EXHIBIT 133

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

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

In the matter of the application of

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

Index No. 651786-2011

Kapnick, J.

EXPERT REPORT

OF

TAMAR FRANKEL

QUALIFICATIONS

I am a Professor of Law at Boston University, and have been teaching at Boston University School of Law since 1968. I was awarded a Law Degree from the Jerusalem Law Classes (Israel) in 1948 and the LL.M. and S.J.D. degrees from Harvard Law School in 1964 and 1972, respectively. I have taught courses on corporations, trusts and estates, securities regulation, insurance, securitization (asset-backed securities), investment management regulation, and seminars on fiduciary law, pension fund regulation (ERISA), and Internet Issues. Throughout the years, I was a Visiting Professor at Harvard Law School (1979, 2005), Harvard Business School (1980, 2006), and at the University of California, at Berkeley (1981); a Visiting Scholar at the Brookings Institution in Washington D.C. (1987) and an Attorney Fellow at the Securities and Exchange Commission ("SEC" or "Commission"), Division of Investment Management (June - December 1995; and July 1996 - July 1997). As an associate at the firm of Arnold & Porter, Washington, D.C. (1965-1966), I worked in the areas of general corporate, securities, and commercial law. As a consultant to Bankers Trust Company, New York (1982-1986), I worked mainly on matters of securities regulation, the Investment Company Act of 1940 and Investment Advisers Act of 1940, as they related to banks and bank trust departments.

Among my publications are a four-volume treatise, *The Regulation of Money Managers (Mutual Funds and Advisers)* (2d ed. 2001) (with Ann Taylor Schwing) (Aspen Law & Business), a two-volume treatise on *Securitization (Structured Financing, Financial Assets Pools, and Asset-Backed Securities)* (2d ed. 2006), *Trust and Honesty, America's Business Culture at a Crossroad* (Oxford University Press 2006), and *Fiduciary Law* (Oxford University Press, 2010). My other publications are listed in Appendix A, attached to this Report.

Throughout the years, I have testified as an expert witness before congressional committees, before the SEC, in court, and in arbitration

In this case, the Trustee was a fiduciary of the Outsiders, particularly with respect to its activities concerning the Settlement. The Trustee's decision to enter into settlement negotiations is precisely the type of discretionary conduct that subjects trustees to the highest duties. There can be no question that the Trustee owed to the Outsiders fiduciary duties.

B. The Trustee exceeded the power vested in it, as provided in the Governing Agreements, and the process by which the Settlement was reached was tainted by the Trustee's conflicts of interest, and lack of care

No fiduciary authority is unlimited.[15] The Trustee anchors its duties in the Governing Agreements.[16] Yet, duties and powers are linked. As one Court noted: "It is axiomatic that the powers of an indenture trustee are limited to those specifically articulated in the indentures themselves."[17] While some powers may be implied from express powers, these powers depend on the circumstances and are subject to the courts' interpretation.

In this case, the Governing Agreements do not grant the Trustee a specific power or function to negotiate or reach a settlement such as the Settlement.[18]

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[15] *Denver Nat'l Bank v. Von Brecht*, 322 P.2d 667 (Colo. 1958). A trust that vests on a trustee unlimited power is not a trust. It is probably a gift or at most custody. *See Morice v. Bishop of Durham*, 32 Eng. Rep. 947, 947 (1805) (where testator left remainder in trust "for such objects of benevolence and liberality as the trustee in his own discretion shall most approve," trust classification failed because the court could not exercise supervisory power, and remainder passed intestate). Once he consents to act, a fiduciary is bound by fiduciary duties even though he was promised nothing in return. A fiduciary is not entitled to any consideration, except perhaps quantum meruit. *See, e.g.*, Austin W. Scott & William F. Fratcher, The Law of Trusts 125 (4th ed. 1987) ("The trustee is held to the standard of a man of ordinary prudence, whether he receives compensation or whether he acts gratuitously. . . . The courts have ordinarily fixed a higher standard for bailees and agents who are compensated than they have fixed for those who act gratuitously. There is no similar distinction, however, as to trustees.").

[16] Hrg. Tr. 11:3-14:5 (Sept. 21, 2011) (Ingber); Hrg. Tr. 150:24-25 (Feb. 7, 2013) (Ingber).

[17] *Cont'l Bank, N.A. v. Caton*, No. 88-1611-C, 1990 U.S. Dist. LEXIS 11624, at *4 (D. Kan. Aug. 6, 1990) ("The rights and powers of the [Indenture] Trustee are a function of the Trust Indenture and cannot be generally expanded in contradiction of the Indenture by reference to broad common law principles.").

[18] [redacted]
Even if the Trustee has the power to bring suit against BoA after an Event of Default, it does not have the power to *forego the claims against BoA* without the consent of the investors whose rights are being extinguished. An analogy to the Trustee's powers is a lawyer's power to settle. *Fennell v. TLB Kent Co.*, 865 F.2d 498, 501-02 (2d Cir. 1989). The lawyer may have power to conduct the litigation. But that power does not by implication vest in the lawyer the unfettered power to settle the case. *Id.* (stating that generally "the decision to settle is the client's to make"; however, settlement may be upheld if there is apparent authority). One of the reasons for this distinction is that conducting the litigation requires the lawyer's expertise and the client's control is likely to undermine the conduct of the litigation. Settlement of a case,

The Governing Agreements also do not grant the Trustee the power to: (a) extend the 60-day cure period and avoid an Event of Default, nor (b) enter into a "forbearance agreement."[19] If the Trustee purports not to be bound by any *duties* that are not specified in the PSA,[20] it may not simultaneously assume *powers* that are unrelated to nonexistent duties. The Settlement is the result of the Trustee's assumption of powers that were not granted under the PSAs.

The Settlement should not be approved absent in-depth judicial scrutiny into the Trustee's conduct and the Settlement's substantive fairness to all investors. Even if the Trustee had acted within its enumerated powers, the assertion and exercise of this power must be accompanied by the duties of loyalty and care.

It is my opinion that the Trustee violated its duty of loyalty. It acted in conflict of interest by [redacted][21] In fact, [redacted][22] The evidence shows that [redacted][23] In fact, the Trustee continued and continues to seek a release from

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on the other hand, is not as time sensitive, and the lawyer's expertise is not necessarily decisive in determining the best settlement terms. In fact, the client may be the better or at least far more important decision-maker. A similar rationale would apply to the Trustee's authority to settle claims on behalf of the beneficiaries.

[19] [redacted]

[20] Tr. 11:3-14:5 (Sept. 21, 2012) (S.D.N.Y.); *see also* [redacted]

[21] Dep. Ex. 235 [redacted] Dep. Ex. 118 [redacted]

[22] Dep. Ex. 210, BNYM_CW-00254990-254998 at -00254991 [redacted]

[23] Dep. Ex. 235 [redacted] Dep.

its activities in attempting to settle the claims against BoA through the Proposed Final Order and Judgment and a side letter agreement with BoA that secured indemnification for the Trustee.[24]

The Trustee's activities seeking [redacted] constitutes an additional conflict of interest.[25] An Event of Default triggers the Trustee's higher fiduciary duties[26] and additional investor rights.[27] The Trustee [redacted][28] Additionally, in negotiating the Settlement, the Trustee did not exercise the necessary level of due care.[29] Rather, the Trustee failed to [redacted][30] This attitude is reflected in the Trustee's purported reliance on its experts. Even though the Trustee sought the opinions of experts, it did so, not in the course of the

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Ex. 118 [redacted] *see also* Bailey Dep. 148:16-149:14 [redacted]

[24] PFOJ ¶¶ b-n,s, t; Exhibit C to Settlement Agreement ("side letter").

[25] Dep. Ex. 46, [redacted] BNYM_CW-00271275-81; Griffin Dep. 143:13-144:4 [redacted] 162:190-162:25 [redacted]

[26] [redacted]

[27] *See, e.g.*, Dep. Ex. 13, PSA Section 7.03.

[28] Dep. Ex. 52, [redacted] BNYM_CW-00270587-89.

[29] [redacted]

[30] *See* The Institutional Investors' Response to Order to Show Cause Why the Court Should Not Compel Discovery (DKT 250), April 13, 2012.

negotiations, but mostly just before the Settlement was submitted to the Court. Some of the experts relied solely on BoA's representations rather than make independent examinations.[31] 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.

Further, the Trustee failed to [redacted][32] even though the negotiations involved a settlement that purported to extinguish the rights of the Outsiders against BoA and the Trustee. [redacted][33] Robert Griffin, a Trustee employee [redacted][34] In this case the Trustee [redacted][35] It seems that [redacted][36]

The evidence of conflict and lack of care should preclude any judicial release of liability for the Trustee's settlement conduct absent in-depth judicial review of that conduct. To the extent that the Trustee acted in conflicts of interest or negligently towards the unrepresented Outsiders, the

[31] Robert Daines report at p. 8 fn. 3; Capstone Valuation Services report; Letter of Brian Lin, Managing Director, RRMS Advisors, New York, N.Y. (June 28, 2011); Letter of Brian Lin, RRMS (June 7, 2011)

[32] Dep. Ex. 53 [redacted] Bailey Dep. 151:18-152:21 [redacted] Kravitt Dep. 366:20-22 [redacted] 187:21-188:5 [redacted]

[33] Griffin Dep. 214:21-215:18 [redacted]

[34] Griffin Dep. 218:6-14.

[35] Kravitt Dep. 366:20-22 [redacted] 187:21-188:5 [redacted]

[36] Dep. Ex. 62, BNYM_CW-00270712-15 at -00270712 [redacted]

Settlement agreement cannot bind the Outsiders without the Court's finding that the Settlement is fair to the unrepresented Outsiders.[37]

C. The Need for Judicial Scrutiny of the Settlement and the Trustee's Requested Release

1. **Deference to Trustees.** Under certain conditions, not present here, the courts have deferred to the decisions of fiduciaries. For example, in the bankruptcy context, "[t]he standard for review of a trustee's decision regarding case administration is the business judgment rule. So long as the decision was not made arbitrarily, or in bad faith, it is appropriate for a bankruptcy court to accept the trustee's decision."[38] The bankruptcy trustee is far more qualified to deal with judicial claims than the Trustee in this case. Therefore, the bankruptcy trustee may negotiate settlements and compromise disputes, and the courts may approve these compromises or settlements. And yet, the "court may approve a proposed compromise only if it is 'fair and equitable' and supported by an adequate factual foundation. Several factors may be considered, including: (i) the probability of success in the litigation; (ii) the difficulty, if any, to be encountered in enforcement of the judgment(s); (iii) the complexity of the litigation, and the expense, inconvenience, or delay involved; and (iv) the paramount interest of creditors and a proper deference to their views. The burden of meeting the standards rests squarely on the trustee."[39]

The main reasons for judicial deference are the fiduciaries' *expertise* relating to the subject matter of fiduciaries' decisions, and the ability of the

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[37] *See, e.g., In re Lower Bucks Hosp.*, 471 B.R. 419, 453 (Bankr. E.D. Pa. 2012) (footnotes omitted) ("BNYM makes an unjustified leap in logic when it suggests that because it was the Bondholders' sole authorized representative, it had the legal right to put the interests of BNYM-Indemnitee ahead of the interests of the Bondholders. There is nothing about BNYM's status as the Bondholders' sole authorized representative that justifies acting in any manner other than in the Bondholders' interests. Nor does BNYM's lack of a threshold duty to act on behalf of the Bondholders following a default justify self-serving conduct once it undertook to represent the Bondholders' interests. Quite the opposite. Regardless of the label put on its role (contractual agent or fiduciary), once BNYM chose to act as the Bondholders' representative and participate in the settlement negotiations on their behalf, it was obliged to represent the interests of the Bondholders faithfully. A review of the relevant case law suggests that BNYM's argument to the contrary is utterly without merit.").

[38] *In Re: Interiors of Yesterday, LLC. Debtor*, Case No. 02-30563 (LMW), Chapter 7, Doc. I.D. Nos. 233, 275, 276, 363 U. S. Bankruptcy Court For the District of Connecticut, *2007 Bankr. LEXIS 449* (2007).

[39] In Re Rake, Debtor. Case No. 05-22188-TLM U.S. Bankruptcy Court For The District of Idaho *363 B.R. 146*; *2007 Bankr. LEXIS 549.*