



Daniel M. Reilly
Tel: 303-893-6100
dreilly@rplaw.com

November 1, 2013

Via E-filing and Facsimile

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*
(Index No. 651786/2011)**

Dear Justice Kapnick:

I write on behalf of AIG in response to the Trustee's October 17, 2013 letter, which sets forth in scattershot-fashion objections Petitioners intend to raise to block portions of Professor Adam Levitin's testimony. Operating under the relentless weight of the Further Assurances clause (by which the Trustee contractually obligated itself to support this settlement at all costs), the Trustee must seek to preclude Professor Levitin from applying his extensive knowledge of the residential mortgage-backed securitization ("RMBS") industry to shed further light on why both the settlement process and the Trustee's conduct therein are unworthy of the Court's pardon.

The settlement proponents chose not to proffer a single expert on the RMBS industry. Similarly, not a single expert has been called by the Trustee who had knowledge of the custom and practice of the various participants in the RMBS industry, including the functions of an RMBS trustee. Professor Levitin has that special RMBS industry knowledge and expertise. This has been repeatedly acknowledged by various participants in the industry, regulators, enforcement officials of the industry, and Congressional members and their staffs tasked with understanding how the RMBS industry works so that they can effectively legislate it.

The Trustee concedes, as it must, that the purpose of an expert witness is to help the fact finder understand specialized issues. Ltr. at 1. That is precisely the purpose of Professor Levitin's testimony. Pursuant to this Court's scheduling order, which specified that Intervenors disclose their experts first, Petitioners disclose their experts and rebuttal experts second, and Intervenors then disclose their rebuttal experts last, Professor Levitin's report, in pertinent part rebuts the testimony of Professor Fischel and Mr. Landau, neither of whom had any measurable RMBS industry knowledge.¹ To give context to his criticisms of these witnesses, Professor Levitin describes his knowledge of the RMBS industry practices related to mortgage servicing issues, the private-label securities market ("PLS"), the putback mechanism in PSAs, RMBS

¹ As set forth in Professor Levitin's report, Mr. Landau's trustee custom and practice experience has no place here because it is limited to corporate bond indenture trustees, which are different in several significant ways from RMBS trustees.



November 1, 2013

Page 2

trustee practice, and the nuanced role of the various parties in RMBS. Professor Levitin's *curriculum vitae* confirms that he is eminently qualified to opine on these topics.²

Professor Levitin's RMBS industry knowledge is broad-based in that he teaches, publishes, comments, speaks, and researches issues in the industry. His expertise has also led to his retention as a consultant to hedge funds, institutional investors, and private litigants on RMBS matters. In these capacities, he has investigated and evaluated servicer practices, including specifically, Bank of America servicer practices. Professor Levitin has also served as a consulting expert to the New York Attorney General and as a Volunteer Deputy Attorney General for the state of Delaware on RMBS matters.

The Trustee pooh-poohs Professor Levitin's teaching experience. Among others, he teaches Structured Finance, which includes detailed coverage of trustees, and servicers, and Corporate Reorganizations, which includes coverage of the role and duties of indenture trustees when facing a default. Professor Levitin has devoted hundreds of hours to researching and analyzing RMBS matters including the economic incentives which underlie the RMBS structure. Before being approached about this engagement, Professor Levitin had already examined over 100 PSAs, published several articles concerning RMBS, and predicted the problems that would arise as a result of the close business relationships between servicers and trustees, citing the BNYM-Countrywide relationship as a prime example. Adam Levitin & Tara Twomey, *Mortgage Servicing*, 28 *Yale J. on Reg.* 1 at 61 (Winter 2011).

Professor Levitin's RMBS expertise has earned him various prestigious governmental appointments beginning with his 2008 appointment as Special Counsel for Mortgage Affairs to the Congressional Oversight Panel ("COP"). He was the primary draftsman of the COP's monthly reporting on foreclosure prevention efforts and obstacles thereto, and interviewed servicers, including former top Countrywide officers. Professor Levitin was also appointed Chair of the Mortgage Subcommittee of the Consumer Financial Protection Bureau's statutory Consumer Advisory Board. In that role, Professor Levitin provides advice and input to staff regarding mortgage servicing and trustee practice issues. His research, study, and involvement in the RMBS industry is too voluminous to detail in this letter, and I attach Professor Levitin's CV for the Court's convenience.

Professor Levitin's testimony will be useful to the Court as it prepares to rule on the Trustee's proposed findings and evaluates the credibility of the Trustee's experts, Fischel and Landau, who opined that the settlement was reasonable, for completely different reasons. The testimony of those witnesses, Professor Fischel, with no particular trustee experience of any kind

² The Trustee gives the Court the false impression that Professor Levitin disavowed that he has any special expertise, citing questions framed around generalized trustee law. Professor Levitin testified that he indeed is an expert on the custom and practice in the RMBS industry. *See* Levitin Depo. at 50:15-51:24 (testifying that he considers himself "an expert on the duties and responsibilities of securitization trustees," and "an expert on the custom and practice of securitization trustees").



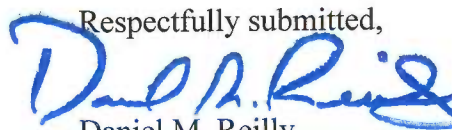
November 1, 2013
Page 3

and admitted marginal familiarity with the record, and Mr. Landau, who blithely and inaccurately equated his corporate trust experience with the unique and distinct RMBS industry, should not be considered by this Court unrebutted. The trial record here is extensive and the Settlement Agreement has 32 separate sections, some of which alter the terms in the PSAs, and some of which have no real value because what they purport to require is already required under other orders and agreements. The Court has many decisions to make. Armed with years of study and research in the securitization industry, and having pored through the record and studied the Settlement Agreement, the PSAs, and the issues in this case, Professor Levitin can provide testimony and guidance that no other expert has provided as to the custom and practice of RMBS in general, and BNYM in particular in this case.³

The Trustee also seeks to preclude criticism of the Fischel event study on the ground that Professor Levitin must be either an economist or a statistician. Ltr. at 2. Ignoring that Professor Fischel himself has neither an economics nor a statistics degree, the Trustee proclaims that, the moniker “economist” or “statistician” is required before an expert can criticize an event study. Professor Levitin has not only conducted his own event study, he regularly reviews event studies submitted for a peer-review at scholarly journals and scholarly conferences, and regularly contributes in law and economics workshops centered on empirical economic analyses, including event studies of stock price movements.

The Trustee also seeks to preclude Professor Levitin’s criticism of Brian Lin’s opinion and Phillip Burnaman’s opinion, but Professor Levitin is not offering an opinion about how the losses should have been calculated. Instead, Professor Levitin is offering an opinion about the *Trustee’s* flawed approach and problematic reliance on experts, an opinion he is well-qualified to give.

Finally, Professor Levitin’s opinions are based not on speculation but entirely on his considerable RMBS experience and his detailed review of the record in this case, including admissions from the settlement proponents themselves. For the reasons set forth above, we respectfully request that Professor Levitin be permitted to testify on all matters set forth in his report and on which the Petitioners had the opportunity to cross-examine.

Respectfully submitted,

Daniel M. Reilly

cc: Counsel of record (via ECF)

³ This type of testimony is entirely proper and helpful when a court is addressing the interpretation of a contract, particularly a contract with specialized language and issues. *Kass v. Kass*, 91 N.Y.2d 554, 566-67 (1998); *Playtex FB, Inc. v. Columbia Casualty Co., et al.*, 622 A.2d 1074, 1076 (Del Super. Ct. 1992).