low debt-to-income ratio, stable employment, time in the same residence or other factors. It is expected that a significant number of the Mortgage Loans will have been originated based on such underwriting exceptions").

entitled to an exception, proof of a material deviation from guidelines is highly uncertain in these situations.[59]

36. Legal uncertainty also makes it difficult to predict whether a court would find that a breach had a material and adverse effect on the interest of Certificateholders. For example, in another proceeding Countywide argued that it was not required to repurchase loans that do not comply with a representation or warranty if they are "*currently performing*" because such loans "*add* value to the Trusts."[60] If Countrywide's argument was accepted in litigation brought by the Trusts, they could be precluded from recovering losses on a loan at least until the time it became delinquent. [redacted][61] If the court were to determine there is a separate causation requirement to establish liability, this too could reduce the value of claims asserted by the Trusts.

37. Regardless of the ultimate amount of any claim asserted, its ultimate value also depends on the ability to collect from a defendant. In this case, however, it is undisputed that Countrywide has insufficient assets to pay for the $8.5

59. Even for loans where there would otherwise be a material breach, there would be uncertainty about whether a breach can be cured in such a way that there would be no recovery for the Trusts.
60. Countrywide's Memorandum of Law In Opposition To Plaintiff's Motion of Partial Summary Judgment And Motion to Strike Defenses, MBIA Insurance Corporation against Countywide Home Loans, Inc. Supreme Court of the State of New York, County of New York at 2. After the Petition Date, MBIA's motion for partial summary judgment was denied in part and granted in part. 34 Misc. 3d 895, 936 N.Y.S.2d 513.
61. BNYM CW-00000206-7. [redacted] *Id.* [redacted] *Id.*

billion Settlement, let alone an amount greater than that obtained in a judgment.[62] Thus the Settlement could only be deemed to be inadequate if there is a sufficiently high probability that the Trusts can reach the assets of Bank of America if they prevail on their claims. Conversely, if there is substantial doubt about whether the Trusts can reach the assets of Bank of America, this by itself without more would be a sufficient reason to conclude that the $8.5 billion Settlement is reasonable and adequate.

38. In support of their successor liability claim, AIG cites the refusal of a court to dismiss claims that Bank of America was liable for Countrywide's acts in a case involving a monoline insurer.[63] I understand, however, that courts in multiple other cases have reached the opposite result, making the outcome on the successor liability claim uncertain at best.

39. AIG also asserts that Bank of America may be held liable for Countrywide's acts because "the trust agreements expressly contemplate a merger of Countrywide into another entity and expressly impose on the successor entity the obligations of Countrywide" and "[BNY Mellon] and [Bank of America] cannot treat [Bank of America] as a successor for one purpose (to indemnify [BNY Mellon]) and deny that [Bank of America] is a successor for another (to argue against successor liability)."[64] I understand the Trustee's position, by contrast, is that AIG's claim incorrectly conflates two different Countrywide entities that have different roles and different potential liabilities under the Governing Agreements.

62. I address Professor Coates' claims that further investigation might support a claim by Countrywide against Bank of America for fraudulent conveyance or breach of fiduciary duty in Section IV *Supra*.

63. AIG Petition ¶ 43.

64. *Id.* ¶ 41.

40. Finally, objectors argue that the Trusts have direct claims against Bank of America for allegedly defective servicing.[65] This claim in turn depends on both a factual determination that Bank of America did fail to perform its duties as master servicer and a legal conclusion that such alleged failure and the resulting damages would make Bank of America (as servicer) liable for billions of dollars of alleged losses.[66]

B. The Delay and Expense That Would Accompany Litigation

41. Delays experienced in other cases involving repurchase claims or other claims relating to RMBS indicate that litigation in this instance would substantially delay recovery by the Trusts. For example, MBIA brought an action in September 2008 asserting repurchase claims against Countrywide and Bank of America but that case is still far from resolved and no trial has occurred or been scheduled.[67] Countrywide is also involved in many other litigations.

42. The likely delay will grow even larger if sampling is not accepted as a matter of proof or either side is permitted to contest sampling by introducing evidence about all loans at issue. As of the Petition Date, there were over 800,000 loans that are either still outstanding or liquidated at a loss.[68] The time required for a court to

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65. *See, e.g.,* AIG Petition ¶ 42.
66. The Governing Agreements provide that the Master Servicer is liable only for "willful misfeasance, bad faith or negligence in the performance of duties or . . . reckless disregard of obligations and duties hereunder" and not for actions taken in good faith. See, e.g. Centex Home Equity Loan Trust 2004-A (CXHE 2004-A), Pooling & Servicing Agreement, January 1, 2004, Section 10.7 (Compensation and Reimbursement).
67. *See* Complaint in MBIA Insurance Corporation v. Countrywide Home Loans, Inc. Countrywide Securities Corp., and Countrywide Financial Corp., dated September 30, 2008 and http://www.mbia.com/investor/legal_proceedings_MBIAvCHL.html#MBIAvCHL.
68. We obtained monthly loan level data on the loans owned by 512 of the Trusts using

adjudicate 800,000 individual loans would be enormous. Even if it only took 2 to 3 minutes per loan, this would require 13.5 to 20 years (2 to 3 minutes per loan times 800,000 = 1.6 to 2.4 million minutes = 27,000 hours to 40,000 hours = 13.5 to 20 years at 2,000 working hours per year).[69] Moreover, getting the loan files ready for judicial review would also require enormous resources.[70] Analysis of loan files, even if sampling were permitted and utilized by both sides, would also be extraordinarily expensive.[71]

VIII. THE MARKET REACTION TO THE ANNOUNCEMENT OF THE SETTLEMENT IS INCONSISTENT WITH THE OBJECTORS' CLAIM THAT BANK OF AMERICA RECEIVED A WINDFALL IN THE SETTLEMENT

43. Another way to test the reasonableness and adequacy of the Settlement is to analyze the reaction of market participants to Bank of America's

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CoreLogic's database of securitized loans. Data was not available on 18 of the Trusts.

69. Monarch, which advises funds that hold in excess of $630 million original face value of the Certificates and was not a party to the Settlement negotiations, expressly cited its concerns regarding the potential delay of the Settlement, let alone the much longer delay that would be incurred by litigation, when it urged the Court to approve the Settlement promptly. *See* Letter from Adam R. Sklar, Managing Principal, Monarch Alternative Capital to The Honorable Barbara R. Kapnick dated February 4, 2013.

70. See, e.g. Opinion & Order, Federal Housing Finance Agency v. JPMorgan Chase & Co. et al., And other FHFA cases. United States District Court, Southern District of New York, Filed December 3, 2012 ("The plaintiff represents that the re-underwriting of a single loan file requires at least 2-3 hours of work and costs approximately $300-400. The defendants have not disagreed with these figures.")

71. The loan file reviews in the bankruptcy of Residential Capital, LLC, illustrate the high cost of reviewing even a relatively small number of loans. To review only 1,500 loans, the debtors' expert retained a team of 42 underwriters and 3 underwriting managers and J.F. Morrow retained a team of 19 re-underwriters. Reply Declaration of Frank Sillman in Support of Debtors' Motion Purusant to Fed. R. Bankr. P. 9019 for Approval of the RMBS Trust Settlement Agreements ("Sillman Report") ¶ 9 and Expert Report of J.F. Morrow Report dated December 3, 2012 and submitted in In re: Residential Capital, LLC, et al. ("Morrow Report"). ¶ 95.

announcement of the Settlement. Prior to the Petition Date, considerable information about the Institutional Investors' claims was disclosed publicly and thus available to market participants, including analysts covering Bank of America who discussed and independently analyzed this information.[72] Given the extensive amount of publicly available information about the claims made in this litigation at the time the settlement was announced, how market participants reacted in terms of their valuation of Bank of America's stock provides valuable information on the market's judgment on whether the Settlement was reasonable and adequate.[73]

44. We analyzed the reaction of Bank of America's stock price to the announcement of the Settlement using an event study, a technique that is widely used in finance.[74] It is standard practice in event studies to take into account the effect of market factors on stock price returns. This is typically done by using regression analysis to estimate the historical relationship between changes in a company's stock price and

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72. *See* e.g., Institutional Investors' Statement in Support of Settlement and Consolidated Response to Settlement Objections, October 31, 2011, at ¶ 72; N.D. Schwartz, "The Next Big Blow," *The New York Times*, October 20, 2010; N.D. Schwartz, "Bank of America Is in Talks on Soured Mortgages," *The New York Times*, December 16, 2010; B.L. Graseck, C.M. Pate and M.J. Cyprys, "Bank of America: Fundamentals Anyone?," Morgan Stanley, October, 20, 2010; and M.H. Burnell and H. Chan, "BAC: Patience Required But Valuations Remains Cheap – Ests Lower," Wells Fargo, April 18, 2011.

73. During the calendar year prior to June 29, 2011: 1) Bank of America stock was actively traded on the New York Stock Exchange, with average weekly share turnover of 8.08%; 2) each month, between 25 and 31 analysts provided estimates of the Company's earnings to IBES, and Thomson Financial lists 240 analyst reports on the Company; and 3) Bank of America filed Forms S-3 and regular public filings with the SEC. Therefore, it is reasonable to presume that market participants followed the stock closely and took the Settlement into account in valuing Bank of America's stock.

74. *See*, e.g., A.C. MacKinlay, "Event Studies in Economics and Finance," 35 *Journal of Economic Literature* (March 1997), 13-39.

changes in the performance of a market index (and possibly an industry index), using the historical relationship and the actual performance of the index(es) on the day in question to calculate a "predicted return," and subtracting the predicted return from the actual return to derive a "residual return" (sometimes referred to as an "abnormal return" or "market-adjusted return"). In this case, we estimated the relationship between Bank of America's return and returns on the S&P 500 Index and a value-weighted portfolio of the firms in the KBW Bank Index (excluding Bank of America) during the period from June 29, 2010 to June 28, 2011.[75]

45. When performing event studies, the conventional practice in finance is to test the "null hypothesis" that the residual return is zero against either the alternative hypothesis that the residual return is different from zero, or the alternative hypothesis that the residual has a particular sign (i.e., it is positive, or it is negative).[76] If the null hypothesis cannot be rejected at conventional levels of significance, then the residual returns are not considered to be statistically significant, i.e., they are not considered to be significantly different from zero. Under these circumstances, one concludes that the observed stock return on a particular date can be explained by the

75. In its most recent annual reports, Bank of America compared its performance with the performance of the S&P 500 Index and the KBW Bank Index. *See* Bank of America Annual Report for the Year Ended December 31, 2011 at 16 *and* Bank of America Annual Report for the Year Ended December 31, 2010 at 22.

76. *See,* e.g., J.Y. Campbell, A.W. Lo, & A.C. MacKinlay, *The Econometrics of Financial Markets*, (Princeton University Press, 1997), at 160-66; A.C. MacKinlay, "Event Studies in Economics and Finance," 35 *Journal of Economic Literature* (March 1997), 13-39; G.W. Schwert, "Using Financial Data to Measure Effects of Regulation," 24 *The Journal of Law and Economics* (1981) 121-57; D.R. Fischel, "Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities," 38 *The Business Lawyer* (1982), 1-20, at 19.

independent variable(s) considered in the estimation model (and is not attributable to the firm-specific events which occurred on that date).

46. In event studies, the statistical significance of the residual returns is typically assessed by calculating a standardized measure of the size of the residual return known as a "t-statistic."[77] A t-statistic with an absolute value of 1.96 or greater denotes statistical significance at the 5 percent level of significance (a conventional level at which such assessments are made) in a "two-tailed" test of statistical significance (i.e., testing for significance regardless of whether the residual return is positive or negative).[78] A t-statistic with an absolute value of 1.65 or greater denotes statistical significance at the 5 percent level of significance in a "one-tailed" test of statistical significance (i.e., testing for significance where the residual return has a particular sign).[79] 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. A residual stock price decline that is not both positive and statistically significant provides market evidence contradicting the Objectors' claims that the Settlement resulted in a windfall to Bank of America.

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77. *See*, e.g., A.C. MacKinlay, "Event Studies in Economics and Finance," 35 *Journal of Economic Literature* (March 1997), 13-39; G.W. Schwert, "Using Financial Data to Measure Effects of Regulation," 24 *The Journal of Law and Economics* (1981), 121- 57; D.R. Fischel, "Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities," 38 *The Business Lawyer* (1982), 1-20, at 18-19.

78. *See*, e.g., W. Mendenhall, J.E. Reinmuth & R.J. Beaver, *Statistics for Management and Economics* (Duxbury Press, 1993), at 345-46 & 368-69.

79. *Id.*

47. After the market closed on June 28, 2011, *The Wall Street Journal* reported that Bank of America was near an $8.5 billion settlement.[80] Before the market opened on June 29, 2011, the company formally announced the Settlement in a press release and held a conference call to discuss it.[81] During the next two days, market participants including analysts discussed the Settlement.[82]

48. We analyzed the returns on Bank of America's stock price over those two days, June 29, 2011 and June 30, 2011.[83] The results are reported in Exhibit G.

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80. "BofA Closing in on Pact To Pay $8.5B to Settle Claims, WSJ Says," *Bloomberg*, June 28, 2011 at 5:40 PM *and* "WSJ: Bank Of America' Settlement With Investors Needs Court Approval," *Dow Jones News Service*, June 28, 2011 at 5:46 PM.
81. In the press release, the Bank also disclosed it expected a second quarter loss because of the Settlement and other additional expected expenditures covering litigation risk. "Bank of America Announces Agreement on Legacy Countrywide Mortgage Repurchase and Servicing Claims," *Business Wire*, June 29, 2011 at 7:00 AM; "Bank of America Corp Conference Call to Discuss Agreement on Legacy Countrywide Mortgage Repurchase and Servicing Claims," *Thomson Reuters StreetEvents*, June 29, 2011 at 12:00 PM GMT, or 8:00 AM EDT.
82. *See,* e.g., D. Reilly, "Heard on the Street: Deal Shows How BofA's Pain Is Countrywide," *The Wall Street Journal*, June 29, 2011; K. Usdin et al., "Regional Banks: MBS Settlement Make Sense For BAC; Longer Tail For The Regionals," Jefferies, June 29, 2011; and J. Morford and J. Daroosh, "BAC: Pre-Announces 2Q11 Loss," RBC Capital Markets, June 30, 2011.
83. Many studies by financial economists have focused on a one or two-day "event window" to analyze changes in stock prices in response to new information. *See,* e.g., B. Cornell & R.G. Morgan, "Using Finance Theory to Measure Damages in Fraud on the Market Cases," 37 *UCLA Law Review* 883 (1990), at 906 ("an observation window of a day or two is long enough"); J. Macey, G. Miller, M. Mitchell & J. Netter, "Lessons from Financial Economics: Materiality, Reliance, and Extending the Reach of *Basic v. Levinson,*" 77 *Virginia Law Review* 1017 (1991), at 1031 ("When computing a stock return due to an event, financial economists often define the event period as the two-day period consisting of the announcement day and the following day"); J.C. Alexander, "The Value of Bad News in Securities Class Actions," 41 *UCLA Law Review* 1421 (1994), at 1433, n. 34 ("Usually the event study covers a two-day period to allow the market to assimilate the disclosure"); and J. Campbell, A. Lo & A.C. MacKinlay, *The Econometrics of Financial Markets*, (Chapter 4) Princeton University Press (1997), at 151 ("In practice, the event window is often expanded to two days, the day of the

The raw returns on these two days were 2.96 percent and -1.62 percent, respectively, for a cumulative return of 1.29 percent. However, our 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.[84] 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. Therefore, over the two-day period following the Settlement announcement, Bank of America's residual return decreased, rather than increased, by 1.70 percent. That the two-day residual return was negative is particularly noteworthy because it is reasonable to have expected that the Settlement that eliminated uncertainty and potentially years of costly litigation would have had a positive impact on Bank of America's stock price.[85]

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announcement and the day after the announcement").

84. The increase in Bank of America's stock price on June 29, 2011 is almost entirely explained by the increase in the value of other bank stocks in the KBW Bank Index on that day. Given this increase in other banks' stocks, the predicted return for Bank of America on June 29, 2011 was 2.65 percent. Because the stock price of Bank of America increased by 2.96 percent, the residual return was 0.31 percent, indistinguishable from zero. *See* Exhibit G. This result has to be interpreted with some caution, however, because of the possibility that bank stocks, particularly those with RMBS exposure, were affected by the announcement of the Settlement.

85. Of course, not all information about the litigation was known at the time of the Settlement and it is possible that such information if it had become known would have produced a different valuation result than what occurred in response to the actual Settlement announcement. But this is true whenever there is a settlement and moreover, it is impossible to know what and in which direction the different price reaction would be. In this case, for example, a hypothetical legal ruling affirming the Trusts' ability to reach the assets of Bank of America would likely have a

Daniel R. Fischel

March 14, 2013

negative effect on its stock price, and the reverse would be true with an opposite legal ruling.

Exhibit 39

MONARCH
ALTERNATIVE CAPITAL

Via Hand Delivery

February 4, 2013

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 Application of The Bank of New York Mellon, et al.* (Index No. *651786/2011*, Kapnick, J.)

Dear Justice Kapnick:

Monarch Alternative Capital LP ("Monarch") is an investment advisor for funds (the "Funds") that hold certificates in original face amount in excess of $630,000,000 and current face amount in excess of $515,000,000 in twenty of the RMBS trusts (the "Trusts") at issue in the above referenced Article 77 proceeding (the "Proceeding"). A schedule of the relevant Trusts is attached hereto ("Schedule A").

As set forth below, Monarch submits this letter in support of the proposed settlement (the "Settlement") and urges the Court to approve it expeditiously.

In August 2011, certain of the Funds petitioned to intervene in the Proceeding, and Judge Pauley granted their petition. Less than four months later, in December 2011, those Funds withdrew from the Proceeding in an application also granted by Judge Pauley (the "Withdrawal Application").

The Withdrawal Application was cited by the Steering Committee (the "Committee") in the Committee's Consolidated Reply Memorandum of Law in Support of Orders to Show Cause, filed on February 1, 2013 (the "Memorandum"). The Memorandum contends that "evidence exists that investors believe the Intervenor-Respondents' efforts militate against the need to incur expense and effort only to raise redundant or duplicative issues." Memorandum, at 17. The Memorandum then quotes a portion of the Withdrawal Application in which counsel for the Funds stated that:

> "The Monarch Entities intervened in this litigation to preserve their rights to seek the disclosure necessary to make an informed decision about the merits of the proposed settlement . . . . A number of other entities have also intervened in this case, many of whom, similar to the Monarch Entities, are also certificateholders

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> in the trusts covered by the proposed settlement. Many of those parties will raise arguments about the proposed settlement that are similar to the arguments that the Monarch Entities would raise, and judicial economy and efficiency would be served by eliminating redundant or duplicative filings."

The Memorandum implies that the Committee speaks for certain investors, like Monarch and the Funds, who oppose the Settlement but are unwilling to expend their resources to do so in Court. The Committee quoted from the Withdrawal Application – filed more than a year ago – *without* contacting any Monarch representative (or Monarch's counsel) to determine whether Monarch opposes the Settlement. Monarch submits this letter to set the record straight.

Simply put, Monarch does *not* oppose the Settlement. To the contrary, Monarch supports it. Monarch believes the Settlement will provide significant immediate benefits to the beneficiaries of the Trusts and should be approved expeditiously. Certificateholders should not be held hostage to a legal battle that threatens to delay (and potentially destroy) the entire Settlement based on the actions of what appears to be a small minority of objecting holders.

We urge the Court to approve the Settlement promptly for the benefit of all of the Trusts' Certificateholders.

Respectfully submitted,

A. Sl

Adam R. Sklar
Managing Principal

Cc (via electronic mail):

Michael Rollin, Esq. (mrollin@rplaw.com)
John G. Moon, Esq. (jmoon@mw-law.com)
Derek W. Loeser, Esq. (dloeser@kellerrohrback.com)
Matthew D. Ingber, Esq. (mingber@mayerbrown.com)

Schedule A

CWALT 2005-27
CWALT 2005-56
CWALT 2006-OA16
CWALT 2006-OA17
CWALT 2006-OA3
CWL 2005-16
CWL 2005-17
CWL 2006-10
CWL 2006-11
CWL 2006-12
CWL 2006-13
CWL 2006-20
CWL 2006-21
CWL 2006-22
CWL 2006-25
CWL 2007-5
CWL 2007-6
CWL 2007-9
CWL 2007-BC1
CWL 2007-SEA1

Exhibit 40

Fir Tree, Inc.

May 2, 2013

Via 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 Application of The Bank of New York Mellon, et al.*
(Index No. *651786/2011*, Kapnick, J.)

Dear Justice Kapnick:

Fir Tree, Inc. ("Fir Tree") is an investment management firm. Fir Tree advises affiliated funds that hold securities (the "Securities") issued by some of the 530 securitization trusts within the scope of the proposed settlement for which approval is sought by The Bank of New York Mellon, as trustee, pursuant to *In re Application of The Bank of New York Mellon, et al.*, Index No. *651/2011* (the "Proceeding").

Fir Tree writes to the Court on behalf of certain of its funds under management who hold Securities to ask the Court to approve the proposed settlement.

As of the date hereof, funds managed by Fir Tree hold more than $550 million in original face value of Securities that are subject to the proposed settlement. Like most other holders of affected Securities, Fir Tree is not an intervenor or an objector in the Proceeding. Fir Tree believes that this widespread lack of objection reflects deep and broad support among holders of Securities for the proposed settlement.

Fir Tree understands that the Court has scheduled a hearing on May 30, 2013, to determine whether to approve the proposed settlement. Fir Tree urges the Court to proceed with the hearing as scheduled and to make its determination to approve the proposed settlement.

Fir Tree supports the proposed settlement and views the settlement as fair and reasonable after taking into account the risks and costs of obtaining a judgment for the benefit of holders of Securities against the Countrywide and Bank of America entities that are parties to the settlement. Accordingly, Fir Tree urges the court to approve the settlement, enabling holders of Securities to see recoveries from the settling parties.

For the avoidance of any doubt, Fir Tree's support regarding the proposed settlement is based on the very particular facts and circumstances of this proceeding, including, without limitation, the staggering task and complexity of organizing a settlement of more than 530 trusts and the costs associated with having to potentially re-underwrite and investigate millions of mortgage loan files if the settlement were not approved. Fir Tree appreciates the opportunity to provide you with their views.

Respectfully submitted,

Evan Lederman
Authorized Person
Fir Tree, Inc. (on behalf of certain of its funds under management)

Exhibit 41

Exhibit 41 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 41 has been delivered to the Court and served on all parties of record.

Exhibit 42

In The Matter Of:

Bank of New York Mellon v.

Oral Argument
April 12, 2013

Supreme Court State of New York - Civil Term
60 Centre Street, Room 420
New York, New York 10007
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line thing, one of the things, I mean, I guess maybe you're upset because maybe eventually somebody would get over it that you weren't invited to the party, that they negotiated and you weren't there. And I guess I can understand your frustration but they negotiated and you didn't. And you didn't know about it and they did. In the end what you want to do, I guess, is do the best for the certificate holders and I guess that's get the most amount of money.

MR. REILLY: Get more money.

THE COURT: And where is there in all the documents and all the depositions and everything that you looked at, any indication that the indemnity caused the settlement amount to be less, that there was ever anything, like if someone had said, well, there's $10 billion out there but if you want the indemnity you are going to take 8.5 and that's it. I mean 8.5, it seems like was very, very heavily negotiated, you finally got that, that's it, take it or leave it. But it wasn't based on the indemnity, based on all the conversations, so what conversation do Bank of New York Mellon, as trustee, and their lawyer would have had that would have shown that an order was given and that all the other negotiating partners had never came up.

MR. REILLY: Well, it starts with the fundamental question about whether the trustee was acting to protect its own interest or not, right? If the trustee is putting it's

Exhibit 43

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., Petitioners, for an order, pursuant to C.P.L.R. 7701, seeking judicial instructions and approval of a proposed settlement.	Index No. 651786/2011

VIDEOTAPED DEPOSITION OF DEBRA BAKER

New York, New York

Friday, January 11, 2013

Reported by:

KRISTIN KOCH, RPR, RMR, CRR, CLR

JOB NO. 56219

What does that mean for you?
A. You know, just keeping up on what's happening, reading the publications and understanding -- at that point I was the chief administration officer in corporate trust working for Scott Posner, so there was a lot of activity around setting up war rooms, we called them at that time, just to make sure we understood any of our exposures.
Q. You said that you were chief administration officer in the corporate trust division; is that correct?
A. When I initially came over in 2008, correct.
Q. And can you define for me what that role was, what your responsibilities were?
A. Sure. My responsibilities were around managing a couple of the groups, mostly the product management group which is in charge of strategic direction. The second area was around training and development, and the third was oversight over some of the financial functions.
Q. When you say strategic direction for product management, what does that mean?

Exhibit 44

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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor), Petitioners, for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.	**Index No. 651786-2011** **Kapnick, J.**

EXPERT REPORT OF ROBERT I. LANDAU

CONFIDENTIAL

I. BACKGROUND AND QUALIFICATIONS

1. I have worked in and have been involved with the corporate trust industry for 50 years, primarily at Bankers Trust Company (now Deutsche Bank) in New York. For 17 years, I led the worldwide corporate trust group at Bankers Trust Company, and from 1992 until 1996 served as head of the corporate trust function at NationsBank in Atlanta. For almost four decades, I dealt directly with the review and administration of hundreds of corporate trust agreements, indentures, pooling and servicing agreements, bond resolutions, agency agreements, and related documents, or was responsible for their review and administration by people who reported to me, covering both pre-default and post-default matters.

2. I am the author of *Corporate Trust Administration and Management*, the sixth edition of which was published in March 2008. This textbook has been used as the basic reference source throughout the corporate trust industry for the past 39 years. Since 1965, I have taught thousands of bankers, securities industry professionals, attorneys, and banking regulatory staff members at conferences, seminars, and workshops in the United States and overseas.

3. Over the course of four decades, I served as Chairman of the Corporate Trust Committee of the American Bankers Association, Chairman of the CUSIP Board of Trustees, founding member of the Financial Industry Securities Council, and Chairman of the Institute of Certified Bankers' Certified Corporate Trust Specialist Advisory Board. Since 1996, I have been engaged in the practice of providing training, advisory, and consulting services to participants in the corporate trust and securities industries. A copy of my resume is attached as Exhibit A.

4. During the past 17 years, I have been retained as an expert witness in over one hundred cases for both plaintiffs and defendants. In at least 46 of those I provided deposition and/or trial testimony. I have been recognized as an expert on corporate trust issues in state and/or federal courts in 17 states, including New York. No court has ever declined to accept my opinions. A list of litigation matters in which I have testified as an expert at trial or by deposition or submitted a report within the past five years is attached as Exhibit B

5. I was retained by counsel for The Bank of New York Mellon ("BNYM" or "Trustee") to provide my expert opinions as to whether the Trustee's process of negotiating, evaluating and entering into the Settlement Agreement was reasonable, prudent, and consistent with custom and practice in the corporate trust industry. I have also been asked to review the report of Professor Tamar Frankel, submitted on behalf of AIG, and to respond to certain of her opinions that touch on these issues.

6. I am being paid at my customary rate of $400 per hour for the review and study of all documents and papers and report preparation, and $4,000 per day for the giving of testimony at deposition or at trial. I will also be reimbursed for my actual out-of-pocket expenses. My compensation does not depend on the outcome of the case or the substance of my opinions.

7. My opinions concerning the appropriate role and duties of a corporate trustee, and custom and practice in the industry, are based upon 50 years of experience in the corporate trust industry, as set forth above and in Exhibit A, including serving as an account administrator and officer; manager of marketing, administration, and operations units; executive officer for the corporate trust business line function for two major banks; consultant to private and government entities; and as an instructor of corporate trust personnel.

II. DOCUMENTS REVIEWED

8. I have reviewed the documents listed in Exhibit C in forming my opinions in this matter. That includes the transcripts of all 27 depositions taken to date in this matter.

9. If additional documents or testimony become available to me, I reserve the right to amend this report ("Report") if I deem it necessary or appropriate.

III. SUMMARY OF OPINIONS

10. Based on my review of the record, and based on my 50 years of experience in the corporate trust industry, it is my opinion that the Trustee's process of negotiating, evaluating and entering into the Settlement Agreement was reasonable, prudent, and consistent with custom and practice in the corporate trust industry. Specifically:

a. The Trustee's negotiation and evaluation of the Settlement was reasonable, prudent, and consistent with custom and practice in the corporate trust industry.

b. The Trustee's entry into the Forbearance Agreement was reasonable, prudent, and consistent with custom and practice in the corporate trust industry.

c. The Trustee's receipt of a confirmation of indemnity was reasonable, prudent, and consistent with custom and practice in the corporate trust industry.

d. Professor Frankel's opinions about the roles, duties, and rights of trustees ignore decades of custom and practice in the corporate trust industry.

IV. <u>SPECIFIC STATEMENT OF OPINIONS</u>

A. Background: Role of a Corporate Trustee

11. The rights and obligations of the parties to a mortgage-backed securitization, as with securitizations and corporate trusts generally, are principally governed by specific transaction documents. These specific documents define the rights, duties, and obligations of the trustee and other parties to the transactions, as well as the rights of the holders of securities issued by the trust. In this matter, it is the Pooling and Servicing Agreements ("PSAs") and Sale and Servicing Agreements and Indentures (collectively, the "Governing Documents"), which I understand to be substantively similar across the 530 Covered Trusts, that set forth the specific rights, duties, and obligations of the relevant parties—the Trustee, the Depositor, the Seller, and the Master Servicer—as well as the Certificateholders in the 530 Covered Trusts.

12. In discharging its responsibilities, the trustee's duties are governed principally by the provisions of the governing documents and industry custom and practice.

13. In my experience in the corporate trust industry, custom and practice is generally an unwritten, but widespread, acknowledgment of the scope and nature of a trustee's role and responsibilities and the generally accepted means and methods by which a trustee should discharge its obligations under the governing documents, including the generally understood meaning of words, terms, and phrases in such documents.

B. The Trustee's process of negotiating, evaluating and entering into the Settlement Agreement was reasonable, prudent, and consistent with industry custom and practice.

1. <u>The Trustee's negotiation and evaluation of the Settlement was reasonable, prudent, and consistent with industry custom and practice</u>.

14. As the holder of the contract claims of the trust, the trustee is the party who ultimately has the final decision-making authority with respect to the question of whether to enter into a settlement agreement on behalf of a particular trust or group of trusts. In practice it is usually the trustee that makes this type of decision, sometimes independently and sometimes at the request of, or by following a direction from, investors. Accordingly, I have evaluated the conduct of the Trustee in this matter, including whether it acted in good faith, professionally, and in conformity with custom and practice in the corporate trust industry.

15. The Trustee's process of evaluating the Settlement was thorough in comparison to industry standards—[redacted] In my expert opinion and based on my industry experience, that process was reasonable, prudent and consistent with industry custom and practice.

16. In forming this opinion, I relied in part on the following deposition testimony describing [redacted] which I con[redacted]lude reflect reasonable and prudent behavior by the Trustee that was consistent with custom and practice in the corporate trust industry:

<u>Loretta Lundberg</u> was [redacted] she testified that she [redacted]d [redacted] (Lundberg Dep. at 55:2-5.) She testified that [redacted] (*Id.* at 286:18-22.) She testified that [redacted] (*Id.* at 209:9-211:12.) [redacted] (*Id.* at 197:3-13.) [redacted] (*Id.* at 204:24-207:20.)

<u>Robert Bailey</u> was [redacted] He testified that [redacted] (Bailey Dep. at 145:18-22.) Mr. Bailey also testified [redacted] (*Id.* at 51:5-64:15) [redacted] (*Id.* at 87:8-91:8; 251:20-252:10.) [redacted] he testified that, [redacted] t[redacted] (*Id.* at 191:21-24), [redacted]

[redacted] (*Id.* at 199:2-10.) He testified that he [redacted] (*Id.* at 184:11-13; 184:21-23.)

Robert Griffin, [redacted] and testified that [redacted] (Griffin Dep. at 144:19-22.) [redacted] he responded that [redacted] (*Id.* at 331:17-24.) [redacted]

Richard Stanley, [redacted] As Mr. Stanley testified, [redacted] (Stanley Dep. at 173:10-23.) He added that [redacted] (*Id.* at 171:15-19.) [redacted] Mr. Stanley testified that [redacted] (*Id.* at 213:5-10.) Mr. Stanley also testified [redacted] (*Id.* at 53:20-59:18.)

17. As set forth in the record, BNYM retained experienced outside legal counsel to advise them. In my experience, that is a very important first step that a trustee should take when confronted with issues of this

complexity. This decision alone indicates that the Trustee understood the seriousness of the Institutional Investors' allegations and prepared to address them reasonably and in good faith.

18. Based on my review of the record, it is apparent that the individuals at BNYM responsible for managing the settlement negotiation process on a day-to-day basis, [redacted] In my experience, this was exactly what a reasonable and prudent corporate trustee should have done under the circumstances.

19. The Trustee also retained the following subject matter experts ("Experts") when the negotiations progressed to the point at which it became apparent that a settlement was possible:

- Professor Barry Adler – New York University School of Law (addressing the Governing Documents' "material and adverse effect" provisions, Countrywide's asserted causation defense, and substantive consolidation)
- Professor Robert Daines – Stanford Law School (addressing veil piercing and whether Bank of America could have successor liability for Countrywide's liability)
- Capstone Valuation Services, LLC ("Capstone") – Bruce Bingham, Executive Director (addressing the maximum economic value that BNYM could recover from Countrywide Financial Corporation)
- RRMS Advisors, LLC ("RRMS") – Brian Lin, Managing Director (addressing the Settlement amount and assessing the mortgage loan servicing and loan administration components of the Settlement)
- NERA Economic Consulting ("NERA") – Dr. Faten Sabry (proposed method for computing actual losses and expected future losses for the Countrywide securitization trusts)

20. These entities or their representatives provided to the Trustee (directly or through counsel) opinions to assist the Trustee in evaluating competing positions of the Institutional Investors or

Countrywide/Bank of America, determining whether to enter into the Settlement Agreement, and implementing the Settlement (if approved).

21. The Trustee also retained the following consultants [redacted]

- EmphaSys Technologies, Incorporated ("ETI") – David Anthony, [redacted]
- Garden City Group – Jose Fraga, [redacted]

22. The ability of corporate trustees to retain and rely upon attorneys, agents, and advisors in the performance of their duties is a universally accepted practice, in accordance with industry custom, and, as here, has long been a central feature of corporate trust transaction documents. (PSA § 8.02(ii): "[T]he Trustee may consult with counsel, financial advisers or accountants of its selection and the advice of any such counsel, financial advisers or accountants and any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith and in accordance with such Opinion of Counsel.")

23. Based upon my review of the record, it is apparent that the Trustee retained a variety of legal experts to assess legal arguments raised by both the Institutional Investors and Countrywide/Bank of America (Professors Daines and Adler), other experts to investigate the financial arguments raised by both the Institutional Investors and Countrywide/Bank of America (Capstone and RRMS), and still other experts, consultants or advisors to [redacted] (Mayer Brown LLP and ETI) or [redacted] (NERA and The Garden City Group) [redacted]

24. With respect to the Experts, I have not attempted to independently verify or critique their opinions, because that is unnecessary to determine whether the Trustee properly relied on them. Rather, I have reviewed the qualifications and written reports of each Expert. In my opinion, each provided advice that was, on its face and at a minimum, sufficiently credible, thorough, and relevant that a competent corporate

trust officer could reasonably rely on it. Not only is each Expert opinion obtained by the Trustee credible, but the collective body of advice is, in my experience, very extensive. That work shows that the Trustee approached the Settlement in a thoughtful and comprehensive manner, which easily comports with industry standards.

25. It is easy to demand that a trustee do "more"—more investigation, retain more experts—and then argue that it should have done "even more." Such criticisms, however, do not establish any standard of care, and certainly not one that could ever be met. It is not the standard which I have followed or observed over many years, nor is it custom and practice in the corporate trust industry. Here, the Trustee acted as it should have in evaluating, and deciding to enter into, the Settlement—reasonably and in good faith.

26. Professor Frankel has opined that the "timing and substance of the expert reports suggests that rather than employ experts to develop the Trusts' case against BoA during the negotiations of the key terms, the Trustee sought the opinions of experts to put a stamp of justification post-hoc on the settlement terms that were agreed upon." (Frankel Report at 11.) In my opinion, it would not have been appropriate or customary for the Trustee to decide whether to accept the Settlement based on experts who were hired to advocate for the Trusts' position. Any reasonable trustee would have taken an objective look at the strengths and weaknesses of the Trusts' claims.

27. In that respect, three points stand out evidencing that the Trustee's conduct was well within industry custom and practice. First, the Trustee hired the Experts and reviewed their reports before making any binding decision; the Settlement terms were not "agreed upon" by the Trustee until the Trustee's officer signed the Settlement Agreement. In fact, the Trustee's lead counsel, Jason Kravitt, [redacted] (Koplow Dep. at 235:24-236:14.) Second, [redacted] (*See* Capstone Report at 5-6, Dep. Ex. 012; Bingham Dep. at 328:8-14; Lin Dep. at 156:9-17.) [redacted]

Third, [redacted]

These facts are consistent with a trustee acting in good faith to make a responsible decision about a proposed transaction.

28. There is an additional point supporting the reasonableness of the Trustee's process of evaluating the Settlement. [redacted] Professor Frankel criticizes the Trustee because, she states, [redacted] (Frankel report at 10 n.29.) [redacted].

29. [redacted]

2. <u>The Trustee's entry into the Forbearance Agreement was reasonable and consistent with industry custom and practice</u>.

30. I understand that the Institutional Investors sent a Notice of Non-Performance to the Master Servicer and the Trustee, dated October 18, 2010, which alleged that the Master Servicer failed to perform its servicing obligations under the PSAs. (Dep. Ex. 017, BNYM_CW-00008683 *et seq.*) I understand that if the 60-day cure period set forth in the Governing Documents had expired, the Trustee would have had to decide if the alleged defaults (which I understand were disputed by the Master Servicer) triggered the Event of Default provisions of the Governing Documents. Before that time expired, Countrywide/Bank of America, the

Trustee, and the Institutional Investors (i.e., the very investors which sent the notice of a purported servicing failure and who alleged that that notice triggered the running of the 60-day cure period) entered into a Forbearance Agreement that would delay the expiration of the 60-day cure period. (Kravitt Dep. Ex. 046.)

31. Based on my industry experience, it is my opinion that the Trustee acted reasonably and in good faith in entering into the Forbearance Agreement. The testimony of Mr. Kravitt (BNYM counsel) [redacted] (Kravitt Dep. at 32:20-25.) [redacted] (*Id.* at 358:23-24.) [redacted] Mr. Kravitt testified, [redacted] (*Id.* at 183:9-12.) As Mr. Kravitt explained, [redacted] (*Id.* at 182:23-183:6.) [redacted] (*Id.* at 183:20-25.) This testimony is consistent with the testimony of other witnesses, such as Elaine Golin, counsel for Bank of America, [redacted] (Golin Dep. at 253:4-7.) [redacted]

32. It was clearly understood that [redacted]

[redacted] (Kravitt Dep. at 183:17-25.) Put another way, there was [redacted] (*Id.* at 629:18-25.)

33. Based upon my review of the Forbearance Agreement (Dep. Ex. 046, BNYM_CW-00271275-281) and the testimony about [redacted], it is my opinion that the Trustee's decision to enter into the Forbearance Agreement was reasonable and appropriate in light of the ongoing potential settlement negotiations. The Forbearance Agreement allowed the parties to the negotiations to avoid debate about whether an Event of Default would occur, which might have resulted in litigation, creating the conditions that allowed the Trustee to help negotiate a settlement in the best interests of all Certificateholders.

34. Professor Frankel has opined that the Trustee "acted beyond the authority vested in it in the Governing Agreements" by entering into the Forbearance Agreement. (Frankel Report at 5.) I understand that the Governing Documents neither expressly permit nor prohibit such an extension of the cure period.

35. In my opinion, industry custom and practice dictate that, absent an express contractual provision to the contrary, the Trustee has the power to determine whether the Master Servicer has breached the Governing Documents, whether such breach was material, and whether it has been cured. The Trustee also has the right to exercise, or forbear from exercising, its rights against the Master Servicer, including by declaring (or not) an Event of Default (assuming all the conditions to an Event of Default have been satisfied), provided that the Trustee makes that decision reasonably and in good faith. Here, there was a dispute about whether the Notice of Non-Performance even triggered any cure period. In my opinion, and based on my experience, the explanation given by Mr. Kravitt—[redacted]—was sensible and practical. [redacted]

[redacted]

36. It is my further opinion that, absent an express requirement in the Governing Documents that the Trustee give notice to holders of the Notice of Non-Performance or the Forbearance Agreement or the prospect of settlement negotiations, industry custom and practice would not require giving such notice.

3. The Trustee's receipt of a confirmation of indemnity was reasonable and consistent with industry custom and practice.

37. It has been understood and acknowledged for many decades by participants in the securities industry that trustees are risk averse, both before and after default. It is well settled that corporate trustees should not be required to put their own assets at jeopardy in acting on behalf of the trust and in the interests of certificateholders, the ultimate recipients of the benefits of the trustee's actions. Accordingly, the transaction documents governing such trusts have long reflected that market reality by expressly limiting the liability of indenture trustees and entitling them to indemnification for actions taken on behalf of the trust. *See Corporate Trust Administration and Management*, Sixth Edition at 84-90. The right of corporate trustees to obtain indemnification against losses, liabilities, or expenses has been a standard provision in governing documents for decades and is universally accepted custom and practice. Accordingly, it makes sense that the Governing Documents at issue here entitle the Trustee to indemnity for "any loss, liability or expense" that it incurs "in connection with any claim or legal action" relating to the Governing Documents, the certificates, or any of the Trustee's duties under the Governing Documents. (PSA § 8.05.)

38. The existence of such an indemnity does not create any conflict of interest. The Trustee was *entitled* to indemnity for its actions in entering into the Settlement, as set forth above. Moreover, as is typical, the indemnity applies only when the Trustee acts in good faith and without willful misfeasance or negligence. Further, it is understood in the industry that indemnities of this sort benefit investors by enabling trustees to incur expenses and exercise judgment when in the best interests of investors.

39. In this matter, the Trustee received a confirmation of its pre-existing indemnification both in connection with its becoming a party to the Forbearance Agreement and its entry into the Settlement

Agreement. [redacted] As Mr. Kravitt testified, [redacted] (Kravitt Dep. at 565:14-19.) Mr. Kravitt testified that [redacted] (*Id.* at 254:11-17). This is consistent with the testimony of other witnesses such as Ms. Golin who testified about [redacted] (Golin Dep. at 269:25-270:8; 273:24-274:17) and Mr. Mirvis who testified [redacted] (Mirvis Dep. at 12:16-15:17; 17:7-18:8).

40. I express no opinion as to the legal effect of the side letter. I do note, however, that Mr. Kravitt's testimony [redacted] Trustees often seek such confirmations even when the scope of their general indemnity is not in any doubt.

C. Additional Responses to Professor Frankel

41. Professor Frankel has stated that the Trustee "does not have the power to forego the claims against BoA without the consent of the investors whose rights are extinguished." (Frankel Report at 8 n.18.) While I do not express any opinion on trust law, I can state that Professor Frankel's opinion not only appears to misstate the facts—as I understand it, the claims that would be extinguished if the Settlement Agreement is approved belong to the Trusts, and not to the investors—but is also contrary to custom and practice in the industry. Trustees routinely settle claims on behalf of their trusts. Such decisions often are made with the

participation and support of a group of holders, as here, but trustees rarely canvass all holders before making such a decision, and I am not familiar with any rule or custom that would require the trustee to secure certificateholders' consent before settling a claim. In my experience, it has not been understood in the industry—and makes no sense—that a trustee cannot settle claims that belong to the trusts without first obtaining the consent of every impacted certificateholder. That would be impractical and would effectively give every certificateholder a veto over settlements regardless of how beneficial the settlement may be to the trusts and other certificateholders.

42. Indeed, the notion that a trustee would decline an opportunity that it believes to be in the best interests of the certificateholders as a group, solely because some individual holders might refuse to consent, is contrary to the industry's understanding of a trustee's duties. Based on my experience, I believe that restricting trustees in this manner would subject investors to the risk of holdup by minority holders.

43. Professor Frankel has opined that settlements of litigation claims are "specifically and uniquely appropriate for court resolution" and that "the subject matter in this case goes beyond the expertise of the Trustee. . . ." (Frankel Report at 13-14.) Corporate trustees regularly make these types of decisions. They do so when litigation must be evaluated, pursued or compromised; when corporate securities issuers enter bankruptcy; or when such issuers seek to restructure their debt. And here, as noted above, the Trustee relied upon qualified experts in evaluating the appropriate course of action—as it was entitled to do, and should have done, under the Governing Documents and settled industry custom and practice.

44. Particularly when armed with the expert advice outlined above, I believe that the Trustee was amply qualified to make an informed decision concerning the Settlement Agreement. I understand that Professor Frankel has stated that the Trustee "rubber-stamped the Settlement Agreement." (Frankel Report at 13.) I have seen no evidence, and Professor Frankel cites none, that that is the case. In light of the custom and practice in the corporate trust industry, the Trustee's process here was thorough, as discussed above.

45. I understand that Professor Frankel has opined that "the Trustee failed to take an active role in the negotiations with BoA." (Frankel Report at 10.) As discussed, I have read more than 8,000 pages of

deposition testimony by 27 witnesses. [redacted]

46. It is my opinion, however, that less participation also would have been appropriate under the circumstances. Although as just discussed, trustees have the right to participate in negotiations on behalf of all investors, it is customary that the parties having the economic interest (trustees have none) and the most substantive expertise (trustees ordinarily have far less than investors) negotiate the substantive terms of a settlement. Such parties would then present the settlement for approval to the trustee, as the party having the right to litigate or settle the relevant claims.

47. Finally, Professor Frankel opines that the Trustee was conflicted because it sought "a release from its own liability arising from its administration of the trusts." But this "release" was nothing more than a request by the Trustee in a draft of a proposed Final Order and Judgment that the court be permitted to consider language preventing certain types of claims against the Trustee. In my experience, requests of this sort—whether made to the parties to a transaction or to the Court —do not constitute a conflict of interest, especially if the request was subject to Court approval. In any event, the Proposed Final Order and Judgment submitted to the Court contained no such request. In my view, this is a non-issue.

IV. CONCLUSION

48. Based on my knowledge of the workings in the corporate trust industry and based on my review of the relevant documents and testimony in this matter, it is my opinion that the Trustee's process of negotiating, evaluating and entering into the Settlement was reasonable, prudent and consistent with custom and practice in the corporate trust industry.

Executed at Eatonton, Georgia, this 14th day of March, 2013

Robert I. Landau

EXHIBIT A

ROBERT I. LANDAU

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164 Rock Springs Road
Eatonton, Georgia 31024

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Tel: 706 484 - 2331
Fax: 706 484 - 2366
Cell: 706 473 - 2100

MANAGEMENT

1996 – Present **LANDAU ASSOCIATES, Eatonton, GA**

Principal of firm providing consulting, advisory and expert witness services to participants in the trust and securities industries. Analysis of existing business practices and processes, the development of strategic and tactical initiatives and planning, and organizational restructuring.

2005 – 2008 **BOARD OF COMMISSIONERS, Putnam County, GA**

County Commissioner with oversight responsibility for Planning & Development Department, Public Buildings, and long-range planning.

1996 – 2006 **VECTOR MANAGEMENT RESOURCES, Eatonton, GA**

Managing Director of firm providing development and delivery of professional, technical and managerial training to participants in the banking and securities industries.

1992 – 1996 **NATIONSBANK, Atlanta, GA**

Senior Vice President, Division Executive *1992 – 1996*

Management of the Corporate Trust Line of Business in the nine states and the District of Columbia, with a staff of 400 associates in the sales, administration and operations functions (trustee, agency, custodian and escrow accounts); and coordination with support functions including systems technology, investments, audit, financial control, compliance, personnel and planning.

1960 – 1991 **BANKERS TRUST COMPANY, New York, NY**

Senior Vice President, Strategic Planning *1990 – 1991*

Initiation and implementation of analytical studies which provided focused objectives for the long-range growth and development of, and strategic planning for, the Bank's non-lending functions.

Senior Vice President, Group Head *1974 – 1990*

Management of the Corporate Trust Line and Agency Group with responsibility for 700 officers and staff in six domestic and overseas locations in the sales, administration and operations functions (trustee, agency, custodian and escrow accounts); and coordination with support functions including systems technology, investments, audit, financial control, compliance, personnel and planning.
Vice President, Operations *1971 – 1974*
Vice President, Administration and Marketing *1968 – 1971*

BANKERS TRUST COMPANY OF LUXEMBOURG, S.A.

Chairman of the Board and Chief Executive Officer *1988 – 1990*

BANKERS TRUSTEE COMPANY LIMITED (UK)

Chairman of the Board and Chief Executive Officer *1976 – 1990*

ACADEMIC

2009 – Present **CENTRAL GEORGIA TECHNICAL COLLEGE, Macon, GA**

Board of Directors

1991 – 1992 **PACE UNIVERSITY - GRADUATE SCHOOL OF BUSINESS, New York, NY**

Associate Professor of Management in the Executive MBA Program with responsibilities for Strategic Management and Planning.

1965 – 1990 **AMERICAN INSTITUTE OF BANKING, New York, NY**

Senior Instructor teaching banking and securities industry courses, management development and strategic planning seminars. and selected law courses..

1983 – 1994 **CANNON FINANCIAL INSTITUTE, Athens, GA**

Senior Instructor teaching banking and securities industry courses, management development and strategic planning seminars, and selected law courses.

PUBLISHED WORKS

CORPORATE TRUST ADMINISTRATION AND MANAGEMENT: 6th Ed. Infinity Publishing (2008); 5th Ed. Columbia University Press (1998); 4th Ed. Columbia University Press (1992); 3rd Ed. Columbia University Press (1985); 2nd Ed. New York University Press (1974).

"Training: Rx For Survival," NETWORK NEWS, Issue 23, Spring 1997, American Bankers Association

PROFESSIONAL AFFILIATIONS

Founding Member, Financial Industry Securities Council
Former Chairman, Corporate Trust Committee, American Bankers Association
Former Chairman, Certification Advisory Board, Institute of Certified Bankers
Former Chairman, CUSIP Board of Trustees

EDUCATION

Advanced Management Program	Harvard Business School	1972
Juris Doctor	NYU Law School	1957
Bachelor of Arts	Cornell University	1955

MILITARY SERVICE

U.S. Army, *Captain* (1957 - 1959, 1961 - 1962)

EXHIBIT B

I. Litigation in which I have testified as an expert at trial or by deposition ("T"), or submitted a report ("R"), within the preceding five years:

1.	Bank of New England Matter (R&T) Mar., Apr., May & Nov. 2008	USBC Mass, Eastern Div.
2.	Bluebird Partners v. BNYM, et al (R) Dec. 2009	NYSC NYC
3.	Trafalgar Power Inc., et al v. U.S. Bank, N.A. (R&T) Nov. 2009 and Jan. 2010	USDC NDNY
4.	CFIP v. Citibank, N.A. et al (R&T) Feb. and Apr. 2010	USDC SDNY
5.	Jeffrey S. Becker v. U.S. Bank (R) Nov. 2010	USDC ED PA
6.	BNYM v. DEPFA Bank, et al. (R &T) Aug. and Sept. 2011	USDC SDNY
7.	In re Allstate Insurance Co. Litigation (R&T) Sept. and Dec. 2012	USDC AZ

II. Publications that I have authored during the past 10 years

Corporate Trust Administration and Management, 6th Ed. Infinity Publishing, PA (2008).

EXHIBIT C

Depositions:

Jason Kravitt 9/19/2012 and 9/20/2012

Loretta Lundberg 10/2/2012 and 10/3/2012

Brian Lin 10/16/2012 and 10/17/2012

Kelly Crosson 11/9/2012

Elaine Golin 11/12/2012

Thomas Scrivener 11/14/2012

David Anthony 11/15/2012

Meyer Koplow 11/19/2012

Jason Buechele 11/27/2012

Theodore Mirvis 11/28/2012

Randy Robertson 11/29/2012

Terry Chavez 11/30/2012

Robert Bailey 12/3/2012

Faten Sabry 12/4/2012

Scott Waterstredt 12/5/2012

Kent Smith 12/5/2012

Douglas Chapman 12/11/2012

Terry Laughlin 12/12/2012

Barry Adler 12/13/2012

Jose Fraga 12/14/2012

Kathy Patrick 12/17/2012

Robert Bostrom 12/18/2012

Robert Griffin 1/3/2013

Richard Stanley 1/8/2013

Debra Baker 1/11/2013

Bruce Bingham 1/18/2013

Robert Daines 1/24/2013

Expert Opinions and Reports:

Prof. Barry Adler 5/27/2011

Prof. Robert Daines 6/7/2011

Capstone Valuation Services, LLC 6/6/2011

RRMS Advisors, LLC 6/7/2011 and 6/28/2011

NERA Proposed Method for Computing Actual Losses and Expected Future Losses for the Countrywide Securitization Trusts

Expert Witness Reports:

Prof. Tamar Frankel (Filed 3/1/13)

Prof. John C. Coates (Filed 3/1/13)

Other:

Pooling and Servicing Agreement dated as of Nov. 1, 2006, and Indenture dated as of Oct. 11, 2007 (Exhibits G and H to Volume II To Affirmation of Matthew Ingber)

Gibbs & Bruns Letters (Deposition Exhibits 15/18)

Agreement of Forbearance dated December 9, 2010 (Deposition Exhibit 46) and Extensions dated 1/28/11, 2/28/11, 3/31/11, 4/19/11, 5/2/11, 5/9/11, 5/25/11, and 6/13/11

Settlement Agreement, Institutional Investor Agreement (Exhibits B and C to Verified Petition dated June 28, 2011

Produced Communications Between Mayer Brown and BNYM (11/12/2010-6/28/2011)

Produced Internal BNYM Communications (6/2/2010-6/28/2011)

BNYM's Two Privileged Document Logs (7/23/2012)

Verified Petition (6/28/2011) with Exhibits [A/F]

Order to Show Cause with Affirmation of Matthew Ingber with Exhibits A/F

Volume II To Affirmation of Matthew Ingber (Exhibit I)

Volume III To Affirmation of Matthew Ingber (Exhibit J)

BNYM's Consolidated Response To Objections

Institutional Investors Statement in Support of Settlement & Consolidated Response to Objections

Steering Committee's Memo Of Law In Support Of Order to Show Cause Why The Court Should Not Compel Discovery of Evidence That The Trustee Has Placed At Issue And That Is Subject To The Fiduciary Exception

BNYM's Opposition to Motion To Compel Discovery Based On The Fiduciary Exception And At Issue Waiver

Selected Objections and Petitions to Intervene (Application of BNYM, Petitioners v. Walnut Place LLC, Intervenor-Respondent USDC SD NY 2011-cv-5988):

Walnut Place – Verified Petition to Intervene

Policemen's – Verified Petition to Intervene

AIG – Verified Petition to Intervene

Homeowners – Pleading in Intervention and Objection to the Proposed Settlement Agreement

Knights of Columbus – Verified Petition to Intervene
U.S. Debt Recovery – Notice of Intention to Appear and Object
Vertical Capital – Objection to the Proposed Settlement

Exhibit 45

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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor), Petitioners, for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.	**Index No. 651786-2011** **Kapnick, J.**

EXPERT REPORT OF JOHN H. LANGBEIN

CONFIDENTIAL

I have been asked by counsel for The Bank of New York Mellon, in my capacity as an expert on trust and investment matters, to examine the report submitted in this case by Professor Tamar Frankel (undated and unsigned, believed to be February 28, 2013) (hereafter, "Frankel Report" or "FR").

I. Expertise

Employment. I am Sterling Professor of Law and Legal History at Yale Law School. I have held chairs or other academic appointments at the University of Chicago, Cambridge University, Stanford University, Oxford University, the University of Michigan, and the Max Planck Institutes in Freiberg and Frankfurt, Germany. I have specialized in the connected fields of trusts, fiduciary and probate administration, and pension and employee benefits for more than 40 years.

Publications. I have written extensively about trust matters. My c.v., attached as Exhibit A, lists my publications in these and other areas. I co-author the book on pension trusts that is used in most American law schools that teach the ERISA field. *See* John H. Langbein, David A. Pratt & Susan J. Stabile, *Pension and Employee Benefit Law* (Foundation Press, 5th ed. 2010 & 2012 Supp.).

Litigation and advisory work. I serve frequently as a consultant on trust and fiduciary matters, and as an expert on such matters in trust and pension litigation. For published opinions discussing my testimony, see *Cobell v. Norton*, 283 F. Supp. 2d 66, 258-59 (D.D.C. 2003) (the Indian Trust Case, in which I served as the trust expert for the United States); *Nickel v. Bank of America Nat'l Trust & Sav. Ass'n*, 290 F.3d 1134, 1138 (9th Cir. 2002); *Eychaner v. Gross*, 321 Ill. App. 3d 759, 747 N.E.2d 969, 980-83, 985-86 (2001). A schedule of expert testimony, attached as Exhibit B, lists cases in which my service has resulted in deposition or trial testimony. Since 1994, I have appeared in a series of training videos for bank trust officers on aspects of fiduciary investing produced by Federated Investors, and over the years I have lectured on fiduciary and trust practice to trust banks, regulators, and trust industry groups.

Law revision activity. Continuously since 1984, I have served as a Uniform Law Commissioner under gubernatorial appointments from Illinois and Connecticut. I have participated in the drafting of most uniform trust legislation promulgated across that interval. I was the reporter and principal drafter for the Uniform Prudent Investor Act (1994), which governs the investment and management of trust assets in most American jurisdictions. I served on the drafting committees that prepared the Revised Uniform Probate Code (1990), the Revised Uniform Principal and Income Act (1997), the Uniform Trust Code (2000), the Uniform Prudent Management of Institutional Funds Act (2006), and the Uniform Statutory Trust Entity Act (2009). For the American Law Institute, I served from 1991 to 2011 as the associate reporter (drafter) for the Restatement (Third) Property: Wills and Other Donative Transfers (3 vols., 1999-2011); and from 1987 to 2011 on the advisory panels that participated in the drafting of the

Restatement (Third) Trusts: Prudent Investor Rule (1992), and the full Restatement (Third) Trusts (4 vols., 2003-2012).

Sources; compensation. Exhibit C, prepared by counsel, lists documents supplied for my review in preparing this report. If additional documents become available to me, I reserve the right to amend or update this report if I deem it necessary or appropriate. I am being compensated for my work in this matter at my regular hourly rate of $650. My compensation does not depend on the outcome of the case or the substance of my opinions.

II. The Litigation

The Bank of New York Mellon (hereafter, "BNYM" or the "Trustee"), acting in its capacity as trustee or indenture trustee for 530 residential mortgage-backed securitization trusts (hereafter, the "Trusts"), has brought a petition (hereafter, the "Petition") under N.Y. C.P.L.R. § 7701 (hereafter, the "Article 77 Proceeding"), dated June 28, 2011 (filed with the Court June 29, 2011). The Petition seeks judicial instruction and approval of a settlement (hereafter, the "Settlement") between the Trustee and various Bank of America/Countrywide entities (hereafter, "BA/CW"), embodied in a settlement agreement also dated June 28, 2011 (the "Settlement Agreement"). The Settlement Agreement, many provisions of which are conditioned upon the Court's approval in the Article 77 Proceeding, would resolve certain claims against BA/CW relating to alleged breaches of representations and warranties, alleged servicing failures, and alleged document deficiencies.

The Frankel Report, commissioned by AIG, an objector to the Petition, advances criticisms of the Settlement, which I discuss below in this report. Each of the 530 Trusts that are the subject of the Article 77 Proceeding is governed by a detailed instrument. For 513 of the Trusts, the governing agreement is a Pooling and Servicing Agreement (hereafter, "PSA") under New York law.[1] Frankel bases her report on one of these PSAs, CWALT 2005-35CB. *See* FR at 4 n. 2. For ease of reference, I follow Frankel in treating that PSA as exemplifying the genre, and all my references to PSA terms are to that instrument. As set forth below, I conclude that Frankel's criticisms of the Settlement are either meritless or lacking in support.

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[1] The remaining 17 Trusts are Delaware statutory trusts, each of which is governed by an Indenture and a "Sale and Servicing Agreement." *See, e.g.*, CWHEQ 2006-A Indenture and Sale and Servicing Agreement. Frankel's report says that she is discussing the "Governing Agreements" pertaining to all 530 Trusts (*e.g.*, FR at 4, 5), but her actual references are solely to PSA terms, not the Delaware documents. Accordingly, in this report, I treat her references to the "Governing Agreements" as intending to reference the PSAs.

III. Trustee Powers

A. The Principle of Necessary Powers

Frankel contends (FR at 5, 8-12) that the Trustee lacked the power to take various of the steps that it took in negotiating and concluding the Settlement Agreement. Below in §§ III.B and III.C of this report, I examine particular transactional and litigation powers that Frankel questions, and I explain why she is mistaken in thinking that the Trustee lacked those powers.

The starting point for any discussion of trustee powers in modern trust law is the principle, which Frankel omits to mention, that a trustee has all the powers necessary to perform the trust. The Restatement states the rule thus: "In administering a trust, the trustee has, except as limited by statute or the terms of the trust ... all of the powers over trust property that a legally competent, unmarried individual has with respect to individually owned property ...." Restatement (Third) Trusts § 85(1) (2007); *accord* Uniform Trust Code § 815(a)(2)(A) (2000). Jurisdictions that have not yet generalized the rule of maximum empowerment tend to get the same result by providing long lists of statutory powers, *e.g.*, in New York, Est. Powers & Trusts Law §§ 11-1.1, 11-2.2(a); *accord* Uniform Trustee Powers Act (1964).

The principle of necessary powers is the product of a fundamental historical transformation in trust law, which I have had occasion to characterize in the scholarly literature as the trend to maximum empowerment. *See* John H. Langbein, *Why Did Trust Law Become Statute Law in the United States*, 58 Alabama L. Rev. 1069, 1071-74 (2007); John H. Langbein, *The Rise of the Management Trust*, 143 Trusts & Estates 52, 53-54 (Oct. 2004); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 640-43 (1995). I explain in those sources that in centuries past, when ancestral land was the typical trust asset, trust law undertook to protect trust beneficiaries by restricting the power of trustees to transact with the trust assets. In modern circumstances, however, the typical trust has come to contain financial assets and, accordingly, trust default law has repudiated the former practice of disempowering trustees. Modern trust law, as exemplified in the Restatement provision discussed above, grants trustees whatever powers are necessary for the trustee to perform the trust.

B. The Power to Compromise or Settle Claims

Frankel argues (FR at 5) that "[t]he Governing Agreements do not grant the Trustee the power to negotiate or reach a settlement such as the Settlement" in this case. In support of this claim, she cites the deposition testimony of a BNYM employee who, when asked to identify a part of the PSA that "specifically" empowers the Trustee to enter into such a Settlement Agreement, agreed that the PSA did not have such a specific provision. *Id.* at 5 n.7 (citing Deposition of Loretta Lundberg, Oct. 2-3, 2012, 78:15-79:23).

Actually, the PSA does provide textual support for the Trustee's power to bring and, accordingly, to settle claims of the sort at issue here. PSA § 2.01 assigns to the Trustee "all right, title and interest" in the mortgage loans owned by the Trusts. Courts have recognized virtually identical language as a source of the trustee's power to bring litigation on behalf of mortgage-backed securitization trusts. *See LaSalle Bank, N.A. v. Nomura Asset Capital Corp.*, 180 F. Supp. 2d 465, 470-71 (S.D.N.Y. 2001); *LaSalle Bank, N.A. v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 632-33 (D. Md. 2002); *see also Asset Securitization Corp. v. Orix Capital Mkts., LLC,* 12 A.D.3d 215, 215 (1st Dep't 2004) (holding that the authority to commence litigation on behalf of the certificateholders in the governing PSA "is committed solely to the trustee" of the securitizations). Moreover, PSA § 8.02(ix), dealing with litigation brought at the direction of certificateholders, provides for circumstances in which the Trustee may "institute, conduct or defend any litigation" arising in connection with its trusteeship duties. Implicit in such powers to conduct litigation, whether or not at the direction of certificateholders, is the power to settle the litigation on terms that the Trustee prudently concludes to be advantageous to the Trusts' beneficiaries. Abundant case law supports the proposition that the power to bring suit on a claim imports the power to settle the claim. *See Brown v. John Hancock Mut. Life Ins. Co. of Boston*, 145 Misc. 642, 646 (N.Y. Mun. Ct. 1932) ("[T]he power to sue ordinarily carries with it the power to settle."); *see also Levine v. Behn*, 169 Misc. 601, 605 (Sup. Ct. N.Y. Cnty. 1938), *rev'd on other grounds*, 282 N.Y. 120 (1940) ("[A]n incident to the right to sue or be sued is the power to compromise or settle suits."); *Codman v. Dumaine*, 249 Mass. 451, 458 (1924) (the power "to sue and be sued carried with it as a necessary incident the power to compromise either the whole claim or to secure relief for a time for the prosecution of an action founded on the claim").

In arguing that BNYM as Trustee lacked the power to settle because the PSA does not contain a term expressly addressing settlement, Frankel is wearing blinders. She is ignoring the provisions of the PSA just discussed, and she is ignoring trust default law. The power to settle claims is a commonplace trustee power that pervades the default law. The Restatement has long recognized that a "trustee has discretion whether to sue or to compromise claims or submit them to arbitration, if he acts within the bounds of reasonable judgment." Restatement (Second) Trusts § 192, cmt. a (1959). Similarly, New York law empowers a trustee "[t]o contest, compromise or otherwise settle any claim in favor of the ... trust ...." Est. Powers & Trusts Law § 11-1.1(13). Where the default law does not expressly address the power to settle, the power to compromise claims is implicit in the principle, discussed above in § III.A, that a trustee has all powers necessary to perform the trust.

Indeed, I would think that if a trust instrument were to contain a term forbidding the trustee to settle trust claims, that term would be void for violation of public policy. The New York courts have spoken repeatedly of the State's strong policy in favor of promoting settlements. *See, e.g., In re Eighth Judicial Dist. Asbestos Litig.*, 8 N.Y.3d 717, 723 (2007) (recognizing the "State's public policy of encouraging the expeditious settlement of claims"); *Bonnette v. Long Island College Hosp.*, 3 N.Y.3d 281, 286 (2004) (referring to "our State's strong policy promoting settlement"); *Jakubowicz v. A.C. Green Elec. Contractors, Inc.*, 803 N.Y.S.2d 71, 76 (1st Dep't 2005) ("As a matter of policy, settlement is favored as a means of facilitating the resolution of disputes and preserving judicial resources."); *In re Will of Hoffman*, 727 N.Y.S.2d 84, 85 (1st Dep't 2001) (describing the "strong public interest in encouraging the settlement of private disputes"). Likewise, in the federal system, judicial action is encouraged in the pretrial process for the purpose of "facilitating settlement." Fed. R. Civ. P. 16(a)(5).

Moreover, it seems particularly clear that BNYM as Trustee must have the power to litigate and settle the principal trust claims at issue here. In litigation brought against BA/CW and the Trustee (nominally) by a party that was previously an objector to the Settlement in this proceeding, the Court held — in a decision unanimously affirmed by the First Department — that a claim for breach of the representations and warranties in the PSAs could only be asserted by the Trustee on behalf of the Trusts, and not by certificateholders. *See Walnut Place LLC v. Countrywide Home Loans, Inc.*, 35 Misc.3d 1207(A), 2012 WL 1138863 (Sup. Ct. N.Y. Cnty. Mar. 28, 2012), *aff'd*, 96 A.D.3d 684 (1st Dep't 2012). It would make little sense to suggest, therefore, that the Trustee did not have the power to bring the claims on behalf of the Trusts (since, in that event, no one could), or to settle those claims.

It is implausible to suggest, as Frankel seems to (FR at 8 n.18), that a settlement of trust claims cannot proceed without the consent of all certificateholders whose interests would be impacted. Such a rule would mean that one or more certificateholders could in effect veto a beneficial settlement achieved by the Trustee, regardless of the deleterious effects that course might be thought to have on the interests of certificateholders taken as a whole. The PSAs mandate no such thing. Frankel makes an analogy to the lawyer-client relationship, arguing that a lawyer has the power to conduct litigation but not to settle it without the consent of the client. FR at 8-9 n.18. This analogy is inapt, however, because a lawyer is not the owner of the client's claims.

C. Extending Time Periods

The complex negotiations leading to the Settlement Agreement in this case transpired across a period of many months. As is common in settlement negotiations, the parties agreed in writing on several occasions to toll (or "forbear") for specified periods various deadlines arising under the PSAs. The Trustee took this step incident to its effort to achieve a settlement for the purpose of maximizing the interests of the Trusts' certificateholder beneficiaries. Frankel contends (FR at 5, 8-9) that the Trustee lacked the power to make these agreements. She again points to deposition testimony of various BNYM personnel, [redacted] *Id.* at 5, 9.[2]

[2] [redacted] *See, e.g.*, Agreement of Forbearance,

These contentions replicate the core fallacy of Frankel's argument that the Trustee lacked the power to settle. As set forth above, trustee powers come from two sources, trust default law and the trust instrument. The fact that a trust instrument does not contain an express power to take some step useful to the conduct of the trust does not mean that the trustee administering that trust lacks that power. To the contrary, as explained above, unless the instrument expressly denies a particular power, the trustee has any power necessary to administer the trust. *See* Restatement (Third) Trusts § 85(1) (2007). Precisely because the Trustee in this case had the power to conclude the Settlement Agreement, it had the power to take ancillary steps such as entering into prudent tolling agreements.

Frankel also argues that the Trustee's entry into the forbearance agreements created a conflict of interest because the Trustee was motivated to avoid occurrence of an Event of Default. *See* FR at 10. Frankel does not articulate how this supposed conflict affected the Trustee's decision to enter the Settlement six months later, and it makes little sense to suggest that any effort by the Trustee to forbear the expiration of the PSAs' cure period was suspect. Record evidence suggests that the Trustee had legitimate reasons to agree to the forbearance agreements, wholly apart from any alleged conflict. [redacted] [3] [redacted] [4] Moreover, [redacted] [5] In my opinion, these grounds

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Dec. 9, 2010, BNYM_CW-00271275-81.

[3] *See, e.g.*, Deposition of Jason Kravitt, Sept. 19-20, 2012 (hereafter, "Kravitt Dep."), 186:23-25 [redacted] *id.* 358:10-13 [redacted]

[4] *See* Kravitt Dep. 182:23-183:8 [redacted] *id.* 183:9-12 [redacted] *see also* Deposition of Elaine Golin, Nov. 12, 2012, 253:4-7 ([redacted].

[5] *See* Kravitt Dep. 183:6-8 [redacted] *id.* 187:21-24 [redacted] *id.* 188:8-10 [redacted]

provide ample basis for the Trustee to have concluded that it was prudent to enter into the forbearance agreements.

IV. Due Care

Frankel asserts (FR at 10) that "in negotiating the Settlement, the trustee did not exercise the necessary level of due care." She faults the Trustee's resort to expert advice (*id.* at 10-11); she alleges that "the Trustee failed to take an active role in the negotiations with BoA" (*id.* at 10); and she faults the Trustee for allegedly failing to supply certificateholders with adequate notice of the settlement negotiations (*id.* at 11). Default standards require that the Trustee "exercise ... reasonable care, skill, and caution." Restatement (Third) Trusts § 77(2) (2007). Below, I explain why I find Frankel's assertions regarding the Trustee's alleged lack of due care to be meritless, and why, in my opinion, the Trustee's actions in entering into the Settlement demonstrated a prudent exercise of its trustee functions.

A. Experts

As regards the Trustee's resort to experts, the starting point is PSA § 8.02(ii), which encourages the Trustee to "consult with counsel, financial advisers or accountants," and provides that the Trustee's reliance on such advice "shall be full and complete authorization and protection in respect of any action taken" pursuant to such advice. In the course of the settlement negotiations in the present case, the Trustee consulted with leading legal, finance, and other experts in regard to matters of liability and valuation. *See* Expert Reports of Barry E. Adler, Robert Daines, Brian Lin, and Capstone Valuation Services.

Seeking expert advice is widely understood to exemplify good trustee practice. Speaking of resort to legal counsel, the Restatement says: "The work of trusteeship, from interpreting the terms of the trust to decisionmaking in various aspects of administration, can raise questions of legal complexity. Taking the advice of legal counsel on such matters evidences prudence on the part of the trustee." Restatement (Third) Trusts § 77, cmt. b(2) (2007). Just as it is prudent for a trustee to look to legal counsel for legal expertise, it is prudent for a trustee to look to experts on other subject matters.

Frankel offers no criticism whatever of the substance of any of the expert reports submitted to the Trustee in this case. She complains (FR at 11) that "[s]ome of the experts relied solely on BoA's representations rather than make independent examinations." In truth, reliance on stated facts is a common and sensible practice in matters in which the expert has not been engaged to conduct fact-finding,[6] and Frankel points to no such "representation" that she finds

[6] The Settlement Agreement reflects this principle. BA/CW represent to the Trustee that neither had "actual knowledge that any factual information provided to the Trustee" regarding certain subjects "was materially false or materially inaccurate at the time the information or documents were provided." Settlement Agreement § 13(b), Ex. B to Petition.

faulty. Relatedly, she criticizes the Trustee (FR at 11) for seeking "the opinions of experts to put a stamp of justification post-hoc on the settlement terms that were agreed upon." My understanding is that the Trustee received the advice of experts before entering into a binding settlement agreement. *See* Petition ¶ 61. 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. I conclude, therefore, that the Trustee's use of experts in this matter was wholly in accord with the prudence norm and with PSA § 8.02(ii).

B. Negotiations

Frankel manages to fault the Trustee both for engaging in settlement efforts that she thinks the Trustee supposedly lacked authority to do, and for not doing enough of it. She contends that "the Trustee failed to take an active role in the negotiations with BoA," because "[t]he key negotiations were conducted by the Insiders and their lawyers ...." FR at 10.

Frankel's term "Insiders" is the Objectors' pejorative for a group of large institutional investors (hereafter, the "Investor Group") whose interest, as holders of tens of billions of dollars' worth of Trust certificates, was strongly aligned with the Trustee and strongly adverse to BA/CW. *See* Petition ¶¶ 7-8 (Investor Group members, value of holdings).

The Trustee has explained in the Petition, ¶¶ 58-96, the main considerations that led the Trustee to accept the Settlement terms that emerged from the lengthy negotiations among the Trustee, the Investor Group, and BA/CW, including challenges to proving causation and successor liability, as well as problems in valuing claims. Frankel has pointed to no shortcoming in the factors that the Trustee considered, and she supplies no evidence that the resulting Settlement Agreement was in any respect less than optimal for the interests of the Trusts and their certificateholders. In my opinion, the Trustee's conduct in the negotiations as discussed in the Petition and the portions of the record that I have reviewed evidence precisely the "reasonable care, skill, and caution" that the prudence norm requires.

C. Notification

Frankel complains (FR at 11) that the Trustee "failed to notify the Outsiders and keep them apprised of the negotiations ...." Her term "Outsiders" refers to those certificateholders "who did not participate in the negotiations." *Id.* at 4.

The 530 Trusts have thousands of certificateholders; the Trusts issued certificates with an aggregate original principal balance of $424 billion.[7] Negotiations among such a vast population

[7] *See* Press Release, Bank of America Announces Agreement on Legacy Countrywide Mortgage Repurchase and Servicing Claims, June 29, 2011, *available at* http://newsroom.bankofamerica.com/press-release/corporate-and-financial-news/bank-america-announces-agreement-legacy-countrywide-mortg (last visited

create what is known as a collective action problem, with the attendant risk of holdout-type behavior. [redacted] *See, e.g.*, Kravitt Dep. 183:10-12 [redacted] *id.* 188:6-10 [redacted] Deposition of Theodore Mirvis, Nov. 28, 2012, 73:11 [redacted]

In these circumstances, it was open to the Trustee to conclude prudently that the interests of all the beneficiaries would be best served by having the Trustee, the Investor Group, and their skilled advisors bear the main weight of negotiations with BA/CW. To the extent that the interests of the Trustee and the Investor Group were to maximize the returns for the Trusts, the Investor Group's interest was aligned with the shared interest of all certificateholders. Moreover, [redacted] *See, e.g.*, Kravitt Dep. 234:14-18; *id.* 235:19-236:2.

Frankel's argument for notice (FR at 11) is also premised on the proposition that the Settlement "purported to extinguish the rights of the Outsiders against BoA and the Trustee." This premise is flawed because, to the extent that the certificateholders did not have rights in the first place to bring the claims being compromised, those claims belonged to the Trustee (see discussion in § III.B, above). This premise is further flawed in that any such rights — even if those rights belonged to the certificateholders, which they did not — would not be "extinguished" absent Court approval of the Petition, well after notice and the opportunity to object.

I do not see in the Trustee's handling of the settlement negotiations any indication that different procedures would have resulted in better settlement terms, and Frankel offers no evidence to support such a claim.

V. Alleged Conflicts of Interest

Frankel contends (FR at 8) that "the process by which the Settlement was reached was tainted by the Trustee's conflicts of interest, and lack of care." I have explained, above in § IV of this report, why her lack-of-care claims are insubstantial. Frankel points to three principal

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Mar. 14, 2013).

aspects of the Trustee's conduct as evidencing supposed conflicts: (1) [redacted] (FR at 9); (2) [redacted] discussed above in § III.C of this report (*id.* at 10); and (3) [redacted] (*id.*). I have already refuted Frankel's contentions with respect to (3) in § III.C above. In my view, neither of her other assertions has merit.

(1) [redacted] *See* Dep. Ex. 235; FR at 9 n.21. [redacted] Thus, Frankel has rummaged through debris on the cutting room floor in search of a conflict of interest, and not finding any actual conflict, she is left to point wistfully to one that might have been.

(2) *Indemnity*. Indemnifying trustees is a routine trust practice. The default rule is that "[a] trustee is entitled to indemnity out of the trust estate for expenses properly incurred in the administration of the trust." Restatement (Third) Trusts § 38(2) (2003). It is also common for trust agreements to provide for more tailored and more extensive indemnification arrangements, as in PSA § 8.05, which provides that the Trustee

> shall be indemnified ... and held harmless against any loss, liability, or expense (including reasonable attorney's fees) (i) incurred in connection with any claim or legal action relating to (a) this Agreement, (b) the Certificates or (c) in connection with the performance of any of the Trustee's duties hereunder, other than any loss, liability or expense incurred by reason of willful misfeasance, bad faith or negligence ....

The "side letter" of June 28, 2011, from BA/CW entities to the Trustee (Exhibit C to the Settlement Agreement, hereafter, the "Side Letter") refers to the indemnity provisions of PSA § 8.05 (and to the comparable provision, § 7.03 of the Sale and Servicing Agreements, governing the Delaware Trusts) (Side Letter at 1). The Side Letter provides (*id.* at 2) that the BA/CW entities "confirm that we view any actions taken by the Trustee in connection with its entry into the settlement ... as being actions that, for purposes of the Indemnity [in the cited agreements], relate to the [cited agreements], the applicable securities, or the performance of the Trustee's duties under the [cited agreements]." Continuing, the Side Letter provides (*id.*): "We confirm that we view reasonable expenses, disbursements and advances otherwise within the Indemnity if incurred or made by the Trustee in connection with [the Trustee's actions in entering into the Settlement], as being reimbursable ... under the Indemnity."

In purporting to treat this document as evidencing an impermissible conflict of interest, Frankel trips over her own admission (FR at 6) that "[a] trustee's functions and powers are enumerated in a document, which constitutes the basis of the legitimacy of the trustee's actions." The indemnity being discussed in the Side Letter is the indemnity contained in the instruments that create these Trusts. The Side Letter does not create any new indemnity; all it does is to "confirm" the parties' understanding that the indemnity provisions of the governing agreement pertain to the Trustee's role in the settlement process. It is common for a trustee, in what is sometimes called excess of caution, to pin down even relatively obvious constructions of relevant documents. The Trustee cannot be faulted for relying upon a pre-existing indemnity to which the Trustee was already entitled under the PSAs and, accordingly, the Trustee's actions in entering into the Side Letter could not have manifested a conflict of interest as Frankel contends.

The parties recorded a similar understanding in connection with the forbearance agreements discussed above in § III.C of this report ("Extending Time Periods"). I have there explained why it was prudent practice for the Trustee, as part of the settlement negotiations, to enter into forbearance agreements that extended otherwise applicable deadlines. [redacted] (BNYM CW-00270587-89) [redacted] Again, as above, it is my opinion that the Trustee's actions in seeking such a letter reflect nothing more than an abundance of caution and are consistent with sound trustee practice.

VI. The Principle of Trustee Discretion in Matters of Trust Administration

A core principle of trust law is the rule that in circumstances in which a trustee acts in respect of a matter over which the trustee has discretion, the court will apply an abuse-of-discretion standard when reviewing the trustee's exercise of that discretion. *See* Restatement (Third) Trusts § 87 (2007); Restatement (Second) Trusts § 187 & cmt. c (1959). Speaking of the rationale for the deferential standard of review in ERISA fiduciary determinations, for example, Judge Wilkinson has remarked: "Here, as in other contexts, the standard exists to ensure that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional." *Berry v. Ciba–Geigy Corp.*, 761 F.2d 1003, 1006 (4th Cir.1985). This rule also promotes judicial economy; a contrary rule of *de novo* review — of an "in-depth evaluation of ... substantive fairness," as Frankel would have it (FR at 14) — would allow any litigant to force the court in effect to assume the work of trust administration and thereby supplant the contractually designated trustee.

This abuse-of-discretion standard is consistent with New York law, including actions, such as the Petition, arising under C.P.L.R. § 7701. *See In re Application of IBJ Schroder Bank & Trust Co.*, No. 101530/98, slip op. at 6 (N.Y. Sup. Ct. Aug. 16, 2000) (in action under C.P.L.R. § 7701, holding that a trustee's decision to settle trust claims was "within the scope of the trustee's powers," "reasonable and prudent," and "entitled to judicial deference," and "in the absence of any evidence tending to show a breach by the trustee of its fiduciary duties, the trustee's view must prevail"); *In re Estate of Stillman*, 107 Misc.2d 102, 110 (N.Y. Surr. Ct. 1980) ("If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise [its] power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment."). Frankel disparages this rule of deference to trustee decisionmaking, contending (FR at 4) that the Trustee's routine invocation of that rule in the Article 77 Proceeding would have the Court act in "a limited and perfunctory manner." But there is nothing limited or perfunctory in a court's applying the correct standard of review of trustee discretionary action that lies at the core of trust law. There is nothing perfunctory about a standard of review that requires persons objecting to the Trustee's decisionmaking to bear the burden of showing why the Trustee's decision was an abuse of discretion.

Frankel would have the Court disregard this settled standard of review on the ground that the Trustee's alleged "conflict and lack of care" (FR at 11) preclude its application in this case. Above in § V of this report, I have indicated why Frankel's allegations regarding care and conflict are unsound. Frankel also contends (*id.* at 13) that the rule of trustee discretion, subject to limited judicial review, presupposes expertise on the part of the Trustee, and, further, that "the subject matter in this case goes beyond the expertise of the Trustee ...."[8] In truth, the work of a corporate trust department acting under agreements such as the PSAs in this case is a highly specialized function carried out by only a few major American financial institutions such as the Trustee in this case. As I have indicated, the Trustee here appropriately obtained the expert assistance of counsel and other experts in a deliberative effort to reach a determination on the best course to follow. In my opinion, the Trustee's engagement as described in Petition ¶¶ 58-96 exemplifies wise exercise of expertise, acting to facilitate a value-maximizing settlement in circumstances of great complexity. There is thus no reason why those actions should be reviewed under any standard short of abuse of discretion.

Respectfully submitted,

John H. Langbein

March 14, 2013

[8] Professor Frankel's reliance (*e.g.*, FR at 12) on cases arising in the bankruptcy law context is puzzling. Frankel provides no explanation, and I can discern none, for why reference to bankruptcy law is appropriate or even relevant here, where settled *trust law* provides for deference to a trustee's actions in administering the trust.

EXHIBIT A

CURRICULUM VITAE

John H. Langbein

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I. Professional

Sterling Professor of Law and Legal History, Yale University, since 2001; previously Chancellor Kent Professor of Law and Legal History, 1990-2001

Honorary Fellow, Trinity Hall, Cambridge (elected 2000)

Previous positions: University of Chicago, Max Pam Professor of American and Foreign Law, 1980-90; professor, assistant professor 1971-80

Visiting Professor: NYU Law School (2010); Arthur Goodhart Professor in Legal Science, Cambridge University (1997-98); Stanford Law School (1985-86); University of Michigan Law School (summer 1976)

Visiting Fellow:
- Trinity Hall, Cambridge (1997-98)
- All Souls College, Oxford (1977)
- Max Planck Institute for European Legal History, Frankfurt (1977; 1969-70)
- Max Planck Institute for Criminal Law, Freiburg (1973) (Alexander von Humboldt-Stiftung Fellow)

Teaching subjects:
- Wills, trusts, estates, and fiduciary administration
- Pension and employee benefit law (ERISA)
- English, European, and American legal history
- Comparative law (emphasizing German law and legal institutions)
- Fiduciary law

Admitted to the bar:
- District of Columbia (1969)
- England: Of the Inner Temple, Barrister-at-Law (1970)
- Florida (1971)

II. Degrees

M.A. 1990 (hon.), Yale University

Ph.D. 1971, Cambridge University, England (Trinity Hall);
Thesis: "The Criminal Process in the Renaissance" (awarded Yorke Prize)

LL.B. 1969, Cambridge University; first class honours;
Trinity Hall Prize in English law; Scholar of Trinity Hall

LL.B. 1968, Harvard Law School; magna cum laude; editor, Harvard Law Review, vol. 80, articles editor, vol. 81; Frank Knox Fellow, 1968-69; Harvard Law School Fellow in Foreign and Comparative Law, 1968-71

A.B. 1964, Columbia University (economics)

III. Personal

Born 17 November 1941; U.S. citizen; married Kirsti M. Langbein, 24 June 1973; children, Christopher H., b. 11 July 1979; Julia L., b. 6 June 1981; Anne K., b. 25 March 1983

Languages: fluent German, good French, working Italian

Listed in:
- Who's Who in America
- Who's Who in American Law
- Who's Who in American Education
- Who's Who in the World

IV. Memberships

American Academy of Arts and Sciences (elected 1987)
American Bar Association (sections: Legal Education; Real Property; Trust & Estate)
American College of Trust and Estate Counsel (elected 1985)
American Historical Association
American Law Institute (elected 1983)
American Society for Legal History
Association internationale de droit judiciaire (elected 1984)
British Academy (corresponding fellow, elected 2012)
Connecticut Bar Association (section: Estates & Probate)
International Academy of Comparative Law (elected 1984)
International Academy of Estate and Trust Law (elected 1985)
International Commission for the History of Representative & Parliamentary Institutions
National Academy of Social Insurance (elected 2004)
Selden Society
Society of Legal Scholars (UK)

V. Public Service

American Law Institute, Associate Reporter, Restatement of Property (Third): Wills and Other Donative Transfers (since 1990); vols. 1-3 (1999, 2003, 2011); Adviser, Restatement of the Law of Trusts (Third) (1987-2011)

Uniform Law Commission (National Conference of Commissioners on Uniform State Laws), Commissioner, since 1984; gubernatorial appointments, from Illinois, 1984-91, Connecticut, since 1991; reporter, Uniform Prudent Investor Act (1991-94); co-reporter, Uniform Transfer-on-Death Security Registration Act (1987-89); drafting committees: Uniform Custodial Trust Act (1987); Articles II & VI, Uniform Probate Code Revisions (1989, 1990); Uniform Health-Care Decisions Act (1993); Uniform Principal and Income Act (1997); Uniform Management of Public Employee Retirement Systems Act (1997); Uniform Trust Code (2000); Uniform Prudent Management of Institutional Funds Act (2006); Uniform Statutory Trust Entity Act (2009)

National Academy of Social Insurance, Panel Member, Uncharted Waters: Paying Benefits from Individual Accounts in Federal Retirement Policy (2003-05)

Joint Editorial Board for the Uniform Trust and Estate Acts (formerly Joint Editorial Board for the Uniform Probate Code), Uniform Law Commission representative (1985 to date)

U.S. Secretary of State's Advisory Committee on Private International Law, Member, Study Groups on Trusts and Decedents' Estates (1984-1998)

William Nelson Cromwell Foundation, trustee (2004-date)

VI. Books

History of the Common Law: The Development of Anglo-American Legal Institutions (Aspen Publishers 2009) (with Renée L. Lerner & Bruce P. Smith)

Pension and Employee Benefit Law (with David Pratt & Susan Stabile) (5th ed., Foundation Press 2010) (prior eds., with Bruce Wolk, 2006, 2000, 1995, 1990)

History of the Yale Law School: The Tercentenary Lectures (with A. Kronman et al.) (Yale Univ. Press 2004)

The Origins of Adversary Criminal Trial (Oxford Univ. Press 2003, paperback 2005) (2006, awarded Biennial Coif Book Award for outstanding American book in law)

Uniform Statutes on Trusts and Estates: 2009-10 Edition (with Lawrence Waggoner) (Foundation Press 2007) (previous editions, 2008-2009, 2005-06, 2004, 2003, 2002, 2001; sub nom. Selected Statutes on Trusts and Estates, 1995, 1994, 1992, 1991, 1989, 1987)

The Privilege Against Self-Incrimination: Its Origins and Development (with R.H. Helmholz et al.) (Univ. Chicago Press 1997)

Comparative Criminal Procedure: Germany (West Pub. Co., American Casebook Series 1977)

Torture and the Law of Proof: Europe and England in the Ancien Régime (Univ. Chicago Press 1977; paperback edition with new introduction, 2006)

Prosecuting Crime in the Renaissance: England, Germany, France (Harvard Univ. Press 1974; reprint edition issued 2005); excerpted in part and published in translation as "Die Carolina" in F.C. Schroeder, ed., Die Carolina: Die Peinliche Gerichtsordnung Kaiser Karls V. von 1532 (Wissenschaftliche Buchgesellschaft, Darmstadt 1986)

VII. Articles

Pension and Investment Law

Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA, 101 Northwestern Univ. Law Review 1315 (2007)

"Social Security and the Private Pension System," in In Search of Retirement Security: The Changing Mix of Social Insurance, Employee Benefits, and Individual Responsibility (T. Ghilarducci et al. eds.) (National Academy of Social Insurance 2005)

"What's Wrong with Employee Stock Pension Plans," in Enron and Other Corporate Fiascos: The Corporate Scandal Reader (Nancy B. Rapoport et al. eds., 2d ed. 2009) (reproducing testimony presented to U.S. Senate Committee on Governmental Affairs, Jan. 24, 2002)

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The Uniform Prudent Investor Act and the Future of Trust Investing, 81 Iowa Law Review 641 (1996); republished in Modern International Developments in Trust Law (D. Hayton, ed.) (1999)

The New American Trust-Investment Law, 8 Trust Law International 123 (1994)

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The Supreme Court Flunks Trusts, [1990] Supreme Court Review 207 (1991)

The Conundrum of Fiduciary Investing under ERISA, in Proxy Voting of Pension Plan Equity Securities 128 (D. McGill, ed.) (Wharton School: Pension Research Council 1989)

ERISA's Fundamental Contradiction: The Exclusive Benefit Rule (with Daniel R. Fischel), 55 Univ. Chicago Law Review 1105 (1988)

Social Investing of Pension Funds and University Endowments: Unprincipled, Futile, and Illegal, in Disinvestment: Is it Legal, Is it Moral? Is it Productive? (National Legal Center for the Public Interest, 1985)

Social Investing and the Law of Trusts (with Richard Posner), 79 Michigan Law Review 72 (1980)

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Trust and Estate Law

Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers, __ ACTEC J. __ (Trachtman Lecture 2012) (forthcoming 2013)

Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments, 89 Boston University Law Review 375 (2010)

Why Did Trust Law Become Statute Law in the United States?, 58 Alabama Law Review 1069 (2007) (Meador Lecture 2006)

Questioning the Trust-Law Duty of Loyalty: Sole Interest or Best Interest? 114 Yale Law Journal 929 (2005) (2006 Green Bag award, best written major article)

The Rise of the Management Trust, 143 Trusts & Estates Magazine 52 (Oct. 2004), republished in 4 Trusts *Trimestrale di Approfondimento Scientifico e Professionale* 338 (2005) (Italy)

Mandatory Rules in the Law of Trusts, 98 Northwestern Univ. Law Review 1105 (2004) (Hess Memorial Lecture of the Ass'n of the Bar of the City of New York, April 2002)

Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) for Probate Lawyers, 18 Probate & Property 28 (Jan./Feb. 2004); substantially republished in 51 Yale Law Report 36 (Sum. 2004)

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Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code (with Lawrence Waggoner), 55 Albany Law Review 871 (1992) (Uniform Probate Code symposium issue)

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"Scholarly and Professional Objectives in Legal Education: American Trends and English Comparisons," in What Are Law Schools For? (P. Birks ed.) (Oxford Univ. Press 1996)

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Comparative Civil Procedure and the Style of Complex Contracts, 35 American Journal of Comparative Law 381 (1987); republished in *Der komplexe Langzeitvertrag*/The Complex Long-Term Contract 445 (F. Nicklisch, ed.) (C.F. Müller Verlag, Heidelberg 1987); republished in German as *Zivilprozessrechtsvergleichung und der Stil komplexer Vertragswerke*, 86 *Zeitschrift für vergleichende Rechtswissenschaft* 141 (1987)

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"The Later History of Restitution," in Restitution Past, Present and Future: Essays in Honour of Gareth Jones 57-62 (Oxford 1998)

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Culprits and Victims, Times (London) Literary Supplement, Oct. 11, 1991 (review)

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"The English Criminal Trial Jury on the Eve of the French Revolution," in The Trial Jury in England, France, Germany: 1700-1900 (Comparative Studies in Continental and Anglo-American Legal History) (Duncker & Humblot, Berlin 1987)

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"Introduction," Sir William Blackstone, Commentaries on the Laws of England, Volume III (Univ. Chicago Press, reprint ed. 1979; reprinted 2002)

Understanding the Short History of Plea Bargaining, 13 Law & Society Review 261 (1979)

Torture and Plea Bargaining, 46 Univ. Chicago Law Review 4 (1978); republished in Spanish as "*Tortura Y Plea Bargaining*," in *El Procedimiento Abreviado* (J.B. Maier & A. Bovino eds.) (Buenos Aires 2001); substantially republished in The Public Interest (Winter 1980) at 43; latter version republished in The Public Interest on Crime and Punishment (N. Glazer ed. 1984)

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The Historical Origins of the Sanction of Imprisonment for Serious Crime, 5 Journal of Legal Studies 35 (1976)

Fact Finding in the English Court of Chancery: A Rebuttal, 83 Yale Law Journal 1620 (1974)

The Origins of Public Prosecution at Common Law, 17 American Journal of Legal History 313 (1973)

EXHIBIT B

PRIOR DEPOSITION AND TRIAL TESTIMONY

John H. Langbein

Convention of the Protestant Episcopal Church v. PNC Bank, Case No. PJM-10-2793, U.S. District Court (D. Md.); trust termination issues; retained for plaintiff by Daniel L. Shea, Esq., Brault Graham, LLC, 101 South Washington St., Rockville, MD 20850, tel. 301-424-1060; deposition in New Haven, CT, Nov. 21, 2012.

Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co., Case No. 3:11-cv-00282-JCH, U.S. District Court (D. Conn.); ERISA fiduciary issues in compensation of 401(k) investment plan service provider; retained for defendant by William J. Delany, Esq., Morgan, Lewis & Bockius LLP, 1111 Pennsylvania Avenue, NW, Washington, DC 20004, tel. 202-739-3000; deposition in Bridgeport, CT, Aug. 31, 2012.

Shaw et al. v. The Northern Trust Co. et al., Case No. 07 CH 24749, Circuit Court of Cook County, IL, Chancery Div.; diversification and prudent investing issues; retained for plaintiff beneficiaries by Robin L. Wolkoff, Esq., Fox, Swibel, Levin & Carroll, LLP, 200 West Madison St., Suite 3000, Chicago, IL 60606; deposition in Chicago, IL, Sept. 15, 2011.

Diamond et al. v. Schottenstein et al., Case No. 534089A, Franklin County, OH, Probate Court; diversification and prudent investing issues; retained for plaintiff beneficiaries by David A. Baker, Esq., McDermott, Will & Emery, 227 West Monroe St., Chicago, IL 60606; depositions in Chicago, IL, May 12, 2011, and New York, NY, June 3, 2011.

Keating et al. v. Sena Weller Rohs & Williams, LLC, et al., Case No. A0911952, Hamilton County, OH, Court of Common Pleas; fiduciary duties under investment management agreement; retained for defendant investment managers by Charles E. Reynolds, Esq., Santen & Hughes, 600 Vine St., Ste. 2700, Cincinnati, OH 45202; deposition in New Haven, CT, Sept. 9, 2010.

In re Marvin M. Schwan 1976 Grandchildren's Trust Litigation, Sioux Falls, SD; breach of trust and trustee removal issues; retained for plaintiff beneficiaries by Blake Shepard, Jr., Esq., Leonard, Street & Deinard, 150 South Fifth St., Ste. 2300, Minneapolis, MN 55402; trial testimony in Sioux Falls, SD, May 13, 2010.

Julie Shelton et al. v. Samuel A. Tamposi, Jr., et al., Case No. 2007-2109, Hillsborough, NH, Probate Court; allocation of functions between trustee and investment managers; prudence and diversification issues in trust administration; retained for plaintiff trustee by Rebecca P.

McIntyre, Wiseman & McIntyre, 99 Summer St., Suite 2010, Boston MA 02110; depositions taken in Hartford, CT., July 8, 2009, and Sept. 16, 2009; trial testimony, Dover, NH, Dec. 7, 2009.

In re Tyco International, Ltd. Multidistrict Litigation (MDL 1335), U.S. District Court (D.N.H.); damages issues in ERISA class action for breach of fiduciary duty arising from employer stock plans; retained for plaintiffs by Robert A. Izard, Esq., Schatz Nobel Izard P.C., 20 Church St., Suite 1700, Hartford, CT 06103, tel. 860-493-6295; deposition taken in Hartford, CT, Apr. 4, 2008.

In re Cushing Trusts, Case No. 07-PB-0023, 9th Judicial Dist., Douglas County, NV (Dept. No.1); fiduciary duties of loyalty, prudence, impartiality, diversification, and disclosure owed by conflicted trustees holding close corporation stock; retained by John Frankovich, Esq., McDonald, Carano, Wilson, LLP, 100 West Liberty St., 10th Fl., Reno, NV 89501, tel. 775-788-2000; deposition taken in Reno, NV, Oct. 22, 2007.

Stoffels et al. v. SBC Communications Inc., Case No. SA 05-CA-0233, U.S. District Court (W.D. Tex.); whether employer-provided reimbursement for certain home telephone services constituted defined benefit pension plan under ERISA; retained for defendant AT&T, Inc., by John L. Carter, Esq., Vinson & Elkins LLP, First City Tower, 1001 Fannin St., Suite 2500, Houston, TX 77002, tel. 713-627-1410; deposition taken in Houston, TX, Oct. 4, 2007.

In re Galloway Family Trusts (Galloway v. U.S. Bank N.A.), Court File C1-04-200006/0045, Ramsey County, MN District Court, Second District; fiduciary duty of professional trustee of irrevocable trust to commission and institute suitable tax planning measures; retained for plaintiff by John A. Cotter, Esq., Larkin, Hoffman, Daly & Lindgren, 1500 Wells Fargo Plaza, 7900 Xerxes Ave. South, Minneapolis, MN 55431, tel. 952-835-3800; deposition taken in New Haven, CT, May 8, 2006; trial testimony in St. Paul, MN, Sept. 27, Nov. 16, 2006.

Janet M. Jeanes v. Bank of America et al., Civil Case No. 046 1636, Shawnee County, KS District Court; investment responsibilities under agency account with express exclusion of investment authority over particular asset; retained for defendant by Charles A. Redd., Esq., Sonnenschein Nath & Rosenthal, 1 Metropolitan Square, Suite 3000, St. Louis, MO 63102; deposition taken in New York, NY, Apr. 13, 2006.

Bayer v. Harris Trust Co., Case No 032370-L7, Jackson County, OR Circuit Court; imprudent investing and failure to diversify prevailingly single-stock portfolio; retained for plaintiff by Jeffrey R. Sylvester, Esq., Sylvester & Polodnak, Ltd., 7371 Prairie Falcon, Suite 120, Las Vegas, NV 89128; deposition taken in New Haven, CT, Mar. 10, 2006.

Matter of Conservatorship of Estate of Ruth Lilly; Matter of the Ruth Lilly Charitable Remainder Annuity Trusts, Cause No. 48D08 0211 TR002770-71, Marion County, IN Probate Division; breach of duty to diversify single-stock inception asset charitable remainder annuity trusts; retained for plaintiffs Americans for the Arts by Andrew J. Goodman, Esq., Kurzman

Eisenberg Corbin Lever & Goodman LLP, 675 Third Ave, 18th Fl., New York, NY 10017, tel. 212-661-2150; depositions taken in New York, NY, Mar. 4 & Apr. 29, 2005.

Furstenau v. AT&T Corp. et al., Case No. 02-CV-5409, U.S. District Court (D.N.J.); ERISA class action alleging breaches of fiduciary duty arising from employer stock option in 401(k) plan; retained for defendants by Mark Blocker, Esq., Sidley Austin Brown & Wood LLP, Bank One Plaza, 10 South Dearborn St., Chicago, IL 60603, tel. 312-853-6097; deposition taken in Hartford, CT, Jan. 6, 2005.

In re William C. Roettger Trust, Cause No. 82D07-0110-TR-00539, Vandenburgh County, IN Superior Court; loyalty and impartiality issues in distributions from inter vivos trust; retained for plaintiff by Martha T. Starkey, Esq., Starkey Law Group, 30 South Meridian St., Suite 850, Indianapolis, IN 46280, tel. 317-705-8888; teleconference deposition taken in New Haven, CT, June 9, 2004; trial testimony in Evansville, IN, Aug. 11, 2004.

In Re Harry Winston; Bruce Winston v. Deutsche Bank, File No. 3806/1978, Westchester County, NY Surrogates Court; cotrusteeship and fiduciary investing responsibilities of corporate fiduciary when trust owns an operating business; retained for plaintiff by Raymond A. Bragar, Esq., Bragar Wexler Eagel & Morgenstern, LLP, 885 Third Ave., Suite 3040, New York, NY 10022, tel. 212-308-5858; deposition taken in New York, NY, Feb. 12, 2004; trial testimony, White Plains, NY, Dec. 7, 2004.

Cobell v. Norton, Case No. 1:96 CV 01285 RCL, U.S. District Court (D.D.C.); fiduciary standards in federal Indian Trust accounting action; retained for defendant United States by John T. Stemplewicz, Esq., U.S. Department of Justice, Civil Division, P.O. Box 875, Ben Franklin Station, Washington, DC 20044; trial testimony in Phase 1.5 trial June 2-3, 2003.

Richard L. Berry v. Key Trust Co., et. al., Case No. 431079, Court of Common Pleas, Cuyahoga County, OH; trust termination action; retained for petitioner in April 2002 by Martha T. Starkey, Esq., Starkey Law Group, 2 Meridian Corporate Plaza, 401 Pennsylvania Parkway, Suite 100, Indianapolis, IN 46280, tel. 317-705-8888; deposition taken in Cleveland, OH, Sept. 27, 2002.

Keach & Sage v. U.S. Trust Co., N.A., et. al., Case No. 01-1168, U.S. District Court (C.D. Ill.); ESOP fiduciary investment issues under ERISA; retained by Dean B. Rhoads, Esq., Sutkowski & Rhoads, Ltd., 124 S.W. Adams St., Suite 560, Peoria, IL 61602; deposition taken in New York, NY, Aug. 12, 2002.

Bishop v. McNeil, Court of Chancery, New Castle County, DE; trust division proceeding, including issues of co-trustee fiduciary duties; retained for Henry McNeil in April 2002 by Lawrence T. Hoyle, Esq., Hoyle, Morris & Kerr LLP, 1 Liberty Place, Suite 4900, 1650 Market St., Philadelphia, PA 19103, tel. 215-981-5700; deposition taken in Philadelphia, PA, Jun. 13, 2002.

Godfrey v. Kamin, Case No. 01 C 3433, U.S. District Court (N.D. Ill.); breach of trust action: loyalty, prudence, and diversification issues arising from investment in close corporation; impartiality issues arising from excessive concentration of financial assets in fixed income investments; retained for plaintiff trust beneficiaries in Dec. 2000 by David H. Latham, Esq., Suite 1118, 300 West Washington St., Chicago IL 60606, tel. 312-782-1910; deposition taken in Chicago, IL, Jan. 8, 2002.

Whetman v. IKON, Civil No. 00-87, U.S. District Court (E.D. Pa.), also No. Civil 2-98-CV-89, U.S. District Court (D. Utah); ERISA action involving fiduciary duties of employer and other fiduciaries in the designation of employer stock as an investment option under a 401(k) plan; retained for plaintiff plan participants in March 2000 by Ron Kilgard, Esq., Dalton, Gotto, Samson & Kilgard, Suite 900, National Bank Plaza, 3101 North Central Ave., Phoenix, AZ 85012, tel. 602-230-6324; deposition taken in New York, NY, Aug. 2, 2001.

Stoddart v. Miller (Peccole Trusts), Las Vegas, NV, Nevada State Court; equitable accounting issues; retained for trusts by William R. Phillips, Esq., General Counsel, Peccole Nevada Corp., 851 South Rampart Blvd., Suite 220, Las Vegas, NV 89145; trial testimony in Las Vegas, NV, May 4, 2001.

Ceridian Corporation Retirement Plan, et al., Claimants v. Corporate Officers & Directors Assurance, Ltd., Respondents: International Arbitration under the Laws of Bermuda; ERISA attorney fees issues in construction of fiduciary liability insurance policy; retained for claimant Ceridian Plan in April 2000 by R. Scott Davies, Briggs & Morgan PA, 2400 IDS Center, 60 South Eighth St., Minneapolis, MN 55402, tel. 612-334-8561; deposition taken in New York, NY, May 3, 2000; arbitration testimony in Toronto, Canada, May 31, 2000.

Tanaka v. First Hawaiian Bank et al., Civil No. 96-00734-SPK, U.S. District Court (D. Hawaii); fiduciary standards in probate and trust administration; retained for plaintiff Yoshitaro K. Tanaka in 1997 by Gerald A. Brooks, P.O. Box 121, Honolulu, HI 96810, tel. 808-533-3312; deposition taken in New York, NY, May 5, 2000.

First National Bank of Chicago v. Acco USA, Inc.-IBT Retirement Plan, Case No. 93 C 0896, U.S. District Court (N.D. Ill.); issues of impartiality and prudent administration in the operation of a collective real estate investment trust; retained in 1999 for functional defendant, First National Bank of Chicago by William Conlan & Mark Blocker, Sidley & Austin, 10 South Dearborn St., Chicago, IL 60603, tel. 312-853-7000; deposition taken Nov. 1999, trial testimony in Chicago, IL, Dec. 16, 1999.

Board of Pensions of the Municipal Employees Pension and Relief Fund of Prichard, Alabama v. Regions Bank, No. CV-97-002524, Mobile County, AL, Circuit Court; fiduciary duties of trustee under "legal list" trust-investment statute; retained in 1998 on behalf of defendant trustee by J. Marshall Gardner, Esq., Vickers, Riis, Murray & Curran, LLC, Regions Bank Bldg., 106 St. Francis St., Mobile, AL 36602, tel. 334-432-9772; deposition in New Haven, CT, Apr. 22, 1999; trial testimony in Mobile AL, Aug. 29, 1999.

In re Eric A. Knudsen Trust, No. T No. 95-120, First Circuit Court, Honolulu, HI; trust investment issues, including duties of diversification, prudence, and productivity; retained in 1994 on behalf of trust beneficiaries by John Hoshibata, Suite 2300 Pauahi Tower, 1001 Bishop St., Honolulu, HI 96813, tel. 808-524-5644; deposition in New Haven, CT, June 9-10, 1999.

Eychaner & Weiss v. Theodore Gross & Roosevelt University, No. 94 CH 11328, Cook County, IL, Circuit Court, Chancery Division; trust creation issues affecting ownership of landmark structure; retained in 1998 on behalf of defendant university, an Illinois not for profit corporation, and its president by Susan A. Stone, Esq,, Sidley & Austin, 10 South Dearborn St., Chicago, IL 60603, tel. 312-853-2177; deposition in Chicago, IL, May 29, 1998; trial testimony in Chicago, IL, July 7, 1998.

Fisher v. Bank of America National Trust and Savings Ass'n, et. al, No. C 96-0203 CAL, U.S. District Court (N.D. Cal.); loyalty, prudence, diversification, and remedy issues arising from corporate fiduciary's investing trust accounts in real estate limited partnerships; retained in 1997 on behalf of plaintiff class by Derek G. Howard, Esq., The Mills Firm, 200 Drake's Landing, Suite 155, Greenbrae, CA 94904, tel. 415-464-4770; deposition in San Francisco, CA, Apr. 13-14, 1998.

Sheronas v. Glenmede Trust Co. et al., Nos. 90-1320, 84-422, Court of Common Pleas, Montgomery County, PA, Orphans' Court Division; fiduciary loyalty and impartiality issues; retained in 1995 for defendant trustee by William T. Hangley, Esq., Hangley Aronchick Segal & Pudlin, 1 Logan Square, 12th Fl., Philadelphia, PA 19103, tel. 215-668-0300; expert report June 13, 1997; deposition in Philadelphia, PA, Aug. 1, 1997.

Arthur R. Moore et al. v. Raymond J. Sweeney, et al., No. CL941029, Circuit Court, Alexandria, VA; ERISA loyalty, prudence, and prohibited transactions issues in attorney malpractice action; retained in 1997 for defendant attorney by Nicholas Lobenthal, Esq., Mayer, Brown & Platt, 1675 Broadway, New York, NY 10019, tel. 212-506-2584; deposition in Alexandria, VA, June 12, 1997.

Carol F. Nickel v. Bank of America National Trust and Savings Ass'n, et al., No. C 94 2716 CAL, U.S. District Court (N.D. Cal.); remedy and measure of damages issues in trustee fee overcharge class action; retained in 1996 on behalf of plaintiff class by Derek G. Howard, Esq., The Mills Firm, 200 Drake's Landing, Suite 155, Greenbrae, CA 94904, tel. 415-464-4770; deposition in San Francisco, CA, July 24-25, 1996; trial testimony in San Francisco, CA, Sept. 19, 1996. Testimony cited with approval in reported appellate case, 290 F. 3d. 1134, 1138 (9th Cir. 2002).

In re McCune Foundation, No. 2-79-R-4788, Court of Common Pleas, Orphans' Court Division, Allegheny County (Pittsburgh), PA; trustee loyalty and diversification issues; retained in 1993 for plaintiffs, members of trust distribution committee, by Donald G. Gerlach, Esq., Reed Smith Shaw & McClay, 435 Sixth Ave., Pittsburgh, PA 15219, tel. 412-288-3192; trial testimony Apr. 24, 1996.

Fisher v. Wilmington Trust Co., Civil Action 11376, Court of Chancery, New Castle County, DE; trust investment issues touching on diversification and principal and income allocations; retained for plaintiff in 1993 by Phebe S. Young, Esq., Bayard, Handelman & Murdoch, P.A., 922 Market St., 13th Floor, Wilmington, DE 19899, tel. 302-429-4236; deposition taken Apr. 18, 1996.

In re William F. Dart Trust, Probate Case No. G-6372, Ingham County, MI Probate Court; trustee removal and breach of trust proceedings; retained for defendant trustee in 1995 by Allan T. Claypool, Esq., Foster, Swift, Collins & Smith, 313 So. Washington Square, Lansing, MI 48933, tel. 517-371-6264; depositions taken Dec. 1995 and Nov. 1996.

Chubet v. Huntington Trust Co., Case No. 94CVA-06-4133, Court of Common Pleas, Franklin County, Columbus, OH; trustee loyalty and diversification issues; retained for plaintiff Mary Ann Prescott Chubet in 1995 by Bernard Mazer, Esq., Mazer & Co., 420 B Metro Place South, Dublin, OH 43017, tel. 614-766-8108; expert report provided; deposition taken Oct. 1995.

Estate of Elizabeth Peebles Jones, Case No. P-93-374.01, Circuit Court for Indian River County, FL, Probate Div.; prudence of executor's retention of nondiversified block of shares; retained for plaintiff Owen Jones in 1994 by James G. Pressly, Jr., Esq., 222 Lakeview Dr., West Palm Beach FL 33401, tel. 407-659-4040; deposition taken June 1995.

Maud Hill Schroll Trust, Ramsey County District Court, MN; principal and income issues affecting timber lands; retained for plaintiff Christopher Schroll in 1994 by James M. Dombrowski, Esq., P.O. Box 751027, Petaluma, CA 94975, tel. 707-762-7807; trial testimony May 1995.

In re Trust under Will of Isabel Stillman Rockefeller, Court of Probate, District No. 57, Greenwich, CT; trustee loyalty and investment issues; retained for John W. Roberts, Esq., Guardian ad Litem in 1994 by Charles A DeLuca, Esq,, P.O. Box 3057, 80 Fourth St., Stamford, CT, tel. 203-357-9200; deposition taken Feb. 1995.

Vivian R. Broderick et al. v. Colorado National Bank et al., Case No. 92 PR 1520, City and County of Denver, CO Probate Court; trustee's liability for exposing unrelated trust assets to environmental liability of trust-held enterprise; retained for plaintiffs in 1994 by Gregory A. Ruegsegger, Esq., Dufford & Brown, 1700 Broadway, Suite 1700, Denver. CO 80290, tel. 303-861-8013; deposition taken June 1994.

First National Bank of Chicago v. Stephen R. Steinbrink, No. 92 C 4053, U.S. District Court (N.D. Ill.), and related federal administrative court hearings, Chicago, IL, 1993; prudence and regulatory compliance of bank trustee's administration of collective real estate investment trust; retained for functional defendant, First National Bank of Chicago by Harold C. Hirshman, Esq., Sonnenschein, Nath & Rosenthal, 8400 Sears Tower, Chicago, IL 60606, tel. 312-876-7934; affidavit provided, 1993; deposition taken, June 1993; trial testimony in administrative court, Sept. 1993.

Virginia D'Addario, et al. v. Stanley Bergman et al., Case No. CV 90-0266582S, Superior Court for District of Fairfield, CT; trustee's liability for resignation to facilitate third-party's intentional breach of trust; retained for plaintiffs by Allan M. Cane, Esq., 1172 Post Rd., Fairfield, CT 06430, tel. 203-255-2626; pretrial deposition July 1993.

CAHP, et al. v. Prudential Securities, Inc., et al., Case No. 372537, San Mateo, CA Superior Court; prudence of conduct of stock broker alleged to have been fiduciary regarding investments of non-ERISA pension investor; retained for defendant, Prudential Securities, Inc. by Michael Lawson, Esq., Steefel, Levitt & Weiss, One Embarcadero Center, 29th Floor, San Francisco, CA 94111, tel. 415-788-0900; pretrial deposition June 1993.

Virginia D. Blake et al. v. Federal Deposit Insurance Corp., et al., Civil Action No. 91-422 P-C, U.S. District Court (D. Me.); bank co-trustee's liability for retention of trust holding of the bank's shares; retained for defendant Federal Deposit Insurance Corp. as successor to defendant Bank of New England in 1992 by Thomas A. Cox, Friedman & Babcock, 6 City Center, P.O. Box 4726, Portland, ME 04112, tel. 207-761-0900; pretrial deposition in Boston, MA, Sept. 1992.

Weyerhaeuser Co. v. Geewax Terker & Co., U.S. District Court (W.D. Wa.); pension investment manager's liability under ERISA for investing beyond account authority; retained in 1991 for plaintiff Weyerhaeuser Co. by Harry H. Schneider, Jr., Perkins Coie, 1201 Third Ave., 40th Fl., Seattle, WA 98101, tel. 206-583-8888; pretrial deposition Nov. 1991.

In re Estate of Raymond Marks, No. 82-P-0547, Circuit Court of Lake County, IL; conflict-tainted executors' breach of fiduciary duties of loyalty and prudence in funding estate's marital devise; retained for plaintiff Carol Marks Jacobsohn in 1989 by Lee A. Freeman, Sr., Freeman, Freeman & Salzman, 401 No. Michigan Ave., Chicago, IL 60611, tel. 312-222-5110; pretrial deposition and trial testimony 1990.

In re Estate of Jaffe, Washington State Court, Seattle; bank trustee's fiduciary duties in funding spousal trust; retained for plaintiff Ruby Jaffe in 1987 by Henry M. Aronson, Esq., Seattle, WA; pretrial deposition and trial deposition taken Mar. 1987.

EXHIBIT C

DOCUMENTS RELIED UPON

John H. Langbein

Deposition Exhibits

1. Exhibit 13 – CWALT 2005-35CB Pooling and Servicing Agreement, BNYM_CW-00217617-857.
2. Exhibit 44 – Nov. 20, 2010 Email from J. Kravitt to Multiple Recipients, [redacted] BNYM_CW-00271138-39.
3. Exhibit 53 – Dec. 1, 2010 Email from. J. Kravitt to Multiple Recipients, [redacted] BNYM_CW-00270970.
4. Exhibit 62 – Dec. 9, 2010 Email from J. Kravitt to E. Golin and M. Ingber, [redacted] BNYM_CW-00270712-15.
5. Exhibit 118 – June 1, 2011 Email from M. Ingber to Multiple Recipients, [redacted] BNYM_CW-00255381-84.
6. Exhibit 210 – June 23, 2011 Email from R. Madden to Multiple Recipients, [redacted] S- [redacted] BNYM_CW-00254990-98.
7. Exhibit 235 – June 17, 2011 Email from M. Ingber to Multiple Recipients, [redacted] BNYM_CW-00261204.

Deposition Transcripts

1. Deposition of Robert Bailey, Dec. 3, 2012
2. Deposition of Elaine Golin, Nov. 12, 2012
3. Deposition of Robert Griffin, Jan. 3, 2013
4. Deposition of Meyer Koplow, Nov. 19, 2012
5. Deposition of Jason Kravitt, Sept. 19-20, 2012
6. Deposition of Loretta Lundberg, Oct. 2-3, 2012

7. Deposition of Theodore Mirvis, Nov. 28, 2012

8. Deposition of Kathy Patrick, Dec. 17, 2012

Court Documents

1. Verified Petition of The Bank of New York Mellon, *In re Application of The Bank of N.Y. Mellon*, Index. No. 651786/2011 (Sup. Ct. N.Y. Cnty. June 29, 2011) (Docket # 1)

    Ex. A – List of Covered Trusts (Docket # 2)

    Ex. B – Settlement Agreement (Docket # 3)

    Ex. C – Institutional Investor Agreement (Docket # 4)

    Ex. D – June 23, 2011 Letter from K. Patrick to R. Bailey, "Proposed Settlement of Claims by Certain Countrywide-issued RMBS Trusts" (Docket # 5)

    Ex. E – NERA's Proposed Method for Computing Actual Losses and Expected Future Losses for the Countrywide Securitization Trusts (Docket # 6)

    Ex. F – [Proposed] Final Order and Judgment (Docket # 7)

2. The Bank of New York Mellon's Consolidated Response to Objections, *In re Application of The Bank of N.Y. Mellon*, Case 1:11-cv-05988-WHP (S.D.N.Y. Oct. 31, 2011) (Docket # 126)

3. Institutional Investors' Statement in Support of Settlement and Response to Settlement Objections, *In re Application of The Bank of N.Y. Mellon*, Case 1:11-cv-05988-WHP (S.D.N.Y. Oct. 31, 2011) (Docket # 124)

4. Memorandum of Law in Support of the Trustee's Motion Regarding the Standard of Review and Scope of Discovery, *In re Application of The Bank of N.Y. Mellon*, Index No. 651786/2011 (Sup. Ct. N.Y. Cnty. Apr. 3, 2012) (Docket # 228)

5. Memorandum of Law in Opposition to the Trustee's Motion Regarding the Standard of Review and Scope of Discovery, *In re Application of The Bank of N.Y. Mellon*, Index No. 651786/2011 (Sup. Ct. N.Y. Cnty. Apr. 13, 2012) (Docket # 244)

6. The Bank of New York Mellon's Reply Memorandum of Law in Further Support of its Motion Regarding the Standard of Review and Scope of Discovery, *In re Application of The Bank of N.Y. Mellon*, Index No. 651786/2011 (Sup. Ct. N.Y. Cnty. Apr. 19, 2012) (Docket # 279)

7. The Institutional Investors' Response to the Objectors Order to Show Cause Why the Court Should Not Compel Discovery, *In re Application of The Bank of N.Y. Mellon*, Index No. 651786/2011 (Sup. Ct. N.Y. Cnty. Apr. 13, 2012) (Docket # 250)

8. Hearing Transcript, *In re Application of The Bank of N.Y. Mellon*, Case 1:11-cv-05988-WHP (S.D.N.Y. Sept. 21, 2011)

9. Hearing Transcript, *In re Application of The Bank of N.Y. Mellon*, Index No. 651786/2011 (Sup. Ct. N.Y. Cnty. Apr. 24, 2012)

10. Hearing Transcript, *In re Application of The Bank of N.Y. Mellon*, Index No. 651786/2011 (Sup. Ct. N.Y. Cnty. Feb. 7, 2013)

<u>Trustee's Expert Opinions</u>

1. Material and Adverse Opinion of Professor Barry E. Adler, May 27, 2011

2. Expert Report of Professor Robert Daines, June 7, 2011

3. Capstone Valuation Services, LLC, Countrywide Financial Corp., Valuation Analysis Prepared at the Request of Counsel, June 6, 2011

4. Brian Lin, Opinion Concerning Contemplated Settlement Amount for 530 Trusts, June 7, 2011

5. Brian Lin, Opinion Concerning Contemplated Settlement Agreement – Mortgage Loan Servicing and Loan Administration, June 28, 2011

<u>Other Documents</u>

1. CWHL 2004-22 Pooling and Servicing Agreement

2. CWL 2006-15 Pooling and Servicing Agreement

3. CWHEQ 2006-A Indenture

4. CWHEQ 2006-A Sale and Servicing Agreement

5. Agreement of Forbearance, Dec. 9, 2010, BNYM_CW-00271275-81

6. [redacted] BNYM_CW-00270587-89

7. Extension of Agreement of Forbearance, Jan. 28, 2011, BNYM_CW-00270083-88

8. Extension of Agreement of Forbearance, Feb. 28, 2011, BNYM_CW-00268756-59

9. Extension of Agreement of Forbearance, Mar. 31, 2011, BNYM_CW-00266296-302

10. Extension of Agreement of Forbearance, Apr. 19, 2011, BNYM_CW-00264652-56

11. Extension of Agreement of Forbearance, May 2, 2011, BNYM_CW-00264417-22

12. Extension of Agreement of Forbearance, May 9, 2011, BNYM_CW-00263406-10

13. Extension of Agreement of Forbearance, May 25, 2011, BNYM_CW-00262430-33

14. Extension of Agreement of Forbearance, June 13, 2011, BNYM_CW-00261598-601

15. Bank of America Issues Statement, Dec. 15, 2010, *available at* http://newsroom.bankofamerica.com/press-release/corporate-and-financial-news/bank-america-issues-statement (last visited Mar. 14, 2013)

16. Bank of America Announces Agreement on Legacy Countrywide Mortgage Repurchase and Servicing Claims, June 29, 2011, *available at* http://newsroom.bankofamerica.com/press-release/corporate-and-financial-news/bank-america-announces-agreement-legacy-countrywide-mortg (last visited Mar. 14, 2013)

17. Gibbs & Bruns LLP, Institutional Holders of Countrywide-Issued RMBS Issue Notice of Non-Performance Identifying Alleged Failures by Master Servicer to Perform Covenants and Agreements in More Than $47 Billion of Countrywide-Issued RMBS, Oct. 18, 2010, *available at* http://www.gibbsbruns.com/institutional-holders-of-countrywide-issued-rmbs-issue-notice-of-non-performance-10-18-2010/ (last visited Mar. 14, 2013)

18. Feb. 23, 2011 Email from M. Koplow to M. Ingber, "FW: Legacy Countrywide mortgage investors rally against potential settlement with Bank of America," BNYM_CW-00268805-07

19. Bank of America Corporation Form 10-K, Feb. 25, 2011, at 35

20. Bank of America Corporation Form 10-Q, May 5, 2011, at 49, 168

Exhibit 46

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., Petitioners, for an order, pursuant to C.P.L.R. 7701, seeking judicial instructions and approval of a proposed Settlement.	Index No. 651786/2011

VIDEOTAPED DEPOSITION OF

BRUCE B. BINGHAM

Friday, January 18, 2013

51 Madison Avenue

New York, New York

Reported by:
AYLETTE GONZALEZ, CLR
JOB NO. 56772

you understood you were doing your work is to show that the CFC couldn't pay a full amount of the judgment?

MR. GONZALEZ: Objection to form; mischaracterizes the witness' prior testimony, assumes facts not in evidence.

A. My conclusion was that the maximum amount available to satisfy a judgment was the $4.6 billion. I had no input, no awareness of the settlement process going around to include any proposed amounts of settlement. It just wasn't in my lane and I did not participate in that aspect of this matter.

Q. Well, you were told that the financial statements which you were given, okay, were consistent -- strike that.

From the review that you did of the July and November 2008 transactions, was any consideration paid to the owners of CFC?

MR. GONZALEZ: Objection to form; mischaracterizes the witness' prior testimony.

A. I really can't say I did a review of those LD 2 100 transactions. I read

Exhibit 47

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STARR INTERNATIONAL COMPANY,	§	
Plaintiff,	§	
vs.	§	**Civil Action No. 05 CV 6283**
AMERICAN INTERNATIONAL GROUP, INC.	§	
Defendant.	§	

EXPERT REPORT OF PROFESSOR JOHN C. COATES IV

Summary

I have been retained by counsel for plaintiff, Starr International Company, Inc. (***SICO***).[1] This report addresses (a) the customs and practices of M&A transactions, such as those by which SICO acquired (i) stock of American International Reinsurance Company, Inc. (***AIRCO***) in the AIRCO Exchange described below (***the AIRCO Exchange***), and (ii) stock of American International Group, Inc. (***AIG***) in the AIRCO/AIG Merger described below (***the AIG Merger***), and (b) the economic principles that support the strong, long-standing, and consistent recognition of corporate separateness and the corresponding strong, long-standing, and consistent reluctance of the law to allow shareholders, creditors, or agents of one corporation to attach or obtain assets of another corporation by setting that separateness aside, whether under the guise of veil-piercing, reverse veil-piercing, substantive consolidation, constructive trusts, or other legal or equitable doctrines. My fee is $950 per hour for time spent on litigation, including preparing this report and preparing and giving associated testimony.

Based on my experience as an attorney and a professor specializing in business organizations, securities law, finance, and mergers and acquisitions (***M&A***), and after a review of documents and testimony in the case, set out in Exhibit C, it is my opinion that:

(1) the AIRCO Exchange and the AIG Merger were conventional M&A transactions, designed and executed in customary ways,

(2) the AIRCO Exchange and the AIG Merger were distinct, separate transactions, not materially related to each other,

(3) the record I have reviewed does not cause me to believe the AIRCO Exchange and the AIG Merger were other than proper, equitable, and fair to both SICO and its counterparties, including AIG,

(4) the record reveals nothing about the corporate history of SICO that provides a reason:

(a) to ignore the corporate separateness of SICO and AIG,

(b) to believe that SICO entered into any contract or guarantee to hold the stock of AIG owned by SICO in trust for AIG or its employees,

(c) to believe SICO has converted assets of AIG or AIG's employees, or otherwise acted inequitably or improperly.

The bases for these opinions, as well as additional opinions, are set out in Parts II, III and IV below.

[1] Throughout, defined terms are defined when first used, in bold italics. Prior to August 21, 1970, SICO was named American International Underwriters Overseas, Inc. (AIUO), but is referred to as SICO in this report.

I. Background / Experience

I am the John F. Cogan Jr. Professor of Law and Economics at the Harvard Law School. At Harvard I teach, among other courses, the basic course on corporations, partnerships, limited liability companies and other business organizations, and advanced courses on M&A, corporate control and governance, the regulation of insurance and other financial institutions, and securities law and regulation, including basic principles of accounting, economics and finance as they relate to corporate, securities or financial institutions law or the design and implementation of business transactions. In my courses, I teach or have taught units on the basics of accounting and finance, option theory, economics, econometrics and statistical theory, decision theory, and efficient markets theory and related academic research. Before joining the Harvard faculty, I taught M&A at New York University for five years, and I also served as an adjunct professor at Boston University, where I taught courses on M&A and the regulation of financial institutions such as banks, insurance companies, and mutual funds. A copy of my *curriculum vitae* (including a list of all of my publications in the last ten years) is attached as Exhibit A.

Before joining the Harvard faculty, I was a partner at the New York law firm of Wachtell, Lipton, Rosen & Katz, one of the nation's leading law firms and consistently ranked one or two in *American Lawyer's* AmLaw 100. I worked at Wachtell Lipton from 1988 to 1997. In my practice at Wachtell Lipton, I represented large public companies and other firms involved in large financial transactions, including stock and asset purchases, corporate mergers, business combinations, joint enterprises, public offerings, private placements and recapitalizations. I routinely advised parties as to their rights and obligations under transaction agreements and relevant securities and corporate laws and regulations, as well as the customs and practices of M&A with respect to such transactions. I was frequently involved in the preparation of documents filed by large public companies under the 1934 Act, including regularly filed 1934 Act Documents. Since joining the faculty of Harvard Law School, I have provided or am providing consulting services to the Securities and Exchange Commission (***SEC***), the New York Stock Exchange, and other organizations and individuals actively involved in corporate and financial transactions, including private equity funds, mutual funds, public and private companies, law firms, and investment banks, regulatory agencies, trade organizations, and entrepreneurs. As a consultant and while at Wachtell Lipton, I was or am a principal advisor in more than 50 completed corporate transactions, each involving more than $100 million, including transactions involving AT&T, Bank of America, GE, IBM, Sara Lee, USAir, and Valero Energy.[2] I have also consulted with or advised an array of investment banks and other financial institutions, including Goldman Sachs on a total of approximately $7.4 billion of financings by Sears, Roebuck and Co., CS First Boston, The Travelers, Bank of America, Merrill Lynch, MFS Financial Services, John Nuveen, First Chicago, Citigroup, and Capital One.

I have studied and written extensively about the law and economics of corporations and other business entities, and of corporate transactions, such as M&A transactions, as well

[2] I have not previously provided services to SICO, whether as an attorney, consultant, or expert witness.

as the contracts and customs and practices of business persons and lawyers relevant to such topics. I am the author *inter alia* of chapters in M. LIPTON & E. STEINBERGER, TAKEOVERS AND FREEZEOUTS (the leading practitioner-oriented treatise on M&A), and for seven years, I co-authored the leading treatise on M&A in the financial industry, FINANCIAL INSTITUTIONS MERGERS AND ACQUISITIONS. My articles have appeared in *Stanford Law Review, California Law Review, University of Pennsylvania Law Review, Texas Law Review, Journal of Corporation Law*, and *The Business Lawyer*. Articles of mine have been chosen by legal academics as among the ten best corporate law articles in 1999, 2001, 2002, 2003 and 2004, and the best securities law articles in 2000, and several have been cited by the Delaware Supreme and Chancery Courts. My research methodologies include doctrinal and policy analysis, historical and recent-event case studies, large-scale empirical data-gathering and analysis, and econometric and statistical analysis. My current research includes detailed, large-sample empirical studies of takeover bids, executive compensation and its effect on M&A in the 1990s, the market structure of the legal profession and the roles of lawyers in the transactional context, factors affecting M&A completion rates, causes and consequences of management buyouts, and the market structure and regulation of the mutual fund industry.

I have been invited to be a speaker at the law schools of Yale, Stanford, NYU, Columbia, Chicago, Penn, Texas, Berkeley, Virginia, Georgetown, and the Royal College of Spain, among others; at Harvard Business School, the Stern School of Business at New York University, and the Wharton School; at the Federal Judicial Center, the American Law Institute, the American Bar Association, the International Bar Association, and the American Association of Law Schools; the National Bureau of Economic Research, the American Law and Economics Association, the Investment Company Institute, and the Federal Reserve Bank of New York; and the High Level Group of Corporate Law Experts established under the auspices of the European Union. I am or have been a member of the Legal Advisory Committee to the New York Stock Exchange, the American Bar Association, the American Association of Law Schools, and the board of directors of the American Law and Economics Association.

A list of cases in which I have testified as an expert at trial or by deposition in the last four years is attached as Exhibit B. As reflected on Exhibit B, I have testified at trial and by deposition in judicial proceedings as an expert witness on disputes concerning M&A transactions, M&A contracts, and the economic principles of and customs and practices regarding corporate separateness. For example, I have provided testimony on behalf of the Commonwealth of Massachusetts in a tax case in which a large corporation claimed that it had entered into corporate transactions as a takeover defense; I have provided testimony on behalf of NatWest in response to a claim that it should be liable for the obligations of a separate corporation, the stock of which was wholly owned by NatWest; and I have provided trial testimony in two unrelated cases (one in the Federal District Court of Connecticut, one in New Jersey state court) regarding M&A customs and practices relevant to those cases.

II. Customs and Practices Related to M&A Transactions

In this section, I describe the customs and practices of M&A transactions, such as the AIRCO Exchange and the AIG Merger, as they existed in the 1970s and today. I first briefly describe the customary purposes and forms of M&A transactions. I then briefly describe the principal disclosure, approval, and fairness requirements for M&A transactions such as the AIRCO Exchange and the AIG Merger, and customs and practices that have been developed to satisfy those requirements. I then describe customs and practices of contracts for M&A transactions, including their purpose and nature.

A. Purposes and Forms of M&A Transactions

The underlying motives for M&A transactions vary enormously, ranging from obtaining economies of scale to tax savings, but the basic purpose of any M&A transaction is to shift ownership and/or control of a business or collection of assets from one owner (or set of owners) to another. Most significant businesses are owned in a corporate form (for reasons including those discussed in Part III), and in fact most shareholders of most large businesses that are organized as corporations are themselves corporations. Thus, most M&A transactions are corporate transactions, and the basic purpose of most M&A transactions is to shift ownership and/or control of a business or collection of assets from one corporation to another. Obviously, owners of a corporation that give up ownership or control of a business will typically expect to receive something in exchange, either directly or by transfer to the corporation. Payment in M&A transactions customarily takes the form of stock, cash, other assets or contract rights, or some combination. Taking into account the interests of owners of both the purchasing and the selling corporation, then, the purpose of most M&A transactions is to shift ownership and/or control of a business or collection of assets in return for stock, cash, or other assets.

M&A transactions take one of three basic legal forms: (a) stock purchase, (b) asset purchase, and (c) merger. The choice of which form to use depends on a host of legal and business considerations, including transaction costs, taxes, accounting, speed, approval requirements, regulatory requirements, and the pre-existing and desired structure of ownership of the corporations involved. The choice of form of transaction is independent of the choice of consideration. It is not unusual to see a stock-for-stock swap, a cash purchase of assets, or a cash merger, as well as a stock-for-assets swap (such as the AIRCO Exchange) and a stock merger (such as the AIG Merger). In a stock-for-assets swap, one company transfers assets to a second company, which in return transfers stock (of another company), so that afterward, all three companies involved continue in existence, but with new assets, ownership, and/or control rights, all as specified in a written transaction agreement. In a stock merger, one company merges into another, with shareholders of the disappearing company receiving stock of the surviving company, so that afterward, shareholders of the two merging companies collectively own the surviving company, all as specified in a merger agreement filed in accordance with corporate law.

B. Corporate Approval, Disclosure, and Fairness Requirements for M&A Transactions

The corporate approval, disclosure and fairness requirements for M&A transactions depend upon the form of the transaction, the form of consideration involved and the ownership structure of the corporations involved.

1. Approvals

With respect to corporate approvals, the board of a corporation that is directly a party to a significant M&A transaction must approve that transaction. Where shareholders sell their stock, however, the corporation involved may not formally be a party to the transaction. If the corporation is not formally a party to the transaction, board approval may not be required. Where a corporation sells substantially all of its assets, the laws of most jurisdictions require that both the board and the shareholders of the corporation approve the sale. Where a corporation buys a business or assets, however, the laws of most jurisdictions require only that the acquisition be approved by or under delegated authority from the acquiror's board of directors. For most mergers, both the board and the shareholders of the merging companies must approve the transaction.[3] Additional approval requirements may apply to companies listed on a stock exchange. In general, when shareholder approval is required for an M&A transaction, shareholders vote on the transaction based on proportionate share ownership. Before shareholders vote on an M&A transaction involving one or more "public companies" (as defined below), they must be provided legally required disclosures to inform the shareholders about the transaction (as discussed more below), as was separately done for the AIRCO Exchange and the AIG Merger. As a result, if shareholders do not believe that the transaction will benefit them, they will be able and can be expected to vote against the transaction, and if a majority (or in some instances, a minority) of shareholders vote against the transaction, the transaction may not take place. In addition, quorum and voting rules often require that a minimum number of shares be affirmatively voted in favor of any transaction subject to a shareholder vote, so that if enough shareholders remain passive and do not vote, again, the transaction will not take place.

2. Disclosure

With respect to disclosure, corporations that have stock listed on a stock exchange are treated as "public companies" under the federal securities laws. The same is true of any company that has 500 or more shareholders and more than a specified amount of assets (currently specified as $10 million) as of the last day of its most recent fiscal year. Public companies must disclose significant M&A transactions under applicable SEC rules, and, if applicable, rules of the relevant stock exchange. Significant changes in the ownership of public companies must also be disclosed.

[3] This is not only generally true for entities in the United states (incorporated under the laws of one or more states), but also for entities incorporated in Panama.

Where a vote of shareholders of a public company is sought to approve an M&A transaction, the person soliciting the vote must also comply with the disclosure requirements of the SEC's proxy rules. The purpose of these rules is to require the disclosure of material information so that investors can make an informed decision. Among other requirements, the proxy rules require a company to disclose:

- the material features of the proposed transaction,
- the terms of the transaction agreement,
- the reasons for engaging in the transaction,
- a description of any past, present, or proposed material contracts, arrangements, understandings, relationships, negotiations, or transactions in the immediately prior period between the parties to the transaction or their affiliates, specifically including any agreements or understandings with respect to future M&A transactions, and
- any substantial interest, direct or indirect, of any director or executive officer of the company in any matter to be voted upon.

In addition, one of the SEC's proxy rules forbids the omission of any facts necessary to make the statements made in the proxy statement not misleading. In an M&A context these requirements effectively mean that the companies involved must disclose to shareholders all material facts relevant to the effects of an M&A transaction for which shareholder approval is sought, including any legal agreements, promises, obligations or contractual restrictions related to the transaction. If at the time one M&A transaction is disclosed to shareholders for their vote, there is any "understanding" (much less an agreement) about another, future M&A transaction between the same parties, that understanding would have to be disclosed. If at the time an M&A transaction is disclosed to shareholders for their vote, any executive officer of a party to the transaction has a material interest in the transaction, even an indirect one, such as would be the case if s/he were to expect to have the right to receive future compensation from the companies involved in the transaction, that interest would have to be disclosed.[4]

3. Fairness

With respect to fairness, the fiduciaries (directors and officers) of corporations that engage in M&A transactions must comply with duties imposed by corporate law. Among those duties are the requirement that fiduciaries act with care and loyalty. Where an M&A transaction presents an actual or potential conflict of interest for a given fiduciary, the fiduciary may be required to prove the "fairness" (or "entire fairness" as it is

[4] Advisors such as outside counsel and accountants have always had a substantial role in ensuring a company's compliance with securities laws governing disclosure. For example, attorneys have always had an obligation to act consistent with ethical requirements, including not participating in a crime or fraud, and auditors have always had an obligation to provide an independent opinion on the fairness of a public company's financial statements. Moreover, with the passage of the Sarbanes-Oxley Act of 2002, these obligations have been further enhanced, for example, imposing affirmative obligations on attorneys when there is sufficient evidence of a "material violation" of the securities laws and imposing restrictions on non-auditing services that can be performed by an auditor to ensure an auditor's independence.

sometimes said) of the transaction, including both the price (*i.e.*, the value of the consideration) and the process by which the transaction was approved. The stringency with which courts applying state corporate law will review a given M&A transaction for fairness may turn on whether and how the transaction was approved, and by whom, and whether the transaction met relevant disclosure requirements or was otherwise disclosed to shareholders. In general terms, M&A transactions that are adequately disclosed and approved by shareholders are more likely to be found to be fair for fiduciary duty purposes, even if public disclosure and shareholder approval was not technically required.

C. M&A Contracts

In all M&A transactions of which I am aware, the transactions have been documented by formal, written agreements drafted, negotiated and finalized by teams of business persons and attorneys. Such agreements are almost always detailed and lengthy, and include specific descriptions of the transactions to be completed, the conditions that must be satisfied before the transactions will be consummated, representations and warranties by the parties concerning the business and consideration involved, termination provisions, and miscellaneous covenants. In large deals, significant M&A transactions are documented extensively, and any significant obligations arising out of M&A transactions are invariably in writing. As stated by Frank Zarb, Chairman of the Board of Directors of AIG, in his deposition testimony, sophisticated parties insist on putting significant legal obligations in writing.[5] M&A contracts also almost always contain "merger clauses" – clauses that state that all of the agreements related to the subject matter of the contract are contained in the written agreement. As a result, and for obvious business reasons, important collateral agreements, reservations of rights, limitations or restrictions on consideration being transferred, or other similar matters are also put in writing. Particularly when obligations or legal agreements are significant, indefinite in duration, and affect a significant number of parties, such obligations and agreements are customarily put in writing.

[5] Dep. Tr. of Frank Zarb (5/31/06) at 116; see also Dep. Tr. of Martin Sullivan (5/24/06) at 402 (AIG CEO agreeing that if he had a contract that involved millions of dollars, he would want to have it in writing).

III. Economic Principles Supporting Corporate Separateness

In this section, I outline economic principles that support the strong, long-standing, and consistent recognition of corporate separateness and the corresponding strong, long-standing, and consistent reluctance of the law to allow shareholders, creditors, or agents of one corporation to attach or obtain assets of another corporation by setting that separateness aside, whether styled as veil-piercing, reverse veil-piercing, substantive consolidation, constructive trusts, or other legal or equitable doctrines. I briefly describe how those principles support the conventional legal and equitable doctrines that address the limited circumstances under which corporate separateness will be ignored. I also briefly describe customs and practices of corporations and their shareholders that affect whether the economic principles that support recognition of corporate separateness are relevant in a given factual setting.

A. Economic Advantages of Corporate Separateness

At the most general level, corporate separateness provides net benefits to society by reducing the cost of capital without imposing uncompensated costs on third parties. The specific, direct economic advantages of corporate separateness include the following:

- Shareholders are not liable for the debts of a corporation, and *vice versa*. Thus, neither needs to worry about assets, debts, liabilities, investments, or activities of the other (except to the extent of shareholders' equity in a corporation). Corporate separateness thus reduces the costs of monitoring or controlling the activities or liabilities of corporations and shareholders alike. The same is true when shareholders are themselves corporations.
- The same is true of *creditors* of both corporations and shareholders. Creditors of a shareholder need not worry about the assets, debts, *etc.* of *other* shareholders, or of corporations in which a shareholder has invested. Creditors of a corporation need not worry about assets, debts, *etc.* of shareholders.
- Shares become much more readily transferable, and simpler to price, since the identity (assets, debts, *etc.*) of a shareholder does not directly affect the value of the corporation or its shares.
- Transferability enhances liquidity, which is intrinsically valuable.
- Simpler pricing enhances transferability and liquidity, too, and improves the allocation of capital among different companies.

Of course, by limiting the ability of creditors of shareholders and corporations to pursue assets beyond those with whom they have expressly contracted, corporate separateness may in the first instance increase the cost of debt capital for any given shareholder or corporation, as well. But the net cost of capital to shareholders and the corporation as a whole is lower, because creditors can (and do) specialize, some lending to the corporation, others lending to shareholders (who may be individuals or other corporations). Specialization allows better risk allocation among creditors, and offers the classic economic advantages of specialization: division of labor, learning, and innovation. Monitoring costs faced by creditors fall as a result, and competition among lenders passes along those economies to corporations and their shareholders.[6]

Corporate separateness also lowers the overall cost of capital by reducing transaction costs. Because the law on corporate separateness is usually clear, well-known and relatively easy to communicate, creditors and shareholders of corporations can more cheaply negotiate transactions than would be the case if corporate separateness were not the default rule. An important subset of costs reflected in the expected cost of capital for a given corporation is the costs of bankruptcy and liquidation in the event of insolvency. Again, because corporate separateness is a clear default rule that can more cheaply be varied by contract than alternatives, it is more economically efficient for corporations and creditors alike for corporate separateness to generally be respected in the case of insolvent corporations and related parties.

Corporate separateness can also reduce a company's cost of capital by allowing it to partition its capital in separate subsidiaries, which may be wholly owned or partly owned by third parties. By partitioning its capital into separate subsidiaries, various legal restrictions will make it more costly for managers of the overall enterprise to shift capital from one use to another, and/or will make doing so more transparent to outside investors, including both shareholders and creditors. Corporate separateness can thus reduce the agency costs that can arise if corporate managers are free to shift capital from one use to another.

Finally, the duration and strength of the rules of corporate separateness, and the fact that they reinforce the reliability of corporate assets and solvency, all helps parties that deal with a corporation to make long-term commitments secure in the knowledge that the corporation will last long enough for those commitments to pay investors back.

B. Costs of Ignoring Corporate Separateness

The inverse of the principles stated in the foregoing analysis are the costs that would flow from the failure of the law to respect corporate separateness. If courts were to frequently or casually ignore corporate separateness, allowing, for example, creditors of a corporation to sue shareholders to obtain the value of a shareholder's personal assets, or for creditors of a shareholder to sue a corporation to obtain the value of the corporation's assets, the overall cost of capital for corporations and shareholders would rise. Higher costs of capital would mean fewer businesses would be started, and fewer projects would be pursued, even if they would otherwise produce net social benefits. Shareholder liquidity would fall, and agency costs, transactions costs and the expected cost of insolvency would all rise. Rational creditors would anticipate all of this, and charge

[6] Where specialization of this kind would not lower the overall cost of capital for a corporation and its shareholders, the shareholders can easily and cheaply guarantee through contract the debts of the corporation, or vice versa. Because the opposite is not true – that is, because it is not cheap or easy for a corporation and its shareholders by contract to establish the rules of corporate separateness – the default rules for corporate separateness are important, and have beneficial economic consequences compared to alternative default rules.

higher interest rates. Rational shareholders would anticipate all of this, and demand a higher expected return on equity capital before investing in a new corporation, or investing more equity in an existing corporation.

C. Applications of these Principles to Legal and Equitable Doctrines

The foregoing economic principles are reflected in various doctrines of corporate and bankruptcy law and in principles of equity. I describe these doctrines here not because I am expecting to (nor am I offering) legal opinions about them – none of what follows would be very controversial in any event – but because the relationship between these doctrines, on the one hand, and the economic principles just discussed, on the other hand, is something I believe to be relevant, as a factual matter, to this case.

Corporate separateness has four features, each a standard feature of the corporate form in countries around the world, including, but not limited to, in the U.S. and Panama: *limited liability*, *creditor priority* (or structural subordination), *reverse limited liability*, and *asset shielding*.

- As a result of limited liability, buying or owning stock does not by that fact alone make a person liable for the debts or other liabilities of the corporations that issued the stock. Generally, neither the corporation nor the creditors (or other shareholders) of the corporation can use or obtain value from the assets of any given shareholder.
- As a result of creditor priority, creditors of a corporation have a claim on the assets of the corporation prior to the claims of shareholders. Even when a parent corporation owns 100% of the stock of a subsidiary corporation, creditors of the parent are "structurally subordinated" to the creditors of the subsidiary. If the subsidiary were liquidated, the subsidiary's creditors must be paid in full before the parent's creditors can be paid.
- As a result of reverse limited liability, creditors of shareholders may not use or obtain value from the assets of the corporation in which those shareholders own stock, unless those assets are legally distributed by the corporation to shareholders.
- As a result of asset shielding, neither creditors nor shareholders may withdraw their capital from (or initiate the liquidation of) a corporation except in specific, limited ways in specific, limited circumstances. A corporation will typically be able to retain invested capital and associated earnings in perpetuity, even if the shareholders themselves face insolvency.

Together, these features strongly and fully separate the ownership, assets, and debts and other liabilities of a corporation from those of its shareholders, and *vice versa*. They thus provide the general economic benefits described above.

D. Customs and Practices of Corporations Related to Corporate Separateness

Because of the importance of corporate separateness, for the economic reasons set forth above, corporations and the individuals that control them customarily engage in practices designed to make it more likely that courts will respect their corporate separateness, and to provide clear indications when they seek to alter that baseline. Among other things, corporations observe legal and accounting formalities, including having charters, bylaws, board minutes, books and records, and bank accounts. They formally designate directors, who formally meet or act by written consent, to among other things appoint officers. Directors and officers act on the corporation's behalf, and obtain shareholder approvals where required by law or for other reasons. Where the size or significance of a corporation's activities warrant the expense, or if the law requires (as with public companies, which must have their financial statements audited by independent auditors), corporations engage law and accounting firms to help them in this regard. Where the size or significance of a corporation's activities warrant the expense, they prepare financial statements and have them audited. They file tax returns and maintain their corporate franchises in good standing in the jurisdictions in which they do business. They document their significant obligations and assets, particularly assets that represent contract rights of a significant nature. When one corporation acts on another's behalf, or holds significant assets for the benefit of another corporation, or engages in a transfer or contribution of significant assets, the corporations involved will carefully document those relationships or transactions.

IV. Opinions Specific to the Facts of this Case

In this section, I relate the opinions set out in Parts II and III above to the facts of this case. In sum, my opinions are that: (1) the AIRCO Exchange and the AIG Merger were conventional M&A transactions, designed and executed in customary ways, (2) the AIRCO Exchange and the AIG Merger were distinct, separate transactions, not materially related to each other, (3) the record I have reviewed does not cause me to believe the AIRCO Exchange and the AIG Merger were other than proper, equitable, and fair to both SICO and its counterparties, including AIG, (4) the record reveals nothing about the corporate history of SICO that provides a reason (a) to ignore the corporate separateness of SICO and AIG, (b) to believe that SICO entered into any contract or guarantee to hold the stock of AIG owned by SICO in trust for AIG or its employees, or (c) to believe SICO has converted assets of AIG or AIG's employees or otherwise acted inequitably or improperly.

A. Relevant Facts

The following facts are based on the written record I have reviewed, and for the most part appear to be undisputed by the parties in this case.

1. SICO's corporate history prior to the AIRCO Exchange

In 1943, SICO was legally organized as a corporation domiciled in Panama having perpetual existence. Prior to 1970, SICO was a holding company for a large number of managing general agencies (MGAs) doing business outside the United States. SICO was thus organized twenty-five years prior to AIG's organization as a Delaware corporation.

2. SICO's shareholders and creditors

From before 1970 through today, SICO has had a set of voting shareholders entitled to full voting rights but only nominal dividend and liquidation rights. SICO also has a class of non-voting preferred stock entitled to no voting rights, cumulative quarterly dividends, and a liquidation preference equal to accrued and unpaid dividends plus the subscription price for such shares. SICO's preferred shares are owned primarily by descendants of former participants in the DCPPPs (described below).

In 1971, the Starr International Charitable Trust was created for the advancement of education, relief of poverty, and other purposes beneficial to the community (***the Charitable Trust***) and acquired all of SICO's shares of non-voting common stock, which are entitled to no voting rights but are entitled to dividends as declared by SICO's board of directors or its voting shareholders (amounting to several hundred thousand dollars or more per year), as well as to all of SICO's assets in liquidation after payment of creditors and the nominal liquidation rights of SICO's voting shares and the liquidation rights of the preferred stock. Thus, the principal economic ownership rights associated with SICO's value have since 1971 been held by the Charitable Trust.[7]

SICO's charter has long restricted the ability of SICO to pay distributions or dividends to its voting shareholders, and in particular prohibited distributions out of restricted surplus. In connection with the AIRCO Exchange (as defined above and discussed more below), SICO's voting shareholders amended SICO's charter to treat the difference between the market value of the AIRCO stock received in that transaction (and any future stock received in exchange for that stock) and the book value of that stock as restricted surplus, thus effectively prohibiting the distribution of that value to shareholders other than to the Charitable Trust. SICO's charter similarly treated the AIG stock received in the AIG Merger.

In 1975, SICO amended its charter to provide that (in general terms) no more than 20% in value of the AIRCO stock that it acquired in the AIRCO Exchange could be used by SICO as credit support for SICO and its subsidiaries, except when necessary for the benefit of AIRCO, AIG, or their subsidiaries.

As AIG has acknowledged in writing, SICO has and has had from time to time since 1970 a number of third-party creditors, who have specifically relied upon AIG shares

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[7] See, e.g., PWCSICO 000129 (basis for AIG auditors' conclusion that SICO should not be consolidated with AIG included that "the beneficial owner of the shares held by SICO is a charitable trust").

owned by SICO in extending credit to SICO, including Goldman Sachs International, and HSBC (***the Creditors***).[8]

3. The AIRCO Exchange

In the AIRCO Exchange, leading law firms and investment banks provided advice to SICO, AIG and other involved parties. The material terms of the AIRCO Exchange, as reflected in the contemporaneous written transaction documents, were described in contemporaneous and subsequent filings with the SEC, and approved by the relevant boards and sets of shareholders. The AIRCO Exchange has thus been part of the public record for 25+ years.

Specifically, in 1970, SICO exchanged substantially all its business operations for stock of AIRCO, pursuant to an Agreement and Plan of Reorganization dated as of May 28, 1970, and AIRCO simultaneously exchanged those business operations for stock of AIG, pursuant to the same written contract. The transaction was approved by the board of AIG at meetings held February 25, March 4, and May 13, 1970; and by the SICO board on April 10, 1970. The transaction was also approved by the AIRCO board on March 5, 1970 and by the AIRCO shareholders on June 17, 1970.

Since the AIRCO Exchange represented the sale of substantially all of SICO's assets at the time, it was also approved by the voting shareholders of SICO on May 14, 1970. In addition, despite the fact that AIG shareholder approval was not required by Delaware law or by AIG's charter, the AIRCO Exchange was conditioned upon approval of AIG shareholders, including its public shareholders.

AIG filed a proxy statement with the SEC on May 12, 1970, mailed definitive copies of that proxy statement to shareholders on May 29, 1970, and obtained shareholder approval on June 29, 1970. Nowhere does the proxy statement contain any mention of a contract or promise by SICO to use the AIRCO stock it was to receive in the AIRCO Exchange for the benefit of AIG or its employees, as would have been required to be disclosed under SEC rules if such a contract or promise had existed. Nor is there any mention in the proxy statement of any contract for a future transaction between AIRCO and AIG, any negotiations for such a transaction, or any understanding about such a transaction, as would have been required to be disclosed under SEC rules if they had existed.

AIG's board and shareholder approvals for both exchanges were obtained following receipt by the AIG Board on February 19, 1970 of a customary written opinion from an independent investment bank, Morgan Stanley & Co. (***Morgan Stanley***). Morgan Stanley's opinion was included in AIG's proxy statement, and at the request of the AIG

[8] See, e.g., AIG-S2 00351605 (email from Kathleen Shannon to Margaret Barnes dated 7/17/03 replying to email from Barnes to Shannon dated 7/16/03, which refers to obligations of SICO to HSBC and Goldman Sachs secured by stock of AIG owned by SICO); AIG-S2 00423841 (letter dated 2/4/05 from AIG to Goldman Sachs International acknowledging obligations of SICO to Goldman Sachs and fact that SICO had pledged AIG stock as collateral supporting those obligations, and confirming that there were no contractual arrangements between AIG and SICO that would be violated by the pledge).

board, on May 29, 1970, Morgan Stanley provided a customary "bring down" of its opinion, to reflect information provided to Morgan Stanley through that date. Morgan Stanley's opinions concluded that, from a financial point of view, the two exchanges were fair and reasonable to AIG shareholders.

The AIRCO Exchange was closed on June 30, 1970. The AIRCO Exchange was conditioned upon a simultaneous, separate exchange transaction between AIG and C.V. Starr & Co., Inc. (***CV Starr***) that did not directly involve SICO, but which was also publicly disclosed and approved by AIG shareholders. The two exchanges provided synergies to AIG by allowing for certain cost savings and economies in the operations of businesses it acquired in those transactions. After completion of the exchanges, AIG owned substantially all of the operating businesses of the companies involved (including SICO's MGAs); AIRCO and CV Starr were substantial shareholders of AIG, which remained a public company; and SICO was a substantial shareholder of AIRCO.

4. The AIG Merger

Again, in the AIG Merger, leading law firms and investment banks provided advice to AIRCO, AIG and other involved parties. The AIG Merger was described in all material respects in contemporaneous and subsequent filings with the SEC, and approved by the relevant boards and sets of shareholders. The AIG Merger has thus all been part of the public record for 25+ years.

Specifically, in 1978, AIRCO merged into AIG, pursuant to a Plan and Agreement of Combination and Reorganization dated as of August 9, 1979. In the AIG Merger, AIRCO merged with and into AIG, with AIG continuing as the surviving corporation, and all of the shares of AIRCO common stock were converted into 1.1 shares of common stock of AIG. The boards of directors of AIRCO and AIG approved the AIG Merger, and a proxy statement filed with the SEC and dated August 17, 1978 was mailed to shareholders, describing the material terms of the AIG Merger. Nowhere in the proxy statement is there any mention of a contract or promise about, or restriction on, the AIG stock to be issued to SICO as a result of the merger, as would have been required to be disclosed if one had existed. Thereafter, shareholders approved the AIG Merger.

SICO was treated identically to other shareholders of AIRCO in the AIG Merger, and accordingly became a direct shareholder of AIG.

5. Absence of written agreements between SICO and AIG

It appears to be accepted by AIG that there has never been a shareholders agreement, voting agreement, or other similar written agreement between SICO and AIG with respect to the AIG stock owned by SICO.[9] By contrast, in 1970, at the time SICO

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[9] See, e.g., Dep. Tr. of Frank Zarb (5/31/06) at 156 (director of AIG 2001-2004 stating to his knowledge no written contract existed between AIG and SICO regarding the AIG stock owned by SICO); Dep. Tr. of Martin Sullivan (5/24/06) at 563 (AIG CEO stating "I don't believe there's a written agreement."); Dep. Tr.

acquired stock of AIRCO, there was a formal written shareholders agreement among CV Starr and shareholders of AIRCO.[10] Nowhere in the charter or bylaws of SICO is there any provision requiring SICO to use its assets for the benefit of AIG or its employees. I understand that AIG accepts that no deed of trust or written trust agreement exists that requires SICO to hold its AIG stock for the benefit of AIG or its employees.[11] No document reveals a donative transfer or contribution of the AIG stock owned by SICO, or of any interest of AIG or its employees in that stock. No board of directors resolution, shareholders resolution, or termsheet approves or sets forth the terms of any contract governing the $19 billion of AIG stock owned by SICO.

6. Separateness of AIG and SICO

AIG has never been a shareholder, parent company, or holding company for SICO, and has never controlled SICO,[12] nor has SICO exerted control over AIG.[13] AIG has since 1969 been a public company, with dispersed shareholders; SICO, by contrast, has always been a separate, privately held company.[14] AIG has never included, and still does not include, SICO as a consolidated company in AIG's financial statements filed with the SEC. While SICO and AIG for many years had overlapping boards and officers, SICO and AIG have always operated as formally and legally distinct entities, with non-identical

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of Ernest Patrikis (6/6/06), at 173-78; Dep. Tr. of Carla Hills (6/30/06), at 110-20; Dep. Tr. of Kathleen Shannon (6/23/06), at 82-87, 195-96; Dep. Tr. of Steve Gorman (5/12/06), at 42-45.

[10] See AIG Proxy Statement dated May 28, 1970, filed with the SEC, at 5; Exhibits 12 and 13 to Dep. Tr. of Edward Matthews (5/18/06).

[11] See, e.g., Dep. Tr. of Martin Sullivan (5/24/06) at 335 (AIG CEO stating "I never saw ... a written trust").

[12] See, e.g., BARCL-038-0001904 (draft letter from AIG corporate secretary stating that SICO and CV Starr "are privately owned and not controlled by AIG"); AIG-S 00063986 (listing SICO as "private" and "non-AIG company"); BARCL-038-0001932 (letter dated 2/12/93 from Edmund Tse to Assistant Commissioner of Insurance, Hong Kong, stating that AIG has "no control" over SICO, which are "private investors" in AIG, nor does AIG have a way of knowing SICO's exact AIG holdings or financial status); PWCSICO 042384 and 042396 (memo dated 4/26/04 from Barry Winograd and Richard Mayock to Jeffrey Allen, which states that this analysis is based on a review of SICO's charter, by-laws, and trust agreement dated 6/29/71 and the supplemental agreement thereto dated 12/8/73, along with discussions with AIG's senior vice president, secretary and deputy general counsel, and with SICO's vice president and secretary, and concludes "AIG cannot wrest control over the AIG shares" owned by SICO).

[13] See, e.g., BARCL-011-0001187 (letter dated 6/15/01 from Ernest Patrikis, senior vice president and general counsel of AIG, to Commissioner of Insurance for Tennessee, summarizing certificate from SICO's vice president and secretary, and stating that SICO is a "passive shareholder in AIG" and does not exercise or attempt to exercise directly or indirectly control over AIG); Dep. Tr. of Kathleen Shannon (6/23/06), Exh. 10; Dep. Tr. of Ernest Patrikis (6/6/06), at 85-92; Dep. Tr. of Kathleen Shannon (6/23/06), at 108-09, 130-33, 163-71, and 189-90; Dep. Tr. of Carla Hills (6/30/06), at 107.

[14] Dep. Tr. of Martin Sullivan (5/23/06) at 199-200 (CEO of AIG and former board member of SICO stating that SICO was a separate, privately held company not owned by AIG).

shareholders, creditors, assets, liabilities,[15] cash,[16] boards of directors,[17] and officers. While the size of SICO's holdings of stock of AIRCO and then AIG substantially aligned the interests of SICO and those companies from 1970 to the present, SICO continues to own and manage commercial real estate and other assets worth over $2 billion. Indeed, if AIG had the right to control and utilize a significant part of SICO's assets, as AIG now claims, one would expect that not only would AIG reflect this as an asset in its financials, but one would also expect, at a minimum, a requirement by SICO creditors that AIG in effect "guarantee" any SICO debt. The majority of AIG's shareholders and creditors are and always have been persons other than SICO.

SICO and AIG have always had separate board meetings, kept their own board minutes, had their own charters, bylaws and other corporate documents, and maintained their own books, records, and financial statements, and bank accounts. For many years, AIG and SICO had overlapping officers, but SICO has and has long had at least one or more employees that are or were not employees of AIG, and *vice versa*. Since March 2005 the two companies have had – by virtue of actions taken by each company – few if any officers or employees in common. SICO has had its headquarters in Dublin for some time, and before that was headquartered in Bermuda. In contrast, AIG has been headquartered in New York for many years. While AIG and SICO engaged in transactions from time to time (including, for example, in 2003, payment by AIG to SICO of several million dollars for services and rentals, and payment by SICO to AIG of several million dollars for services and rentals), these transactions were conducted at fair market values[18] and were publicly disclosed in AIG's SEC filings.

7. The DCPPPs

For many years, starting in the 1970s, SICO contingently awarded, pursuant to two-year deferred compensation profit participation plans (***DCPPPs***), a very small percentage of its assets to both SICO and AIG employees who remained employees for specified periods of time.[19] AIG has never reflected liabilities under SICO's DCPPPs on its own books and records, even after its May 2005 restatement "correcting" what it now claims

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[15] See, e.g., AIG-S2 00422528 (memo dated 12/9/92 from Coopers & Lybrand to the boards and management of SICO, AIG, the Robert Plan Corporation, and the New Jersey Insurance Department, stating that AIG management and a SICO director each represented that AIG has not guaranteed and is not contingently liable for any SICO debts).

[16] See Dep. Tr. of Edward Matthews (5/19/06), at 382-85 (discussing different cash positions of AIG and SICO).

[17] See AIG Annual Proxy Statement dated 4/5/02, at 2-6 (listing 20 directors, of whom 7 were also directors of SICO); BARCL-042-0000256 (SICO Annual General Meeting minutes, dated 7/18/02, listing 16 directors, of whom 7 are listed in AIG Annual Proxy Statement as directors of AIG).

[18] E.g., Dep. Tr. of Martin Sullivan (5/25/06) at 544-55; OSBOR-015-0001685; ARCHI 1080002002, 1080000262 to -264; and GREEN 0060003424 to -3433.

[19] See, e.g., BARCL-013-00001423.

were its past misstatements. SICO, by contrast, has reflected all costs associated with the DCPPPS in its financial statements.

Under the DCPPPs, amounts that were awarded would not be distributed until specified times or terms of service had elapsed; prior to distribution, SICO "reserved" some of its assets (including very small amounts of AIG stock) for eventual distribution to the participants in the DCPPPs. SICO has never awarded more than a small percentage of its AIG stock under the DCPPPs, so the vast majority of its AIG stock has never been "reserved" for distribution to a DCPPP participant,[20] and even those shares were never held in trust for the participants and remained part of SICO's general assets subject to its general corporate liabilities.[21] In recent years, the costs of the DCPPPs would have represented less than 1 percent of AIG's pre-tax income, had they been incurred by AIG rather than by SICO. Even as to shares reserved for DCPPP participants, SICO is entitled to incidents of ownership, such as dividends and voting rights, which AIG has acknowledged by paying dividends to SICO for such shares.

There is no and there has never been any written "plan" or equivalent document that required SICO to continue to adopt new DCPPPs. SICO's board unilaterally determined the terms of the DCPPPs, the identities of the participants, and the amounts of awards.[22] Each DCPPP plainly stated: "nothing ... shall confer ... any right to be included in any future Plan of a similar nature," and each Plan also made clear this was being undertaken "for the benefit of SICO."[23] Prospective participants were informed that no promise could be made that there would be any future distributions under the current DCPPP, or any future plans.[24] From time to time, SICO's board made substantial changes in the DCPPPs without any approval by AIG, including elimination of cash payments and changes in the term of service required before amounts were distributed.[25]

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[20] See, e.g., GREEN-006-0003425 (letter dated 5/28/82 from Gompers & Blau to Maurice Greenberg summarizing ownership of AIG stock by SICO, listing 276,423 shares reserved for holders of DCPPP units and a total of over 10 million shares not so reserved, representing over 97% of SICO's AIG shares). Overall, from 1975 to 2004, SICO reserved approximately 45 million of its original AIG shares for plan participants and when forfeited shares of approximately 4 million are backed out, this represents just under 13%.

[21] See, e.g., BARCL-001-0000959 (letter dated 7/13/01 from Conyers Dill & Pearman to Mello Jones & Martin).

[22] See, e.g., Dep. Tr. of Axel Feudmann (6/1/06) at 60-61 (head of AIG human resources agreeing that SICO board, and not AIG compensation committee, had final approval authority over DCPPP awards); Dep. Tr. of Margaret M. M. Barnes (4/28/06), at 33 (SICO board made ultimate decision about DCPPP participation).

[23] AIG-S 00078318 (DCPPP for 2001/2002, at 7).

[24] Dep. Tr. of Edward Matthews (5/19/06) at 261.

[25] E.g., AIG-S 00031704 (SICO board resolution removing cash distributions from DCPPP).

B. Record Evidence Is Consistent with M&A Customs and Practices

1. The AIRCO Exchange and AIG Merger were Conventional M&A Transactions

Based on my experience as an M&A attorney and a professor of law teaching M&A, subject to further review of the record, it is my opinion that the AIRCO Exchange and the AIG Merger were entirely conventional M&A transactions. In each case, the evident purpose of the transaction was to shift ownership or control of assets. The forms of transaction were conventional – a stock purchase and a merger – as were the forms of consideration – assets and stock. The disclosure, approval, and other procedural steps followed were consistent with custom, practice, and legal requirements.

2. The AIRCO Exchange and AIG Merger were Distinct, Separate Transactions, Not Materially Related To Each Other

The AIRCO Exchange and the AIG Merger were distinct, separate transactions, not materially related to each other. The two transactions took place eight years apart. Nothing in the board minutes related to the two transactions suggests that they were part of an overall agreement or understanding between the parties. The proxy statements filed with the SEC and sent to shareholders in 1970 do not mention any agreement or understanding about the 1978 transaction, as would have been required had such an agreement or understanding existed. The proxy statement sent to shareholders in 1978 never describes the 1978 transaction as the second- or final step of the 1970 transaction, as would have been required had such an agreement or understanding existed. There was nothing about the two transactions that was required by the other, as a legal matter, a business matter, or a logical matter.

3. Record Evidence Reveals Nothing Improper about the Transactions

The record I have reviewed does not cause me to believe that either the AIRCO Exchange or the AIG Merger was other than entirely proper, equitable, and fair to both SICO and its counterparties, including AIG. In the AIRCO Exchange, Morgan Stanley's fairness opinions, the full disclosure under SEC rules of the terms of the transactions, and the fact that the AIG shareholders were able to vote on the transaction despite not having a legal right to do so all are consistent with best M&A practices. Likewise, the AIG Merger was a relatively straightforward reorganization of affiliated companies that complied with all relevant legal and equitable requirements.

C. Record Evidence Does Not Support AIG's Claims

Nothing in the record I have reviewed regarding the corporate history of SICO (including the AIRCO Exchange and the AIG Merger) causes me to conclude that the corporate separateness of SICO and AIG should be ignored in part or in whole, or that there was any contractual understanding that the stock of AIG owned by SICO was being held in trust for AIG or its employees, or that SICO has acted inequitably or otherwise improperly, or that SICO has been unjustly enriched by the AIRCO Exchange, the AIG Merger, or subsequently. The record shows that SICO respected corporate formalities. It is also clear from the record that SICO acquired AIG stock in distinct, conventional M&A transactions. SICO's stock in AIG can be directly and relatively straightforwardly traced back to its own, separate business (the MGAs) that represented the consideration it provided for the AIRCO stock it received in 1970; and in the AIG Merger it is undisputed that SICO was treated identically to other AIRCO shareholders. As stated on 6/29/05 by AIG's CEO, Martin J. Sullivan, "the shares owned by SICO are owned by SICO."[26] Mr. Sullivan did not qualify that public statement – as would be required by the federal securities laws, of which he was aware – with further statements about contracts or promises made by SICO to use its assets for the benefit of AIG or AIG's employees. The record shows that – far from harming AIG – SICO's use of a small fraction of its assets to create and fund the series of separate DCPPPs benefited AIG (for no consideration on AIG's part) by giving AIG employees incentives to increase the earnings and value of AIG. SICO, as a shareholder of AIG, also benefited from the effects of these incentives in direct proportion to its ownership of AIG stock.

Nothing in the record suggests that either the AIRCO Exchange or the AIG Merger – by which SICO obtained stock of AIG – deceived or misled any third parties with legal rights or interests in either transaction. To the contrary, the record makes it clear that AIG has consistently filed financial statements over the years reflecting SICO's corporate separateness, as well as the ownership by SICO, not AIG, of the stock of AIG that AIG is now seeking to obtain. Even after the filing of this case, AIG paid dividends to SICO, and permitted SICO to vote its AIG stock, inconsistent with AIG's claims.

It is also telling what is *not* in the record; based on my experience as an M&A attorney and a professor teaching M&A, certain disclosures or documents, at a minimum, would be in the record if AIG's claims in this case had merit. Despite the existence of numerous written documents – shareholder agreements, merger agreements, plans of reorganization, deeds of trust, board minutes, shareholder resolutions, charter amendments (such as SICO's 1975 charter amendment restricting the amount of AIRCO stock SICO acquired in the AIRCO Exchange that could be used by SICO as credit support for SICO and its subsidiaries), and the DCPPPs themselves – there are no written documents signed by SICO backing up the assertion that the difference between market value and the book value of the AIG stock held by SICO was being held in trust for AIG or its employees. The absence of such documents is not simply oversight; the possibility that some or all of SICO's assets might be put into an actual trust for various purposes was considered and rejected by the SICO board on more than one occasion.[27]

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[26] Corrected Transcript of a Conference Call published by CallStreet (6/29/05).

[27] E.g., AIG-S 00081250 (SICO board minutes dated 6/19/92, stating the board "discussed whether all or a portion of [its cash flow] should be placed in a separate trust … to isolate the funds for purposes considered by the Directors to be catastrophic events. The Directors determined that an irrevocable trust constituted too formal a legalistic approach and would impede the flexibility of management to deal with the unforeseen future needs and problems which may arise with regard" to SICO); BARCL-081-0000382 (SICO board minutes dated 6/1/84, stating "a discussion of a Ten Year Foreign Trust designed to pass

Nor is it the case that the value of the AIRCO shares acquired by SICO in the AIRCO Exchange was so small or insubstantial as to not be worth documenting how it was to be used or controlled: it is undisputed that the value of those shares (and the amount that AIG now asserts was set aside for its employees) was over $100 million at the time. This would have been even more true in 1978, when AIRCO merged with AIG and SICO's stake in AIG was worth considerably more. At the time of the AIG Merger, when SICO directly acquired its stake in AIG, AIG had a number of fully independent directors, holding no other position at AIG, AIRCO or SICO, including Carter Bacot, president of the Bank of New York, Charles Coombs, former executive vice president of the Federal Reserve Bank of New York, and John Sawhill, president of New York University. To put it mildly, it would have not been customary for independent directors to fail to inquire whether a significant obligation of a counterparty in a major M&A transaction should be put in writing, or disclosed to shareholders to whom the directors were recommending the deal.

It is also *not* the case that AIG was represented by incompetent counsel who did not know how to create a deed of trust, shareholders agreement or charter restriction. Rather, AIG was represented by one of the leading M&A law firms in the country. The lawyers at that firm were (and are) also excellent securities lawyers, and would have not allowed AIG to flagrantly violate the SEC's rules, as AIG's claims now imply: the proxy statements filed in connection with the AIRCO Exchange and the AIG Merger omit any mention of what AIG now asserts was the case – a legally binding oral agreement by SICO to use the difference between market value and the book value of the AIG stock it received in those transactions for the benefit of AIG's employees. Such a restriction on how SICO could use the consideration it was obtaining in the transactions would have been a good selling point for AIG shareholders who were being asked to vote on the transactions, so that even if the SEC rules did not require disclosure of such an agreement (which they did), AIG would have had an incentive to disclose the agreement anyway. Nowhere, of course, do those proxy statements even remotely suggest that SICO would be obliged to put AIG's interests ahead of SICO's own shareholders and creditors.

Likewise, in AIG's many public filings with the SEC since the AIRCO Exchange and later AIG Merger, no mention was made of an oral agreement or trust as now alleged by AIG. If it existed as AIG claims, some mention of such a contract or trust would have been required in AIG's annual proxy statements, at a minimum. If credited, AIG's claims by clear implication suggest that AIG has been violating the federal securities laws for more than 30 years and that its outside professional advisors have been complicit in those violations. To put it mildly, this seems highly implausible.

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through U.S. withholding tax on AIG dividends to the individual income beneficiaries of the Trust occurred. The Directors felt that the Plan was complicated to understand even if it were only applied to the top twenty current participants in the DCPPP ... [and] determined not to approve the plan due to its complexity."). I have reviewed the SICO Shareholder Statements of Commitment and they do not alter my opinions herein. These documents appear to me to be aspirational statements between SICO's voting shareholders and were not with, directed to, or for the benefit of AIG and it employees.

SICO had and continues to have its own creditors and shareholders (particularly, the Charitable Trust) who have interests that are directly implicated by control of SICO's assets. Were AIG to succeed in its claims, SICO's creditors and shareholders would – obviously – lose. The Charitable Trust, in particular, would lose its residual ownership interest in the AIG stock. SICO's creditors would no longer be able to rely on the AIG stock owned by SICO to support their credit.

D. Implications of AIG's Claims for Economic Value of Corporations

More generally, by attempting to invade SICO's assets and "acquire" – for free! – SICO's stock in AIG, AIG's claims threaten precisely to invert conventional corporate relationships and destroy the fundamental principles of corporate separateness. These principles apply, it should be noted, even in a more compelling case, where a parent and a 100% owned subsidiary are involved – the subsidiary cannot simply grab assets of the parent company for its own benefit, or for the benefits of its creditors, because the parent will have creditors (and shareholders) of its own that have prior claims to those assets. These principles should apply even more strongly here, where third party shareholders and creditors have interests directly in conflict with those asserted by AIG.

AIG's efforts in this case to impose a constructive trust on SICO's principal asset (AIG stock owned by SICO) would in its economic essence represent a type of extraordinary veil-piercing – AIG would be disregarding its own corporate veil to permit it to obtain its own shareholder's assets – on behalf not of a creditor but AIG's management and other shareholders. Economically, it would be no different than ignoring the corporate separateness of both AIG and SICO, simultaneously, to benefit one group of AIG's shareholders (and, more directly, AIG's current management) at the expense of another shareholder. It would have all of the bad economic effects of ignoring corporate separateness generally: it would contribute to a higher cost of equity capital for companies like AIG in the future, since investors would potentially stand to lose their assets to the corporations in which they invest even if they never agreed to contribute their assets to those corporations.

The action would deprive SICO's own creditors and residual shareholder – a charitable trust – of SICO's primary asset by transferring it to AIG. Creditors of investment and holding companies generally would need to consider that other shareholders of portfolio companies might be able to similarly impose trusts on shares held by the investment or holding companies, leaving investment or holding companies stripped of their largest assets. The cost of both equity and debt capital for corporations generally would rise. Even worse than a veil-piercing action, such trusts would directly benefit public company management by eliminating the disciplinary effect that large blockholders have on managers of public companies with dispersed shareholders. The bottom line is simple: to permit the constructive trust claim asserted by AIG to represent a colorable threat to SICO's assets would have negative economic consequences for public companies generally.

Conclusion

In conclusion, based on my experience as an attorney and a professor specializing in business organizations, securities law, finance, and M&A, and after a review of documents and testimony in the case, it is my opinion that (1) the AIRCO Exchange and the AIG Merger were conventional M&A transactions, designed and executed in customary ways, (2) the AIRCO Exchange and the AIG Merger were distinct, separate transactions, not materially related to each other, (3) the record I have reviewed does not cause me to believe the AIRCO Exchange and the AIG Merger were other than proper, equitable, and fair to both SICO and its counterparties, including AIG, (4) the record reveals nothing about the corporate history of SICO that provides a reason (a) to ignore the corporate separateness of SICO and AIG, (b) to believe that SICO entered into any contract or guarantee to hold the stock of AIG owned by SICO in trust for AIG or its employees, or (c) to believe SICO has converted assets of AIG or AIG's employees or otherwise acted inequitably or improperly.

Dated: September 18, 2006

Professor John C. Coates IV

A

Exhibit A

JOHN C. COATES IV

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EXPERIENCE

Harvard Law School, Cambridge, MA

John F. Cogan Jr. Professor of Law and Economics	6/06 - Present
Professor of Law	6/01 – 6/06
Assistant Professor of Law	6/97 - 6/01

Teaching Corporations, Mergers & Acquisitions, Contracts, Financial Institutions Regulation, and advanced seminars

Securities and Exchange Commission, Washington, D.C.

Independent Distribution Consultant	5/04 - Present

Wachtell, Lipton, Rosen & Katz, NYC

Partner	1/96 - 5/97
Associate (Full- or Part-Time)	3/88 - 12/95

Specialized in corporate, securities, M&A, and financial institutions law and regulation

Managed legal work for large corporate mergers and acquisitions, recapitalizations, buyouts, freezeouts, and public offerings

Advised participants in proxy fights, auctions, and hostile takeovers

Managed disclosure and compliance "crises" at public companies, particularly financial institutions

New York University School of Law, NYC

Visiting Professor	7/05 – 12/05
Adjunct Assistant Professor	1/93 -5/97
Lecturer	1/92 - 12/93

Boston University Law School, Boston, MA

Lecturer	1/95 -- 6/97

MEMBERSHIPS / AFFILIATIONS

New York Stock Exchange	Member, Legal Advisory Board
American Bar Association	Member, Section on Business Law
American Law and Economics Association	Member, Board of Directors
Association of American Law Schools	Member
National Bureau of Economic Research	Invited Speaker / Researcher
Harvard Business School / Harvard Law School Ad Hoc Group on Corporate Governance	Founding Member
Harvard Center on Lawyers and the Professional Services Industry	Founding Member

EDUCATION

New York University School of Law	J.D. Cum Laude, May 1989
New York University Law Review 1987-88 -- Staff Member	1988-89 – Editorial Board, Articles Editor
Law Review Alumni Association Award	Third in Class
George P. Foulk Memorial Award	Scholarship
Pomeroy Prize	Outstanding Academic Performance
Order of the Coif	
American Jurisprudence Awards (contracts, procedure, securities)	
University of Virginia	B.A. (History), Highest Distinction, May 1986

Thesis: "Christianity, Kingship and a Carolingian Lord"

Younger Prize	Distinction in American History
Jefferson Scholar	Four-year Merit-Based Scholarship
Echols Scholar	Academic and Leadership Merit

B

PUBLICATIONS **Exhibit B**

Recent Publications

Separating Myth and Reality in the Sarbanes-Oxley Act, *J. Econ. Persp.* (forthcoming 2006)

Ownership, Takeovers and EU Law: How Contestable Should EU Corporations Be?, in Company and Takeover Law in Europe, eds. E. Wymeersch & G. Ferrarini (Oxford University Press 2004)

The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants, 55 *Stan L. Rev.* 885 (2003) (with Lucian A. Bebchuk and Guhan Subramanian), selected as one of 10 best corporate law articles published during 2003 by academics surveyed

The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy, 54 *Stan. L. Rev.* 887 (2002) (with Lucian A. Bebchuk and Guhan Subramanian), selected as one of 10 best corporate law articles published during 2002 by academics surveyed

Explaining Variation in Takeover Defenses: Blame the Lawyers, 89 *Cal. L. Rev.* 1301 (2001), selected as one of 10 best corporate law articles published during 2002 by academics surveyed

Second-Generation Shareholder Bylaws: Post-*Quickturn* Alternatives, 56 *Bus. Law.* 1323 (2001) (with Bradley C. Faris)

Private vs. Public Choice of Securities Regulation: A Political Cost/Benefit Analysis, 41 *Va. J. Int'l L.* 531 (2001), selected as one of 10 best securities law articles published during 2001 by academics surveyed

A Buy-Side Model of M&A Lockups: Theory and Evidence, 53 *Stan. L. Rev.* 307 (2000) (with Guhan Subramanian)

Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence on Takeover Defenses, 79 *Tex. L. Rev.* 271 (2000), reprinted in 43 *Corp. Practice Commentator* 1 (2002) as one of 10 best corporate law articles published in 2001-02 by academics surveyed

Empirical Evidence on Structural Takeover Defenses: Where do We Stand?, 54 *U. Miami L. Rev.* 783 (2000)

Other Major Publications

Measuring the Domain of Mediating Hierarchy: How Contestable Are US Public Corporations?, 24 *J. Corp. L.* 837 (1999)

"Fair Value" as a Default Rule of Corporate Law: Minority Discounts in Conflict Transactions, 147 U. Penn. L. Rev. 1251 (1999), reprinted in 41 Corp. Practice Commentator 1 (2000) and selected as one of 10 best corporate law articles published in 1999-2000 by academics surveyed

Freezeouts, Management Buyouts and Going Private, in *Takeovers & Freezeouts* (eds. M. Lipton & E. Steinberger, Law Journal Seminars-Press 1998)

Reassessing Risk-Based Capital in the 1990s: Encouraging Consolidation and Productivity, in *Bank Mergers and Acquisitions* (eds. Y. Amihud & G. Miller, Kluwer Academic Publishers 1998)

Annual Survey of Developments in Mergers and Acquisitions of Financial Institutions 1990-1998 (with Herlihy et al.) (co-authored leading annual survey for eight years; privately published)

Acquisitions of Financial Advisory and Investment Management Businesses, 17 Bank & Corp. Gov. L. Rep. 8 (Sep. 1996) (with Herlihy et al.)

Concentration Limits: New Interstate Moves Still Face Minefield of Deposit Cap Statutes, in a Special Report on Interstate Banking, 13 Banking Policy Rep. 23 (Aug. 15, 1994) (with Neill)

Mergers of Equals: Achieving a Delicate Balance of Control, 13 Banking Policy Report 1 (Oct. 3, 1994) (with Herlihy et al.)

State Takeover Statutes and Corporate Theory: The Revival of an Old Debate, 64 N.Y.U. L. Rev. 806 (1989)

Other Publications

The Trouble With Staggered Boards: A Reply to Georgeson's John Wilcox, Corporate Governance Advisor (2002) (with Lucian A. Bebchuk and Guhan Subramanian)

Purchase Accounting Deals: A Look at Pricing Formulas and Allocation Procedures, 15 Banking Policy Report 1 (Nov. 18, 1996) (with Herlihy, et al.)

Takeovers & Freezeouts (L.J. Seminars-Press) (with Lipton et al.)

New Guidance for Freezeouts and MBOs -- Negotiation Strategy Privileged from Disclosure, Corp. Rep. (Aspen Law & Business (June 1996) (with Rowe)

M&A Strategies, 9 Bank Accounting and Finance 40 (Winter 1995-96) (with Herlihy, et al.)

Bank M&A Preparedness, 66 Corp. Rep. 1 (Aspen Law & Business Nov. 15, 1995) (with Herlihy, et al.)

Mergers and Acquisitions of Financial Institutions – 1995: An Unprecedented Year of Consolidation, Securities Activities of Banks, Fifteenth Annual Institute (1995) (with Herlihy, et al.)

Deal Developments Update, Corporate Control Alert (August 1995) (with Herlihy et al.)

Updating the Use of Special Committees in Freeze-Outs and Other Conflict Transactions, Corp. Rep. (Aspen Law & Business Aug. 15, 1995)

Banking on Nonbank Acquisitions, The Community Banker 46 (Second Quarter 1995)

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Bank and Thrift Mergers and Acquisitions -- 1994, in Securities Activities of Banks, Prentice-Hall Law & Business, Fourteenth Annual Institute (1994) (with Herlihy, et al.)

Stock Buybacks: Strategic, Legal and Fiduciary Issues, 8 Insights 10 (Nov. 1994) (with Herlihy et al.)

Banking Developments, Banking on Non-Bank Acquisitions and Current Issues in Bank Acquisitions, in Bank Mergers and Acquisitions, Practicing Law Institute (1994) (with Herlihy, et al.)

Current Issues in Bank Acquisitions, 7 Bank Acct'g & Fin. 44 (Spring 1994) (with Herlihy et al.)

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M&A Strategies, 7 Bank Accounting & Finance 48 (Winter 1993- 94) (with Herlihy et al.)

Assessing the Current Bank Merger Environment: A Preparedness Checklist, 12 Banking Policy Report 1 (Oct. 18, 1993) (with Herlihy et al.)

Bank Mergers and Acquisitions -- 1993: A Year of Increasing Franchise Consolidation, in *Securities Activities of Banks*, Prentice-Hall Law & Business, 13th Annual Institute (1993) (with Herlihy, et al.)

Hostile Acquisition Overtures At Smaller Banks and Thrifts, 11 Bank & Corp. Gov. L. Rep. 47 (1993) (with Herlihy et al.)

Flexibility on Safety and Soundness, 3 Bank Director 3 (Third Quarter 1993) (with Wasserman)

Designing Bank Governance Structures, 12 Bank Policy Report (Apr. 19, 1993) (with Herlihy et al.)

Capital and Compliance Strategies in the Era of Prompt Corrective Action, in *The New Implementing Regulations Under FDICIA* (Prentice Hall 1992) (with Wasserman et al.)

1992 -- A Year of Continuing Financial Industry Consolidation: Current Trends and Various Considerations in Bank Mergers and Acquisitions, in Securities Activities of Banks, Prentice-Hall Law & Business, Twelfth Annual Institute (1992) (with Herlihy, et al.)

Bank Regulators Turn Up Intensity in Examination of Racial Discrimination in Lending Practices, 9 Bank & Corp. Governance L. Rep. 758 (December 1992) (with Stern et al.)

Meeting the Challenge of Loan Bias Scrutiny, Am. Banker (August 21, 1992) (with Stern et al.)

Investment Company Act Exemption Proposed, 11 Int'l Fin. L. Rev. 41 (July 1992) (with Robinson)

Dealing with Market Risks in Stock Mergers: Collars and Walk-aways, 6 Insights 4 (July 1992) (with Herlihy et al.)

Market Risks in Bank Mergers, 1 Bank Governance L. Rep. 1114 (July 1992) (with Herlihy et al.)

Racial Discrimination in Lending Practices, 1 Bank Gov. L. Rep. 1114 (July 1992) (with Stern et al.)

Disclosure of the Analyses Underlying Investment Banker Fairness Opinions, 6 Insights 11 (March 1992) (with Herlihy et al.)

Federal Reserve Board Approval Criteria for Bank Mergers, 7 Bank & Corp. Governance L. Rep. 45 (1992) (with Herlihy et al.)

Consensus Needed on Early Resolution's Legal Issues, Am. Banker (Mar. 25, 1992) (with Wasserman)

An Overview of Current Trends and Various Considerations in Bank Mergers and Acquisitions, in Securities Activities of Banks, Prentice-Hall Law & Business, Eleventh Annual Institute (1991) (with Herlihy et al.)

"The Greatest American Shambles": An Exchange, 38 *N.Y. Rev. of Books*, 59 (June 13, 1991)

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Advising the Board of Directors of a Target Company Regarding Defensive Strategies, in Dynamics of Corporate Control IV, American Bar Association National Institute (1989) (with Fogelson)

State Takeover Statutes: A Fifty-State Survey (privately published) (1989) (with Robinson et al.)

The Reorganization Plan: Statutory Framework and Commercial Realities, in Business Reorganizations and Workouts, Law Journal Seminars-Press (1988) (with Koplow)

Working Papers

An Empirical Reassessment of MBO Bids: Techniques, Outcomes, and Delaware Corporate Law, Working Paper (October 2005)

Why Are Firms Sold? The Role of the Target CEO's Age, Tenure, And Share Ownership, Working Paper (October 2005) (with Reinier Kraakman)

Competition and Shareholder Fees in the Mutual Fund Industry: Evidence and Implications for Policy, Working Paper (November 2005) (with R. Glenn Hubbard)

The Legal Origins of the Politically Puzzling U.S. "Market" for Corporate Charters, Working Paper (October 2004)

The Power of Defenses, National Bureau of Economics Research Working Paper (July 2003) (with Lucian Arye Bebchuk and Guhan Subramanian)

CEO Incentives and M&A Activity in the 1990s: Stock Options and Real Options, Working Paper (March 2002) (with Reinier Kraakman)

An Index of the Contestability of Corporate Control: Studying Variation in Legal Takeover Vulnerability, Working Paper (June 1999)

Exhibit 48

Exhibit 48 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 48 has been delivered to the Court and served on all parties of record.

Exhibit 49

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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor), Petitioners, for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.	**Index No. 651786-2011** **Kapnick, J.**

<u>EXPERT REPORT OF ROBERT M. DAINES</u>

CONFIDENTIAL

Introduction

On June 7, 2011, I provided a report in connection with a potential settlement (the "Settlement") involving securitization trusts (the "Trusts") for which The Bank of New York Mellon ("BNY Mellon" or the "Trustee") is trustee or indenture trustee. My report dealt with the likelihood that the Trustee would prevail in a veil piercing or successor liability claim against Bank of America Corporation ("BAC" or "Bank of America") if certain Bank of America subsidiaries were liable for damages to the Trusts and unable to meet their respective obligations.

The Trustee has now asked me to review the report of Professor John C. Coates, IV, submitted on February 28, 2013, and to consider whether any information presented in that report alters my initial opinions. After reviewing Professor Coates's report, as well as additional information related to the claims made by Professor Coates therein, the opinions expressed in my June 7, 2011 report remain unchanged.

Qualifications

I am the Pritzker Professor of Law and Business at the Stanford University School of Law. I am also Co-Director of the Rock Center for Corporate Governance at Stanford and a Professor (by courtesy) of Finance in the Graduate School of Business.

My academic research focuses on the economic and empirical analysis of corporate transactions, mergers and acquisitions, corporate governance and the impact of securities regulation. This research has appeared in such publications as the Journal of Financial Economics, the Journal of Law, Economics and Organization and The Yale Law Journal. It has also been reported on by The Economist, The New York Times, The Wall Street Journal, Financial Times, Forbes, Fortune and other media.

I regularly teach the basic Corporations course at Stanford, which includes mergers and acquisitions. I also teach advanced courses on mergers and acquisitions, the law and finance of complex transactions, corporate governance and corporate finance. Before joining the faculty at Stanford, I taught at the New York University School of Law and the Yale Law School, and have also taught at Columbia Law School, the University of Toronto Faculty of Law, and the University of Basel.

I have been a member of the NASDAQ Stock Market Review Council, Chair of the Corporate and Securities Law Section of the American Law and Economics Association and Chair of the Law and Economics Section of the Association of American Law Schools. In addition, I have served as a referee for various professional journals and publications, including Journal of Finance, Journal of Financial Economics, Journal of Law and Economics, Journal of Law, Economics and Organization, Financial Management, Journal of Legal Studies, The American Law and Economics Review and others.

I regularly provide business and legal training to corporate directors, both independently and as part of an executive education program run by the Stanford Law School, Stanford Business School, University of Chicago Booth School of Business and the Tufts Business School. This training includes the fiduciary duties of board members, corporate governance and mergers and acquisitions.

I have served as an expert witness or consultant on numerous cases involving mergers and acquisitions, complex transactions and corporate structure, and have been retained by the Securities and Exchange Commission and the Attorney General of California to advise on merger-related issues.

Before entering academics, from 1993 to 1997, I was an associate in the investment banking division of Goldman Sachs & Co., where I advised firms and conducted due diligence investigations for public and private financings, bank loans and potential acquisitions.

I received my J.D. from Yale Law School, where I received the Olin Prize for the Best Paper in Law and Economics. Following law school I served as a law clerk for Judge Ralph Winter on the United States Court of Appeals for the Second Circuit.[1]

Compensation

I am being compensated for my work in this matter at an hourly rate of $1,000. My compensation does not depend on the outcome of the case or the substance of my opinions. If additional documents or information become available to me, I reserve the right to amend or update this report if I deem it necessary or appropriate.

Response to Professor Coates's Report

1. Nothing in Professor Coates's expert report changes my original opinion.

Nothing in Professor Coates's report changes my opinion that "a successor liability case would be difficult to win if a court concluded that BAC paid a fair price in the Transactions" or my opinion that "BAC has a reasonable argument that a successor liability claim would be defeated." Ex. 3 (June 7, 2011 Daines Report ("Daines Rep.")) at 7.

I continue to believe that fair value is a key consideration in determining whether Bank of America was likely to face successor liability. As I stated in my original report, "[a] veil piercing claim would likely fail" and "[t]o succeed on a veil piercing claim, the Trustee would

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[1] A copy of my curriculum vitae is included as Exhibit 1. A list of the documents that I relied on in forming this opinion is included as Exhibit 2.

probably need to show that BAC siphoned off value from Countrywide by materially underpaying for the assets it purchased in the [LD2 and LD100] Transactions." Ex. 3 (Daines Rep.) at 5. In addition, "[t]he outcome of a successor liability claim is uncertain and would depend on where the case was brought, whether BAC underpaid in the Transactions, and other factual findings. Based on the facts as I understand them, BAC has a reasonable argument that any successor liability claim would be defeated." *Id.* at 6. I also continue to believe that regardless of where a successor liability case were brought, the court would likely apply Delaware law. *See id.* at 39.

In this section, I conclude that: (a) while Professor Coates suggests additional areas for further investigation, he offers no opinion about what such an investigation would yield; (b) none of the suggestions for additional information change my opinion on the difficulty of a successor liability claim; and (c) the various claims that Professor Coates suggests might have been pursued do not alter my conclusions about the difficulty of pursuing a successor liability claim against Bank of America.

a. While Professor Coates suggests additional areas for further investigation, he offers no opinion about what such an investigation would yield.

Professor Coates's report primarily suggests other areas that I or the Trustee could have investigated or considered. *See* February 28, 2013 Coates Report ("Coates Rep.") at 7-15. But even assuming that Professor Coates is correct, he never opines that these additional considerations would or should have changed my bottom-line opinion or the Trustee's decision. Most importantly, Professor Coates admits that he has "*not* conducted a complete study" of — and has *not* "reached any bottom-line conclusions" as to — the ability of Countrywide Financial Corporation ("CFC" or "Countrywide") to pay or Bank of America's potential successor liability. *Id.* at 7 (emphasis added).[2] Professor Coates also admits that he has *not* "conducted or had conducted for [him] . . . a choice-of-law analysis." *Id.*

Instead, Professor Coates suggests alternate avenues of investigation and consideration, without saying what those investigations would unveil or explaining how those considerations would undermine the ultimate conclusions reached in my original report.[3]

Nor does Professor Coates provide any opinion about whether these other areas of investigation would have (or should have) affected the Trustee's decision to enter into the Settlement. There may have been benefits to additional analysis (though Professor Coates never quantifies them), but there were certainly costs as well. Rational decision makers must consider costs as well as benefits, including the costs of acquiring additional information. Professor Coates says only that these costs would be "non-trivial," but does not describe these costs in a meaningful way or opine that these other analyses would have been worth the costs. Coates Rep. at 13 (asserting without citation that "the *likely* increase in the ability of the Trustee to make *better estimates* of the *likely* outcomes of any fully litigated Claim would have been enormously benefited by incurring those costs") (emphasis added). Nor does he describe the real potential downsides to the interests of the Trusts should the Trustee have commenced litigation as a means

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2 In this report, I refer to CFC or Countrywide, but by doing so do not mean to imply that the same principles do not apply to Countrywide Home Loans, Inc. ("CHL").

3 For example, Professor Coates states: "The Trustee has not presented evidence that it considered or took a number of steps that it could have taken to adequately evaluate the Settlement, including obtaining information about or pursuing . . ." (Coates Rep. at 1); "The evidence that the Trustee has presented as to the steps that it did take — such as obtaining a report from Capstone, and reports from Professor Robert Daines and Professor Barry Adler — shows that those reports were based on limited facts [and] were constrained by strong limiting assumptions that were not tested by the Trustee . . . that prevented the providers of the reports from obtaining more than minimal information that was likely to have affected the nature of their analyses, particularly in regards to successor liability . . ." (Coates Rep. at 2); and "[f]urther, the choice of law analysis that the Trustee obtained did not adequately consider the customs and laws that would govern the likely choice of law that would apply to any successor liability claim that the Trustee might bring, or the choices that the Trustee might have in deciding among possible courts to bring such claims, or how those choices might affect the outcome of such a choice of law analysis, or address choice of law in respect of any Claim other than successor liability or veil-piercing claims" (*Id.*).

of obtaining information. *See id.* at 13. [redacted][4] It would be entirely rational — if not mandatory — for the Trustee to consider such a risk.

While Professor Coates mentions several things that the Trustee could have considered, it is important to note that a group of sophisticated and highly motivated investors preferred the Trustee's approach (settling the claims) to Professor Coates's suggestion that they pursue additional information or litigation. The twenty-two institutional investors that participated in the negotiation of, and support, the Settlement represent sophisticated entities such as Freddie Mac, ING Investments, BlackRock, PIMCO and MetLife — among the world's largest investors. My understanding is that, as a group, [redacted] and thus were highly motivated to make value-maximizing decisions about whether and on what terms their claims should settle. *See* Institutional Investors' Responses and Objections to the Steering Committee's First Set of Interrogatories (Aug. 27, 2012), Exhibit A.

Professor Coates offers no reason to think that these sophisticated, highly motivated investors made poor decisions about settling or seeking additional information. In fact, these investors were likely in the best position to decide whether to support a settlement, having strong incentives to make a rational decision about the strength of Bank of America's corporate

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[4] *See* Griffin Dep. 227:25-229:8 [redacted] Golin Dep. 152:18-153:12 [redacted] Mirvis Dep. 128:14-24 [redacted] Koplow Dep. 36:10-16 [redacted]

separateness defense and the costs of pursuing the additional information and litigation strategy Professor Coates has suggested. I understand that [redacted] *See* Golin Dep. 313:14-22. I suspect that these investors weighed the benefits of additional research and litigation and found them wanting.

It is undisputed that in reaching their decision to support the Settlement, the institutional investors relied, in part, on their view that Bank of America had a strong separateness defense and Countrywide had limited assets. *See* Institutional Investors' Statement in Support of Settlement and Consolidated Response to Settlement Objections, Case No. 1:11-cv-05988-WHP, Dkt. No. 124 (S.D.N.Y. Oct. 31, 2011), at 24-26 ("The successor liability risk here is obvious. . . . The case for successor liability or de facto merger is far from clear. . . . It was inherently reasonable for the Trustee to settle for twice the likely recovery from Countrywide, given the prospect that successor liability issues might be lost. Settlement is also entirely reasonable given the very real possibility that Bank of America might yet bankrupt Countrywide, leaving the Trusts fighting for what they could get in a Countrywide bankruptcy. . . . It was not unreasonable for the Trustee to conclude that certainty, and the substitution of Bank of America as a solvent obligor, were a better outcome for the Trusts than years of uncertain litigation at the end of which there might be only a bankrupt Countrywide to satisfy the Trustee's claims. Given the risks, the Trustee's decision to settle might well have been the only truly *prudent* conclusion to be drawn.").[5]

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[5] *See also id.* at 6-7 ("Evaluation of any settlement necessarily requires consideration not only of the terms of the proposed settlement but an estimate of the likely outcome of a litigated alternative. . . . Speculative claims that Bank of America is liable as a successor in interest for contracts with the Countrywide Mortgage Sellers do little to assure investors that years of contested litigation will not end with only an insolvent Countrywide to respond to their claims.").

It would be entirely rational (if not required) for the Trustee to take the view of such investors into account. The fact that the Settlement had the support of a large group of sophisticated institutional investors is strong evidence that "BAC has a reasonable argument that a successor liability claim would be defeated" (Ex. 3 (Daines Rep.) at 7) and that the Settlement was reasonable.

b. None of the suggestions for additional information change my opinion on the difficulty of a successor liability claim.

None of the suggestions for additional information in Professor Coates's report alter the conclusions that I reached regarding the difficulty of pursuing a successor liability claim. In preparing my report, [redacted] *See* Daines Dep. 22:9-23:25. In rendering my initial report, I had all the information that I needed to express the opinions that I did.[6] I did not need sworn testimony to reach my conclusions, *e.g.*, that "a successor liability case would be difficult to win if a court concluded that BAC paid a fair price in the Transactions." Ex. 3 (Daines Rep.) at 7. *Cf.* Coates Rep. at 15-16.

The plain fact is that findings of successor liability are rare — a proposition I do not believe Professor Coates would dispute. They are rare, as Professor Coates has elsewhere recognized, because of the "strong, long-standing, and consistent recognition of corporate separateness" and the "consistent reluctance of the law to allow shareholders, creditors, or agents of one corporation to attach or obtain assets of another corporation by setting that separateness aside, whether styled as veil-piercing, reverse veil-piercing, substantive consolidation, constructive trusts, or other legal or equitable doctrines." Ex. 4 (Coates Report in *Starr Int'l Co.*

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[6] Contrary to the charge in Professor Coates's report, I had adequate time to reach my opinions. I was first contacted by the Trustee's counsel on April 24, 2011. I began work on my report on April 26, 2011, six weeks before I provided my written opinion.

v. Am. Int'l Grp., Inc., Case No. 05-cv-6283, Dkt. No. 184-2 (S.D.N.Y. Feb. 2, 2009)) at 1, 8. He has further opined that corporate separateness principles "apply . . . where a parent and a 100% owned subsidiary are involved — the subsidiary cannot simply grab assets of the parent company for its own benefit, or for the benefits of its creditors, because the parent will have creditors (and shareholders) of its own that have prior claims to those assets." *Id.* at 21.[7]

Professor Coates claims that "[h]ad the Trustee sought to do more than simply accept BAC's word on crucial facts, and had it not imposed such strong limits on the efforts of its advisors, the Trustee would have discovered facts such as those reflected in [Professor Coates's report in the *MBIA* case], which would tend to show that the successor liability elements of the Claims had a materially greater chance of success than the Trustee appears to have believed." Coates Rep. at 3. But Professor Coates provides no explanation for why the purportedly unreviewed facts would have materially changed the Trustee's view of the success of the successor liability claims. Reviewing the expert report of Professor Coates in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, Index No. 602825/2008 (Sup. Ct. N.Y. Cnty.), as well as reviewing additional expert material in *MBIA* (discussed below), does not change my conclusion about the likelihood of success of a successor liability claim against Bank of America.

Professor Coates has attached the report that he prepared in the *MBIA* case to his report in this case. After reviewing his report, as well as several responsive and other expert reports in *MBIA*, my opinion remains the same. In fact, this review reveals an important fact that supports my opinion: MBIA chose not to dispute evidence that Bank of America paid fair value to

7 In that case, Professor Coates was acting as an expert witness adverse to AIG and AIG sought to have Professor Coates's opinion excluded. *See* AIG's Mem. of Law in Supp. of its Mot. in Limine to Exclude the Test. of John C. Coates IV and Portions of the Test. of Ronald J. Gilson, *Starr Int'l Co. v. Am. Int'l Grp., Inc.*, Case. No. 05-cv-6283, Dkt. No. 183 (S.D.N.Y. Feb. 2, 2009).

Countrywide in the July and November 2008 transactions (also referred to as the LD2 and LD100 transactions). This makes it less likely that a successor liability claim would succeed.

In *MBIA*, Dr. John McConnell opined that Bank of America paid Countrywide adequate consideration in the LD2 and LD100 transactions. While MBIA had every incentive and opportunity to rebut Dr. McConnell's opinion, I understand that it did not. As detailed in Dr. McConnell's report, Bank of America paid a total of $46.20 billion to Countrywide in the July and November 2008 transactions in the form of cash, demand notes and liabilities assumed. *See* Ex. 5 (McConnell *MBIA* Report ("McConnell Rep.")) at 8-11. Dr. McConnell conducted a detailed, asset-by-asset valuation analysis, and concluded that "Countrywide-legacy entities received aggregate consideration from the BofA-legacy entities in the July and November 2008 transactions that exceeded the aggregate value, as defined above, of the assets they sold by $1.41 billion." *Id.* at 8.

This unrefuted analysis by Dr. McConnell is particularly important in my opinion, because a prerequisite to the sensible application of any successor liability doctrine is inadequacy of consideration. *See* Ex. 3 (Daines Rep.) at 6-7, 27-28, 32, 37-39.[8] If fair value was paid, there is little reason to apply the doctrine. I previously opined that "a successor liability case would be difficult to win *if a court concluded that BAC paid a fair price in the Transactions*." Ex. 3 (Daines Rep.) at 7 (emphasis added). Dr. McConnell's unrefuted opinion supports the idea that

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[8] For example, in my initial report I concluded that veil piercing was not likely under Delaware, New York and California law "unless the Trustee can prove that the [LD2 and LD100] Transactions harmed creditors." Ex. 3 (Daines Rep.) at 27. I also concluded that "it is highly unlikely that a de facto merger claim would succeed in Delaware absent a showing that the Transactions materially reduced the value of the selling corporations." *Id.* at 32. And while I acknowledged that New York de facto merger law is more difficult to predict, I stated that "the economic arguments and bulk of the case law favor BAC" and "the Trustee's best chance to recover under this theory would be to appeal to the strain of cases that look at simple tests and ignore the underlying economic reality (the benefits of consolidating operations, the need for legal certainty, and *the need to focus on whether creditors were harmed in the transaction*)." *Id.* at 38 (emphasis added). As to the application of the de facto merger doctrine, I testified that [redacted] Daines Dep. 263:19-23.

this fundamental condition might not be demonstrated even in a case with a full discovery record.

In short, as I testified in my deposition, [redacted] Daines Dep. 100:6-7. The de facto merger doctrine of successor liability "has been described as a 'judge-made device for avoiding patent injustice that might befall a party simply because a merger has been called something else.'" Ex. 3 (Daines Rep.) at 34-35 (quoting *Cargo Partner AG v. Albatrans, Inc.*, 207 F. Supp. 2d 86, 104 (S.D.N.Y. 2002)). If adequate consideration was provided by Bank of America in the asset transactions, it seems unlikely that Countrywide creditors suffered any prejudice, let alone patent injustice.

c. The hypothetical claims that Professor Coates suggests may have been pursued do not alter my conclusions about the difficulty of pursuing a successor liability claim against Bank of America.

Fraudulent Conveyance

Professor Coates states that he has "seen no evidence that the Trustee ever considered the possibility that CFC or its subsidiaries may have had assets in the form of potential fraudulent conveyance claims." Coates Rep. at 8. The Trustee's purported failure to consider such a claim does not impact my opinion whether the *Trustee* (not Countrywide) could have succeeded on a successor liability claim against Bank of America. And indeed, Professor Coates offers no opinion on whether a fraudulent conveyance claim would have resulted in any meaningful recovery for the Trusts.

As an initial matter, Professor Coates is describing a hypothetical fraudulent conveyance claim made by *Countrywide* against Bank of America. However, in my original report I considered the likelihood of success on claims that the *Trustee* could have asserted against Bank of America because those are the only claims within the Trustee's control. Hypothetical claims that have not been asserted by Countrywide were not relevant to my analysis.

Moreover, Professor Coates does not opine on whether such a claim would actually be successful. As Professor Coates concedes, a fraudulent conveyance claim requires "proof that less than adequate consideration was paid in the relevant transaction." Coates Rep. at 8-9. Professor Coates points to no evidence that this was the case. To the contrary, Dr. McConnell's unrebutted opinion in *MBIA* — establishing that Countrywide received adequate consideration from Bank of America in the asset-sale transactions at issue here — supports the idea that this fundamental condition could not be demonstrated even in a fully litigated case with a full discovery record. Ex. 5 (McConnell Rep.) at 8-11

Indeed, constructive fraudulent transfer claims are highly fact-intensive, not only on questions of whether reasonably equivalent value was given in the transaction, but also on whether the transferor was insolvent at the time of the transfer or became insolvent or was left with unreasonably small capital to continue on in its business as a result of the transfer. Professor Coates offers no analysis of whether anyone could establish these elements of a claim or the costs and expenses of doing so. There is competing testimony on this issue in the MBIA expert record, including the opinion of Mr. Gene Deetz, CPA/ABV, ASA, CFF, that the Countrywide entities were solvent at the time of both the July and November 2008 asset sale transactions.[9]

Similarly, the value of a claim for intentional fraudulent conveyance is unclear. Thomas L. Porter, Ph.D., C.P.A., concluded in *MBIA* that "the amount [Bank of America] paid for [Countrywide's] assets" in the July and November 2008 transactions "was determined using methods designed to reasonably approximate the assets' fair value. This means that the asset

9 As MBIA stated in its reply in support of its motion for summary judgment, "[t]he issue of CFC's and CHL's solvency is clearly in dispute, as the parties submitted competing expert reports on the issue." MBIA Reply Mem. of Law in Further Supp. of Mot. for S.J., *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 3645 (Nov. 27, 2012) at 19.

sales were intentionally designed to provide Countrywide with the same economic value after the asset sales as it had before the asset sales . . . . [T]he asset sale transactions converted future income streams from currently illiquid assets into their equivalent net present value in liquid consideration." Ex. 6 (Porter *MBIA* Rebuttal Report) at 2.

Moreover, it is not correct to say without qualification, as Professor Coates does on page 8 of his report and reiterates in substance throughout, that Countrywide or its subsidiaries "may have had assets in the form of potential fraudulent conveyance claims." That could only be true if Countrywide were in bankruptcy. Only in bankruptcy do fraudulent conveyance claims become capable of assertion by the company due to provisions of the Bankruptcy Code.

In this case, Countrywide was not in bankruptcy when the Trustee was faced with a decision whether to settle, and the Trustee had minimal ability to force Countrywide into bankruptcy. Professor Coates does not address whether Countrywide could or should have been put into bankruptcy. He also does not analyze whether such a bankruptcy would have been likely if the Trustee were pursuing various claims rather than settling. But *only in bankruptcy and not otherwise* could Countrywide "have had a basis to increase its assets by pursuing such a claim," as Professor Coates says the Trustee should have considered. Coates Rep. at 8.

Professor Coates does not contend that the investors would have been better off if Countrywide were in bankruptcy. If the Trustee undertook an evaluation of the benefits of a Countrywide bankruptcy, where a hypothetical fraudulent conveyance claim by Countrywide might exist, the Trustee would also have had to consider the costs, delays and risks of a Countrywide bankruptcy. For example, the Trustee would be only one creditor in a long line of creditors, and would be a creditor with only contingent claims against Countrywide's bankruptcy estate. As is clear from public disclosures, there are numerous other litigations pending against legacy Countrywide entities. *See* Bank of America Corp., Annual Report (Form 10-K) (Feb. 28, 2013) at 230-31, 234-37. It is unclear why investors would have been better off if Countrywide were in bankruptcy.

Fiduciary Duty

Professor Coates's objection that he has "seen no evidence that the Trustee considered the possibility that CFC and its subsidiaries may have more assets than reflected in the Capstone report based on their having fiduciary duty claims against BAC or its subsidiaries" is irrelevant to the conclusions in my initial report and omits the fact that, absent evidence of harm, such claims would be highly unlikely to succeed or provide value to Countrywide if successful. Coates Rep. at 9.

This fiduciary duty claim, like the fraudulent conveyance claim, is one that Countrywide, not the Trustee, might bring. *See* p. 11, *supra*. So even if a fiduciary duty claim was successful, any recovery would flow to Countrywide (not the Trustee) and thus be subject to multiple claims from all of Countrywide's creditors. Professor Coates also never asserts that such a claim actually could be successful. Moreover, because undisputed evidence establishes that fair value was paid in the LD2 and LD100 transactions, it is not clear what damages Countrywide would be able to obtain through a fiduciary duty claim based upon those transactions.

Professor Coates asserts that the subsidiary directors were obligated to act in the best interests of the subsidiary's creditors such that the transactions between Bank of America and Countrywide after the Red Oak merger were "conflict-of-interest transaction[s]" requiring proof of entire fairness. Coates Rep. at 9-10. But the legal and factual predicates for such a claim are uncertain. Mr. Deetz, for example, has provided an opinion in *MBIA* that the Countrywide entities were in fact solvent at the time of both the July and November 2008 sale transactions.

Moreover, there is unrefuted evidence that Bank of America did pay a fair value. *See* Ex. 5 (McConnell Rep.) at 8-11.

PSAs and Servicing Losses

Professor Coates's complaint that he has "seen no evidence that the Trustee obtained information or evaluated successor liability claims based on the contract provisions of the PSAs" in my view provides no basis to criticize the Trustee's decision. Coates Rep. at 10.

As an initial matter, the PSAs do not provide for successor liability claims, as Professor Coates's report suggests. Instead, the PSAs merely provide for certain obligations of the Master Servicer, Countrywide Home Loans Servicing Inc. ("CHLS"), which could be replaced by a successor servicer under the PSAs. In my original report, I acknowledged that CHLS was one of the assets *transferred* in the LD2 transaction. *See* Ex. 3 (Daines Rep.) at 9. To the best of my knowledge, Bank of America has never contended that the liabilities of the *Master Servicer* have not been transferred to Bank of America's subsidiary, Bank of America, N.A.

Professor Coates states that "[l]iabilities arising from failure to perform [servicing] obligations were not subject to the defense that CFC had insufficient assets . . . ." Coates Rep. at 10. However, the claims for breaches of representations and warranties are *origination* claims, not *servicing* claims. And under the PSAs that Professor Coates cites, liability for the origination claims runs to CHL (the Originator) and not CHLS (the Master Servicer). *See, e.g.*, CWHL 2004-22 Pooling and Servicing Agreement § 2.03. As to CHL, the corporate separateness defense applies with full force. The provisions he cites in his report do not apply to these origination claims.

2. The expert record and briefing on successor liability in *MBIA* do not alter my original opinions on the difficulty of pursuing a successor liability claim against Bank of America.

Professor Coates's evaluation of my report includes, as an attachment, his report in the *MBIA* case. Therefore, I have reviewed expert reports related to successor liability from both sides in *MBIA*, as well as the briefs filed in conjunction with cross motions for summary judgment on successor liability in that case. I am attaching certain of Bank of America's expert reports filed in *MBIA* as exhibits to this report. *See* Exs. 5-12. That record, as well as MBIA's decision not to rebut the evidence that fair value was paid, further supports my original view that a successor liability claim against Bank of America would be difficult.

At a minimum, the battle of experts in *MBIA* demonstrates the extremely problematic nature of litigating a successor liability claim. The successor liability litigation in *MBIA* has already lasted three years, has involved protracted discovery, and is still only at the summary judgment stage.

Moreover, each of the expert opinions in *MBIA* offered by Bank of America offers reasonable rebuttals to Professor Coates's conclusions in his report:

First, in both his *MBIA* report and in his response to my opinion, Professor Coates refers to the LD2 and LD100 transactions as "Asset Stripping Transactions." *E.g.*, Coates Rep. at 2-3. This pejorative description is unsupported however. Professor Coates offered no analysis to support the idea that the transactions actually reduced the value of Countrywide — and this is perhaps the fundamental issue. As discussed earlier, Dr. McConnell concluded that Bank of America did the opposite of "asset stripping." Bank of America paid $46.20 billion in consideration for assets worth $44.78 billion. *See* Ex. 5 (McConnell Rep.) at 8. Thus, Countrywide "received aggregate consideration from the BofA-legacy entities in the July and

November 2008 transactions that exceeded the aggregate value . . . of the assets they sold by $1.41 billion." *Id.* MBIA did not even attempt to challenge that conclusion.

As Professor John C. Coffee explained, "once we follow the flow of funds between BAC and CFC and its subsidiaries after the date of these July and November transactions, we see that assets were not 'stripped'; rather, they were in large measure converted from illiquid to liquid in a manner that provided CFC and CHL with the cash necessary to meet their obligations as they became due." Ex. 7 (Coffee MBIA Report ("Coffee Rep.")) at 4.

Second, Professor Coates states that the Red Oak Merger and the LD2 and LD100 transactions "are inconsistent with M&A customs and practices for how a purchaser would customarily effect the acquisition of a stand-alone entity." Coates Rep. at 3. However, Professor Coffee opined that "[t]here is no rule in law, or any generally recognized custom or practice, that required BAC to treat all of CFC's creditors identically or equally. An acquirer is free to decide in its own best interests to pay off some creditors of an acquired business, but not others." Coffee Rep. at 21. Professor Coffee further stated that "triangular mergers are the norm in M&A custom and practice," and that "the normal custom and practice (at least within the banking sector) is for the acquiring firm to seek selectively to avoid the assumption of some liabilities." *Id.* at 23, 45. *See also id.* at 21.

In addition, Professor Guhan Subramanian concluded that, contrary to Professor Coates's assertion that there are only two customary post-acquisition integration strategies (absorption and confederation), "absorption strategies are *regularly* paired with triangular mergers and designed to take advantage of potential synergies while preserving separation between the acquirer and the target entities." Ex. 8 (Subramanian *MBIA* Rebuttal Report ("Subramanian Rebuttal Rep.")) at 1-2 (emphasis added).

Finally, Professor Timothy J. Galpin stated that "contrary to Professor Coates's assertion that purchasers have a 'custom and practice' of employing either absorption or confederation, sophisticated market participants do not simply choose full absorption or full confederation. . . . The end result more often than not is a transition that falls between Professor Coates's two extremes." Ex. 9 (Galpin *MBIA* Report ("Galpin Rep.")) at 8. Professor Galpin concluded that Bank of America's transition practices were consistent with those of other "large-scale organizational change efforts" he has observed, and were thus in accordance with industry custom and practice. *Id.* at 15, 23.

Third, Professor Coates states that "[t]he Asset-Stripping Transactions had equivalent economic effects on CFC, CHL and the Other Subs and their business operations as if they had been *de jure* merged into BAC and its subsidiaries." Coates Rep. at 3. But Professor Coffee concluded that "the July and November transactions were the precise opposite of a *de jure* triangular merger because such a merger normally gives stockholders something (stock in BAC) and creditors nothing. In contrast, the July and November transactions gave creditors something (cash and notes) and stockholders nothing." Ex. 7 (Coffee Rep.) at 23.

Moreover, Professor Subramanian opined that whether the transactions achieved the "economic equivalent" of a *de jure* merger or "could have been accomplished" through a *de jure* merger is irrelevant. I agree with Professor Subramanian that if courts too quickly invoked "the *de facto* merger doctrine it would wreak havoc on transactional practice, because (i) the benefits of asset partitioning, entity shielding, and internal capital markets described in my original report would be eviscerated, and (ii) *de facto* merger would become the norm rather than the exception. This would deter economically beneficial transactions, as transactional planners could no longer predict the legal consequences of the structures that they use." Ex. 8 (Subramanian Rebuttal Rep.) at 1.

Fourth, Professor Coates states that "CFC and its subsidiaries ceased operating a business while BAC [ ] continued maintaining the ownership, management, personnel, physical location and the bulk of the assets and business operations through other BAC commonly controlled and owned subsidiaries . . . ." Coates Rep. at 3. However, Professor Coffee observed that "it seems obvious that BAC was not a 'mere continuation' of CFC, because it is far larger, with far broader operations, a different senior management, and far more and different shareholders. Indeed, BAC can hardly be seen as a 'mere continuation' of CFC, where (i) CFC's shareholders received only 2% of BAC's common stock, and (ii) over four years later, CFC has not been dissolved." Ex. 7 (Coffee Rep.) at 62.

Fifth, Professor Coates repeatedly questions Countrywide's solvency at LD2 and LD100. *See* Coates Rep. at 3, 9, 10, 17, 22, 23, 24. But, Mr. Deetz concluded in the *MBIA* case that Countrywide and CHL were solvent as of July 31, 2008 and November 30, 2008.

Sixth, Professor Coates states that "[t]he procedures by which the Asset-Stripping Transactions were approved were inconsistent with corporate governance customs and practices for economically similar transactions, and certainly inconsistent with 'best practices.'" Coates Rep. at 3. But, the expert record in *MBIA* casts real doubt on the legal and factual predicates of this claim. As noted above, there is unrefuted evidence that Bank of America did pay a fair value in the July and November 2008 transactions. *See* Ex. 5 (McConnell Rep.) at 8-11. This unrefuted testimony undermines Professor Coates's corporate governance concerns because the only purpose for corporate governance and "best practices" in the first place is to try to make it more likely that fair value is paid. Therefore, if Bank of America paid fair value, there is no reason to worry about these objections. Moreover, Professor Coates has assumed, but not established, the factual basis for his opinion, *i.e.*, the insolvency of Countrywide. At the very least, there is disagreement in the *MBIA* expert record about this important predicate. *See* note 9, *supra*.

3. **The opinions I express in my original report are also supported by the litigation history of successor liability claims against Bank of America, in which courts routinely dismiss those claims at the pleading stage.**

The opinions that I expressed in my original report are supported by the *MBIA* expert record and bolstered by surveying the outcomes of successor liability claims asserted in litigation against Bank of America in recent years. These claims are dismissed regularly at the pleading stage and, when not dismissed, are highly contested and hotly litigated for years (with no guarantee of success even then).

The balance of the court opinions that have considered the successor liability issue clearly weighs in favor of considering successor liability an unlikely result. There are at least twenty-two federal cases, decided both before and after the date of my expert report, in which successor liability claims against Bank of America have been dismissed — that is, rejected by the court at the pleading stage, even assuming all the facts asserted by the plaintiffs were true. Before the Settlement, nine different judges in eight different courts had granted motions to dismiss successor liability claims of various sorts against Bank of America (if limited to RMBS-related cases, two judges in two different courts); after the Settlement, twelve decisions by three different judges have likewise dismissed such claims (if limited to RMBS-related cases, ten decisions by one judge).[10] I am attaching as Exhibit 13 to this report a chart that summarizes these decisions.

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10 In the MBS context, the cases dismissing successor liability claims include: *Argent Classic Convertible Arbitrage Fund LP v. Countrywide Fin. Corp.*, 2009 WL 8572340 (C.D. Cal. Mar. 19, 2009), *In re IndyMac*

Most notably, in *Allstate Insurance Co. v. Countrywide Financial Corp.*, 842 F. Supp. 2d 1216 (C.D. Cal. 2012), the court granted Bank of America's motion to dismiss Allstate's successor liability claims, finding that plaintiffs had failed to adequately plead a *de facto* merger under Delaware law with respect to (1) the Red Oak merger standing alone, (2) the LD2 transaction standing alone, (3) the LD100 transaction standing alone, and (4) the three transactions together.

In *Allstate*, the court observed that "Delaware uses the doctrine of *de facto* merger sparingly, 'only in very limited contexts.'" *Id.* at 1231. The court then went on to find that "Allstate has never contended that the Red Oak Merger failed to comply with applicable Delaware statutes, and no court has ever so-found" and that "Countrywide retained all of its assets in the Red Oak Merger. It is therefore difficult to see how creditors could have been harmed by the Red Oak Merger standing alone." *Id.* at 1231-32. Finally, the court concluded that "Allstate has pleaded no facts from which the Court could infer that the compensation in the [LD2] and LD100 transactions was not reasonably equivalent. Neither has Allstate pleaded any

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Mortgage-Backed Secs. Litig., 718 F. Supp. 2d 495 (S.D.N.Y. 2010), *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 2011 WL 1765509 (C.D. Cal. Apr. 20, 2011), *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164 (C.D. Cal. 2011), *Allstate Ins. Co. v. Countrywide Fin. Corp.*, 842 F. Supp. 2d 1216 (C.D. Cal. 2012), *Thrivent Fin. for Lutherans v. Countywide Fin. Corp.*, 2012 WL 1799028 (C.D. Cal. Feb. 17, 2012), *Dexia Holdings, Inc. v. Countrywide Fin. Corp.*, 2012 WL 2161498 (C.D. Cal. June 1, 2012), *Thrivent Fin. for Lutherans v. Countywide Fin. Corp.*, 2012 WL 2161002 (C.D. Cal. June 1, 2012), *Nat'l Integrity Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 U.S. Dist. LEXIS 184429 (C.D. Cal. June 29, 2012), *Mass. Mut. Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 WL 3578666 (C.D. Cal. Aug. 17, 2012), *Minnesota Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 WL 6742119 (C.D. Cal. Dec. 6, 2012), *Bank Hapoalim B.M. v. Bank of America Corp.*, 2012 WL 6814194 (C.D. Cal. Dec. 21, 2012), and *F.D.I.C. v. Countrywide Fin. Corp.*, 2013 WL 49727 (C.D. Cal. Jan. 3, 2013).

Outside the MBS context, the cases dismissing successor liability claims include: *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177 (N.D. Cal. 2009), *Infante v. Bank of America Corp.*, 680 F. Supp. 2d 1298 (S.D. Fla. 2009), *Jones v. Countrywide Home Loans, Inc.*, 2010 WL 551418 (N.D. Ill. Feb. 11, 2010), *Ralston v. Mortgage Investors Group, Inc.*, 2010 WL 1136317 (N.D. Cal. Mar. 22, 2010), *Madura v. Bank of America, N.A.*, 2010 WL 2821936 (M.D. Fla. July 16, 2010), *Pajarillo v. Bank of America*, 2010 WL 4392551 (S.D. Cal. Oct. 28, 2010), *Araki v. Bank of America*, 2010 WL 5625970 (D. Haw. Dec. 14, 2010), *Rodenhurst v. Bank of America*, 2011 WL 4625696 (D. Haw. Sept. 30, 2011), and *Serna v. Bank of America, N.A.*, 2012 WL 2030705 (C.D. Cal. June 4, 2012); *cf. Crawford v. Countrywide Home Loans, Inc.*, 2010 WL 597942 (N.D. Ind. Feb. 12, 2010) (denying plaintiffs' motion to add Bank of America as additional defendant on successor liability grounds).

facts from which the Court could infer that the transactions were designed to disadvantage creditors." *Id.* at 1232.

Professor Coates does not claim to predict the eventual results of litigation of successor liability claims, nor do I, but based on the *MBIA* expert record and decisions in other cases, I stand by my initial view that "a successor liability case would be difficult to win unless the Transactions materially reduced the value of the legacy Countrywide subsidiaries" (Ex. 3 (Daines Rep.) at 38), and that it was appropriate for the Trustee to consider the difficulty of prevailing on a successor liability claim in reaching its decision to enter into the Settlement.

4. Nothing in Professor Coates's report changes my opinion that Delaware law would probably apply to successor liability claims.

Professor Coates asserts that a "more careful analysis" of choice of law was required (Coates Rep. at 23), but does not conduct a separate choice of law analysis, either in his report for AIG in this case or in the *MBIA* report he attaches. Coates Rep. at 7 ("Nor have I conducted or had conducted for me . . . a choice-of-law analysis."). Professor Coates does not say that New York law should apply, or express any opinion on what the right choice of law would be.

My initial report analyzed the choice of law issue as it relates to successor liability and the possible law that courts could consider applying (including New York law, which Professor Coates appears to favor), and concluded that "a court would probably apply Delaware law" based on the internal affairs doctrine. Ex. 3 (Daines Rep.) at 39; *see generally id.* at 39-43. I specifically concluded that "a New York court would likely apply Delaware law," though this is not certain, "Delaware courts are likely to apply Delaware law" and "it seems more likely that a California court would apply Delaware law." *Id.* at 39, 41, 43. Moreover, after reviewing the lengthy choice of law briefing in *MBIA*, my opinion remains unchanged.

As to the substance of Professor Coates's choice-of-law critique, there are several problems:

First, Professor Coates incorrectly states that one New York court has "concluded" that it would apply New York law to a successor liability claim against Bank of America. Coates Rep. at 21. I presume that he is referencing the *MBIA* case, but I understand that the New York court considering successor liability claims against Bank of America in that case has, in fact, reached no conclusion on the choice of law argument.[11] In *MBIA*, both sides briefed this issue on summary judgment, it was a topic of debate during oral argument, and it is still under consideration by the court.[12]

Second, Professor Coates suggests that the Trustee should have "considered the choice of law analysis more carefully, by getting some more detailed sense of how often and when cases involving *creditors* led courts to use interest analysis rather than the internal affairs doctrine." Coates Rep. at 22. However, I did consider the interest-of-creditors argument in my initial report, and still concluded that, while the outcome is uncertain, "a New York court would likely apply Delaware law." Ex. 3 (Daines Rep.) at 39-40.

Predicating choice of law on the interests of creditors would create uncertainty about important legal rules because the state law applicable to corporate-separateness issues would

[11] *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, Index No. 602825/2008, 36 Misc. 3d 1215(A) (Sup. Ct. N.Y. Cnty. Apr. 27, 2010) (applying New York law without discussion). *See also* Order re Mot. to Compel, *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 1736 (Sup. Ct. N.Y. Cnty. June 4, 2012), at 5 ("The court makes no finding on the choice of law argument.").

[12] *See* (1) MBIA Mem. of Law in Supp. of Mot. for S.J., *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 2074 (Sept. 28, 2012) at 17-28; (2) BAC Mem. of Law in Opp'n to MBIA's Mot. for S.J., *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 2212 (Nov. 7, 2012) at 8-18; (3) MBIA Reply Mem. of Law in Further Supp. of Mot. for S.J., *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 3645 (Nov. 27, 2012) at 2-6; (4) BAC Mem. of Law in Supp. of Mot. for S.J., *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 2073 (Sept. 28, 2012) at 21-25; (5) MBIA Mem. of Law in Opp'n to BAC Mot. for S.J., *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 2213 (Nov. 7, 2012) at 11-24; (6) BAC Reply Mem. of Law in Further Supp. of Mot. for S.J., *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 3608 (Nov. 27, 2012) at 4-8; and (7) Transcript of Oral Argument, *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 4036 (Jan. 9, 2013) at 28-34, 115-43.

then depend on the identity of the creditor that challenged the transaction. These dangers are detailed in the *MBIA* briefing. As I explained in my initial report, "Delaware, contracting parties and capital markets generally all have a strong interest in the clarity offered by a bright line rule (like following the law of the state of incorporation), while an ad hoc 'state's interest' analysis would generate a great deal of uncertainty . . . ." Ex. 3 (Daines Rep.) at 41.

Moreover, federal courts assessing the choice of law issues in cases arising out of the same facts have repeatedly reached the conclusion that Delaware law applies to creditors' successor liability claims against Bank of America. *See, e.g.*, *Allstate Ins. Co. v. Countrywide Fin. Corp.* 824 F. Supp. 2d 1164, 1173 (C.D. Cal. 2011) ("[A]pplying Delaware law to *de facto* merger questions will allow Delaware to provide its corporations with one bright-line rule rather than subjecting them to the vagaries of multiple states' rules."); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 2011 WL 1765509, at *4 (C.D. Cal. Apr. 20, 2011) ("Mergers, reorganizations, and matters that may affect the interests of the corporation's creditors all fall within the scope of Section 302 [of the Restatement (Second) of Conflict of Laws], which prescribes the law of the state of incorporation.").

And in *MBIA*, even MBIA appears to have questioned this position at summary judgment by arguing that North Carolina (the place of business of Bank of America) has the most significant interest in the case. *See* MBIA Reply Mem. of Law in Further Supp. of Mot. for S.J., *MBIA Ins. Corp.*, Index No. 602825/2008, Dkt. No. 3645 (Nov. 27, 2012) at 3 (arguing "North Carolina law is the more appropriate alternative (than Delaware law) to New York law because North Carolina is BAC's principal place of business."). In my opinion, it would be quite surprising, and unfounded, for a court to apply the law of a corporation's place of business to the question of its having or not having successor liability as a result of its participation in a triangular merger and asset purchases: it is difficult to understand why the principal-place-of-business state would have the requisite level of interest (Professor Coates's report does not appear to disagree).

Third, Professor Coates argues that Delaware, while "well-known and highly regarded for its case law regarding alleged fiduciary duty breaches in cases brought by shareholders," is not a common choice of law or forum "for resolving non-shareholder contract disputes involving private companies." Coates Rep. at 21. Professor Coates suggests that the fact that the PSAs were governed by New York law militates in favor of applying New York law to the successor liability claims. *See id.*

However, successor liability claims are *not* contract disputes. Instead, they go to the essence of Bank of America's corporate structure. These claims will determine what assets are available to creditors of Countrywide and, as many have recognized, this is the essential role of corporate law.[13] Because successor liability claims so directly involve this essential role of determining the assets that creditors can claim, courts often rely on the law of the state of incorporation when resolving such claims. Indeed, by their terms, the PSA's choice-of-law provisions are not applicable to successor liability claims but to the primary contract claims. And, as noted above, "an ad hoc 'state's interest' analysis would generate a great deal of uncertainty." Ex. 3 (Daines Rep.) at 41.

Of course, even if New York law were to apply to the successor liability claim, Bank of America would have a reasonable argument that a successor liability claim would be defeated. Even under New York law, an essential element of any successor liability claim based on de

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[13] *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

facto merger should be whether fair consideration was paid.[14] I have seen no evidence that the consideration here was grossly inadequate. Rather, the undisputed McConnell report suggests that fair value was paid. And, as indicated in my initial report, New York and Delaware courts have not held a buyer liable on facts similar to those here. *See* Ex. 3 (Daines Rep.) at 28.

5. Other issues raised by Professor Coates are outside the scope of my report.

Professor Coates devotes a significant portion of his report to critiques of the Trustee's methods and process — *e.g.*, contending that the Trustee should have used probability weightings or litigated (like MBIA) rather than settled. *See* Coates Rep. at 12-19. These issues fall well outside the scope of my assignment and analysis and may be better suited for an expert on trustee's functions.

Respectfully submitted,

Rob Daines

Robert M. Daines
March 14, 2013

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14 *See, e.g.*, *Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 (2d Cir. 2003) ("So long as the buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in thus limiting recovery to the proceeds of the sale-cash or other consideration roughly equal to the value of the purchased assets would take the place of the purchased assets as a resource for satisfying the seller's debts. Moreover, as the magistrate judge observed, allowing creditors to collect against the purchasers of insolvent debtors' assets would 'give the creditors a windfall by increasing the funds available compared to what would have been available if no sale had taken place.'").

Exhibit 50

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'Ridiculous' $2.7B MBS Suit Needs Reining In, Judge Says

By **Eric Hornbeck**

Law360, New York (April 24, 2013, 5:57 PM ET) -- A New York state judge hacked apart an "impenetrable" and "ridiculous" $2.7 billion mortgage-backed securities lawsuit against a half-dozen megabanks during a hearing Wednesday, saying it was too convoluted to manage.

Investment vehicles associated with the collapsed German bank WestLB AG have sued JPMorgan Chase & Co., Credit Suisse AG, Morgan Stanley, Royal Bank of Scotland Group PLC, Merrill Lynch & Co. Inc. and Goldman Sachs Group Inc. and their affiliates, claiming that they misrepresented the underwriting standards they used on 272 separate securities worth $2.7 billion that the WestLB entities bought in 163 different securities offerings.

But Judge Charles E. Ramos said during a hearing that the sheer size of the case, with its plethora of different defendants and offering documents in the more than 500-page complaint, needed to be broken up because he couldn't evaluate the merits of the convoluted allegations.

"I'm tempted to dismiss it just because it's ridiculous, but I'm not going to do that," Judge Ramos told the dozens of attorneys in his downtown Manhattan courtroom.

"I don't understand what you're alleging in regards to each of these offerings, and I need to know that. ... You're just putting too much on the court's plate right now," he said.

Calling the complaint a "mess," Judge Ramos said he needs to known what specific misrepresentations are alleged for each of the 163 different offerings in order to evaluate if the complaint is specific enough under New York state law standards.

"I'm going to make you break this down ... even if it looks like 163 different cases, I want to deal with each offering separately," the judge said.

Once the hulking complaint is streamlined, Judge Ramos said he'd be able to tackle the six banks' motions to dismiss, which allege that the complaint is too vague and that the WestLB affiliates waited years too long to sue.

If the complaint were allowed to proceed as-is, the judge worried, it might allow weaker allegations on some of the offerings to slip through to discovery.

The plaintiffs are all entities affiliated with the late German bank WestLB, which collapsed after the financial crisis. What remains of its banking operations is being managed by a German government-backed entity called Erste Abwicklungsanstalt, and its portfolio management business is now known as Portigon AG, according to the complaint.

The plaintiffs claim that they were defrauded because the banks lied when they said that the mortgages in the securities had been vetted for the borrowers' ability to repay and the value of the collateral backed by their mortgages.

The plaintiffs are represented by Scott Saham of Robbins Geller Rudman & Dowd LLP.

JPMorgan is represented by Daniel McLaughlin of Sidley Austin LLP, who argued on behalf of all the defendants. JPMorgan and Credit Suisse are also represented by Cravath Swaine & Moore LLP. Morgan Stanley is represented by Davis Polk & Wardwell LLP. Royal Bank of Scotland Group PLC is represented by Gibson Dunn & Crutcher LLP. Merrill Lynch & Co. Inc. is represented by Skadden Arps Slate Meagher & Flom LLP. Goldman Sachs Group Inc. is represented by Sullivan & Cromwell LLP.

The case is Phoenix Light SF Ltd. et al. v. J.P. Morgan Securities LLC et al., case number 651755/2012, in the Supreme Court of the State of New York, County of New York.

--Editing by Elizabeth Bowen.

Exhibit 51

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), Petitioner, for an order, pursuant to CPLR § 7701, seeking judicial instructions and approval of a proposed settlement.	Index No. 651786/2011 Assigned to: Kapnick, J.

Expert Report of

Phillip R. Burnaman, II

The GreensLedge Group LLC

Opinion on Settlement Amount,
Valuation of Servicing Improvements
and Certain Document Exception Cures

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Contents

1 Scope of Work

On June 28, 2011, The Bank of New York Mellon ("BNYM" or the "Trustee"), in its capacity as trustee or indenture trustee of 530 RMBS trusts (the "Covered Trusts") entered into a settlement agreement (the "Settlement Agreement") with Bank of America Corporation ("BAC"), BAC Home Loans Servicing, LP ("BACHLS" and, together with BAC, "BANA"), Countrywide Financial Corporation ("CFC") and Countrywide Home Loans, Inc. ("CHL" and, together with CFC, "Countrywide"), regarding claims belonging to the Covered Trusts concerning (i) alleged breaches by Countrywide of representation and warranties related to certain of the residential mortgage loans sold by Countrywide to the Covered Trusts, (ii) alleged servicing breaches by the Master Servicer for the Covered Trusts, and (iii) alleged documentation defects.[1]

In addition to BANA and Countrywide agreeing to pay a settlement payment of $8.5 billion (the "Settlement Amount"), BANA agreed to perform its servicing obligations under the Covered Trusts' governing agreements in accordance with a series of "servicing protocols" designed to improve the servicing operations of the loans, including, in some cases, transferring the responsibility for servicing of certain non-performing loans to specialty Subservicers (such "servicing protocols," which are set out in Paragraph 5 of the Settlement Agreement, are referred to herein, collectively, as the "Servicing Improvements").

BNYM engaged The GreensLedge Group LLC to provide its expert opinion on the following issues:

1. The reasonableness of the agreed-to compensation detailed in Paragraph 3 of the proposed Settlement Agreement,
2. The reasonableness of the assumptions and the competing methodologies that the Institutional Investors and BANA presented during the negotiations to estimate the size of the potential repurchase liability, and
3. A reasonable expectation of the monetary value of the Servicing Improvements.

To undertake the review of the status and performance of the loans and to enable me to quantify the benefits of the Servicing Improvements, I accessed data in CoreLogic's Securities databases. These databases and systems are commonly used to track the performance of mortgage loans in securitizations based upon data supplied by loan servicers and are generally considered to be reliable and market leading sources of mortgage performance data.

I authored this expert report in collaboration with my colleagues at GreensLedge. My experience and qualifications are set forth in Appendix A. Neither I nor GreensLedge have any economic interest in this matter or any financial stake in any particular outcome.

[1] Capitalized terms not defined herein will have the meaning prescribed to them in the Settlement Agreement.

2 Summary and Conclusion

BANA, BNYM, and the Institutional Investors negotiated the Settlement Agreement in the first half of 2011and signed it on June 28, 2011. It represented considerable effort by a large number of sophisticated parties and their equally expert counsel to address issues described in my report. I have reviewed much of the work done to negotiate the settlement, I have also reviewed the record surrounding the negotiations and I have performed my own analysis on the data pertinent to the Settlement Agreement. Based on the work that I performed, my opinion is:

> ***The $8.5 billion Settlement Amount detailed in Paragraph 3 of the proposed Settlement Agreement represented a reasonable outcome to this negotiation,***
>
> ***The assumptions and the competing methodologies the Institutional Investors and BANA presented during the negotiation to estimate the size of the potential repurchase claims, employed standard mortgage finance analysis and were reasonable as of the time they were made, and***
>
> ***A reasonable expected monetary value of the Servicing Improvements as of June 2011 would be $2.51 to $3.07 billion.***

The Settlement Amount

The character and process of the negotiations among BANA, BNYM, and the Institutional Investors regarding the Settlement Amount had many components that I would expect to see in a valuation exercise in the context of mortgage finance. Redacted [redacted] These were sufficiently diverse as to yield initial positions that were far apart. However, the assumptions and methodologies employed by the parties to the negotiations were within the usual and customary framework of mortgage valuation and their respective outcomes had sufficient quantitative and qualitative support that an independent third party would conclude that their estimates were well reasoned. The parties employed a standard mortgage modeling framework to estimate cumulative losses. Given the information they possessed in early 2011, the assumptions they employed were reasonable, with a single exception that is noted in Section 5.4. Employing a similar mortgage modeling methodology, using data available to me as of the date of this report (March 2013), and using my own set of assumptions, I calculate that a conservative estimate of total cumulative losses on the Covered Trusts would be $84.7 billion. My result falls between the estimates of BANA and the Institutional Investors. I conclude that these respective processes and assumptions were reasonable and the negotiating positions are consistent with common practices in the mortgage market.

BANA and the Institutional Investors each provided to the parties a unique framework for estimating the number of loans that they believed would be subject to valid claims for repurchase by the loan originator for breach of an applicable representation and warranty. There is no standard methodology for this analysis. I therefore examined each of the parties' positions with the benefit of my experience in the mortgage market and looked to the few examples of similar settlements that I could find, in order to opine on the reasonableness of the respective assumptions and the application of their methodology regarding this calculation. Notwithstanding the significantly diverse outcomes of BANA's and the Institutional Investors' approaches to this computation, I do not find that their negotiation positions were unreasonable or that their methodologies were unsupportable.

Applying my industry experience and performing my own examination of the methodologies used during the negotiations, I sought to quantify a reasonable range for the estimate of potential damages from a breach of applicable representations and warranties. In my opinion, I conclude that a reasonable range for the estimate of potential repurchase liability from Countrywide's breach of representations and warranties would be $8.2 billion to $12.9 billion before taking into account any adjustment for counterparty risk, successor liability issues or litigation risk and delays. I also conclude that a Settlement Amount within or below this range is reasonable given the facts and uncertainties in this matter, as described more fully in this report.

In my opinion, the methodologies employed by the parties in reaching the Settlement Amount were reasoned, comprehensive and consistent with my experience in the mortgage finance industry. Multiple reasonable outcomes, uncertainty regarding assumptions and lack of definitive or agreed-upon data are common hurdles in mortgage finance transactions. Based on my review of the record in this matter, the negotiation process appeared consistent with many transactions in the mortgage marketplace where quantitative and qualitative factors must be considered in reaching a negotiated settlement.

The Servicing Improvements

In my opinion, the Servicing Improvements provide additional value to the Covered Trusts and should be considered in addition to the cash component of the Settlement Amount.

My opinion calculates the value of the Servicing Improvements as of the June 2011 Settlement Agreement date, using historical portfolio information as of that date in order to calculate a reasonably expected monetary value as of that date. The actual experience of the application of the terms in the Settlement Agreement and the actual performance of the Covered Trusts are not factors in my analysis.

The Servicing Improvements are intended to enhance the quality of servicing of the loans by providing concrete requirements and performance measures beyond the Master Servicer's obligation to service the loans prudently in accordance with the relevant provisions of the governing agreements of the Covered Trusts. In my opinion, the Servicing Improvements are measures that go beyond the industry norm for servicers and would not have been available to the Covered Trusts without the benefit of the Settlement Agreement. To assign a monetary value to the Servicing Improvements, I applied several common mortgage valuation metrics, as described fully in this report.

In my opinion, the primary benefit of the Serving Improvements to the Covered Trusts will be directly derived from an improvement in the processing of High Risk Loans (defined below). Improved servicing of High Risk Loans can be quantified using two metrics: (i) the net increase in re-performance rates for High Risk Loans, and (ii) the reduction in the foreclosure timeline for High Risk Loans. In Section 10, I set out a methodology to calculate the monetary benefit resulting from an improvement in those metrics, and apply that methodology to the High Risk Loans in the Covered Trusts according to the terms of the Settlement Agreement. The result of my calculation is that the incremental improvement in loan re-performance and the incremental reduction in time to foreclosure would reasonably be believed to create a monetary benefit to the Covered Trusts in the amount of $2.42 to $2.65 billion.

In my opinion, 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. The cost to be incurred by BANA, and consequently the benefit derived from this aspect of the Servicing Improvements, I calculate has a value to the Covered Trusts between $98 million and $411 million as described in Section 11. This benefit is directly attributable to the actual loan transfers and because this expense is not borne by the Covered Trusts, it represents a monetary benefit to the Covered Trusts as well.

In my opinion, the potential Master Servicing Fee Adjustment payable to the Covered Trusts could be as much as $750 million, as I discuss in Section 12. The probability of receiving this benefit is directly reduced by the transfer and improved servicing of High Risk Loans. The greatest monetary benefit to the Covered Trusts of this fee adjustment is dependent on assumptions that would reduce the benefit calculated in Section 10 as it presumes fewer High Risk loans would be transferred to Subservicers. This is consistent with my understanding of the intent of the Servicing Improvements; namely that the Master Servicing Fee Adjustment was to be an incentive to promote improved servicing performance by BANA and the transfer of High Risk Loans to the Subservicers.

In my opinion, BANA's obligation to cure or indemnify the Covered Trusts for certain document deficiencies, as provided for in Paragraph 6 of the Settlement Agreement, is an additional and potentially valuable benefit to the Covered Trusts beyond the Servicing Improvements. As I describe more fully in Section 13, I elected not to calculate a monetary value for this benefit because doing so would require me to make several additional assumptions, which cannot be further refined without additional data.

I believe an aggregate reasonable estimate of the monetary value of the Servicing Improvements as of June 2011 is between $2.51 billion and $3.07 billion. This value does not include the Master Servicing Fee Adjustment, as it is derived primarily from transfers of High Risk Loans and improved portfolio performance. If those transfers did not occur, the Master Servicing Fee Adjustment could be as much as $750 million, but the other benefits would be diminished. The separate components which I have aggregated to calculate a reasonable value for the Servicing Improvements are set out in this table:

	low- end	high-end
Reperformance Rates	467,375,034	711,222,878
Fixed Costs of Foreclosure	1,941,106,188	1,949,407,980
Transfer Costs	98,823,711	411,031,152
TOTAL	**2,507,304,933**	**3,071,662,010**

Source: Greensledge Group

I reserve the right to update my opinions to reflect any further information which becomes available to me and for future events.

3 Background

In the late 1970's and early 1980's, the residential mortgage lending industry began to transition to a model in which the servicing, nominal ownership and economic ownership of residential mortgage loans could be separated after origination and sold individually to unrelated parties. The practice of originating, selling and securitizing residential mortgage loans in the United States expanded significantly prior to the financial crisis of 2008, and a number of contentious issues were raised in the aftermath of the crisis. The Settlement Agreement that I have been asked to review addresses, among others, the issue of contractual representations and warranties made by a mortgage loan originator/seller to residential mortgage backed securities ("RMBS") trusts.

Assessing the amounts a loan originator owes to RMBS trusts for the repurchase of mortgages that breached the originator's representations and warranties is a complex and now heavily litigated aspect of mortgage finance. Unlike the quantification of estimated cumulative losses on a mortgage portfolio, where the industry standard methodology is generally accepted and the primary issues arise from the assumption set to be used, the calculation of breach and repurchase rates relies heavily on subjective analysis, estimation and experience.

In considering the Settlement Agreement in the context of my opinion, I considered allegations that Countrywide, as originator (and maker of the representations and warranties), together with its parent, BANA, and the Institutional Investors, as beneficial owners of the trust certificates (and economically, the ultimate beneficiaries of repurchases), had some form of collusive interest in the resolution of the issues underlying the settlement. I also considered the position of BNYM, as trustee, in the settlement negotiations. While I have no firsthand knowledge of the parties' negotiations, I found no evidence in the record I reviewed that would support any allegation that the negotiations were collusive. Instead, I observed that the record reflects that the negotiation process was consistent with my experience in negotiating arms-length transactions with sophisticated parties in the context of the mortgage finance marketplace. I applied my own quantitative analysis to the facts of this matter as I understood them in order to confirm the analysis I reviewed, and made my own qualitative assessments on subjective assumptions, where appropriate, using my firsthand experience in negotiating deals relating to mortgage collateral.

My review of the information upon which I have based my opinion comprises both qualitative and quantitative considerations, as I believe any prudent comprehensive business decision will include both. In this report, I first identify the major qualitative issues that outline the perspective through which I have considered the Settlement Amount. I then review the quantitative models applied, the assumptions involved, and the outputs generated given the differences in those assumptions. I have reviewed, and will comment on, the quantitative analysis that each party generated in order to calculate their range of potential values for Countrywide's liability for breaches of representations and warranties. I then discuss those assumptions and their reasonableness in the context of the qualitative framework I previously framed.

4 Qualitative and Quantitative Considerations Regarding Claims

The process of prospectively calculating a monetary value for repurchase claims arising from a breach of representations or warranties by a mortgage originator/seller with respect to a portfolio of mortgage loans begins with the calculation of the estimated cumulative losses that the mortgage portfolio will incur during its lifespan. A mortgage loan in which all contractual payments are made pursuant to the term of the loan cannot suffer losses occasioned by a failure of the originator/seller.[2]

Having estimated the cumulative loss amount for the pool of mortgage loans, the next step in this process would be to identify the portion of the cumulative losses that pertain to loans wherein the originator/seller has demonstrably breached one or more of its contractual representations or warranties. The final step in this exercise would be to then determine how many of the identified breaches would, in fact, give rise to realizable claims under the relevant Pooling and Servicing Agreements, or Indentures and corresponding Sale and Servicing Agreements (collectively, the "PSA's").

The first step of this process, estimating cumulative losses, is a familiar one to any mortgage market professional and relies heavily on quantitative analysis. The quantitative analysis of mortgage portfolios involves the projection of future cash flows which are derived from a number of model variables, the two most significant of which are defaults (mortality) and loss severity (recovery). The size and timing of these inputs relies not only on their individual accuracy, but also qualitative assessments in their application by the modeler. The financial crisis (or housing crisis) of 2008-2009 represented a failure of widely-accepted mortgage modeling assumptions in projecting financial outcomes. As a result of the financial crisis, the assumptions behind those models were amended. The housing crisis was not the first time mortgage cash flow models required recalibration nor would I expect it be the last.

Mortality in a mortgage portfolio (which is defined as either a loan prepayment or payment default) is a key quantitative assumption in portfolio valuation. While germane to mortgage portfolio valuations generally, prepayments, or prepay speed, is only one of several factors in this case, in my opinion. For that reason, I have identified and used a highly conservative prepay speed assumption.[3]

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[2] I understand that some would argue that the mere *existence* of a breach would, *de facto*, give rise to a put-back right under the contract, as a defective mortgage loan would have a lower market value than it originally carried its continued payment performance notwithstanding. In my experience as an investor, I never experienced or heard of performing loans being removed from RMBS trusts for defects.

[3] The CPR (Conditional Prepayment Rate) based on the modeling assumptions used was approximately 1% constant.

"Loss Severity" is a second key quantitative assumption in mortgage portfolio valuation. Loss severity is defined as the percentage of the loan balance that is lost after the underlying property is sold and all outstanding fees, servicing advances and liens are paid. There are a host of factors that influence defaults and loss severity, some of which are specific to each mortgage loan, such as loan-to-value ("LTV"), and others which are more global or macro-economic in nature, such as house price appreciation ("HPA"). Mortgage portfolio models, with historical and now increasingly granular data about loan portfolio performance over a growing and more varied time series, enable mortgage modelers to conclude retrospectively that specific (under) performance of a portfolio was due to one or more specific attributes of the mortgage portfolio, for example LTV or geographic concentration. However, when multiple variables change simultaneously in the context of a mortgage portfolio, such retrospective analysis, in my opinion, serves to narrow the list of causes for the (under)performance being analyzed, rather than point with certainty to the specific casual factors which generated the (under)performance – a factual question that may be impossible to determine in a wide range of cases even though it is acknowledged that a sharp decline in housing prices is associated with an increased level of strategic mortgage defaults.

Valuation of a mortgage portfolio or a mortgage-backed security by different parties will normally yield different outcomes based upon the modeling assumptions used. In the secondary securities market, the resultant differential is the bid and offer levels for RMBS. When counterparties agree to a price and a transaction is consummated, the buyer and seller have not necessarily agreed to use identical assumptions in their valuation exercise. Rather, more appropriately they have agreed to a market clearing price for the security using a set of valuation assumptions that they both believe are reasonable. It may well be the case that while their specific assumptions are different, their specific valuation results are within the range of reasonable compromise, i.e., an agreeable price. Similarly, in the context of a settlement negotiation, I might expect that the parties could reach a reasonable settlement without agreeing on all, or even most, underlying assumptions.

Market participants derive comfort from market transactions to affirm that their assumption set is consistent with that used by other market participants. "Price discovery" is the most robust method for a trader or investor to know that his judgment is in line, or nearly so, with his competitors in the marketplace. In other words, price discovery enables an investor to test the reasonableness of his assumptions against those currently being used in the marketplace. When assumptions are called into question and confidence in the application of basic factors such as default and loss severity are uncertain, the range of outcomes for a valuation exercise becomes larger, increasing the bid-offer spread. In times of great uncertainty, or when buyers and sellers in the mortgage marketplace fear their quantitative assumptions are grossly inadequate, there are fewer transactions consummated and price discovery becomes harder.[4] I considered that an effective method of evaluating the reasonableness of the Settlement Amount would be to review all available information regarding the negotiating positions of the parties. Specifically, I reviewed the presentation materials that were available to me and reviewed the deposition testimony of participants to the negotiation in order to understand their process, as it was reported in the record. The price discovery process in the marketplace is analogous to the settlement negotiations that I would expect to be undertaken by sophisticated, truly adversarial counterparties negotiating at arm's length. I considered how the Settlement Amount related to the initial position of BANA and the Institutional Investors, respectively, regarding their estimate of potentially realizable claims for breaches; what in transactional parlance would be the "bid," the "offer," and the transaction, or "execution," price.

Given the complex issues in this matter, and the differing models used by the Institutional Investors and BANA, I by analogy drew upon the rationale used by The Financial Accounting Standards Board ("FASB") when it recognized the limitations of financial modeling and the import of price discovery in Topic 820 regarding fair value accounting for use in valuing complex assets, including RMBS and ABS, held by GAAP compliant filers. My perspective relies in large part on my experience in mortgage finance and mortgage capital markets. I also considered the record concerning the negotiating parties' reasonable assessment of its respective positions using quantitative and qualitative analysis. I found that the parties, implicitly or explicitly, considered most of the factors cited in this report. Finding appropriate evidence in the record, I also noted the robustness of the process. I thus conclude that the Settlement Amount contains many of the attributes of a "market price" and might be loosely analogous to a Level I price as defined by FASB, and worthy of greater reliance than a purely model-derived Level III valuation.

Finally, I considered counterparty risk, successor liability risk and litigation risk, which impact the valuation of many financial transactions, and are germane to this matter. In the context of a transaction, counterparty risk (in simplest terms) refers to the credit risk of the counterparty for the term of its obligation – and what discount rate is appropriate to use in valuing the future cash flows expected to be received from that counterparty. Successor liability risk, in the context of this matter, arises from the structure of BANA's acquisition of Countrywide. Litigation risk (in simplest terms) refers to the potential costs (in terms of fees, the time value of money, and the risk of an unexpectedly adverse result, notwithstanding the perceived soundness of either side's position) that the parties to the dispute may incur if in fact they will not settle, but instead choose to litigate. In the context of this matter, I believe it is prudent, reasonable, and in keeping with

[4]"The intuitive notion that fewer, publicly reported prices reduce information is consistent with statistical theory." William G. Tomek, *Price Behavior on a Declining Terminal Market*, 62 Am. J. Agric. Econ., 434, 435 (1980).

common market precedent for the claimant to consider the financial strength of the payer of the potential claims, the risks of successor liability, and the potentially damaging and uncertain impact of costly litigation in reaching a compensatory settlement. Consequently, I consider these factors, at least qualitatively, on the derivation of the Settlement Amount.

4.1 Mortgage Portfolio Modeling Considerations

All mortgage loan portfolios anticipate some amount of credit loss experience and in my opinion no forward-looking projection of cumulative losses will be precisely accurate. Credit losses in a mortgage portfolio may arise from many causal factors, relating to the financial condition of the borrower, the value of the mortgage collateral, the overall economic climate or a combination of these factors. The best quantitative analysis will produce a range of possible outcomes, and the absolute magnitude of the range of outcomes will increase as the number of mortgages increases. When, as in this matter, the homogeneity of the mortgage portfolios decreases, and the diversity of other portfolio characteristics[5] increases, the range of reasonable expected outcomes is further widened. Adding significantly divergent macro-economic assumptions resulting from economic, regulatory or tax expectations to the modelers' palette will cause a reasoned quantitative analyst to yield a wide range of potential outcomes.[6] My opinion is that there was no single quantifiable range of cumulative loss outcomes sufficiently precise in this matter to compel a reasonable third-party observer to conclude that one approach was definitely correct, but rather several approaches may have yielded a reasonable range.

4.2 Application of Breach, Success, Causality and Repurchase Rate

Default and loss severity are quantifiable as mortgage loans in a portfolio become delinquent and are resolved. As a mortgage portfolio ages, actual defaults and loss severity on the portfolio are crystallized and cumulative loss experience becomes a fact.

In my opinion, with the passage of time, the factors responsible for individual defaults and losses on individual mortgage loans become harder to identify. Mortgage portfolio modeling is a dynamic process using static data, and certain data, such as debt- to-income (**"DTI"**), is generally not updated after the origination of the loan, while other data, such as LTV, may be interpolated from the original underwriting or imputed from available market data such as HPI's ("Housing Price Indices"). The utility of the original underwriting information therefore declines over time, in my experience. Assigning a specific cause first to the default and then to the loss has historically not been used in the valuation of mortgage loan portfolios.

[5] These characteristics include FICO scores, geography, vintages, documentation types, and credit metrics, among others.
[6] Frank J. Fabozzi & Steven V. Mann, *The Handbook of Fixed Income Securities*, (8th ed. 2011).

In my opinion and based upon my experience in the mortgage industry, time from origination is an important consideration in connecting a specific breach to the default and loss severity on a specific mortgage loan.[7] Identifying an unimpeachable relationship between a loan underwriting defect and a loss is challenging because not all losses are the result of breaches and not all breaches result in losses, and mortgages are subject to a repurchase obligation only if the breach "materially and adversely affects the interests of the certificateholders in that mortgage loan."[8] In my opinion, this means that specific mortgage loans to be repurchased needed to be identified.

The mortgage finance industry historically has at least tacitly acknowledged the concept that time from origination is a factor in claims for breach of a representation and warranty against a loan originator. In my experience, it was common for a mortgage loan originator to provide a first or early payment default representation and be expected to repurchase any mortgage loan which became seriously delinquent in the first three to twelve months (occasionally as little as 30 days). This practice was, in my opinion, an acknowledgement between the loan seller and loan purchaser that such an early-payment default was sufficient evidence of a breach for which the originator was responsible that there was no need for a forensic re-underwriting of the loan. The PSAs that I have reviewed for the Covered Trusts do not contain such an early payment default representation.[9]

Similarly, in my experience, if a loan defaults after a significant amount of payments have been made, industry participants are less likely to attribute that default to a breach or representations and warranties. Numerous industry sources support the understanding that defaults after two or three years of good payment history are unlikely to be attributed to defective underwriting.[10] This is more applicable to a private-label securities ("PLS") transaction where the contractual requirement that a breach "materially and adversely affects the interests of the certificateholders in that mortgage loan" may present a hurdle to repurchase.

Redacted [redacted]

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[7] Sabry Dep. 77:4-22, December 4, 2012.
[8] Prospectus, CWALT 2007- OA6.
[9] Pooling and Servicing Agreement, CWABS 2006-15, CWALT 2007-OA06, CWMBS 2006-15, and CWALT 2006-OA19.
[10] See, for example, John E. McDonald, CFA & Peter G. Handy, Bernstein Research, *BAC: Tough Slog Continues, Trimming Estimates on Higher Expense Run Rate* (January 24, 2011).
[11] *See generally:* Robertson Dep., Nov. 29, 2012; Smith Dep., Dec. 5, 2012; Waterstredt Dep., Dec. 5, 2012; Scrivener Dep., Nov. 14, 2012.

[redacted]

These are not necessarily the specific terms or definitions used by BNYM, BANA, and/or the Institutional Investors in this matter; they are general concepts pertaining to claims for breach of representation and warranties by an originator. In this matter the parties may have had used different terms, may have provided different or competing analysis, and may have widely divergent views on liability as it relates to the concepts I enumerated and the representations contained in the relevant PSAs.

The qualitative and quantitative assumptions each party made regarding the application of these concepts were the significant sources of the variance on their calculation of potentially realizable repurchase claims arising from the originator's breach of representations and warranties. I am not aware of any industry standard methodology in this regard that could be used to calculate a repurchase rate.

4.3 Valuation Methodology Considerations

Problems valuing portfolios of mortgages and securities backed by pools of mortgages are not new. I think it fair and constructive in the context of this matter to consider the approach that the FASB has promulgated with respect to fair value accounting (FASB Topic 820) with regard to complex financial assets – many of which are mortgage and mortgage derivatives. Topic 820 provides, in relevant part:

"820-10-05-1C: When a price for an identical asset or liability is not observable, a reporting entity measures fair value using another valuation technique that maximizes the use of relevant observable inputs and minimizes the use of unobservable inputs. Because fair value is a market-based measurement, it is measured using the assumptions that market participants would use when pricing the asset or liability, including assumptions about risk. As a result, a reporting

entity's intention to hold an asset or to settle or otherwise fulfill a liability is not relevant when measuring fair value."[12]

As I discussed in Section 4.1 and more significantly in 4.2 above, modeling of the cash flows used in negotiations regarding the Settlement Amount is a complex undertaking involving a large number of assumptions. The significant uncertainties I discuss in Section 4.2 and the fact that there are no "industry accepted norms" for the single most contentious aspect of the analysis, correspond in a fashion to FASB issues relating to valuation of complex financial instruments, in particular those characterized as Level III, being solely dependent on cash flow modeling.

However, I also consider that FASB allows the most accurate reflection of value of a claim secured by cash flows to be the price at which a willing buyer and a willing seller will transact in the marketplace, at arm's length. Consequently, I have given consideration to the final Settlement Amount as a data point, which while not a "market transaction" per se, can be compared anecdotally with other similar settlements in the marketplace on which some information is available in the public domain. I therefore believe that the FASB framework provides a reference point worth noting as I weigh the reasonableness of the Settlement Amount.

4.4 Counterparty Risk, Litigation Risk and Other Risk Considerations

Counterparty risk is a usual and customary consideration in any financial transaction – to ignore counterparty risk is imprudent. In the context of a transaction, counterparty risk refers to risk of non-performance by the counterparty in accordance with the terms of its obligation.[13] Generally speaking, counterparty risk is analogous to credit risk over the term of the obligation and is measured by discounting future cash flows expected to be received from the counterparty at a rate consistent with the adjudged risk of the counterparty.

When bankruptcy or liquidation is a possible result stemming from a criminal, civil or regulatory action, it is reasonable and prudent for a counterparty to weigh that consideration in its negotiations and ascribe some monetary value or discount factor in accordance with the assessed risk. In the context of the Settlement Amount, I believe it is prudent and reasonable for the claimant to consider the financial strength of the payer of the potential claims in deciding what claim amount it is prepared to accept.

Commercial logic dictates that should a defendant be required to pay damages in excess of its enterprise value (for simplicity), its managers have a fiduciary duty to consider bankruptcy in

[12] FASB, *Accounting Standards Update No. 2011-04: Fair Value Measurement (Topic 820: Amendments to Achieve Common Fair Value Measurement and Disclosure Requirements in U.S. GAAP and IFRSs,* 191 (May 2011).

[13] Office of the Comptroller of the Currency (2013), http://www.occ.gov/topics/capital-markets/financial-markets/counterparty-risk/index-counterparty-risk.html.

order to treat equitably all constituent parties, including shareholders. I have been involved in situations as both debtor and creditor where this was an important issue. Countrywide's ability to pay, in my opinion, is a valid consideration in the negotiation between the parties in this matter and I would expect that it had a bearing on the Settlement Amount. I have not considered any quantification of this risk factor, its potential imputed cost, or the legal and commercial issues relevant to it.

Litigation risk, in this case, would be the risk of protracted and costly litigation, which creates financial risk in the form of fees and expenses relating to the litigation, in addition to the time value of money lost as a result of a delay in the ultimate monetary recovery, if accrued interest is not a part of the judgment.[14] As the outcome of litigation is uncertain, there is also the risk of an adverse judgment or a change in the law during the course of protracted litigation, regardless of whether either could have been reasonably expected or not. I have not considered any quantification of this risk factor, its potential imputed cost, or the legal and commercial issues relevant to it.

Successor-liability risks, as I understand them in this case, relate to a potential litigation issue regarding BANA's liability, if any, for Countrywide's conduct based on its acquisition of Countrywide.[15] I have not considered any quantification of this risk factor, its potential imputed cost, or the legal and commercial issues relevant to it.

[14] Litigation is fraught with uncertainty, which is a condition or a state inherent in situations offering more than one possible outcome. Uncertainty also arises from the inherently probabilistic nature of some of the events affecting the ultimate outcome, as well as from the imperfect information available about certain facts and the concomitant need to make assumptions. Risk is the likelihood that the actual outcome will be unfavorable or undesired. Complexity results from uncertainty piled atop uncertainty. From a business decision-making point of view, litigation management is to a large degree a risk management problem. Paul J. Lerner & Alexander I. Poltorak, Euromoney PLC, *Introducing Litigation Risk Analysis,* Managing Intellectual Property (May 2001).

[15] Timothy J. Murphy, *A Policy Analysis of a Successor Corporation's Liability for its Predecessor's Defective Products When the Successor Has Acquired the Predecessor's Assets for Cash*, 71 Marq. L. Rev. 815 (1988), http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1816&context=mulr.

5 Review of the Parties' Claims Valuation Methodology

5.1 Valuation Methodology of BANA

The first step in calculating the estimate of potential damages from a breach of representations and warranties is to estimate total projected losses for the Covered Trusts. [redacted]

[redacted]

(Billions)	Principal	Losses	Loss Rate
Current	61.67	3.5	5.7%
Current, but Mod'd	13.35	3.81	28.5%
BK	6.24	2.48	39.7%
30-180	40.32	9.29	23.0%
180+	98.86	48.66	49.2%
Total	**220.44**	**67.74**	**30.7%**

Source: BNYM_CW-00000165, Greensledge Group

[redacted]

[redacted]

[redacted]

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16 Scrivener Dep. 291: November 14, 2012.

17 BNYM_CW-00000165

18 Scrivener Dep. 120:10-17, November 14, 2012.

[redacted]

[redacted]

[redacted]

[redacted]

5.2 Valuation Methodology of the Institutional Investors

[redacted]

[redacted]

	[redacted]			
[redacted]				[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]			[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

5.3 Key Differences in Valuation Methodology

In Section 4, I described from a qualitative perspective how BANA and the Institutional Investors can arguably employ different assumptions to estimate potential repurchase liability from a breach of representations and warranties. Critical assumptions regarding loan performance when further modified using dissimilar approaches to model a repurchase rate unsurprisingly yield divergent outcomes. Assumptions that account for a significant amount of the differential are cumulative realized losses (derived from loss severity), estimates of breach and success, and the inclusion or exclusion of causality and presentation.

[redacted]

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[22] Smith Dep. 199, December 5, 2012.

[23] This understanding was most specifically referred to on page three of the report of Brian Lin (June 7, 2011) who reported on the derivation of the Institutional Investors' methodology as follows:

> The "Breach Rate" and "Success Rate" were obtained by a third party who completed a forensic underwriting project of a non-agency whole loan portfolio. This review consisted of approximately 250,000 loans of similar product types, and of the same origination period as the Settlement Portfolio. It was observed that there was an instance of a breach in approximately 60% of the loans examined and the actual repurchase rate of these loans by the originator ranged between 50% and 75%. I was not able to verify these figures since I was not given access to any documents or specifics pertaining to this underwriting review.

[redacted]

[redacted]

[redacted]

5.4 Opinion on Derivation of the Settlement Amount

In my opinion, the Institutional Investors' assumptions, with one exception, and BANA's assumptions with respect to the calculation of cumulative losses are reasonable, given the data available to them at the time. Unsurprisingly, I find the Institutional Investors more pessimistic and BANA more optimistic.

[redacted]

[redacted]

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[24] Amherst Securities Group, Laurie Goodman, et al, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications,* 22 J. Fixed Income, 21-36 (May 30, 2012).

Redacted [redacted]

The material differences in cumulative losses, while important, contribute less variance to the range of outcomes than the calculation of the repurchase rate. The repurchase rate is the largest source of the volatility in calculating an estimate of potential repurchase liability for a breach of representations and warranties. This uncertainty existed for the following reasons, all of which represent my opinion or draw upon my industry experience:

1. Breach and success rates have not been modeled by the industry; thus, there is no historical industry standard or norm that mandates a particular form of analysis against which the parties' estimates could be measured or tested;
2. Application of anecdotal or historical data from various and diverse mortgage portfolios is sometimes difficult to reconcile with contemporary mortgage portfolios;
3. Historical data may be of limited utility due to the historical precedents described in Section 4.2;
4. Current data sampling may not correlate well between portfolios due to a combination of recent factors including the increased incidence of mortgage fraud, increased litigation-driven behavior by investors, GSEs and monoline insurers, and "observer effect" or litigation externalities;
5. Determination of a breach and success rate is a subjective exercise with the prospect of significant variability and dispute given the inherent subjectivity in "re-underwriting" specific loans years after origination without access to the borrower, the actual underwriter, or, in some cases, the information available to the actual underwriter. This complexity is compounded where the underwriting standards are themselves largely dependent on subjective standards[25] with exceptions and "compensating factors" being part of the ordinary course of business and recognized in the underwriting guidelines;
6. The significant increase in mortgage loan originations and the mortgage loan product expansion that occurred between 2004 and 2008 makes comparison difficult.

Against this uncertainty, I conclude that BANA's concept of estimating Covered Trust repurchase rates based on its experience with GSE loans has considerable merit. It has a large degree of transparency, is based on actual reported repurchase activity of independently motivated parties, and has an appealing logical construct. However, the magnitude assigned to some of the factors incorporated in BANA's modeling which attempt to account for the

[25] "Compliance with underwriting guidelines," for example.

distinctions between GSE portfolios and the diversity of loan types in the Covered Trusts is somewhat arbitrary, in my opinion. From my own experience, I know that GSE loans and their underwriting can vary in many respects from non-GSE loans. I therefore believe that comparisons between PLS loans and GSE loans for repurchase purposes requires adjustments. To cite just one example, I compared the representations and warranties sections from the Fannie Mae Approved Seller/Servicer guide from 2007[26] with a sample of PSAs (four) from the Covered Trusts[27] in my investigation of this matter. In my opinion, the Fannie Mae-required representations and warranties are more numerous and appear to be more detailed than those in the Covered Trust PSAs I reviewed.

The framework of a methodology that is described in the Institutional Investors' spreadsheet[28] and cited by the Institutional Investors also has merit, but the data and process used to derive potential repurchase liability from a breach of representations and warranties described is opaque and the results were more severe than I was aware of based on my industry knowledge and direct experience. The Institutional Investors' approach is consistent with positions I have seen reported in the financial press and industry journals as being taken by plaintiffs in representation and warranty cases. The methodology may be appropriate, and it is certainly understandable from a "plaintiff-side" perspective why aggressive numbers would be presented. But I have no way to opine on the veracity of the analysis or the accuracy of its conclusion. [redacted]

In my opinion, no specific amount of repurchase liability attributable to breaches of representations and warranties that was calculated by either BANA or the Institutional Investors can be deemed unreasonable on its face. Each has the strength of a cogent logical argument and the weakness of uncertainties about the underlying data, the conclusions drawn therefrom and the direct applicability to the loans in the Covered Trusts.

In considering the reasonableness of the Settlement Amount, it is not necessarily useful, in my opinion, to ascribe significantly greater certainty to the cumulative loss modeling assumptions employed by the Institutional Investors or those of BANA, particularly at the time they were performed in early 2011.

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[26] Fannie Mae 2007 Selling Guide, https://www.fanniemae.com.

[27] Pooling and Servicing Agreement, Prospectus Supplements, and Prospectus, CWABS 2006-15, CWALT 2007-OA06, CWMBS 2006-15, and CWALT 2006-OA19.

[28] BNYM_CW-00000206.

[29] Smith Dep., 196, 199: December 5, 2012.

Because they are each reasonable approaches, the methodologies applied by BANA and the Institutional Investors created boundary conditions for a potential outcome: this is a standard and useful analysis in any business transaction. In my opinion, the initial positions taken by these parties are an indication of both the uncertainties relating to the analysis and the robustness of the negotiation process between adversarial parties advocating their own interests. The range of the boundary set between these two parties is large, and there may be outliers advocated by each that were not justifiable, but considering the volatility of the potential outcomes to changes in critical assumptions and the multiple uncertainties that impact those assumptions, the size of the boundary set is not unreasonable.

6 Range of Reasonable Value for Repurchase Claims and Settlement Amount

I calculated my own estimate of cumulative losses for the Covered Trusts using the loan balances and updated loss history as of June 2011, the default rate expectation using the average roll rates experienced in 2010 weighted by vintage[30] and pool type, and the average loss severity experienced by the trusts over the prior twelve (12) months also weighted by vintage and pool type. See Figure 6a.

Figure 6a: Projected Losses (in billions of dollars)

As of 6/1/11

Description	Balance ($B)	Default Rate	Severity Rate	Losses ($B)
Liquidated Loans				$ 27.4
60, 90, Forclosure & REO	$ 69.6	71%	67%	$ 33.0
Current & 30 day DQ Loans	$ 103.4	39%	59%	$ 24.2
	$ 173.0			$ 84.7

Source: CoreLogic, Intex, Greensledge Group

In my opinion, a conservative estimate of cumulative losses on the Covered Trusts is $84.7 billion. In my opinion, it is appropriate to use my estimate of cumulative losses as I further refine the range of reasonable value, rather than continue to compare the positions of BANA or the Institutional Investors.

[redacted]

As discussed above, the greatest volatility in an estimate of potential repurchase liability from a breach of representations and warranties is driven by the repurchase rate used. Figure 6b (below) indicates the sensitivity of potential outcomes using a set of breach and success rates as used by the Institutional Investors, without any reduction for causality or presentation as used by BANA. This sensitvity analysis is useful as it illustrates the magnitude of the increase in potential repurchase claims as breach and success rates scale upward using my estimate of cumulative losses.

[30] Vintage is generally defined as the year of origination.

Figure 6b: Repurchase Liability Claims by Possible Breach and Success Rates

[redacted]

In my opinion, the Institutional Investors' repurchase rate calculation is aggressive as might be expected in the context of a negotiation,[31] as the repurchase rate is derived from their expectations for breach and success. Though recent litigation has led to litigation claims of repurchase rates higher than 25%, such allegations are a recent development, and generally speaking are part of an extended discovery process regarding the complex issues raised in those cases. Any rulings on such matters are also, therefore, a recent development. I chose to use a repurchase rate in excess of 25% as a proxy for breach and success rates each in excess of 50%, as my experience on this point relates to loans actually repurchased. The inference of such numbers is outside of my experience in the mortgage finance industry prior to 2009, when I was involved in purchasing non-conforming whole loans, providing capital markets alternative PMI and financial guaranty insurance policies, investing in kick-out and re-performing loan securitizations, and securitizing a variety of mortgage loans.

My industry experience with repurchase rates has been closer to BANA's estimate than that of the Institutional Investors. [redacted] In my experience, successful claims for a breach of representations and warranties were generally expected to arise from an underwriting defect that had a material and adverse effect on the performance of the loan. I am not aware of any significant rulings or disputes on this issue prior to 2009, and understand that it is now the center of much debate and legal interpretation.

In order to determine useful data points on repurchase rates for comparative purposes, I reviewed (i) the total consideration paid by BANA/Countrywide to Fannie Mae in order to resolve Fannie Mae's representation and warranty claims, including the January 6, 2013 and December 31, 2010 settlements between those parties, and all other repurchases on the population covered by those settlements,[32] and (ii) the total consideration paid by BANA/Countrywide to Freddie Mac [33] to

[31] *See generally:* Robertson Dep., Nov. 29, 2012; Smith Dep., Dec. 5, 2012; Waterstredt Dep., Dec. 5, 2012.
[32] January 7, 2013

resolve Freddie Mac's similar claims, including the December 31, 2010 settlement between those parties and all other repurchases in the population covered by that settlement. I understand that the 2010 Freddie Mac settlement and 2013 Fannie Mae settlement each represented a full and final settlement with the applicable GSE. In order to determine the total cost of these resolutions, which is not publicly available, I relied upon information which was provided to me by BANA.[34] That information indicated that, taking the all-in cost of the settlements and other previous repurchase activity (the appropriate measure, since repurchases completed before a full and final settlement would be expected to reduce the ultimate settlement amount), the repurchase rates for the Freddie Mac and Fannie Mae populations were 12.3% and 14.5% respectively.[35]

Using the repurchase rates from the resolutions between BANA/Countrywide and Fannie Mae and Freddie Mac as a reference point, I compared the negotiating positions of BANA and the Institutional Investors by applying the Fannie Mae and Freddie Mac repurchase rates to each party's estimate of cumulative losses. This yielded an estimated range of potential repurchase liability of $8.3 to $9.8 billion for BANA and $13.3 to $15.6 billion for the Institutional Investors. In my opinion, these items of market data serve as helpful data points, not guidelines, on a gauge of relative scale because they relate to claims substantially similar to those in the Settlement Agreement, and concern loans also originated by Countrywide. Moreover, they are the result of a negotiated settlement.

In my opinion, none of the values in Figure 6b (above) are necessarily unsupportable, given the uncertainty of the inputs. Though the variance between the extremes is quite large, in my opinion the range of reasonable outcomes is smaller. This matrix of outcomes does not include two of the factors utilized by BANA in its calculation, causality and presentation, so I am not comparing the estimated repurchase rates for the parties on an unambiguous basis. In order to do that, I elected to make a simplifying assumption to normalize the positions of the parties, as I understand them.

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33 January 3, 2011

34 BNYM_CW-00285555 (Exhibit B)

35 The repurchase rate was calculated by dividing the total consideration paid ($2.7B for Freddie Mac and $11.6B for Fannie Mae) to resolve the claims for each population by BANA's estimate of the collateral losses for that population ($22B and $80B respectively). I understand, based upon a conversation with Tom Scrivener of BANA on March 8, 2013, that BANA calculated its collateral loss estimates using the same methodology as was used for its presentations during the negotiation with BNYM and the Institutional Investors. [redacted]

[redacted]

[redacted]

In my opinion, the range for the potential repurchase claims of [redacted] billion includes some reasonable estimates of potential repurchase liability from a breach of representations and warranties, but also contains estimates at the higher end that rely on unverifiable and possibly suspect assumptions. In my opinion, a more refined range would be \$8.2 to \$12.9 billion, which is derived by applying disputed assumptions of the negotiating parties to the wider range of possible outcomes. This range of potential repurchase claims for a breach of representations and warranties should then be discounted to take into account counterparty risk, litigation risk, other risks including successor liability and any value attributed to the Servicing Improvements, in order to gauge the reasonableness of the Settlement Amount. In my opinion, based on all of these factors, the Settlement Amount of \$8.5 billion is reasonable.

I take additional comfort in my opinion that the Settlement Amount of \$8.5 billion is reasonable as it is, in my view, generally analogous to a transaction price in the mortgage finance marketplace, as outlined in Section 4. The record reveals that BANA, the Institutional Investors, each using their own proprietary modeling assumptions, and BNYM—which had the benefit of these competing reasonable views—entered into a protracted, arms-length negotiation, and ultimately agreed on a compensatory payment. In my opinion, this lends credence to the conclusion that the Settlement Amount was reasonable.

[36] BNYM_CW-00000206. [redacted]

7 Servicing Improvements Background

Residential/consumer mortgage servicing is usually performed on a contract for services basis, where a mortgage lender contracts with the mortgage servicer to perform services related to the collection of amounts due on a pool of mortgage loans for the life of that pool. Often, but not exclusively, the servicer is an affiliate of the loan originator, the lender, or both. The contract rights and obligations of the servicer are transferrable in the ordinary course of business and such transfers occur frequently.

A servicer's primary function is to serve as point of contact between the borrower and the lender. The servicer sends out monthly statements to the borrower, collects loan payments, and may divide a mortgage loan payment into component parts, such as interest, principal, fees and escrow payments. Should a borrower fail to make a payment when required under its loan agreement, the servicer usually takes a series of actions with the goal of encouraging the borrower to make up the delinquent payment and to continue making its loan payments.

Each servicer, while required to perform under federal and state debt collection and consumer protection laws, has its own internal policies, procedures, and systems. As such, payment collection and property disposition metrics will vary between different servicers.

Borrowers who are delinquent or have defaulted on their payment obligations are often reluctant to face the creditor. When servicers deal with delinquent borrowers, making "right-party" contact (defined as establishing contact with the mortgage obligor) is often difficult. Having opted to stop making payments on a significant and contractual debt, many borrowers become elusive to debt collection efforts. Most servicers have comprehensive telephone, email and internet "white pages" and employ sophisticated skip-tracing techniques in order to make "right-party" contact to begin the enforcement of the loan agreement.

Managing the borrower into a state of loan re-performance (defined as making up delinquent loan payments and recommencing regular loan payments) can be accomplished in a variety of ways. Often, a servicer will provide credit counseling services where representatives of the servicer work with the borrower and generate a complete picture of the borrower's fiscal situation that can be considered by the borrower and the servicer. For example, the counselor might suggest alternatives to the borrower, such as amending household budgets.

Should counseling the borrower fail to return the loan to performing status, the servicer may (when included in its contract rights) attempt to modify the terms of the loan in order to increase its affordability to the borrower. Lowering the interest rate, capitalizing missed payments, and/or forgiving principal may be possible depending on limitations set by the specific owner of the loan. Additional avenues toward re-performance have been provided by federal or state programs such as the National Mortgage Settlement of April 5, 2012. Generally, a servicer will elect to modify a loan if it believes that such modification is likely to maximize the value of the loan (i.e., the present value of all expected future payments on the modified loan would exceed the present value of the expected net recovery that could be realized through a foreclosure). If a modification option is not viable, the servicer may then consider other loss mitigation alternatives in the form of a short sale, or deed-in-lieu of foreclosure, where the borrower voluntarily exits the home but without the associated costs and effort of a foreclosure. As with modifications, the decision to approve a short sale or deed-in-lieu would depend on whether the expected voluntary liquidation value exceeds the expected return through a foreclosure sale.

After repeated and unsuccessful attempts to return a loan to performing status or find an appropriate loss mitigation alternative, the servicer would ordinarily initiate the foreclosure process, seeking to enforce the lender's claim on the mortgaged collateral (the property), and, if permitted by applicable law, the borrower's obligation under the promissory note secured by the collateral. This final remedy stands as the ultimate threat to the borrower's personal and financial situation which may induce re-performance or cooperating in loss mitigation. The servicer's ability to constructively use the threat of this action and convince the borrower of the imminence of its action is the servicer's final rehabilitative measure. Failing to convince a delinquent borrower to cooperate, the servicer's foreclosure process begins in accordance with procedures that will vary based upon the geographic location of the property and the servicer's policies and procedures. The ultimate resolution is the forced sale of the underlying property and either return of the net sale proceeds (in the case of a successful third party bid) or property title (if the owner is the successful bidder) to the owner of the loan. There are many costs associated with the foreclosure process and the process differs (sometimes meaningfully) amongst different jurisdictions. For example, 24 states require foreclosures be processed through the state's courts;[40] this tends to lengthen the foreclosure timeline and increase the associated costs.

In addition to legal and administrative costs of enforcing the lender's rights and lien, protection of the value of the property requires the ongoing payment of property taxes, the expense of maintaining the property and improvements that will maximize sale value, and the carriage of insurance on the property (these are defined as "Protective Advances".) Generally, the servicer is required to advance the funds required to cover these costs during the period between delinquency and completion of the property disposition. The longer such period persists, the greater the sum of such Protective Advances become and this directly reduces the ultimate recovery on the loan, as Protective Advances have a priority in recovery from the proceeds of the disposition of the mortgaged collateral. Servicers who most efficiently process loan foreclosures will therefore be able to reduce Loss Severity for the benefit of the owner(s) of the loans, by

[40] Fannie Mae's foreclosure timeframes on a state-by-state basis are available at https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf

reducing the amount of Protective Advances and other carrying costs associated with the loan. A pool of loans with higher Loss Severity is therefore worth less than a similar pool of loans with a lower Loss Severity. Loss Severity is often used as a metric by which homogeneous pools of loans are compared.

8 Review of Servicing Improvements in Proposed Settlement

My outline below of the Servicing Improvements contained in Paragraph 5 of the Settlement Agreement provides an overview of the Servicing Improvements that I believe would be expected to create a monetary benefit to be realized by the Covered Trusts. It is not a comprehensive recitation of the Settlement Agreement; rather this section provides a summary of the Servicing Improvements that I considered in framing my opinion, specifically determining an appropriate methodology for calculating a reasonable expectation of the monetary value of the Servicing Improvements. All terms not defined can be found in the Settlement Agreement. Section 8.3 summarizes the Document Deficiency cure, which is not characterized as a Servicing Improvement, but nonetheless provides an additional benefit to the Covered Trusts. The Servicing Improvements generally are new obligations of the servicer which expand upon, or create additional requirements in addition to, the contract obligations defined in the PSAs of each of the Covered Trusts. BNYM reasonably concluded that these measures would bring significant benefits to the Covered Trusts. My aim in this opinion is to develop a reasonable monetary estimate of that value as of June 28, 2011.

8.1 Transfer of High Risk Loans to Subservicers

Pursuant to the terms of the Settlement Agreement, the Master Servicer, now BANA, agreed to transfer High Risk Loans, as explained below, to a minimum of eight and a maximum of ten Subservicers. Typically, there is no requirement in a PSA mandating the use of Subservicers or loan transfers. The maximum number of loans that BANA may transfer to a particular Subservicer is capped at 30,000 loans[41] resulting in a maximum sub-servicing capacity of between 240,000 and 300,000 loans. As of June 1, 2011, the number of High Risk Loans (see Section 9) in the Covered Trusts was approximately 239,000. The Settlement Agreement defines high risk loans ("High Risk Loans") as:

a. Mortgage loans that are 45+ days past due without the right-party contact;
b. Mortgage loans that are 60+ days past due and have been delinquent more than once in any rolling 12 month period;
c. Mortgage loans that are 90+ days past due and have not been in the foreclosure process for more than 90 days and are not actively performing on trial modification or in the underwriting process of modification;
d. Mortgage loans in the foreclosure process that do not yet have a scheduled sale date; and
e. Mortgage loans where the borrower has declared bankruptcy regardless of days past due.

[41] Specifically, the Settlement Agreement provides that the maximum number of loans that the Master Servicer may transfer to a Subservicer is capped at 30,000 loans or a lesser number of loans per a determination of a lower cap by BNYM for a particular Subservicer.

8.2 Servicing Improvements for Loans Not Transferred

Loans that are not transferred pursuant to the terms of the Settlement Agreement (whether they are High Risk Loans or not) will be subject to a servicer performance metric whereby BANA's servicing of the loans will be measured against mortgage servicing industry benchmarks. Typically, there is no requirement for objective servicing standards and performance metrics in a PSA. The payment performance of each loan will be benchmarked against one of the following standards:

a. First-lien Loans Only: Delinquency status of borrower at time of referral to BANA's foreclosure process: 150 days (excludes time borrower is in bankruptcy.)

b. First-lien Loans Only: Time period between referral to BANA's foreclosure process and foreclosure sale or other liquidation event: the relevant state timeline in the most current FHFA referral-to-foreclosure timelines (excludes time borrower is in bankruptcy and or is performing pursuant to HAMP[42] or other loss mitigation efforts mandated by law.)

c. Second-lien Loans Only: Delinquency status of borrower at the time of reporting of charge-off to BNYM: Standards in Governing Agreement.

To the extent BANA does not meet the industry benchmarks outlined above, BANA will be required to compensate the Covered Trusts in the form of a Master Servicing Fee Adjustment. The Master Servicing Fee Adjustment, calculated on a monthly basis, takes into account all loans that do not meet the benchmark together with a percentage of the loans' coupons and will vary depending on the extent of the variance to the industry benchmarks. BANA is also incentivized to move loans through the foreclosure process, as exceeding industry benchmarks results in a lower Master Servicing Fee Adjustment.

8.3 Cure of Certain Document Exceptions

For all loans in the Covered Trusts, BANA was required to submit an Initial Exceptions Report Schedule, followed by Monthly Exception Reports, enumerating all loans listed as having both a Mortgage Exception and Title Policy Exception, as defined in the Settlement Agreement.[43] The Mortgage Exceptions and the Title Policy Exceptions enumerated in the Settlement Agreement relate to documentation defects whose combined effect may impair the enforceability of the loan or mortgage on behalf of the relevant Covered Trust. For loans listed on the then current

[42] FHA National Servicing Center Loss Mitigation Services http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/nsc/lossmit

[43] BANA provided the Initial Exceptions Report Schedule to BNYM in August 2011.

Monthly Exceptions Report, to the extent BANA does not cure the Mortgage Exception or Title Policy Exception and the exception for a particular loan results in a loss to the applicable Covered Trust in connection with the foreclosure on such loan, BANA is required to reimburse the relevant Covered Trust up to 100% of the Realized Loss on such loan.

9 Servicing Improvement Valuation Methodologies

I consider the Servicing Improvements set out in Section 8 in the context of accepted mortgage modeling conventions, the data available to me and the reasonableness and complexity of the assumptions needed to calculate a monetary value for each the Servicing Improvements. The methodology I have employed is based upon standard mortgage cash flow modeling techniques, comparable metrics for measurement and assumptions that I have made to apply those techniques appropriately and calculate a monetary value for the Servicing Improvements.

Once a loan has become delinquent, the role of the servicer is to attempt to return that loan to a performing state and, failing that, move the loan into and through the foreclosure process in a timely fashion. The servicer's effectiveness in communicating with borrowers and in effecting the foreclosure process can make a material difference in the ultimate amount recovered on any delinquent or defaulted loan.[44] The policies, procedures, and quality of different servicers vary within the industry, and consequently their effectiveness or performance may vary. In my opinion, comparing the performance of BANA as servicer of the Covered Trusts with the performance of other servicers on a similar population is an appropriate method of estimating the benefit of transferring the servicing of certain loans from BANA to the Subservicers. Indeed, this approach may be conservative as in my opinion the purpose of the Servicing Improvements is to encourage the transfer of the loans to specialized, "high-touch" servicers who are believed to be able to generate better-than-average results.

Loss Severity is sometimes proffered as a metric for assessing the quality of a servicer's performance and in fact, the Loss Severity for the Subprime loans in the Covered Trusts was generally higher in 2010 than for other trust outside of the Settlement that I examined. However, in my opinion, Loss Severity alone is an insufficient metric for measuring the quality of a servicer. Many factors contribute to a loan's Loss Severity beyond the performance of the loan servicer. Longer foreclosure timelines resulting from reasons beyond the servicer's control (e.g., state laws) do incur greater costs and lead to a higher Loss Severity, and other characteristics of the loan may lead to a high severity number as well. For instance, properties in certain geographies or states that were ground zero for the housing bubble realized HPI declines, peak to

[44] "Servicer differences matter" Barclays Capital Securitized Research, December 9, 2011.

trough, of 45 to 50%.[45] A geographic skew in a servicer's portfolio could be one factor that would increase that servicer's observed loss severity metrics.

The amount of payment advances made by the servicer will also contribute to loss severity. While a loan is delinquent, the servicer is generally required to make Protective Advances and may choose to make "recoverable"[46] advances of interest and principal payments to the RMBS trust in the form of a servicer advance – in order to keep the certificateholders current. When the property is ultimately sold, the servicer will recover the amounts it had advanced to the trust from the property's sale proceeds as a priority payment. Servicers are permitted to stop making advances of principal and interest to the RMBS trust if the servicer may not be able to recover the amounts it advances. All else equal, the Loss Severity on a loan will be higher the greater the amount of advances made by the servicer.

To quantify the value of the Servicing Improvements in the this matter I first assumed that the most appropriate method to measure the value of the servicing transfer would be to compare BANA's re-performance rate and measured time to foreclosure to those rates and timelines of the Approved List of Subservicers to whom the loans were intended to be transferred, and then apply a measurement methodology to that improvement.

I did not pursue this line of analysis for two reasons: I am currently unable to identify the Servicers of many of the loans because the CoreLogic database I used does not adequately identify servicers limiting my ability to select an appropriate control group. I also considered that BNYM did not know the identity of the approved Subservicers in June, 2011.

The first assumption in my valuation construct was to compare the loans in the Covered Trusts to the entire universe of comparable loans which enables me to measure BANA's performance against the industry as a whole (exclusive of the Covered Trusts.) This, in my opinion, is a conservative assumption. In effect, my comparison group represents an industry average, as I can construct it from the data currently available to me. The comparison group consists of all loans in the non-agency, Private Label Securities CoreLogic databases[47] that are not in the Covered Trusts ("Non-Covered Trusts".) It will contain, therefore other trusts that may be serviced by BANA or its affiliates.

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45 S&P Case-Shiller Home Price Indices

46 "The master servicer is obligated to make advances with respect to delinquent payments of principal of or interest on each Mortgage Loan to the extent that the advances are, in its reasonable judgment, recoverable from future payments and collections or insurance payments or proceeds of liquidation of the related Mortgage Loan." Prospectus, CWALT 2007- OA6.

47 CoreLogic refers to these databases as the "ABS Loan Level Database" and the "MBS Loan Level Database". I made no independent assessment of the accuracy of this data.

The second assumption in my valuation construct was that the Settlement Agreement incentivizes the Master Servicer to accelerate the disposition of delinquent loans held by the Covered Trusts, whether they are retained by the Master Servicer or transferred to subservicing. Transferring High Risk Loans to Subservicers who are both expert in loss mitigation techniques and are properly incentivized, would be expected to improve the performance of a portfolio of mortgage loans. Subservicers in this context can reasonably be expected to reduce the time to foreclosure and improve upon the re-performance rate of the loan portfolios that they are compensated to service. From my reading of the record, all the parties in the negotiation intended to improve portfolio results by engaging the selected Subservicers, and the concept of transferring delinquent loans to a specialized "high-touch" delinquent loan servicing has been a technique used in the mortgage finance industry previously.[48] The selection process set forth in Paragraph 5 of the Settlement Agreement regarding the selection of Subservicers is in my opinion fair and robust, as the Institutional Investors and BANA must agree to the proposed Subservicers, and BNYM, with advice from an expert in the servicing industry, may object to the appointment of any Subservicer, adding effectively another level of oversight. Given this selection approach and the sophistication of the parties, I believe it is reasonable and actually conservative to evaluate the required servicing protocols on the premise that the approved Subservicers will perform no worse than the industry average.

My third simplifying assumption is that the subserviced loans would also perform no better than the industry average, even though my expectation would be that the subserviced loans should perform better than industry averages. On this basis, I can therefore compute a monetary value to the potential performance differential between BANA and the industry average attributable to the transfer of servicing based upon the number of loans transferred and the timing of the transfers.

Generally in mortgage finance groups of loans (vintage) are securitized together or otherwise separated into distinct portfolios ("pool types") based upon a defined group of characteristics that distinguish them from loans that were eligible for participation in government financing or guarantee programs. These characteristics include loan size, credit quality (generally measured by credit score), loan-to-value ratio, and type of documentation. Simplifying the aggregation of loans in this matter, I characterize the types of loans as: jumbo loans with generally higher credit scores which are pooled into "MBS" pools; loans with non-standard documentation or underwriting exceptions (including self-employed, non-US citizens, and other irregularities as opposed to deficiencies as well as "no-doc" loans) which are pooled into "Alt-A" pools; and borrowers with weaker credit histories which are pooled into "Subprime" pools.

[48] Recovery-focused specialty servicers became prevalent during the RTC liquidation of S&L assets, and continue to evolve. I was directly involved in this area during the 1990s.

Measured performance of loans grouped this way has historically produced more highly correlated results than the measured performance of loans that were comingled or more heterogeneous.[49] Therefore, in trying to evaluate specific performance characteristics and to compare them with other portfolios' performance, I first divide loans into these subcategories or cohorts by vintage.

In order to keep comparisons on a like basis between the Covered Trusts and the Non-Covered Trusts, I will compare the Alt-A, Subprime, and MBS loans separately and aggregate the results. As is seen in Figure 8.3-a, loan characteristics vary greatly by Pool Type (Alt-A, Subprime, and MBS) but are comparable for the Covered Trusts vs. the Non-Covered Trusts within each Pool Type.

Figure 8.3-a: Composition of Covered & Non-Covered Trusts

As of 6/1/11

	Covered Trusts			Non-Covered Trusts		
	ALT A	Subprime	MBS	ALT A	Subprime	MBS
Total Balance ($000s)	101,569,119	45,779,984	25,613,987	446,100,800	360,332,108	250,544,684
Avg Balance ($000s)	275	184	511	279	143	454
Current (MBA)	58.6%	35.3%	80.2%	64.8%	52.2%	87.0%
30-59 (MBA)	3.6%	6.0%	2.6%	4.0%	8.1%	1.8%
60-89 (MBA)	2.0%	3.2%	1.5%	2.2%	4.1%	0.9%
90+ (MBA)	20.2%	32.8%	10.0%	11.0%	14.7%	4.1%
Forecloseure	12.8%	19.8%	4.7%	14.7%	17.2%	5.4%
REO	2.7%	3.0%	1.0%	3.3%	3.7%	0.8%
Owner Occup	84.2%	97.1%	93.9%	80.6%	93.3%	91.4%
Full Doc	28.5%	66.7%	38.1%	23.8%	62.0%	50.9%
Purchase	42.5%	30.7%	51.8%	41.8%	33.7%	45.5%
Current WAC	5.2%	6.8%	5.9%	5.0%	6.3%	5.1%
Orig LTV	74.0%	79.4%	74.1%	74.6%	81.1%	70.1%
Orig FICO	708	610	739	711	630	735
2nd Lien	0.0%	0.4%	0.0%	0.1%	5.5%	0.0%
Judicial	27.7%	35.1%	23.3%	28.7%	42.1%	25.1%
CA	39.9%	25.7%	43.9%	40.8%	20.6%	44.9%
NY,NJ,FL	17.9%	20.7%	14.4%	19.6%	23.6%	16.3%

Source: CoreLogic, Greensledge Group

Because my analysis did not include investigation of actual servicing records to determine right-party contact or scheduled sale dates, I estimate the universe of High Risk Loans as those in the 60 day, 90 day, and foreclosure delinquency status. All delinquency measurements follow the

[49] JPMorgan MBS Credit Monthly, January 4, 2013, various pages including A-4, A-8, A-21, A-24 through A-27.

MBA (Mortgage Bankers Association) standard[50] as it is considered more conservative than the Office of Thrift Supervision (OTS) standard.[51]

My opinion calculates the value of the Servicing Improvements as of June 28, 2011, using portfolio information as of that date in order to calculate a monetary value as of that date. The actual experience of the application of the terms in the Settlement Agreement and the actual performance of the Covered Trusts (after June 2011) is not a factor in my analysis.

Based upon my experience with servicing transfers and my understanding of this matter, I assume that it would take one month to prepare and submit an Agreed List of Subservicers to BNYM, then another two months for BNYM to approve or deny the sub-servicer's inclusion, and finally an additional three months for BANA to fully contract and integrate with the first Subservicer. Therefore my analysis assumes that transfers of High Risk Loans would commence in December 2011, using loan information as of November 2011.

In order to estimate the performance of the loans in the Covered Trusts and the size of the aggregate balances in each of the High Risk Loan cohorts, I use transition rates or "roll rates" based on historical performance. In June 2011, and going forward, I will use the average roll rates from 2010. Using the average 2010 roll rates to analyze performance at June 2011 represents a standard mortgage finance assumption, neither particularly aggressive nor conservative, to project the future migration of loans as they "roll" or transition from one category to the next, for example from 60 to 90 days delinquent. Transitions can occur in both directions, but generally speaking the certainty of eventual default increases as the loan rolls down into a more severe delinquency status.

Using the June 2011 portfolio data and average delinquency roll rates from 2010, I estimated that the Covered Trusts would have a projected delinquency composition in November 2011 (Figure 8.3-b):

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[50] "[A] loan is "past due" when a scheduled payment is unpaid for 30 days or more." Office of the Comptroller of the Currency, *Definitions and Methods, available at* http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics-q1-2008/definitions-and-methods-2008-1-quarter.html (last visited March 13, 2013).

[51] "In short, a borrower that misses one payment is current under the OTS method and 1-month delinquent under the MBA method." Kyle G. Lundstedt, Ph.D. & Andrew Davidson & Co., Inc., *Modeling Mortgage Risk: Definitional Issues*, (2005) http://www.securitization.net/pdf/content/ADC_Delinquency_Apr05.pdf.

Figure 8.3-b: Unpaid Principal Balance of loans in Covered Trusts by Delinquency Status and Pool Type

	Total		Alt-A		Subprime		MBS	
Current	$ 89,295,234,258	51.6%	$ 55,352,544,994	54.5%	$ 15,021,524,741	32.8%	$ 18,921,164,523	73.9%
30-59	7,717,481,363	4.5%	4,004,149,208	3.9%	3,070,373,009	6.7%	642,959,145	2.5%
60-89	4,222,041,902	2.4%	2,248,898,729	2.2%	1,615,046,631	3.5%	358,096,541	1.4%
90+	37,172,581,201	21.5%	19,739,863,130	19.4%	14,943,979,822	32.6%	2,488,738,249	9.7%
FCL	22,023,134,158	12.7%	12,711,404,702	12.5%	8,070,044,800	17.6%	1,241,684,656	4.8%
REO	3,877,823,240	2.2%	2,295,383,551	2.3%	1,371,161,813	3.0%	211,277,876	0.8%
Total	$ 164,308,296,122	100.0%	$ 96,352,244,314	100.0%	$ 44,092,130,817	100.0%	$ 23,863,920,991	100.0%

Source: CoreLogic, Greensledge Group

To this population of High Risk Loans, I make the following simplifying assumptions:

a. High Risk Loan transfers will occur once every quarter;
b. The identified loans will be transferred in order of priority as described in Paragraph 5(b) of the Settlement Agreement;
c. A maximum of 30,000 High Risk Loans will be transferred each quarter;
d. There will be ten approved Subservicers to whom transfers can be made, one per quarter, and each Subservicer can manage 30,000 loans from the transfer;
e. The population of High Risk Loans will be repopulated over time according to the 2010 average roll rates from current to 30, 30 to 60, and so on;
f. Transfers will conclude in December 2016, five years from the first transfer;

I use these assumptions as a reasonable expectation of the implementation of the Servicing Improvements at the time the Settlement Agreement was executed, in order to calculate a value of the Servicing Improvements.

10 Calculation of Value for the Transfers of High Risk Loans

Sections 10.1 to 10.5 detail the calculation of the value of the Servicing Improvements for the first quarterly transfer of High Risk Loans. For each subsequent quarterly transfer, the methodology is identical; the only change occurs in the size and composition by cohort of the High Risk Loan population that is transferred. This population eventually declines until there are fewer than 1,000 loans eligible for transfer, at which time I terminate the process. Section 10.6 aggregates the benefit to the Covered Trusts of all such quarterly transfers of High Risk Loans.

10.1 Total High Risk Loan Population as of November 2011

I first calculated the total High Risk Loan balances eligible to be transferred in December of 2011 by rolling June 2011 Balances forward based on 2010 average roll rates.[52] A loan transfer

[52] Roll rates are calculated and applied individually by loan vintage and loan pool type.

in December would be based on November balances. The population of High Risk Loans as of November 2011 is set out in Figure 10.1-a.

Figure 10.1-a: Total High Risk Loan Population, as of November 2011

	Alt-A	Subprime	MBS
Balance	34,696,416,648	24,632,168,824	4,087,857,840
Count	105,072	124,832	7,969

Source: CoreLogic, Greensledge Group

10.2 Identify Loans to Transfer to Subservicers

I then identified the specific High Risk Loans to be transferred in this quarter by applying the priority of transfers in Paragraph 5(b) of the Settlement Agreement pro-rated across pool types and vintages. From this subset I identified a specific group of 30,000 loans that will be transferred to Subservicers set out in Figure 10.2-a:

Figure 10.2-a: High Risk Loans to be Transferred in December 2011

	Alt-A	Subprime	MBS
Balance	4,230,608,059	3,181,890,856	542,639,962
Count	12,854	16,092	1,054

Source: CoreLogic, Greensledge Group

10.3 Calculation of the Benefit from Improved Re-Performance Rates

For this cohort of 30,000 loans which have been transferred, I then calculated the value resulting from the incremental improvement in the amount of re-performing loans.

I first determined the rate at which loans that are 60 days delinquent, 90 days delinquent or in foreclosure return to performing status (the "re-performance rate".)[53] Based upon my experience, and consistent with the actions of the parties in negotiating the Settlement Agreement, I think it reasonable to attribute variations in re-performance rate to the actions of the servicer and to conclude that variations in re-performance rates are correlated with servicer effectiveness.

To calculate the benefit of improved re-performance rates on the cohorts of High Risk loans in the Covered Trusts to be transferred to subservicing, I compared re-performance rates (i.e., the

[53] This may be due to timely and constructive right-party contact with the borrower, successful credit counseling, or a loan modification. CoreLogic does not provide complete information concerning loan modifications; thus, it is difficult to determine with any certainty if the terms of a loan have been modified. I do not require this differentiation for my analysis as the same issue applies to the universe of deals outside the Covered Trusts; re-performing loans are re-performing loans whatever the reason. The only observable fact available to inform this analysis is that a seriously delinquent loan has been returned to a performing status.

rate at which loans became current on their payments the following month) by High Risk Loan delinquency cohort, vintage and collateral type between the Covered Trusts and the Non Covered Trusts using 2010 data. The re-performance rates are shown on an aggregate basis in Figure 10.3-a. This information is compiled by origination year for both the Covered Trusts and for the Non-Covered Trusts and then broken out by pool type:

Figure 10.3-a: Average Re-Performance Rates, 2010

	Alt-A	Subprime	MBS
Covered Trusts	1.37%	1.64%	2.32%
Non-Covered Trusts	2.35%	3.89%	2.96%
Reperformance Rate Difference	0.98%	2.25%	0.64%

Source: CoreLogic, Greensledge Group

Figure 10.3-a shows that 1.37% of Alt-A High Risk Loans in the Covered Trusts became current the following month. By comparison, 2.35% of Alt-A High Risk Loans in the Non-Covered Trusts became current the following month. This difference (0.98%) is the improvement in the re-performance rate that would occur if these High Risk Loans were to re-perform at the industry average re-performance rate as opposed to the rate at which they have historically re-performed.

I apply this re-performance rate differential by collateral type and delinquency status to the cohort of 30,000 loans, by aggregate balance that I have already identified above in Figure 10.2-a. The result, in Figure 10.3-b, calculates the potentially avoided losses due to increased re-performance rates which I attribute to this first transfer.

Figure 10.3-b: Potentially Avoided Losses, loans transferred in December 2011

	Alt-A	Subprime	MBS
Reperformance Rate Difference	0.98%	2.25%	0.64%
Additional Cured Loans	41,430,154	71,647,803	3,464,474
Projected Average Severity	61%	78%	42%
Potentially Avoided Losses	25,300,776	55,991,109	1,459,781
with 30% Re-default Rate	17,710,543	39,193,776	1,021,847

Source: CoreLogic, Greensledge Group

For illustration, the 0.98% incremental increase in the Alt-A re-performance Rate, when applied to the principal balance of Alt-A loans transferred this quarter ($4.2 billion from Figure 10.2-a) results in $41.4 million of additional re-performing loans. To calculate the benefit from these

Alt-A loans that now re-perform as opposed to default, I apply a loss severity of 61%[54] to calculate potentially avoided losses of $25.3 million.

I apply the identical process to Subprime and MBS and calculate potentially avoided losses for the Covered Trusts for the loans transferred this quarter of $82.7 million.

I must discount the potentially avoided losses as calculated because re-performing loans have a significant re-default rate. In my experience and consistent with industry research, re-performing loans will default again ("re-default rate") within 18 months between 30% and 54% of the time,[55] a rate which varies according to modification type and other factors.[56] Multiplying each end of this range of re-default rates by the Potentially Avoided Loss number in Figure 10.3-b yields a value of this improvement between $38.1 million and $57.9 million for the loans transferred in this first quarter.

10.4 Calculation of the Benefit from Improved Foreclosure Timeline

For the loans remaining in this first cohort of 30,000 loans - after the re-performing loans have been accounted for, the next step in my methodology is to calculate a value derived from the improvement in the foreclosure timeline between the Covered Trusts and the Non-Covered Trusts.

When the servicer has determined that a delinquent loan is not qualified for loss mitigation or cannot be returned to performing status, it begins the foreclosure process. The disposition costs of the foreclosure process, including various fees, expenses, and taxes, along with Protective Advances that may be made during the timeline are borne by the owner of the loan. The longer the foreclosure timeline runs, the greater the sum of Protective Advances and disposition costs becomes, so in all but the exceptional cases of rapidly rising home prices, a shorter foreclosure timeline will reduce Loss Severity. Therefore, servicers who most efficiently process loan foreclosures will reduce Loss Severity for the benefit of the owner(s) of the loans.

Figure 10.4-a sets out the foreclosure timeline by average number of months[57] by collateral types. It shows that an Alt-A loan in the Covered Trusts, for example, would on average remain in the 90+ day, Foreclosure or REO delinquency status for 18.3 months before moving to final sale or liquidation. The average for 90+, Foreclosure and REO loans is 16.5 months for the Non-

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[54] Vintage weighted average for Alt-A Covered Trust loans over the 12 months prior to June 2011.

[55] Amherst Securities Group, Laurie Goodman, et al, *Modification Effectiveness: The Private Label Experience and Their Public Policy Implications*, 22 J. Fixed Incomes, 21-36 (May 30, 2012).

[56] I cannot from the data differentiate between the modifications and natural re-performers, so I therefore elected to use this re-default rate across the entire population of Re-performing loans without any secondary loss development curve (i.e. immediate application of the reduction as opposed to over 18+/- months).

[57] The average number of months calculated using weighted average loan balances.

Covered Trusts, or 1.8 months less. On average as shown in Figure 10.4-a, Subprime loans take 4.9 months longer and MBS loans take 1.6 months longer to move though the foreclosure process than similar loans in the Non-Covered Trusts.

Figure 10.4-a: Months in 90+, Foreclosure, and REO, 2010 data

	Alt-A	Subprime	MBS
Covered Trusts	18.3	23.2	14.8
Non-Covered Trusts	16.5	18.3	13.2
Difference (Months)	1.8	4.9	1.6

Source: CoreLogic, Greensledge Group

I use the aggregate principal balance by pool type of the loans remaining in this cohort of 30,000 loans after the re-performing loans have been accounted for, and the savings expected due to the reduction in foreclosure timeline which is a function of the average monthly costs of carrying a delinquent loan, to calculate the monetary benefit of reducing the foreclosure timeline.

Based on my experience in mortgage finance and homebuilding, I estimate the required annual Protective Advances (costs) of carrying a loan to disposition are 8% of the property value each year.[58] I therefore multiply the aggregate loan balances in each category by 0.667%[59] and then again by the average reduction in months in foreclosure, to calculate the net benefit. The data and result of this calculation and the results are shown in Figure 10.4-b:

Figure 10.4-b: Benefit of shorter Foreclosure timeline, loans transferred in December 2011

	Alt-A	Subprime	MBS
HRL that didn't Reperform	4,201,606,952	3,131,737,394	540,214,831
Foreclosure Timeline Difference	1.8	4.9	1.6
Avoided Fixed Costs of Foreclosure	49,193,576	103,242,090	5,662,646

Source: CoreLogic, Greensledge Group

10.5 Total Benefit this Quarter from Re-performance and Foreclosure Timeline

For this cohort of 30,000 loans which have been transferred in December 2011, I combine the calculated benefit from both an improvement in the re-performance rate shown in Section 10.3 and a reduction in the time in foreclosure shown in Section 10.4. The value of each of these improvements is set out by collateral type in Figure 10.5-a along with the total benefit.

[58] Property taxes: 2%, insurance: 1%, maintenance: 5%.

[59] This figure is 8% / 12 months.

Figure 10.5-a: Total benefit for loans transferred in December 2011

	Alt-A	Subprime	MBS
Reperformance Rates	17,710,543	39,193,776	1,021,847
Fixed Costs of Foreclosure	49,193,576	103,242,090	5,662,646
Total	66,904,119	142,435,866	6,684,493

Source: CoreLogic, Greensledge Group

The sum of the benefit I calculate for the 30,000 loans transferred in the first quarterly transfer is $216 million.

10.6 Total Savings after Five Years of Transfers

I replicated the same set of calculation each quarter into the future until December 2016, or five years after the first transfer. I chose this date for ease of explanation and because almost 90% of the benefit is created over the first 21 quarters. Loans are added to the population of High Risk Loans each month by applying the same 2010 roll rate that I used to model the migration of loans within the High Risk Loan categories. The import of this standard assumption is that some loans that are "current" at June 2011 will become delinquent and eventually default, thereby adding to the population of High Risk Loans.

The final step is to discount each of the quarterly transfer benefits to present value using a discount rate of 3.25%, which was the Prime Rate[60] in June 2011. The sum of these present values in Figure 10.6-a is the monetary value attributed to the transfer of High Risk Loans to Subservicers, based upon the assumptions I have made. The undiscounted value is shown in Figure 10.6-b, for comparative purposes.

Figure 10.6-a: Total Savings, all transferred loans, 3.25% discount rate

	Re-default Rate	
	54%	30%
Reperformance Rates	467,375,034	711,222,878
Fixed Costs of Foreclosure	1,949,407,980	1,941,106,188
TOTAL	**2,416,783,014**	**2,652,329,066**

Source: CoreLogic, Greensledge Group

[60] Wall Street Journal Prime Rate, as defined.

Figure 10.6-b: Total Savings, all transferred loans, 0% discount rate

	Re-default Rate	
	54%	30%
Reperformance Rates	499,449,114	760,031,260
Fixed Costs of Foreclosure	2,083,316,515	2,074,456,387
TOTAL	**2,582,765,628**	**2,834,487,647**

Source: CoreLogic, Greensledge Group

The monetary benefit of the Servicing Improvements resulting from these two metrics, foreclosure timeline and re-performance rates is significant. I considered two of the most important assumptions in designing my methodology, namely: (i) the Subservicers performance would improve only the transferred loans with respect to these metrics so that they would meet the industry average, and (ii) the transfers would occur every quarter until December 2016.

Appendix D details the calculations done in this section by origination vintage.

11 Transfer Costs

From the Representative Subservicer Compensation[61] structure, BANA will incur out-of-pocket costs in excess of the Master Servicing Fees it receives due to the transfer of High Risk Loans to Subservicers and the incentive fee structure that the Subservicer will earn upon disposition of any loan. In my experience, the incentive fee structure in this case is in the average to high end of the range for such compensation. A more detailed analysis of these expenses can be found in Appendix C.

In my opinion, the incremental cost incurred by BANA is a benefit of the Servicing Improvements that inures to the Covered Trusts. Without the terms of the Settlement Agreement, any servicing fees and expenses in excess of the Master Servicing Fee (as defined), would have been borne by the Covered Trusts.

In my opinion, this benefit could be as much as $411 million, but its derivation is dependent upon the number of, and timing of, the transfers of High Risk Loans. Under other assumptions this benefit could be lower, approximately $98 million. As an incremental expense to BANA under the Settlement Agreement, I consider it, at minimum, a quantifiable incentive for BANA to improve its performance as loan servicer and, in the case of significant transfers of High Risk Loans, a direct subsidy payment to the Covered Trusts.

[61] Exhibit E, Verified Petition with Exhibits.

In my opinion the transfer of loans is a benefit of the Servicing Improvements with a value that may range between $98 and $411 million.

12 Incentives for a Timely Foreclosure Process

Paragraph 5(c), the "Master Servicing Fee Adjustment", of the Settlement Agreement details an incentive structure applicable to loans in the Covered Trusts that are not being serviced by a Subservicer. The Master Servicer will incur a monetary remediation payment should the non-transferred delinquent loans fail to meet certain benchmarked standards for movement into and through the foreclosure pipeline.

The probability of a Master Servicing Fee Adjustment is reduced to the extent that High Risk Loans are transferred to the Subservicers as described in Section 8.1. Calculating a Master Servicing Fee Adjustment into many future periods while also projecting loan transfers requires a number of complicated assumptions. However, it is a quantifiable benefit to the Covered Trusts in the event that the other Servicing Improvements are not undertaken. The characterization and structure of the Master Servicing Fee Adjustment is as an incentive to promote improved servicing performance by BANA in conjunction with encouraging the transfer of High Risk Loans to the Subservicers.

For purposes of the valuation in this Section 12, in order to quantify the upper end of the range for this benefit to the exclusion of the other benefits, I will assume that none of the loans in the Covered Trusts are transferred to Subservicers. Therefore, all the loans in the Covered Trusts would be considered under the calculation of the incentive of the Master Servicing Fee Adjustment.

12.1 Incentive Payment - Timeline for Referral to Foreclosure

Paragraph 5(c)(i)(A) of the Settlement Agreement refers to loans that have not been referred to foreclosure. The Industry Standards pursuant to which BANA is benchmarked is defined here as 150 days delinquent at the time of referral to Foreclosure. If I consider the 90+ day delinquency cohort and calculate the variance between the number of days the loan has been delinquent and 150 days, I can calculate the Master Servicing Fee Adjustment.

For purposes of illustration, if 100% of the loans that were 90+ days delinquent as of 6/1/11 were referred to Foreclosure the following month, the calculation for the Master Servicing Fee adjustment is shown in Figure 12.1-a:

Figure 12.1-a: Loan Level Amount for 90+ Day Delinquent Loans

Days Variance to Industry Std	Loan Count	Loan Balance	W.Avg. Int. Rate	Applicable Percentage	Loan Level Amount
<= -60.0	40,323	$ 11,275,283,792	6.39%	-50%	$ (30,020,443)
-59.9- -30	4,993	1,340,242,726	6.45	-20%	(1,440,761)
-29.9- 0.0	5,180	1,405,736,644	6.48	0%	-
0.1- 30.0	4,765	1,294,606,031	6.47	0%	-
30.1- 60.0	4,659	1,287,366,596	6.42	40%	2,754,965
60.1- 90.0	4,089	1,119,880,345	6.48	60%	3,628,412
90.1- 120.0	3,833	1,068,101,250	6.34	80%	4,514,508
> 120.0	66,501	$ 18,823,684,077	6.56%	100%	$ 102,902,806
				Total:	$ 82,339,487

Source: Loan Performance, Greensledge Group

In this illustration, the Loan Level Amount (as defined in the Settlement Agreement) would be approximately $82 million.

Similarly, if 100% of the loans above were to migrate to the "> 120" day variance row and are assessed the maximum incentive fee, the total Loan Level Amount would be approximately $203.3 million[62].

12.2 Incentive payment - Timeline for Foreclosure Process

Paragraph 5(c)(i)(B) of the Settlement Agreement refers to loans that are in foreclosure. Here, the applicable variance is between the number of days a loan has been in Foreclosure and the relevant state timeline in the most current (as of the time of each calculation) FHFA referral to "foreclosure timelines"[63].

For purposes of illustration, if 100% of the loans that were in foreclosure as of June 1, 2011 were subsequently sold or otherwise liquidated the following month, and I calculate the variance between the number of days in foreclosure and the applicable FHFA timeline, the Master Servicing Fee Adjustment would be calculated as shown in Figure 12.2-a:

[62] This figure is $37.6MM * 6.49% (the weighted average interest rate)/12 * 100%

[63] Fannie Mae Servicing Guide, *Foreclosure Time Frames and Compensatory Fee Allowable Days, available at* https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf (last visited March 14, 2013).

Figure 12.2-a: Loan Level Amount for Loans in Foreclosure

Days Variance to Industry Std	Loan Count	Loan Balance	W.Avg. Int. Rate	Applicable Percentage	Loan Level Amt
<=-120.0	47,707	$ 12,059,513,406	6.65%	-50%	$ (33,414,902)
-119.9- -90	3,407	965,249,495	6.43	-40%	(2,068,851.42)
-89.9- -60	3,299	911,038,426	6.36	-30%	(1,448,551.10)
-59.9- -30	4,121	1,139,640,691	6.34	-20%	(1,204,220.33)
-29.9- 0.0	3,503	867,424,394	6.70	0%	-
0.1- 30.0	2,643	654,442,139	6.66	0%	-
30.1- 60.0	2,141	505,792,465	6.89	20%	580,818.35
60.1- 90.0	1,725	457,045,913	6.61	30%	755,268.37
90.1- 120.0	1,561	387,879,757	6.60	40%	853,335.46
120.1- 150.0	1,993	520,066,444	6.29	50%	1,363,007.47
150.1- 180.0	1,985	500,194,502	6.40	60%	1,600,622.41
180.1- 210.0	1,558	374,348,754	6.63	80%	1,654,621.49
> 210.0	13,388	3,595,244,355	6.69	100%	20,043,487
				Total:	$ (11,285,364)

Source: Loan Performance, Greensledge Group

In this illustration, the Loan Level Amount would be approximately -$11.3 million.

Similarly, if 100% of the loans above migrate to the "> 210" day variance row and are assessed the maximum incentive fee, the total Loan Level Amount would be approximately $126.4 million[64].

Once the loans from Section 12.1 have migrated into the foreclosure bucket, they are subject to the calculation in this section. If 100% of those loans then remain in foreclosure for more than 210 days above the industry standard and sustain the maximum incentive fee the total Loan Level Amount would be an additional $203.3 million[62].

12.3 Incentive payment – Current Loans

As a result of the roll rate analysis done in Section 10, I calculated approximately $40.7 billion of loans will default from the population of loans that are current as of December 1, 2011. Assuming these loans have a 6.5% Weighted Average Coupon (similar to the loans in the 90+ and foreclosure buckets), and assuming these loans are in the 90+ delinquency status and

[64] This figure is $22.9MM * 6.61% (the weighted average interest rate)/12 * 100%.

foreclosure long enough to incur the maximum incentive fee, the maximum total Loan Level Amount these loans might reach is approximately $221 million.[65]

12.4 Incentive payment – Summary

In calculating the maximum Master Servicing Fee Adjustment, I assume that none of the loans are transferred to Subservicers and all loans move through the BANA foreclosure pipeline slowly enough as to incur the maximum incentive fees. This calculates the theoretical maximum penalty payable by BANA according to the methodology explained in Sections 12.1 to 12.3.

The cumulative maximum Master Servicing Fee Adjustment using the above assumptions is approximately $750 million. This maximum number is well beyond my expectations under any expected case, and useful only to describe how the calculation works. Any amount payable with respect to the Master Servicing Fee Adjustment will take into account the actual performance of BANA as servicer and the transfer of High Risk Loans to the Subservicers; variables which I believe are difficult to make supportable assumptions around concurrently, over an extended period of time. However I might choose to calculate it, in my opinion, this benefit will be significantly smaller than the potential benefit I have calculated for the transfer of High Risk Loans in Section 10.

My opinion is that the value of this Servicing Improvement could be as much as $750 million but as a practical matter it will be significantly smaller. This Servicing Improvement provides a monetary incentive for BANA to transfer many of the loans that would be subject to the Master Servicing Fee Adjustment loans to Subservicers and/or improve its performance as servicer with respect to delinquent and defaulted loans. Applying the methodology outlined in this Section 12 to the assumed case of transfers in Section 10, I calculate a Master Servicing Fee Adjustment in May 2012 of $7.6 million for illustrative purposes. Given the variability of this payment with regard to the amount of delinquent loans transferred to Subservicing, the Master Servicing Fee Adjustment is difficult to model with any precision. While I do not add it to the cumulative total of benefits attributed to Servicing Improvements for the purposes of my quantification, I note that the Master Servicing Fee Adjustment applies to even non-High Risk Loans and thus would be in addition to the Servicing Improvements benefits.

[65] This figure is $40.7MM * 6.5%/12 * 100% for the time in the 90+ day delinquency category and the same for the time in the Foreclosure category.

13 Cure of Certain Documentation Exceptions

Paragraph 6 of the Settlement Agreement addresses certain mortgage documentation exceptions, which could prevent foreclosure if not cured.

Prior to the execution of the Settlement Agreement, BNYM provided to BANA a loan level report for certain of the Covered Trusts outlining the total number of document deficiencies tracked by the BNYM.[66] The loan level reports contained 117,899 loans with any type of document deficiency.

As per the Settlement Agreement, BANA submitted to BNYM an "Initial Exception Report Schedule," including all the Mortgage Exception and Title Policy Exception loans in the Covered Trusts. On an ongoing basis, the Settlement Agreement requires BANA to issue an updated Monthly Exception Report listing current Mortgage Exceptions and Title Policy Exception loans as well as loans with respect to which a Mortgage Exception or Title Policy Exception was Cured during the reporting period.

Applying the Settlement Agreement document deficiency criteria to the loans within the BNYM loan level report, the number of loans listed on the Initial Exceptions Report Schedule was 1,116.[67] The Settlement Agreement requires BANA to reimburse the Covered Trusts for any loss associated with a loan listed on the then-current Monthly Exception Report if that loan has defaulted and a loss is incurred due to the Master Servicer's inability to foreclose as a first-lien holder by reason of an outstanding Mortgage Exception and the trust is not made whole by title policy as a result of an outstanding Title Policy Exception.

To maintain the privacy of the borrowers, loan identification numbers have been removed from the Exception Report. As such, I cannot identify the individual characteristics of these loans and must make assumptions as to the balance and delinquency status to determine a value for this Paragraph 6 of the Settlement Agreement.

In my opinion, the document deficiency section in the Settlement Agreement is a benefit to the Covered Trusts, because BANA will reimburse the Covered Trusts for losses due to Mortgage Exceptions and Title Policy Exceptions for the life of the loans. In order to calculate an estimated benefit for this improvement, I must assume that the loans on the Exception Report are of average balance and are distributed across delinquency statuses as the rest of the Covered Trust loans, and make further assumptions as to the disposition of the loans in the event of default.

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[66] "Trustee's Loan-Level Exception Reports" BNYM_CW-00243975 to BNYM_CW-00244091.

[67] The August 2011 Monthly Exception Report.

While it clearly would carry an expectation of a monetary value to the Covered Trusts, I elected not to calculate a specific value for this benefit as it is subject to further assumptions that I would need more information to refine.

14 Summary

My opinion calculates the value of the Servicing Improvements as could have reasonably been expected on the June 2011 Settlement Agreement date, using historical portfolio information to calculate a reasonably expected monetary value as of that date.

In my opinion, the monetary value of the benefits that comprise the Servicing Improvements as could have reasonably been expected at June 2011 is $2.51 to $3.07 billion.

My analysis in Section 6 indicates that the final Settlement Amount represented a reasonable outcome to the negotiation. The monetary value I have calculated for the benefit from the Servicing Improvements further supports my opinion in regard to the reasonableness of the Settlement Amount.

Dated: March 14, 2013
New York, New York

Phillip R. Burnaman, II

Exhibit 52

Exhibit 52 contains materials that have been designated Confidential pursuant to the Court's Protective Order dated June 14, 2012. A copy of Exhibit 52 has been delivered to the Court and served on all parties of record.