

Exhibit 1

to

**Affirmation of Michael A. Rollin in Support of Order to
Show Cause Why The Court Should Not Continue The Trial
Following The September Trial Dates to Allow Discovery
Concerning Newly Disclosed Evidence**

In The Matter Of:

BNY Mellon v.

July 8, 2013

Laura L. Ludovico, Senior Court Reporter

Original File 070813BNY.txt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM : PART 39

-----X
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),

Index No.
651786/2011

Petitioner,

for an order, pursuant to CPLR § 7701,
seeking judicial instructions and approval
of a proposed settlement.

-----X
Hearing

New York Supreme Court
60 Centre Street
New York, New York 10007
July 8, 2013

B E F O R E:

HON. BARBARA R. KAPNICK, JSC

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(continued on next page.)

* * * * *

LAURA L. LUDOVICO
Senior Court Reporters
60 Centre Street - Room 420

New York, New York 10007

1 J. Kravitt - by Petitioner - Direct/Mr. Gonzalez
2 different addresses, and then a lawyer who was representing
3 Bank of New York at the time, Leo Crowley and Jeanne
4 Naughton-Carr.

5 Q And when did you first see this letter approximately?

6 A I would have seen this letter sometime on the day that
7 Mr. Finkenberg hired me, or the next day.

8 Q And in this letter there is reference to a "Notice of
9 Event of Default," and in the context of this letter, what did
10 you understand that to mean?

11 A The way I understood this letter was that Ms. Patrick,
12 on behalf of her clients, was giving a notice to the servicer
13 and the trustee that in their opinion the servicer had breached
14 its servicing obligations, some of them, under the applicable
15 Pooling and Servicing Agreements, and if this were true, that
16 would start a 60-day clock ticking, at the end of which there
17 would be an outstanding event of default under the various
18 Pooling and Servicing Agreements.

19 Q Now, at the time that you first saw this letter, did
20 you know Ms. Patrick?

21 A I did not.

22 Q And when did you first meet Ms. Patrick?

23 A I met Ms. Patrick for the first time on the Wednesday
24 following Thanksgiving of that year.

25 Q All right. So it would have been --

26 A It would have been early in November, something on the

1 J. Kravitt - by Petitioner - Direct/Mr. Gonzalez
2 meeting among the three parties was set up and the topic of an
3 overall settlement was put on the table, including the
4 possibility that Bank of America would pay the trustee's legal
5 fees. Nothing was decided, but we worked in two strings, at
6 that point, in trying to negotiate a letter of instruction and
7 at the same time beginning to see if there were grounds for a
8 settlement. Eventually, it became unnecessary to get the
9 letter of instruction and indemnity as the negotiation of the
10 settlement, a potential settlement, had picked up steam.

11 Q Now, Mr. Kravitt, you've used the terms "instruction"
12 and "direction."

13 Are you using those terms to mean the same thing?

14 A I am. I apologize for the inconsistency.

15 Q And in the context of your discussion of your
16 testimony, what do you mean by the term either "instruction" or
17 "direction"?

18 A Well, the way most Pooling and Servicing Agreements
19 are written, a trustee has a Safe Harbor to liability if it
20 follows an instruction from the holders of not less than some
21 given percentage of the dollar amount of the certificates in
22 the Pooling and Servicing Agreement.

23 In addition, the trustee is free to ask for any
24 reasonable indemnity to indemnify it against expense or loss as
25 part of that instruction or direction. So normally, before a
26 trustee will take action, at the request --

1 J. Kravitt - by Petitioner - Direct/Mr. Gonzalez

2 MR. REILLY: Excuse me, Mr. Kravitt.

3 Your Honor, can we get clarity whether he is
4 talking about these Pooling and Servicing Agreements or
5 whether he is talking about Pooling and Servicing
6 Agreements generally that have nothing to do with this
7 case?

8 MR. GONZALEZ: I believe he started in his answer
9 by saying "generally, in his experience."

10 THE COURT: Yes, I think he is just talking about
11 it generally.

12 MR. REILLY: And not these Pooling and Servicing
13 Agreements?

14 THE COURT: That is how I understood it.

15 MR. REILLY: Okay.

16 THE COURT: Am I correct?

17 MR. REILLY: Then I would argue it's irrelevant,
18 but...

19 THE COURT: I am allowing it. I think it is.

20 A Fortunately, what is true generally is true
21 specifically, and in this case the Pooling and Servicing
22 Agreements and the applicable indentures provide that a trustee
23 has a Safe Harbor if it takes directions from the holders of a
24 required percentage of the dollar amount of outstanding
25 certificates and the trustee, in taking that direction, has the
26 right to ask for and receive a reasonable indemnity as to any

1 J. Kravitt - by Petitioner - Direct/Mr. Gonzalez

2 loss or expense before taking such instruction.

3 So, in this case, the trustee started the normal way
4 of operating with an investor group, which would be to try and
5 negotiate a letter of instruction and an acceptable indemnity.

6 Q And did you send such a draft of a letter of
7 instruction to Ms. Patrick?

8 A We did.

9 Q Let me direct your attention to Petitioner's 139 for
10 identification, and ask you to take a look at that, please?

11 A Okay.

12 Q Could you describe what Petitioner's 139 is, please?

13 A 139 is a cover letter plus an attached draft. The
14 attached draft is the trustee's proposal for a Letter of
15 Instruction or Direction -- and let's call it direction because
16 I think that is what the letter uses -- a Letter of Direction
17 also requiring a Confidentiality Agreement and an Indemnity,
18 and the cover letter discusses a few issues arising in
19 connection with the letter of Direction in our earlier meeting.

20 Q And just to be clear, this is a letter and attachment
21 with a draft that you sent to Ms. Patrick?

22 A Yes, that is correct.

23 MR. GONZALEZ: Your Honor, at this time we offer
24 Petitioner's 139.

25 MR. REILLY: No objection, Your Honor.

26 THE COURT: Thank you.

1 Kravitt - Defendant - Direct

2 from the previous correspondence.

3 Secondly, we were reserving our rights on
4 whether we agreed that the assertions in her

10:38:54 5 October 18th letter were accurate or not.

6 Thirdly, we were telling Ms. Patrick that we
7 would give some documents to her that she had requested
8 after the indemnity and confidentiality issues that always
9 arise in connection with letters of direction and had arisen
10 in connection with this letter of direction were resolved.

10:39:21

11 And then finally, we were confirming that the
12 letter of direction also attempted to resolve some other
13 issues.

14 Q Now, Mr. Kravitt, the attached draft letter of
15 direction was that letter ever finalized?

10:39:35

16 A No.

17 Q And why not?

18 A We didn't reach agreement on all of the issues
19 raised in the letter of direction prior to going the

10:39:50

20 alternative route, which was attempting to negotiate the
21 settlement. And in that process of negotiation the Trustee
22 ended up being indemnified by Bank of America.

23 Q Now, I'd like to turn your attention to --
24 following the October 18th letter, did there come a time
10:40:17 25 that the Trustee entered into a forbearance agreement
26 regarding that letter?

1 Kravitt - Defendant - Direct

2 of high risk loans. And I have a very strong recollection
3 that Jana Litsey on behalf of UFA said that was something
4 they would be interested in thinking about.

11:04:03 5 Q How did the meeting end, and by that I mean, was
6 there any discussion about next steps?

7 A Well, we didn't have a settlement fully negotiated
8 at that point. So there was a discussion of next steps, and
9 what we agreed at that time or shortly thereafter, but my
11:04:26 10 memory is at that time is that to give us a stable
11 negotiating platform to try to work these things out, which
12 after all were very complicated, we would have to enter into
13 an agreement where the 60-day notice period with regard to
14 the alleged event of default would have to be suspended so
11:04:49 15 that the parties could continue to negotiate.

16 Q Now, you mentioned that during the meeting there
17 was a discussion about investigating loan files. Do you
18 recall that?

19 A I do.

11:05:01 20 Q Was a loan file review ever done during the course
21 of the negotiations?

22 A No.

23 Q And why not?

24 A Between the November meeting and our first -- our
11:05:15 25 next meeting, which was in early January, Bank of America
26 entered into some settlements with regard to breach of

1 Kravitt - Defendant - Direct

2 warrantee claims with one or more of the GSEs. And after
3 that happened, the three groups of parties started to
4 discuss whether an investigation were necessary or could we
11:05:49 5 find some other basis to estimate damages for breach of
6 warrantee and settle on that other basis.

7 Q Did you come up with such a basis?

8 A I want to answer this very precisely. B of A came
9 up with a proposed basis to analogize their settlements with
11:06:22 10 the GSEs, a settlement of the GSEs to the private label
11 portfolio in which Kathy's groups had invested, therefore,
12 claiming an investigation was not necessary.

13 The investor group came up with their own
14 analysis based on other sources of data with regard to
11:07:01 15 alleged breaches of warrantee that they had at their
16 disposal. And the Trustee hired an expert to advise it with
17 regard to the appropriate amount of damages for a breach of
18 warrantee. So in the end we didn't do an investigation as
19 the parties felt that they had come up with reasonable
11:07:31 20 alternatives to that investigation.

21 Q Let me direct your attention to Petitioner's 187
22 for identification and ask you to take a look at that,
23 please?

24 A I see it.

11:07:44 25 Q Do you recognize Petitioner's 187 for
26 identification?

1 Kravitt - Defendant - Direct

2 T6 (Continued from previous page.)

3 AFTERNOON SESSION

4 J A S O N K R A V I T T, having been

02:11:12 5 previously duly sworn resumed the witness stand and
6 testified further as follows:

7 THE COURT: Mr. Gonzalez, are you ready to
8 continue?

9 MR. GONZALEZ: I am, yes.

02:14:27 10 THE COURT: Okay.

11 Q Mr. Kravitt, I'd like to begin by showing you
12 Petitioner's 1, the settlement agreement, where we left off.

13 When was the settlement agreement finalized?

14 A I think it was finalized on or about June 28th,
02:14:47 15 2011.

16 Q And what is your understanding of the structure of
17 the settlement agreement?

18 A Well, the settlement agreement is organized as
19 follows: First there is the normal set of recitals
02:15:08 20 explaining the facts. Then there is the section on
21 definitions that are used. Then there is a discussion of
22 what constitutes final approval of the settlement agreement,
23 including what has to happen in judicial proceedings. The
24 tax rulings needed to be obtained and notice given to
02:15:32 25 Certificate Holders with an opportunity to object.

26 Then after dealing with what final approval

1 Kravitt - Defendant - Direct

2 is the agreement goes into the cash payment, the amount that
3 it will be, how it will be allocated among the 530 trusts,
4 and how it will be allocated in the trust once the cash
02:16:06 5 portion is obtained and distributed.

6 There also is a section on what happens if --
7 which hasn't happened so far -- if the Court provides that
8 some trust may leave the settlement. If that eventuated,
9 then the Bank of America had the option of dropping out of
02:16:27 10 the settlement if a certain threshold is met.

11 Then the settlement agreement goes into the
12 servicing remedies. The first servicing remedy is the
13 transfer of high risk loans to specialist high touch sub
14 servicers. Those sections deal with how to define what a
02:16:58 15 high risk loan is. The qualifications for a special sub
16 servicer, the process that's gone about in choosing them,
17 and then the schedule for transferring loans quarter by
18 quarter to the designated sub servicers.

19 Then the settlement agreement has a provision
02:17:19 20 on costs for Bank of America in the following sense. First
21 of all, there is an exhibit which lists how the sub
22 servicers are to be compensated and they are to be
23 compensated by B of A. And there is also a section on
24 reduction of the cash that B of A, as Master Servicer, can
02:17:49 25 take out of the deals as they liquidate if it doesn't
26 perform to certain agreed upon benchmarks for loans that are

1 Kravitt - Defendant - Direct

2 in default or in foreclose.

3 Then the -- moving on to Section 5, the
4 settlement remedies next dealt with are guidelines for the
02:18:19 5 bank in how it treats borrowers who are having difficulty
6 paying, principally focusing on loan modifications to deal
7 with borrowers who can't pay. And there are provisions in
8 that on how to go about calculating the net present value
9 calculation that has to be made in order for a loan to
02:18:47 10 qualify for modification.

11 There's also a provision in the settlement
12 remedies that provides for any requirements of law affecting
13 execution of the settlement remedies being required to be
14 paid for by Bank of America Countrywide. After the
02:19:13 15 servicing remedies the agreement has a section on
16 documentary exceptions, and it deals principally with the
17 two most serious types of documentary exceptions where
18 there's something wrong or there's something missing about a
19 mortgage or an assignment of mortgage and the title
02:19:40 20 insurance policy.

21 The section defines what those exceptions
22 are, and there's a provision that requires Bank of America
23 to make the trusts whole with regard to any loan that is
24 missing both a proper mortgage or assignment of mortgage and
02:20:06 25 an enforceable title policy. In that case, after the
26 appropriate time period, Bank of America will make the

1 Kravitt - Defendant - Direct

2 appropriate trust whole where the difference in the amount
3 of the loan then outstanding and any accrued interest and
4 audit obtained from liquidating the underlying property or
02:20:27 5 not being able to liquidate the underlying property.

6 Then there is the section which deals with
7 the forbearance agreement and the tolling of the statutes of
8 limitations, we've been through that section, basically
9 leaves the parties in the condition they were before the
02:20:49 10 settlement agreement was entered into on the date of the
11 first forbearance agreement, if the settlement agreement is
12 not approved, finally approved, and otherwise if the
13 settlement agreement is approved then the notice of default
14 is deemed withdrawn that was originally given -- I should
02:21:13 15 say the notice of non-compliance which, if true, could ripen
16 into an event of default that notice is withdrawn if the
17 settlement is finally approved.

18 By the way, as I'm reciting this I realize
19 that when I talked about section 2 as to what constituted
02:21:34 20 final approval, I left out that a final order and judgment
21 has to be approved as well or adopted by the Court.

22 After the section dealing with the
23 forbearance agreement and any statutes of limitation there's
24 a section on what is released, what the Trustee releases B
02:22:02 25 of A from. Then there's a section clarifying what B of A is
26 not released from -- B of A and Countrywide, I should say.

1 Kravitt - Defendant - Direct

2 Q In the settlement agreement.

3 A I don't recall any discussions concerning the
4 precise monetary value of the remedies that were agreed to,
03:50:11 5 though I do remember discussions saying that we thought they
6 were very valuable.

7 Q What do you recall about those discussions?

8 A Well, if -- there's several ways to go about
9 looking at servicing remedies. One thing you could try to
03:50:34 10 do is get compensation for what you believe was breached in
11 the past. Okay? A different way to focus on them would be
12 to focus on what will occur in the future.

13 Now, the way Pooling and Servicing Agreements
14 were written, the ones in this case and the way they are
03:50:56 15 generally written, but the way they were written in this
16 case is that the servicing standard was a very vague,
17 general standard which was for the most part that the Master
18 Servicer will service the portfolio in accordance with
19 prudent servicing standards, in effect where the property
03:51:17 20 was located.

21 So that is a very amorphous standard. It's
22 very difficult to prove when or how much that's violated.
23 For example, if you could compare servicing between two
24 servicers, it's very difficult to because everybody has a
03:51:42 25 different portfolio. But if you could, if one servicer were
26 10 percent less effective than another is that a breach of

1 Kravitt - Defendant - Direct

2 employing prudent servicing standards?

3 You could argue about what their protocols
4 were, what their processes were, how fast they did things et
03:52:02 5 cetera, but that would only try to get you a measurement, it
6 wouldn't tell you if that reached the standard of a breach.
7 Certainly it couldn't be that if you were below average that
8 was a breach because that would mean half the servicers in
9 America were in breach of prudent servicing standards. I
03:52:21 10 don't think if you got damages you could pull yourself up to
11 average.

12 Secondly, the way I construed the Pooling and
13 Servicing Agreement, and as I stated several times to the
14 Institutional Investors and their counsel, you can only go
03:52:42 15 after the Master Servicer if they acted in bad faith or were
16 grossly negligent, and that's even a tougher standard to try
17 to figure out than the amorphous consistent with prudent
18 servicing standards.

19 So what we thought, with Institutional
03:53:07 20 Investors and the Trustee fund was to be far more valuable,
21 to create value going forward that would be produce a higher
22 standard of servicing than even the agreement required.

23 Q What agreement are you referring to?

24 A Than the Pooling and Servicing Agreements
03:53:32 25 required. So for requiring the high risk loans to be
26 transferred to sub servicers, we fully expected would mean

In The Matter Of:

v.

July 9, 2013

Laura L. Ludovico, Senior Court Reporter

Original File 070913BNY.txt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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11:29:34

IN THE MATTER OF THE APPLICATION OF THE
BANK OF NEW YORK MELLON, (as Trustee
under various Pooling and Servicing
Agreements and Indenture Trustee under
various Indentures),

Petitioner,

Index No.
651786/11

11:29:34

for an order, pursuant to CPLR Section
7701, seeking judicial instructions and
approval of a proposed settlement.

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July 9, 2013
60 Centre Street
New York, New York

11:29:34

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11:29:34

1 Kravitt - Petitioner - Cross/Mr. Reilly

2 J A S O N K R A V I T T, having been
3 previously duly sworn resumed the witness stand and
4 testified further as follows:

10:11:42 5 THE COURT: Good morning.

6 So I see you're all ready to go, Mr. Kravitt.

7 THE WITNESS: Yes, ma'am.

8 THE COURT: So of course having previously
9 been sworn you know that you are still under oath.

10:11:58 10 THE WITNESS: Thank you.

11 THE COURT: Mr. Reilly.

12 MR. REILLY: May it please the Court, your
13 Honor.

14 CROSS EXAMINATION

10:12:06 15 BY MR. REILLY:

16 Q You testified yesterday there was no requirement,
17 basically agreed there was no requirement in any of the 530
18 pooling and servicing agreements or indenture agreements
19 that the Trustee had court approval for --

10:12:27 20 A I did.

21 Q Did you yourself review all 530 Pooling and
22 Servicing Agreements?

23 A I did not.

24 Q Did someone on your team review each and every one
10:12:47 25 of the 530 Pooling and Servicing Agreements?

26 A We had a team of lawyers who reviewed all the

1 Kravitt - Petitioner - Cross/Mr. Reilly

2 Pooling and Servicing Agreements or trust indentures for
3 various aspects of them.

4 Q And when was that done?

10:13:12 5 A It was done not all at once. It started -- I
6 don't remember when it started, it continued throughout the
7 seven month period.

8 Q Was it completed by New Year's Eve 2010?

9 A No, because different issues kept arising and we
10:13:34 10 would go back and check the agreements on the portions of
11 them that applied to the different issues that kept arising.

12 Q You found through that process that there were
13 different provisions in the 530 Pooling and Servicing
14 Agreements, correct?

10:13:51 15 A Yes.

16 Q And that process was undertaken in part because
17 Bank of New York Mellon was a Trustee 530 different times,
18 correct?

19 A Correct.

10:14:12 20 Q In 530 different trusts?

21 A Correct.

22 Q And the obligations of the Trustee in each one of
23 those trusts was driven in part by whatever the language was
24 of the respective Pooling and Servicing agreement?

10:14:27 25 A Correct.

26 Q And the rights of certificate holders in each one

1 Kravitt - Petitioner - Cross/Mr. Reilly

2 (Pause.)

3 A Where do you want me to start on 205?

4 Q Line 6.

11:35:14 5 "Q There would be nothing wrong and everything
6 right with trying to advocate for the largest possible
7 recovery for your beneficiaries. Do you see that?

8 "A I do."

9 Q Unless Mr. Gonzalez wants me to read the objection
11:35:29 10 I'll skip it.

11 "A That's a different question but yes, of
12 course, you are attempting in various ways to get the
13 largest possible recovery that you can.

14 "Q And in fact, that was the duty of Bank of New
11:35:48 15 York Mellon in this case, was it not?

16 "A Act in the best interest of your
17 beneficiaries with due care" -- I think it is rather
18 than duly care.

19 Do you agree with me on that?

11:36:00 20 A I would.

21 "Q -- "with due care, skill and caution, yes.

22 "When we say act in the best interest of the
23 beneficiaries what's going on in this case is financial,
24 that's what the case is about, we agree?

11:36:13 25 "A Yes.

26 "Q So what was in the best interest of the

1 Kravitt - Petitioner - Cross/Mr. Reilly

2 beneficiaries is to maximize the settlement amount?

3 "A Yes."

4 Do you agree with that?

11:36:24 5 A I agree that in a case such as this the Trustee
6 should be trying to maximize the recovery. But you can't
7 enter into a settlement agreement if it's an option. Nobody
8 is going to sign a settlement agreement if the parties they
9 sign with have the option of attempting to get a better
11:36:48 10 agreement the day after it's signed.

11 So the price of entering into the settlement
12 agreement was agreeing to support the settlement agreement
13 after it was signed. And that's what we thought would get
14 the best recovery for the certificate holders.

11:37:02 15 Q So did you lower the settlement amount in exchange
16 for an agreement that you'd support the settlement?

17 A No.

18 Q You didn't do that, did you?

19 A No.

11:37:11 20 Q And are you testifying that, in fact, the efforts
21 that Bank of New York Mellon took were consistent with the
22 effort to maximize the financial recovery in the settlement?

23 A I'm very comfortable that that's what we did.

24 MR. REILLY: Two more, your Honor.

11:37:33 25 Page 232, line 13.

26 THE WITNESS: We're lucky I didn't drink a

1 Kravitt - Petitioner - Cross/Mr. Reilly

2 lot this morning.

3 232, Mr. Reilly?

4 Q 232, line 13.

11:37:58 5 A Okay, I'm there.

6 Q Why don't you just read to yourself line 232, line

7 13 to 233 line 1 to see that it's orienting you to the

8 Octobers 18 content letter.

9 A Okay.

11:38:17 10 Q Tell me when you're ready.

11 (Pause.)

12 Q Are you oriented now that we're talking about the

13 October 18th, 2010 letter?

14 A Yes. Took half a page for them to agree on that.

11:38:46 15 Q Page 233, line 2.

16 "Q Now, at that point Bank of America is sharply

17 adversarial to what the beneficiaries are alleging, are

18 they not?

19 "A Bank of America has an interest adverse to

11:38:58 20 the beneficiaries in the sense that Bank of America

21 would like to pay out as little as it can to discharge

22 the alleged liabilities."

23 You would agree with that, wouldn't you?

24 A Yes.

11:39:09 25 "Q And the Trustee is there to represent the

26 interest of the beneficiaries only?

1 Kravitt - Petitioner - Cross/Mr. Reilly

2 "A Yes."

3 Would you agree with that?

4 A The Trustee is there to represent the interest of
11:39:21 5 the beneficiaries only, subject to the rights that it has by
6 the terms of the various trust indentures and Pooling and
7 Servicing Agreements.

8 Q But not to be representing the interest of Bank of
9 New York Mellon if they are contrary to the interest of the
11:39:37 10 certificate holders, correct?

11 A I would not agree with that in theory, though in
12 practice that's almost always the case.

13 For example, the document gives -- the
14 various Pooling and Servicing Agreements and indenture give
11:39:55 15 the Trustee the right to ask for additional indemnity.
16 If -- let's say the B of A had not been willing to grant the
17 guarantee, and Bank of New York Mellon in that circumstance
18 refused to enter into the settlement agreement. I think the
19 Bank of New York Mellon would not be violating any right or
11:40:17 20 obligation that it had because it had that right in the
21 settlement agreement -- excuse me, in the governing, 530
22 governing documents. But subject to that type of
23 qualification, I agree.

24 Q You know that if, in fact, the prudent person
11:40:35 25 standards triggered under the contract or contracts, 530
26 contracts, that the Trustee must act as a prudent investor

1 J. Kravitt - by Petitioner - Cross/Mr. Riley

2 Q Did they make clear to you during the settlement
3 process they wouldn't turn the loan files over?

4 A They made it very clear that they would prefer not to
03:37:03 5 turn loan files over.

6 Q Who said that?

7 A Who? Who from Bank of America?

8 Q Correct.

9 A I'm sure it was said on more than one occasion and I'm
03:37:16 10 sure it was said by a Wachtell attorney, but I don't remember
11 the circumstances or who.

12 Q When?

13 A I'm sure the statement on fighting was Ted Mervis'.

14 Q Was there a point between October of 2010 and
03:37:34 15 June 29th of 2011, that it became clear to you that Bank of
16 America and Bank of New York Mellon and Ms. Patrick and its
17 Institutional Investors were going down the route of
18 negotiating without the loan files?

19 A Let me try and make this clear, and I apologize if
03:37:54 20 it's a long answer. Okay?

21 Whether or not we asked for loan files, again, was a
22 function of how well the negotiations were going with regard to
23 the cash payment and whether we thought we needed to go look at
24 loan files. We thought -- by "we," I mean the Institutional
03:38:19 25 Investors and the trustee -- thought that those negotiations
26 were going well enough, and the information that we had at the

1 J. Kravitt - by Petitioner - Cross/Mr. Riley

2 time was sufficient that we didn't need to hold out for
3 reviewing loan files. So there was never a decision made on
4 any particular day, we just never reached a point where we felt
03:38:40 5 that we needed to go back and ask for loan files.

6 Q When was the last time that the Bank of New York
7 Mellon asked for loan files from Bank of America?

8 A I don't think technically that we ever did ask for
9 loan files. We discussed if we did a sampling what the
03:39:04 10 sampling would be like, but we didn't -- we never made a
11 specific request for loan files.

12 Q There was never a point -- and I think we had this
13 conversation, but I'm trying to make sure I understand it.

14 There was a point where loan files were no longer
03:39:19 15 discussed between Bank of New York Mellon and Bank of America,
16 correct?

17 A Right. But that doesn't mean that we wouldn't -- by
18 "we," I mean the Bank of New York Mellon, wouldn't have gone
19 back to discussing a request for them if we felt it was
03:39:33 20 necessary to do so.

21 (Continued on the next page.)

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In The Matter Of:

v.

July 11, 2013

Laura L. Ludovico, Senior Court Reporter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM : PART 39

-----X

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),

Index No.
651786/2011

Petitioner,

for an order, pursuant to CPLR § 7701,
seeking judicial instructions and approval
of a proposed settlement.

-----X

Hearing

New York Supreme Court
60 Centre Street
New York, New York 10007
July 11, 2013

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(continued on next page.)

* * * * *

LAURA L. LUDOVICO ,SCR
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1 J. Kravitt - by Petitioner - Cross/Mr. Pozner

2 Q When Countrywide purchases a loan and puts them into
3 the trust package it makes the reps and warranties?

4 A Yes, that's right. I was just -- I was -- I didn't
01:13:11 5 want to agree to an inaccurate statement, that's all.

6 Q And when we talk about whether Countrywide had a
7 methodology or formulas, as was discussed in that
8 representation and warranty we just read, you knew a lot about
9 Countrywide's business practices by 2009, and '10, didn't you?

01:13:41 10 A In 2009, I probably did not. By the middle of 2011, I
11 did.

12 Q In 2011 or 2010?

13 A I didn't start working on this until late October of
14 2010.

01:13:57 15 Q You are in the securitization business and you did not
16 know anything about the business practices of Countrywide and
17 whether they were considered to be at the bottom of the
18 originator pool?

19 A One thing that I have learned is that what everybody
01:14:13 20 knows is never the case. So I'm very careful always to say
21 that I don't know about somebody. I may know what people have
22 said, but I don't know about something until I have personal
23 knowledge of it.

24 Q Well, then, did you hire an investigator or group of
01:14:35 25 investigators to say I want to put together the brief for
26 purposes of settlement or litigation proving that Countrywide's

1 J. Kravitt - by Petitioner - Cross/Mr. Pozner

2 methodologies of originating loans were among the worst in the
3 city and did not rise up to the standards of the industry. Was
4 that person hired?

01:14:56 5 A That person was not hired because we started doing our
6 own research in 2010/2011.

7 Q On Countrywide?

8 A On Countrywide.

9 Q And you determined that it was at the bottom of
01:15:10 10 originators, in terms of its practices?

11 A They were not a high-quality originator, but I didn't
12 rank them.

13 Q Are you being charitable when you say "not a
14 high-quality"?

01:15:24 15 A No.

16 Q Didn't you come to the conclusion that Congress came
17 to and that others came to that, frankly, Countrywide was an
18 enormous source of problem loans that should not have been
19 made?

01:15:36 20 MR. GONZALEZ: Objection to form, to the extent
21 that Mr. Pozner is trying to elicit, through this witness,
22 an out-of-court declaration by other parties or entities.

23 THE COURT: I think it's just what he determined.
24 I'll take it that way.

01:15:49 25 And you can answer.

26 A In preparation for this whole matter, we did look at

In The Matter Of:

v.

July 12, 2013

Laura L. Ludovico, Senior Court Reporter

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

-----X

IN THE MATTER OF THE APPLICATION OF THE
BANK OF NEW YORK MELLON, (as Trustee
under various Pooling and Servicing
Agreements and Indenture Trustee under
various Indentures),

Petitioner,

Index No.
651786/11

for an order, pursuant to CPLR Section
7701, seeking judicial instructions and
approval of a proposed settlement.

-----X

July 12, 2013
60 Centre Street
New York, New York

B E F O R E: HONORABLE BARBARA R. KAPNICK, JSC

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1 Kravitt - Petitioner - Cross/Mr. Pozner
2 Claims whether such legal arguments were sufficiently
3 serious that it would be appropriate to haircut a
4 calculation of damages to take account of them.

11:10:47 5 That's how you wrote that?

6 A It is.

7 Q You didn't hire experts to say how do we beat
8 BofA's legal positions, did you?

9 A No, we didn't.

11:11:13 10 Q And I understand that you've chosen a career that
11 does not involve litigation, but you understand that
12 litigators are different, that they put together the facts
13 to try cases?

14 A Lots of members of our negotiating team were
11:11:29 15 litigators.

16 Q And when we say you had then a chance to make a
17 presentation time after time to Bank of America that says,
18 our litigation team has put together facts or here are the
19 discovery requests we're going to hit you with, or here is
11:11:46 20 how we're going to put together the case against you, those
21 kinds of analyses were never given to Bank of America, were
22 they?

23 A That's correct.

24 Q Because they were never performed by the Trustee?

11:11:57 25 A No, the Trustee, through its counsel, performed
26 its own legal analysis. Subsequently to that analysis we

1 Kravitt - Petitioner - Cross/Mr. Pozner

2 hired experts for the purpose of finding out what national
3 experts felt on the subject. The Trustee was advised as to
4 the strength or weakness of their case by their own counsel
11:12:24 5 which was Mayer Brown.

6 Q But when we talk about the assignment you gave the
7 experts, it's a completely different assignment than you
8 could have given if you wanted to say I need experts to
9 battle Bank of America and show how we intend to beat their
11:12:44 10 defenses?

11 A That was not the strategy we chose.

12 Q You didn't ask him are Bank of America's positions
13 going to win, are they correct, right?

14 A It was -- we made very clear they were to write
11:13:03 15 what they believed. And --

16 Q You wrote clearly that they were to provide an
17 opinion on whether there was a reasonable basis to the
18 argument Bank of America was making?

19 A Right. And, for example, Professor Daines went
11:13:22 20 further than that, he gave us an opinion which was stronger
21 than that. Professor Adler gave us an opinion that was
22 close to that.

23 In my answer I said, in this sentence I said
24 that, we made very clear to them that they were to write
11:13:40 25 what they believed.

26 Q But these experts that were available could have

1 Kravitt - Petitioner - Cross/Mr. Loeser
2 certainly had a very strong right to get the loan files.

3 Q Again, that strong right is the PSA actually says
4 you can get them; isn't that right?

12:53:39 5 A What people always argue in these situations is
6 you didn't give me an adequate confidentiality agreement,
7 you didn't do this adequately, you didn't do that. It's not
8 absolute because you have to jump through hoops before you
9 get them.

12:53:52 10 THE COURT: Can I ask a question? What's the
11 difference between a loan file and a mortgage file?

12 THE WITNESS: A mortgage file is the
13 documents that create the loan, the note, the mortgage,
14 the assignment of mortgage, the title, insurance
12:54:05 15 policy. The loan files are what the originator of the
16 loan went through in creating the loan. The
17 information the borrower filled out, the due diligence
18 that it did, that sort of thing.

19 THE COURT: Those aren't put together?

12:54:19 20 THE WITNESS: No. Because the Trustee is the
21 custodian of the legal documents and the servicer needs
22 the loan files to be able to service them.

23 THE COURT: Okay.

24 Q Mr. Kravitt, did you advise your client, the
12:54:32 25 Trustee, that it would have a difficult time getting the
26 loan files if it chose to get them?

1 Kravitt - Petitioner - Cross/Mr. Loeser

2 A No.

3 Q You mentioned a minute ago --

4 A I did advise them it might take awhile.

12:54:42 5 Q You mentioned -- actually, you testified
6 previously that you thought it would take about a year to do
7 a statistically significant sampling of the loan files
8 themselves; is that right?

9 A I don't remember saying it would take a year. I'm
12:54:57 10 not saying you're wrong. I don't remember saying that. I
11 think it's hard to predict how long it would take. I think
12 it's very hard to predict how long it would take. It would
13 depend on the process the parties agreed on.

14 Q We can check the transcript. We'll deal with that
12:55:11 15 later. A minute ago you mentioned that there's a warrantee
16 from the settlement from Bank of America saying that
17 effectively they told you the truth when they gave you the
18 information?

19 A I believe the warrantee says they believe they
12:55:22 20 told us the truth, yes.

21 Q They believe they might have, they might not have,
22 they think they did, correct?

23 A I don't think it says we might have, we might not
24 have, but we think so. I think they said we believe we told
12:55:35 25 you the truth.

26 Q That warranty expires if this settlement is

1 J. Kravitt - by Petitioner - Cross/Mr. Loeser

2 Q Is it your testimony that this settlement did, in
3 fact, change provisions in the PSAs?

4 A No.

02:20:29 5 Q Because the circumstances that exist here, you would
6 agree, do not allow for changing the meaning; is that correct?

7 None of the provisions that you noted would allow for
8 even changing the meaning are applicable here?

9 A Well, no. As a matter of fact, some of them are
02:20:52 10 applicable here.

11 Q Is it your testimony that you're permitted to change
12 the meaning of the loan modification provisions in the PSAs?

13 A Yes.

14 Q Is that what you have done?

02:21:11 15 A I do not believe that I've changed the meaning, but
16 the way to interpret them can be overruled by the description
17 of them in the process.

18 Q Well, my question was: Whether you changed the
19 meaning of the loan modification provisions in the PSAs. Could
02:21:32 20 you answer that question?

21 A All words are susceptible to -- most of the time, no
22 matter what you write, it's susceptible to several
23 interpretations.

24 One of the Sections of 10.01 says that if the
02:21:51 25 description of whatever subject matter is covered both in the
26 PSAs and in the ProSupp that the description in the ProSupp can

1 J. Kravitt - by Petitioner - Cross/Mr. Loeser

2 govern the -- the provision in the PSA. So, for example, if
3 the PSA says that you can modify the interest rates pursuant to
4 refinancing, provided that you repurchase it, you could look to
02:22:26 5 the ProSupp to give additional meaning to or additional context
6 or meaning to that provision. For example, if the ProSupp in
7 the Loan Modification Section describes refinancing loan
8 modifications and also in the Servicing or Risk Factor Section
9 describes credit mitigation, loan modifications and says you
02:22:53 10 don't have to repurchase those, then the intent in the ProSupp
11 governs.

12 Q And are you telling the Court that you have reviewed
13 all of the 530 ProSupps and all of 530 PSAs and identified all
14 the instances in which the ProSupps say something different
02:23:10 15 than the PSAs, prior to the entry of the settlement?

16 A I didn't do that. I didn't do all 530 prior to
17 entering into the settlement. I have done all 530 since then.

18 Q Now, the trustee's position is that loan modification
19 repurchase provisions are not materially different in any of
02:23:30 20 the 530 governing documents; is that right?

21 A No.

22 Q So the trustee recognizes that the Loan Modification
23 Repurchase Agreements are, in fact, materially different in the
24 530 PSAs?

02:23:45 25 A They are worded differently.

26 Q I understand that you think they are worded

1 Kravitt - Peitioner - Cross/Ms. Kaswan
2 origination requirements for borrowers who stated their
3 income you wouldn't know that, right?

4 A I personally would not know that.

03:07:46 5 Q And you don't know, sir, whether or not the
6 underwriting and origination practices -- strike that.

7 Let me ask you, do you know whether the GSEs
8 had a representation and warrantee of prudent underwriting
9 and origination practices?

03:08:08 10 A I don't recall. I reviewed their warranties much,
11 much longer ago.

12 Q And so, sir, you would agree with me then that you
13 couldn't look at the GSE repurchase experience in order to
14 obtain an indication of the number of loans in the private
03:08:34 15 label securitizations that violated the prudent underwriting
16 and origination practices if, in fact, the GSEs didn't have
17 that representation, right?

18 A Well, actually we reviewed the representations of
19 the GSEs and we reviewed the private label representations.
03:08:57 20 It all took a long time because of the number of trusts.
21 And we compared them and we found that the GSE
22 underwriting -- excuse me, the GSE reps and warranties to be
23 meaningfully stronger.

24 Q Well, sir, would you agree with me that a
03:09:15 25 representation that somebody acted prudently is generally
26 similar to a negligence standard?

1 Kravitt - Petitioner - Cross/Kaswan

2 default under the applicable PSAs.

3 Do you see that?

4 A I do.

04:13:15 5 Q And, sir, when you received these letters, did you
6 investigate whether or not there were facts in the June 17,
7 2010 letter that constituted events of default?

8 A We were of the opinion that no event of default
9 had been proven to the Trustee.

04:13:49 10 Q Well, sir, there's actually nothing in the PSAs
11 that require an event of default to be proven, is there?

12 A I disagree with you. If you look at the
13 definition of event of default in Section 7, the way I
14 interpret -- this could be 702, I think, or 701(b), the
04:14:15 15 second default, which is the servicer default, the way I
16 interpret it is that the facts have to be true which are
17 alleged for there to be an event of default. If the alleged
18 facts are not true there is no event of default.

19 Q Well, sir, Ms. Patrick's June letter recounted
04:14:37 20 information that was in the public record, right?

21 A I don't remember the content of that letter.

22 Q Well, before you all started negotiating in
23 November of 2010 Ms. Patrick didn't have information that
24 was not in the public record, did she?

04:15:06 25 A She did not have any information that was not in
26 the public record. Well, I don't know if she did or she

In The Matter Of:

BNY Mellon v.

July 15, 2013

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1 J. Kravitt - by Petitioners - Cross/Kaswan

2 Q Did the Trustee confirm that 2.03, 3.01 and 7.01 were
3 largely the same as they pertained to the Master Servicer's
4 obligation among the governing agreements?

10:22:35 5 A The Trustee, of course, through its counsel, studied
6 those provisions on the Trust many, many times. All I can tell
7 you now is that they're generally similar, but they are not
8 identical.

9 Q And did the Trustee examine each of those provisions
10 to determine whether the Trustee's obligations under 2.03 and
11 7.01 were largely the same?

12 A We studied those provisions many times. I don't
13 recall enough of those studies to tell you whether or not they
14 were largely the same. I can tell you that generally they were
10:23:32 15 the same, but they were not identical. I'm not trying to avoid
16 any omission or admission. I'm just telling you what my memory
17 is.

18 Q And, sir, could you take a look at P-11? That's the
19 excerpts of the PSA.

10:23:53 20 A I certainly will. P-11, where would you like me to
21 go?

22 Q And could you look at the page Bates stamped 275159?

23 A Okay. I don't have the Bates stamps. I have the PTX
24 page numbers.

10:24:14 25 Q 11.63.

26 A 11.63. Okay. I'm at 11.63.

1 J. Kravitt - by Petitioners - Cross/Kaswan
2 and warranty that materially and adversely affects certificate
3 holders, you understood that the Trustee had to give notice,
4 right?

10:26:08 5 MR. GONZALEZ: Objection, your Honor. Asked and
6 answered.

7 THE COURT: Overruled.

8 A Well, what this 2.03 says is that if any of the
9 parties, including the Trustee, discovers a breach of those
10 warranties, it's supposed to give notice to the other parties.

11 Q And, sir, 3.01 was the provision we looked at earlier
12 that defined the Master Servicer's obligations, right?

13 A Correct.

14 Q And was it your understanding under the governing
10:26:45 15 agreements that one of the servicing obligations of the Master
16 Servicer was to put back loans that materially and adversely
17 violated the representations and warranties?

18 A I don't recall if it had an affirmative duty to do
19 that or not. It generally had an affirmative duty to service
10:27:18 20 the mortgage loans consistently with prudent mortgage servicing
21 in the area the loans were located.

22 Q Sir, what I'm asking you is whose job was it to
23 enforce the repurchase rights under the governing agreements,
24 as you understood it?

10:27:40 25 MR. GONZALEZ: Objection, your Honor, to the
26 extent it calls for a legal conclusion.

1 J. Kravitt - by Petitioners - Cross/Kaswan

2 MS. KASWAN: Your Honor, Mr. Gonzalez must have
3 asked this witness at least 20 times what his understanding
4 was.

10:27:55 5 THE COURT: I'll allow it.

6 Go ahead. You can answer it.

7 A I think if anyone had an obligation to enforce the
8 breach of warranties, it would either be the Trustee, if it
9 received a direction from certificate holders, or the Master
10 Servicer, if you read into the general standard that it was its
11 obligation to do that.

12 Q So is it your understanding that the Trustee never had
13 an obligation to enforce the repurchase rights unless there was
14 a group of certificate holders owning 25 percent of the Trust's
15 interests to give a direction?

16 A Correct.

17 Q Now, could you look at P-19 -- strike that.

18 And is that what the position was that you took during
19 the negotiations?

10:29:13 20 A Correct.

21 Q Could you look at P-19?

22 A I am there.

23 Q And this is, of course, the October 18, 2010 letter
24 from Gibbs & Bruns that you received?

10:29:32 25 A Yes.

26 Q And could you turn to the second page?

1 J. Kravitt - by Petitioners - Cross/Kaswan

2 Need proxy for contract differences."

3 Q And what did you mean by that?

4 A Well, I'm not sure, but I believe what I meant was
10:35:28 5 which trusts give this type of representation. And I'm not
6 sure what I meant by proxy, but "need proxy for contract
7 differences" was some note to myself asking for us to study in
8 more detail what the contract differences were.

9 Q Well, when you use the word "proxy," were you
10:35:52 10 attempting to use the GSE experience as a proxy for the private
11 label securitization experience?

12 A Yes. But that clause, as I said, I believe was a note
13 to myself to study the differences.

14 Q And, sir, is this the chart that you had mentioned
10:36:13 15 earlier that compared the representations and warranties in the
16 GSE contracts versus the governing agreements for the private
17 label securitization trusts?

18 A This is the chart that BofA presented, but we did our
19 own study.

10:36:38 20 Q And when you say you did your own study, was that a
21 document that you developed?

22 A I don't recall now if it was a document that I saw,
23 you know, other of my colleagues might have, but I received an
24 extensive oral report on differences in warranties between the
10:37:04 25 parties. I don't remember if a document exists summarizing
26 that or not.

1 J. Kravitt - by Petitioners - Cross/Kaswan

2 Is that fair?

3 A I think that's a fair summary.

4 MS. KASWAN: Could we pull up R-131?

10:59:20 5 Q Now, sir, is this a brief that you approved before it
6 was filed?

7 A Yes.

8 Q And this was a brief that was filed when the
9 settlement case was pending in front of Judge Pauley; is that
10:59:38 10 right?

11 A Is this filed on October 31, 2011?

12 Q Yes, sir.

13 A Then I believe this was filed in response to Justice
14 Kapnick's original timetable of the matter. It was -- so it
10:59:55 15 was before Judge Pauley, but everybody honored the October 31st
16 date that Justice Kapnick had agreed to.

17 Q But it was filed in the federal court before the
18 matter was transferred back to Judge Kapnick?

19 A That's what it says.

11:00:08 20 Q And, sir, was this your firm's effort to respond to
21 the various different objections raised to the settlement as of
22 October 31, 2011?

23 A Yes.

24 Q Now, sir, is it correct that the Trustee in fact had
11:00:35 25 the power under the governing agreements to sue to enforce the
26 repurchase rights?

1 J. Kravitt - by Petitioners - Cross/Kaswan

2 A Yes.

3 Q And during the negotiations, did either your firm or
4 any of the employees of Bank of New York Mellon, in your
11:01:04 5 presence, ever assert that Bank of New York Mellon was prepared
6 to sue to enforce the repurchase rights of those trusts where
7 Ms. Patrick's group did not hold 25 percent?

8 A Again, I'm not trying to be obstreperous. I have no
9 memory one way or the other and, unlike other situations, I'm
11:01:44 10 not going to tell you it's more likely one way or the other.

11 Q Now, could we -- strike that.

12 And let me ask you, sir, did you or your firm or
13 Ms. Patrick's group, in your presence, ever tell the assembled
14 parties that the Trustee, given all of the GSE data, was
11:02:17 15 prepared to notice a default on the part of the Master Servicer
16 in failing to put back any of the Trust's loans?

17 A I have no memory one way or the other of that ever
18 being said.

19 Q And, sir, that's the type of thing you're likely to
11:02:41 20 remember, is that fair to say, given the fact that it happened?

21 A When I was younger, yes.

22 Q So today you have no memory of that, is that what
23 you're saying, no memory one way or the other?

24 A That's correct.

11:02:56 25 Q And, sir, at the negotiations, did your firm or
26 anybody from Bank of New York Mellon state that if the

1 KRAVITT-PETITIONERS-CROSS (WOLLMUTH)

2 those claims and, in fact, agreed to release them in this
3 settlement for no financial consideration.

4 MR. GONZALEZ: Your Honor, is that a question or
04:36:12 5 testimony?

6 THE COURT: Yes, I think we don't need those kinds
7 of statements.

8 MR. WOLLMUTH: It's not a question, so I will move
9 on. It was just a context.

04:36:22 10 THE COURT: Well --

11 Q You testified earlier that you did not evaluate
12 servicer claims because one, the servicing, the servicing
13 standard, the servicing standard was vague, and two, the
14 standard of proof is very high; isn't that correct?

04:36:39 15 A There was a three.

16 Q The three is the servicer enhancement?

17 A The first was because the standard itself is extremely
18 amorphous. The second was that the, in order to find the
19 servicer liable, you had to find bad faith, intentional
04:37:00 20 wrongdoing, reckless disregard or gross negligence.

21 The fourth, the next reason was that we felt that the
22 remedies we did obtain were so much more valuable than the ones
23 we didn't pursue, that that added to the, our reasoning that we
24 should pursue the remedies we did, as opposed to the ones we
04:37:28 25 didn't pursue.

26 Q For sure, I am not asking you about the future servicer

1 KRAVITT-PETITIONERS-CROSS (WOLLMUTH)

2 enhancement.

3 As to evaluation of the past claims, I think we are in
4 agreement as to what your two principle reasons were in finding
04:37:43 5 those claims difficult to evaluate the proof, correct?

6 A I apologize for fighting you on this, but part of our
7 decision making process about what claims to make, included our
8 judgment as to what remedies we could otherwise obtain.

9 Q Yep, and I grant you, you have obtained servicing
04:38:08 10 enhancement that you want to tell us about. I understand that.

11 My question here is more limited. Okay.

12 My question is, these are the two principle
13 difficulties you identified in evaluating servicer liability for
14 past misconduct, the vague servicing standard, and I think you
04:38:29 15 said it was amorphous, and the high burden of proof, fair?

16 A Correct.

17 Q Now, first, let's take the standard of proof. I think
18 you hit on this just now.

19 You testified that you advise the Defendant
04:38:42 20 Institutional Investors repeatedly that you can only go after
21 the Master Servicer if they acted in bad faith or were grossly
22 negligent.

23 That's your testimony at 1451; is that correct?

24 A No.

04:38:56 25 MS. PATRICK: By definition, if he is reading
26 testimony from 1451, he is reading testimony that the

1 KRAVITT-PETITIONERS-RECROSS (PATRICK)

2 Q And, who is the entity that is obligated to correct
3 defects in the mortgage loan file under this provision? Look at
4 the top.

00:02:28 5 MR. WOLLMUTH: Your Honor, objection. She asked
6 the question and found the answer for him.

7 MS. PATRICK: I am directing his attention?

8 MR. WOLLMUTH: Leading.

9 THE COURT: I must say, it's going to say what it's
00:02:38 10 going to say.

11 MR. WOLLMUTH: She should let him find it.

12 THE COURT: To move it along a little bit, would be
13 nice.

14 Q Directing your attention to the bottom of the area,
00:02:48 15 carry over paragraph on section 2.02 and to the top of the next
16 page, who is the party obligated under this provision to correct
17 defects in mortgage documents?

18 A The obligation to cure in the last -- that starts in
19 the last sentence on the preceding page and then continues to
00:03:50 20 the following page, is the obligation of Countrywide, not the
21 Master Servicer on its own behalf and the other three sellers.

22 Q So, the obligation is the obligation of Countrywide to
23 cure; is that what you are saying?

24 A My understanding is that it's the obligation of
00:04:12 25 Countrywide, the seller, and the other three sellers to cure a
26 lack of delivery of required documents in the mortgage file to

1 KRAVITT-PETITIONERS-RECROSS (PATRICK)

2 the Trustee.

3 Q And, what is your understanding of about what's the
4 obligation of the Master Servicer?

00:04:33 5 A It's not the obligation of the Master Servicer.

6 Q All right. Directing your attention to paragraph
7 20.3(c), of Petitioner's Exhibit 11, which is at pages 11.63 to
8 .64?

9 This paragraph C please.

00:05:01 10 Are you familiar with the repurchase obligation in the
11 Pooling and Servicing Agreements.

12 A Generally.

13 Q And, can you tell Justice Kapnick, who is the party
14 that is obligated to repurchase the mortgage loans?

00:05:13 15 A It's the seller.

16 Q And, when does that obligation to repurchase get
17 triggered under 2.03(c), as you understand it?

18 A Well, this is with regard to the C you are showing me,
19 is the repurchase in the event of breach of warranty and the
00:05:58 20 obligation of the each seller.

21 Q And, yes, and the sellers' obligation, does it say that
22 upon discovery by any of the parties hereto of a breach, the
23 party discovering such breach shall give prompt notice thereof
24 to the other parties?

00:06:15 25 A Yes.

26 Q So, what is your understanding about whether notice is

1 KRAVITT-PETITIONERS-RECROSS (PATRICK)

2 required to trigger the repurchase obligation?

3 MS. KASWAN: Your Honor, I am just going to object.

4 She is reading the agreement, but if she is referring

00:06:38 5 generally to the body of law, with respect to whether notice

6 would be excused under certain circumstances, then I think

7 it's a legal argument.

8 THE COURT: What are you basing it on, this PSA?

9 MS. PATRICK: Yes.

00:06:56 10 Q What do you understand about whether notice is required
11 to trigger a repurchase obligation under this?

12 A What the highlighted sentence says, if the seller
13 itself, what I -- the highlighted sentence says, that each
14 seller, within 90 days or the earlier of its discovery of a
00:07:24 15 breach or its received notice of a breach, then it has to do the
16 repurchasing.

17 Q And, turning over to the next, to the continuation of
18 that paragraph, Mr. Kravitt, what was your understanding about
19 whether, upon discovery of a breach, seller could attempt to
00:07:44 20 cure it by locating a missing document?

21 MR. REILLY: Can we get the time period? Counsel
22 said what was, and I am not clear if she was talking about a
23 minute ago or three years ago.

24 Q Before the settlement was entered into, Mr. Kravitt,
00:08:02 25 which is the relevant timeframe here --

26 MR. REILLY: I will object to that comment. We

1 KRAVITT-PETITIONERS-RECROSS (PATRICK)

2 have a dispute --

3 THE COURT: Everybody has made comments here, not
4 just her -- everybody has. I don't think comments are
00:08:13 5 necessary. So, just ask the questions.

6 Q Mr. Kravitt, for purposes of my question, directing
7 your attention to the timeframe prior to the settlement.

8 A Well, I understood that each seller always had a chance
9 to cure.

00:08:31 10 Q Had a chance to cure the breach upon notice or just a
11 long time ago?

12 A Had an opportunity to cure the breach if it discovered
13 it or upon notice.

14 Q And, Mr. Kravitt, just to round this out, what was your
00:08:54 15 understanding of the obligation of the Master Servicer to cure
16 any document defects under the Pooling and Servicing Agreement
17 at or prior to the settlement?

18 MR. WOLLMUTH: Your Honor, I object to this
19 question and even if your Honor let's it go in, I ask we be
00:09:12 20 mindful of the scope of cross.

21 I never asked this witness, I am unaware of any
22 questions about the identity of the party that had to
23 repurchase. Examination was focused on the failure to give
24 notice and breaches.

00:09:24 25 THE COURT: She is responding to a whole week's
26 worth of cross-examination. I will allow it.

1 KRAVITT-PETITIONERS-RECROSS (PATRICK)

2 MR. WOLLMUTH: I think she has her sections
3 confused and misstates the questions. I won't go into it,
4 but I just ask we be mindful of the scope of cross, which is
00:09:40 5 vast, I agree.

6 THE COURT: All right.

7 Q Mr. Kravitt, directing your attention to section 2.203
8 of the Pooling and Servicing Agreement first, in the timeframe
9 prior to this settlement, what was your understanding about
00:09:55 10 whether the Master Servicer had any obligation to repurchase or
11 cure defective mortgages?

12 A I understood the obligation to repurchase, cure or
13 substitute with regard to mortgage loans that were, allegedly
14 breached warranties, that was it was the obligation of any of
00:10:16 15 the sellers, but not the Master Servicer.

16 Q Now, you were asked a couple of questions as well about
17 paragraph 6A of the settlement agreement, and so let's turn to
18 that. That's Petitioner's Exhibit 1.

19 And, first, you will remember that Mr. Wollmuth called
00:10:38 20 your attention to this paragraph here 6(a)(2), regarding the
21 Master Servicer's ability to elect to cure document
22 deficiencies.

23 Do you see that?

24 A I do.

00:10:52 25 Q And then, he also called your attention to paragraph
26 6(c), which is page 131, which provides that the Master Servicer

1 KRAVITT-PETITIONERS-REDIRECT (GONZALEZ)

2 into account the timing of when a Certificate Holder may have
3 purchased its certificates

4 A I do.

00:35:00 5 Q And, I believe you testified that the Trustee had not
6 examined that issue, correct?

7 A Correct.

8 Q Why did the Trustee not examine that issue?

9 A Principally for two reasons. The first is, we did not
00:35:12 10 believe that the Trustee had the legal duty to do so.

11 But secondly, and easily as important, is the fact that
12 a Certificate Holder chooses its own strategy. It decides what
13 its appetite for risk is. If it wants to take less risk, it can
14 decertify its certificate. If it wants to take more risk, it
00:35:37 15 can buy a certificate.

16 It is not up to the Trustee to decide on an investment
17 strategy for a Certificate Holder. The job of the Trustee is
18 to negotiate the best settlement it can, and let the chips fall
19 where they may.

00:35:53 20 Q Now, Mr. Kravitt, I am sure you recall questions during
21 your cross-examination regarding the various servicing
22 provisions of the settlement agreement.

23 A I do.

24 Q Could you tell us why did the Trustee choose, as you
00:36:06 25 described it, a forward-looking remedy, rather than a remedy
26 seeking monetary damages for alleged past servicing breaches?

KRAVITT-PETITIONERS-REDIRECT (GONZALEZ)

1
2 A Notwithstanding the cross-examination that we have had
3 today --

4 MR. REILLY: Can we -- I think it's an
5 inappropriate comment. Move to strike.

6 THE COURT: Let it go. Let it go.

7 A I believe and still believe, that any damages -- we
8 believe that actually look at the servicing standard, look at
9 the level of liability that the Master Servicer had, look at the
10 damages that could be proved, that we were much better off
11 focusing on the future remedies that we were going to get
12 because they would be worth a lot more than any damages we could
13 get for the alleged past violations of servicing.

14 We didn't feel that -- first of all, we did the
15 investigation of what documents were missing and we analyzed how
16 serious it was, how serious were the missing documents or not.
17 We decided that documents that made the most difference were the
18 mortgaging, excuse me, were the mortgage, something wrong with
19 the mortgage file and/or the title insurance policy.

20 When we looked at the lost documents or missing
21 documents, excuse me, we didn't feel that missing notes would
22 have made that big a difference. There weren't that many to
23 begin with, and they could be cured through lost note
24 affidavits.

25 So we, first of all, with regard to the document cures,
26 we focused on what would actually make a difference.

1 KRAVITT-PETITIONERS-REDIRECT (GONZALEZ)

2 Secondly, with regard to the servicing standard, as I
3 have stated before, we actually got, to my mind, the best
4 servicing relief we could possibly get.

00:38:35 5 If you didn't even have to negotiate with, but just was
6 able to pick your most effective servicing relief, the problem
7 we had with trying to decide whether or not to replace the
8 Master Servicer was balancing the job demands the Master
9 Servicer was probably doing, versus the tremendous dislocation
00:38:57 10 that would occur if you tried the replace a Master Servicer
11 pursuant to a fight.

12 What we were able to do was replace the Master
13 Servicer, about whom everybody was concerned not being
14 sufficiently effective, with what we consider to be some of the
00:39:14 15 best specialist servicers in the United States, who could deal
16 with high risk loans and produce cash flow that would be
17 superior to the average in the United States.

18 We negotiated the time period so that these could be
19 phased in without dislocation, and for the loans that didn't go
00:39:36 20 to the specialty servicers, we forced the, we negotiated to pay
21 a cash, the equivalent of a cash penalty by having a credit
22 against servicing compensation, otherwise owed them, to the
23 extent that they didn't meet what we took as a proxy to the
24 industry standards.

00:40:05 25 Q I believe you said as a proxy?

26 A As a proxy for industry standards, some of the GSE

1 J. Kravitt - by Petitioners - Redirect/Gonzalez
2 paragraph H at page R-4.5.

3 Paragraph H reads: "The Settlement Agreement is the
4 result of factual and legal investigation by the Trustee and is
04:03:47 5 supported by the Institutional Investors."

6 Based on your personal involvement in the negotiation,
7 is that an accurate statement?

8 A Yes.

9 Q And what's your basis for that statement?

04:03:59 10 A Well, I'll try and summarize the investigation that
11 I'm aware of that the Trustee and his counsel performed.

12 First of all, we reviewed --

13 MR. REILLY: Your Honor, can we get clarity on
14 when he's talking about factual and when he's talking about
04:04:18 15 legal. They asserted a privilege, an attorney-client
16 privilege throughout the discovery on the legal
17 investigation that Mayer Brown did in this process and did
18 not produce any documents or give us testimony about that.

19 So if in fact they're now waiving that, then, you
04:04:37 20 know, that will be -- I don't think he can ask this
21 question without the compound nature of factual and
22 legal --

23 MR. GONZALEZ: Your Honor, I'll rephrase it.

24 THE COURT: Thank you.

04:04:46 25 Q Mr. Kravitt, let's just deal with the factual prong
26 first.

1 J. Kravitt - by Petitioners - Redirect/Gonzalez

2 A Okay. We read the correspondence between our client,
3 The Bank of New York, and the Institutional Investors, and we
4 continued to read that correspondence as the Settlement
04:05:02 5 Agreement went on.

6 We supervised or the Trustee supervised and performed
7 the review of the mortgage files to find out what was missing.
8 We tried to keep track of other -- if what we did is read a
9 legal document, is that a legal investigation or a factual
04:05:34 10 investigation?

11 Q You can tell us what you did.

12 A All right. We tried to read cases that were decided
13 while we were conducting the settlement negotiations. We read
14 the 530 trust documents many different times with regard to the
04:06:00 15 many different issues as they arose. In fact, when this is
16 over, I never want to read a PSA again.

17 THE COURT: Me neither.

18 A We hired experts to perform certain additional
19 investigations; RMS to do an investigation as to the
04:06:33 20 appropriate range of damages for the alleged breach of
21 warranties; RMS to lend us their expertise on the servicing as
22 those provisions were negotiated; Capstone to evaluate the
23 ability of Countrywide to pay for damages under the governing
24 documents; Professors Daines and Adler on the legal issues they
04:07:06 25 gave us advice on. We tried to keep track of press articles in
26 the subject area.

1 J. Kravitt - by Petitioners - Redirect/Gonzalez

2 And tell me if this is going too far with regard to
3 privilege. We gave advice --

4 MR. REILLY: Your Honor, I'm not advising. He's
04:07:29 5 looking at me.

6 THE COURT: I don't think he thought you were
7 going to --

8 MR. REILLY: No, he looked at me like I
9 thought --

04:07:35 10 THE WITNESS: I was trying to make you happy,
11 Mr. Reilly.

12 MR. REILLY: Keep going.

13 A (Continuing) To the extent there were legal issues
14 that arose, we tried to research and think about those issues
04:07:48 15 and discuss them with the Trustee.

16 Q Now, Mr. Kravitt, turning to legal, in addition to
17 those legal issues that you just generally described that you
18 looked at and discussed with the Trustee, what steps did you
19 take in terms of experts with respect to legal issues?

04:08:06 20 I believe you discussed Professor Daines and Professor
21 Adler and I just want to be clear in which context you were
22 discussing they them.

23 A Okay. This is the same -- I'm referring to the same
24 thing, that is, we hired Professor Adler to give us advice on
04:08:28 25 the opinion that was filed, the material and adverse
26 interpretation. We hired Professor Daines to give the Trustee

In The Matter Of:

BNY Mellon v.

July 16, 2013

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM : PART 39

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In the Matter of the Application of

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

Petitioner,

Index No.
651786/11

for an order, pursuant to CPLR § 7701,
seeking judicial instructions and
approval of a proposed settlement.

-----X

New York Supreme Court
60 Centre Street
New York, New York 10007
July 16, 2013

B E F O R E:

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1 J. Kravitt - by Petitioners - Recross/Reilly

2 Q Sure. But we don't represent every single certificate
3 holder, correct?

4 A Correct.

10:00:54 5 Q And the Trustee had fiduciary duties or has fiduciary
6 duties to all certificate holders in all of the 530 trusts,
7 correct?

8 A Well, the two fiduciary duties are not to be negligent
9 and to not have a conflict of interest. And I don't think that
10:01:13 10 that issue, as you're raising it, would apply a conflict of
11 interest.

12 Q Well, I didn't ask you that question. But you
13 understand the Court will determine that, correct?

14 A But you did ask me that question, I believe. I'm not
10:01:25 15 trying to be argumentative, because you said I knew the Trustee
16 had fiduciary duties, but those fiduciary duties would not be
17 impacted by this provision, in my opinion.

18 Q Well, actually the Court will decide.

19 A Of course.

10:01:39 20 Q And, in fact, if the Trustee became aware in this case
21 about facts that would undermine whether or not Bank of America
22 actually was going to infuse dollars to support Countrywide's
23 liability here, the Trustee couldn't present that to the Court
24 pursuant to Section 30(c) as evidence undermining settlement?

10:02:05 25 A Correct.

26 Q And the same would be true with regard to Justice

1 R. Bailey - by Petitioners - Cross/Reilly

2 Q And, generally, do you believe that the language that
3 was drafted in this provision was originally and generally
4 drafted by Bank of America's lawyers?

12:12:32 5 A Oh, as to the origin of the language, I don't know. I
6 don't recall.

7 Q And do you recall whether or not you made any proposed
8 edits to this provision?

9 A This particular provision, I do not recall.

12:12:44 10 Q Do you know if there were any discussions about the
11 ultimate language agreed to by the parties in this provision?

12 A Not that I recall.

13 Q Did the Trustee, to your knowledge, ever make a
14 settlement offer in the process?

12:13:15 15 A I'm sorry. I'm slightly confused. Did the Trustee
16 make a settlement offer?

17 Q Correct.

18 A You mean did the Trustee propose a number?

19 Q Correct.

12:13:23 20 A No, not to my knowledge.

21 Q Before the summer of 2010, were you intimately
22 familiar with Pooling and Servicing Agreements?

23 A No, not intimately familiar.

24 Q And through this process, meaning this process

12:13:52 25 beginning in June 2010 through June 2011, did you, in your

26 view, become intimately involved and familiar with the 530

1 R. Bailey - by Petitioners - Cross/Reilly

2 Pooling and Servicing Agreements?

3 A With each of the individual agreements?

4 Q Right.

12:14:05 5 A No. I would have -- I looked at a handful of the
6 PSAs. There were certain -- I don't recall -- there were
7 certain distinctions among the groups, and then Mayer Brown
8 looked at all 530 or however many there were.

9 Q In looking at the handful, did you identify
12:14:26 10 distinctions within the 530, or within the handful -- I'm
11 sorry -- of Pooling and Servicing Agreements that you looked
12 at?

13 A Were there distinctions among them?

14 Q Did you identify distinctions among them in the
12:14:39 15 handful you looked at?

16 A There were distinctions. Sitting here today, I don't
17 recall. I mean I think some of them, there may have been a
18 couple that were Delaware trusts and stuff like that, but I
19 don't recall specifically.

12:14:52 20 Q Do you recall at anytime between June of 2010 and June
21 of 2011, that the Trustee took into consideration in the
22 settlement process distinctions between or among provisions in
23 the 530 Pooling and Servicing Agreements?

24 A Did I personally? Not that I recall. Again, we would
12:15:16 25 have looked to Mayer Brown to advise us on that sort of issue.

26 Q And my question is, do you recall receiving any advice

1 BAILEY-PETITIONERS-CROSS (REILLY)

2 Q That the Trustee only acted at the direction of
3 Certificate Holders through the settlement process?

4 A No, there was not, under the PSA, there was not a
00:11:39 5 direction in indemnity to engage in settlement negotiations.

6 Q And the Trustee did so anyway, right?

7 A The Trustee engaged in settlement negotiations.

8 Q Without any Investor demanding that it do so from the
9 perspective of the Trustee in a way that complied with the
00:11:59 10 Pooling and Servicing Agreements, correct?

11 A Was there a binding instruction to engage in settlement
12 negotiations?

13 Q No, I didn't actually ask you that question, but if you
14 want to answer that one, answer it as to Bank of New York
00:12:11 15 Mellon's position on that.

16 Was that binding instruction, did Bank of New York
17 Mellon take the position, there was a binding instruction from
18 Certificate Holders in these 530 Trusts to engage in settlement
19 negotiations?

00:12:22 20 MR. GONZALEZ: Your Honor, objection, to the extent
21 this is calling for the witness to answer in terms of a
22 litigation position, that the Trustee might take, or the
23 reading of the PSA from the legal position that the
24 corporate entity is taking.

00:12:37 25 This witness is not being put forward as a
26 corporate representative for that purpose. So, if he has

1 BAILEY-PETITIONERS-CROSS (REILLY)

2 an understanding, that's fine.

3 THE COURT: I think he can answer that based on

4 his -- I think that's what he would be answering from, based

00:12:51 5 on his understanding.

6 A Based on my understanding, there was not a binding

7 instruction from the Certificate Holders to engage in the

8 settlement negotiations.

9 Q And back to R146-001.

00:13:11 10 The position the Trustee was taking in September of
11 2010 was, there is not a binding instruction to engage in an
12 investigation, correct?

13 A I believe the September letter says that the
14 instruction, that the purported instruction that Ms. Patrick
00:13:32 15 sent, did not meet the requirements of the PSA to the extent
16 that instruction included an investigation of loan files, then
17 yes, that instruction did not meet the requirements of the PSA.

18 Q In fact, if you look at R146-002, the third line.

19 A Which? Third line?

00:13:56 20 Q The third line with the heading and underlining?

21 A The third line beginning under the paragraph, beginning
22 "Holders", the August 20th letter, your contention of the
23 August 20th letter -- look at the screen.

24 "The August 20th letter does not constitute a valid
00:14:18 25 direction"; that was the position of Bank of New York Mellon as
26 it related to Ms. Patrick's previous letter, correct?

1 R. Bailey - by Petitioners - Cross/Reilly

2 A Does the Trustee owe a loyalty to avoid conflicts to
3 each of the trusts in the certificate holders? Yes.

4 Q And if there was a conflict between the interests of
03:41:41 5 certificate holders in Trust No. 1 and the interests of
6 certificate holders in Trust No. 530, the Trustee would have to
7 figure out what to do with that conflict, right?

8 MS. PATRICK: Objection. Foundation. No
9 evidence that the trusts are differently situated.

03:41:54 10 THE COURT: You can answer.

11 A Hypothetically, if there were a conflict between two
12 trusts, yes, the trustee would have to figure out how to
13 address that issue.

14 Q And one of the ways that a trustee figures out how to
03:42:07 15 resolve a conflict is going to the court and ask for guidance,
16 correct?

17 A It is one of the options, yes.

18 Q What are -- the other option would be to withdraw as
19 trustee in one of the trusts?

03:42:17 20 A That would be an option, yes.

21 Q Are there other options?

22 A I assume it would depend on the nature of the
23 conflict. I assume it's possible to go to the certificate
24 holders of the affected trust and inform them of the potential
03:42:31 25 conflict and see if they waive or whatever.

26 Q Did you, on behalf of New York Mellon, ever evaluate

1 R. Bailey - by Petitioners - Cross/Reilly

2 whether certificate holders in certain trusts had stronger
3 claims against Bank of America than certificate holders in
4 other trusts?

03:42:52 5 A We -- I looked at the issues generally across all the
6 trusts. Did I analyze Trust No. 1 versus Trust No. 529? I did
7 not.

8 Q And to your knowledge, nobody did, correct?

9 A Actually, that's not correct. Mayer Brown reviewed
03:43:11 10 all of the PSAs at issue and I don't recall them saying, to me
11 at least, that there was a material difference among all of the
12 trusts.

13 Q Well, in fact, during your deposition you weren't
14 allowed to answer any questions about what Mayer Brown did
03:43:26 15 regarding the strength and weaknesses of the claims, correct?

16 MR. GONZALEZ: Your Honor, that's a different
17 answer to a different question. So I don't know what the
18 point of that question is.

19 MR. REILLY: Well, I guess I'm asking you, are
03:43:38 20 you going to waive the privilege on what Mayer Brown did
21 with regard to investigating legal issues in this case?

22 MR. GONZALEZ: The answer is no. The fact of the
23 investigation is all that's relevant, not what the
24 underlying investigation was, and we haven't brought
03:43:52 25 forward the underlying investigation.

26 MR. REILLY: Well, in fact it appears that what's

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 39

- - - - - X

In the Matter of the Application of:
THE BANK OF NEW YORK MELLON, (as Trustee
under various Pooling and Servicing
Agreements and Indenture Trustee under
various Indentures),

PETITIONER,

- against -

For an Order pursuant to CPLR Section 7701,
seeking judicial instructions and approval
of a proposed settlement.

- - - - - X

INDEX NO: 651786/11 60 Centre Street
New York, New York
July 18, 2013

BEFORE: HONORABLE BARBARA R. KAPNICK, Justice

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(Appearances continue on next page.)

1 R. Bailey - by Petitioners - Cross/Reilly

2 Q And the same with regard to Mr. Stanley. At anytime
3 in that same time frame did you discuss with Mr. Stanley
4 whether Bank of New York Mellon had fiduciary duties to the
10:20:45 5 certificate holders in the trusts?

6 A I don't recall sitting here.

7 Q Would you agree that it would be fair to expect
8 Mr. Stanley, as the head of the RMBS Group, to be familiar with
9 the legal responsibilities that the Bank of New York Mellon has
10:21:06 10 when it accepts responsibility to be a Trustee in the trusts
11 that are being settled in this case?

12 A I don't know the state of Mr. Stanley's knowledge on
13 that issue, but Mr. Stanley has dealt with those issues in his
14 role. So I just -- I don't know what he knows and what he
10:21:28 15 doesn't know.

16 Q I understand that. But would it be fair to assume
17 that he should know in that role what the legal obligations are
18 of Bank of New York Mellon when he agrees to serve as a Trustee
19 in a trust like those that are being settled in this case?

10:21:45 20 MR. GONZALEZ: Two objections, your Honor. Asked
21 and answered and the second one is that it's asking for
22 this witness' opinion of what someone else should know.

23 THE COURT: Sustained.

24 Don't answer that.

10:21:55 25 Q With regard to the question of whether or not the
26 Trustee had an obligation to maximize the certificate holders'

1 R. Bailey - by Petitioners - Cross/Reilly

2 recoveries, in the time frame that this issue was being
3 negotiated, was it your belief that Bank of New York Mellon had
4 an obligation to maximize recovery in these trusts as to the
10:22:15 5 claims that could be brought against Bank of America or
6 Countrywide?

7 A The Trustee had an obligation to achieve a result that
8 was reasonable and fair to all certificate holders.

9 Q And what would you say to my question. Did the
10:22:32 10 Trustee have a responsibility to maximize the recovery in these
11 trusts?

12 A I'm struggling over the use of "maximize." I'm not
13 sure I know the answer to that question.

14 Q Okay. During the time that you were participating in
10:22:57 15 this process, did you believe that Bank of New York Mellon had
16 a fiduciary obligation to evaluate strength and weaknesses of
17 the claims that the Trustee could bring against Bank of America
18 or Countrywide?

19 A The Trustee did evaluate those claims, the nature of
10:23:20 20 those claims.

21 Q That's not my question.

22 A I understand.

23 Was it a fiduciary duty? Again, my understanding of
24 the PSA is that prior to a servicer event of default, the
10:23:37 25 Trustee is largely in a ministerial capacity. Following a
26 servicer event of default, it becomes subject to the prudent

1 R. Bailey - by Petitioners - Cross/Reilly

2 person standard, which I sort of equate to the fiduciary duty
3 standard.

4 Q If I understand your testimony, you would say that
10:24:08 5 before a servicer event of default, it was your belief that
6 during this settlement process, that Bank of New York Mellon
7 did not have a fiduciary duty to evaluate the strengths and
8 weaknesses of the claims that the Trustee could bring against
9 Bank of America or Countrywide, correct?

10:24:26 10 A It had an obligation to evaluate those claims. Is
11 that obligation properly characterized as a fiduciary duty? I
12 don't know.

13 Q The same question with regard to during that time
14 frame, did you believe that Bank of New York Mellon as a
10:24:42 15 Trustee had a duty, a fiduciary duty of prudence towards the
16 certificate holders in the trusts, that it could have brought
17 claims against Bank of America and Countrywide?

18 A I'm not sure I understand the distinction between a
19 fiduciary duty and a fiduciary duty of prudence.

10:25:01 20 Q Okay. That's not something you were thinking about in
21 that time frame, is that fair?

22 A No, I don't think that's what I said. I said -- I
23 think I said, sitting here, I don't understand the distinction
24 you're making.

10:25:13 25 Q Well, have you ever heard of a fiduciary duty of
26 prudence?

1 BAILEY-PETITIONERS-REDIRECT (GONZALEZ)

2 THE COURT: Thank you.

3 Is there anybody else over there that has any
4 questions? All right.

00:12:51 5 MR. GONZALEZ: Just have a few redirect.

6 May I inquire, your Honor?

7 THE COURT: Please.

8 REDIRECT EXAMINATION

9 BY MR. GONZALEZ:

00:12:59 10 Q Mr. Bailey, you were shown a number of letters from
11 Ms. Patrick from the summer of 2010.

12 Do you recall that?

13 A Yes.

14 Q What's your understanding of whether the Trustee agreed
00:13:10 15 with any of the allegations from the letters that Mr. Reilly
16 highlighted for you during his examination?

17 MS. KASWAN: Objection, your Honor, and my
18 objection is when Mr. Gonzalez asks Mr. Bailey what is your
19 understanding of what the Trustee thought, he is actually
00:13:31 20 asking for what Mr. Gonzalez has claimed to be attorney
21 client communication.

22 So, we are either going to have to ask the witness
23 what's the basis of the understanding and then be blocked,
24 or Mr. Gonzalez has to ask the witness about who he, whose
00:14:00 25 position he is talking about.

26 MR. REILLY: I join in that, your Honor. The

1 BAILEY-PETITIONERS-REDIRECT (GONZALEZ)

2 question is compound.

3 THE COURT: I will let you answer.

4 A I apologize. So, the question is, did the Trustee

00:14:24 5 agree to the positions staked out by Ms. Patrick in her letters

6 that I was shown by Mr. Reilly?

7 Q Yes.

8 A The answer to that question is no.

9 Q Why did the Trustee decide to engage in the settlement
00:14:41 10 negotiations without a binding direction from Certificate
11 Holders?

12 A Because, at that point, a potential settlement appeared
13 to be the most potentially beneficial route to follow on behalf
14 of all the Trusts and Certificate Holders.

00:14:59 15 Q Do you recall being asked questions about the Trustee's
16 decision not to give notice to Certificate Holders of the
17 settlement negotiations?

18 A I do.

19 Q What role, if any, did the notice that would be given
00:15:12 20 in connection with any proposed Court approval process play in
21 that decision to not give notice of the settlement negotiations?

22 A It did play a role at the time. I don't think we knew
23 that if there were a settlement it would result in an Article
24 77, and there would be a the retention of the Garden City Group
00:15:37 25 and widespread notice program, but from the beginning, the
26 Trustee understood that if there were a settlement reached, it