

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.<sup>1</sup> 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.

---

<sup>1</sup> 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.<sup>2</sup>

---

<sup>2</sup> [REDACTED]

*See, e.g.*, Agreement of Forbearance, [REDACTED]

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.

<sup>3</sup>

<sup>4</sup> Moreover,

<sup>5</sup> In my opinion, these grounds

---

Dec. 9, 2010, BNYM\_CW-00271275-81.

<sup>3</sup> *See, e.g.*, Deposition of Jason Kravitt, Sept. 19-20, 2012 (hereafter, “Kravitt Dep.”), 186:23-25

*id.* 358:10-13

<sup>4</sup> *See* Kravitt Dep. 182:23-183:8

*id.* 183:9-12

*see also* Deposition of Elaine Golin, Nov. 12, 2012, 253:4-7 (

<sup>5</sup> *See* Kravitt Dep. 183:6-8

*id.* 187:21-24

*id.* 188:8-10

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,<sup>6</sup> and Frankel points to no such “representation” that she finds

---

<sup>6</sup> 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.<sup>7</sup> Negotiations among such a vast population

---

<sup>7</sup> *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.

*See, e.g.*, Kravitt Dep. 183:10-12

*id.* 188:6-10

Deposition of Theodore Mirvis, Nov. 28, 2012, 73:11

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,

*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

---

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]  
[REDACTED]  
[REDACTED] See Dep. Ex. 235; FR at 9 n.21.

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.

(BNYM\_CW-00270587-89)

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 ....”<sup>8</sup> 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

---

<sup>8</sup> 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

Mailing address:

Yale Law School  
P.O. Box 208215  
New Haven, CT 06520-8215

Street address (for courier deliveries):

127 Wall Street  
New Haven, CT 06511

Tel: 203-432-7299

Fax: 203-432-1109

Email: [john.langbein@yale.edu](mailto:john.langbein@yale.edu)

Finland telephone (summers): 011-358-2-473-4591

#### 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)

What ERISA Means by “Equitable”: The Supreme Court’s Trail of Error in *Russell, Mertens, and Great-West*, 103 *Columbia Law Review* 1317 (2003), substantially republished in *NYU Review of Employee Benefits and Executive Compensation* 2-1 (2004)

Trust-Investment Law in the United States: Main Themes of the Uniform Prudent Investor Act, *Shintaku* No. 189 (Feb. 1997) (in Japanese)

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)

Reversing the Nondelegation Rule of Trust-Investment Law, 59 *Missouri Law Review* 104 (1994) (William Fratcher memorial issue)

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)

Market Funds and Trust-Investment Law II (with Richard Posner), 1977 *American Bar Foundation Research Journal* I

The Revolution in Trust Investment Law (with Richard Posner), 62 *American Bar Association Journal* 887 (1976)

Market Funds and Trust-Investment Law (with Richard Posner), 1976 *American Bar Foundation Research Journal* I

## Trust and Estate Law

Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers, \_\_ AC TEC 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)

The Uniform Trust Code: Codification of the Law of Trusts in the United States, 15 Trust Law International 69 (2001)

The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale Law Journal 165 (1997); republished in *Modern International Developments in Trust Law* (D. Hayton, ed.) (1999)

The Contractarian Basis of the Law of Trusts, 105 Yale Law Journal 625 (1995)

Will Contests, 103 Yale Law Journal 2039 (1994) (review)

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)

The Inheritance Revolution, *The Public Interest* 15-31 (Winter 1991)

Education and Family Wealth, 20 *Planning for Higher Education* 1 (1991)

Taking a Look at the Pluses and Minuses of the Practice, *Trusts & Estates Magazine* 10-18 (Dec. 1989)

The Twentieth-Century Revolution in Family Wealth Transmission, 86 *Michigan Law Review* 722 (1988)

The Twentieth-Century Revolution in Family Wealth Transmission and the Future of the Probate Bar, 1988 *Probate Lawyer* 1 (American College of Probate Counsel)

Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law, 87 *Columbia Law Review* 1 (1987)

Redesigning the Spouse's Forced Share (with Lawrence Waggoner), 22 *Real Property, Probate and Trust Journal* 303 (ABA 1987).

The Nonprobate Revolution and the Future of the Law of Succession, 97 *Harvard Law Review* 1108 (1984)

Reformation of Wills on the Ground of Mistake: Change of Direction in American Law? (with Lawrence Waggoner), 130 *Univ. Pennsylvania Law Review* 521 (1982)

"Defects of Form in the Execution of Wills: Australian and Other Experience with the Substantial Compliance Doctrine," in *American/Australian/New Zealand Law: Parallels and Contrasts* 59 (ABA Press 1980)

Crumbling of the Wills Act: Australians Point the Way, 65 *American Bar Association Journal* 1192 (1979)

Living Probate: The Conservatorship Model, 77 *Michigan Law Review* 63 (1978)

Substantial Compliance with the Wills Act, 88 *Harvard Law Review* 489 (1975)

#### Comparative Law

Cultural Chauvinism in Comparative Law, 5 *Cardozo Journal of International & Comparative Law* 41 (1997)

"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)

Money Talks, Clients Walk, *Newsweek*, April 17, 1995, at 32-34

The Influence of Comparative Procedure in the United States, 43 *American Journal of Comparative Law* 545 (1995) (United States National Report to the Tenth World Congress for Procedure Law)

“American Legal Education in Comparative Perspective,” in *Legal Education in the Netherlands in a Comparative Context* 55-64 (Grotius Academy 1995)

The Influence of the German Émigrés on American Law: The Curious Case of Civil and Criminal Procedure, in *Einfluß deutschsprachiger juristischer Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (Mohr Verlag, Tübingen 1993)

Trashing "The German Advantage," 82 *Northwestern Univ. Law Review* 763 (1988)

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)

The German Advantage in Civil Procedure, 52 *Univ. Chicago Law Review* 823 (1985)

Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?, 1981 *American Bar Foundation Research Journal* 195

Land without Plea Bargaining: How the Germans Do It, 78 *Michigan Law Review* 204 (1979)

Judging Foreign Judges Badly: Nose Counting Isn't Enough, 18 *Judges' Journal* 4 (Fall 1979)

Comparative Criminal Procedure: “Myth” and Reality (with Lloyd L. Weinreb), 87 *Yale Law Journal* 1549 (1978)

Controlling Prosecutorial Discretion in Germany, 41 *Univ. Chicago Law Review* 439 (1974)

### Legal History

The Disappearance of Civil Trial in the United States, 122 *Yale Law Journal* 522 (2012)

“Bifurcation and the Bench: The Influence of the Jury on English Conceptions of the Judiciary,” in *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* 67 (Paul Brand & Joshua Getzler eds. 2012)

“Blackstone on Judging,” in *Blackstone and His Commentaries* 65 (Wilfrid Prest ed. 2009)

- “The Legal History of Torture,” in *Torture: A Collection* 93 (Sanford Levinson ed.) (Oxford Univ. Press 2004)
- Review, *The Trial in History* (Vol.1, M. Mulholland & B. Pullan eds., Vol. 2, R.A. Melikan ed.), 119 *English Historical Review* 192 (Feb. 2004)
- “Trinity Hall and the Relations of European and English Law from the Fourteenth to the Twenty-First Centuries,” in *The Milestones Lectures* (Cambridge, England 2001)
- The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors, 58 *Cambridge Law Journal* 314 (1999) (awarded the Sutherland Prize, American Society for Legal History, 2000)
- “The Later History of Restitution,” in *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* 57-62 (Oxford 1998)
- The Historical Foundations of the Law of Evidence: A View from the Ryder Sources, 96 *Columbia Law Review* 1168 (1996)
- The Historical Origins of the Privilege Against Self-Incrimination at Common Law, 92 *Michigan Law Review* 1047 (1994)
- Chancellor Kent and the History of Legal Literature, 93 *Columbia Law Review* 547 (1993)
- On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial, 15 *Harvard Journal of Law & Public Policy* 119 (1992); published in translation, 17 *Yonsei Law Review* (Sept. 2007) (South Korea); 1996 *Nueva Doctrina Penal* 45 (Argentina)
- Culprits and Victims, *Times* (London) Literary Supplement, Oct. 11, 1991 (review)
- The Twilight of Amateur Law Enforcement, 9 *Law & History Review* 398 (1991) (review)
- “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)
- “The Constitutio Criminalis Carolina in Comparative Perspective: An Anglo-American View,” in *Strafrecht, Strafprozess und Rezeption* (P. Landau & F.-C. Schroeder eds.) (Frankfurt 1984)
- Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 *Univ. Chicago Law Review* 1 (1983)
- Illustrations as Legal Historical Sources, 29 *Univ. Chicago Law School Record* 3 (1983)

Encyclopedia of Crime and Justice, entry for the history of the law of torture (1983)

*Albion's Fatal Flaws, Past and Present* (No. 98, February 1983) 96-120

Biographical Dictionary of the Common Law (A.W.B. Simpson, ed.), entries for G. Gilbert, W. Lambarde, D. Ryder, T. de Veil, J. Wild (Butterworths 1983)

“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)

The Criminal Trial Before the Lawyers, 45 *Univ. Chicago Law Review* 263 (1978)

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 prevalingly 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, Vanderburgh 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 Eigel & 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. Hangle, Esq., Hangle 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)

Trustee's Expert Opinions

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

Other Documents

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