

Exhibit 17
to
Affidavit of Daniel M. Reilly
in Support of Joint Memorandum of
Law in Opposition to Proposed Settlement

SUPREME COURT OF THE STATE OF NEWYORK
COUNTY OF NEWYORK

_____)	
In the matter of the application of)	Index No. 651786/2011
THE BANK OF NEW YORK MELLON (as)	
Trustee under various Pooling and Servicing)	Assigned to: Kapnick, J.
Agreements and Indenture Trustee)	
under various Indentures), <i>et al.</i>)	
)	
Petitioners,)	
)	
for an order, pursuant to C.P.L.R. § 7701, seeking)	
judicial instructions and approval of a proposed)	
settlement.)	
_____)	

EXPERT REPORT OF DANIEL R. FISCHER

I. QUALIFICATIONS

1. I am President of Compass Lexecon, a consulting firm that specializes in the application of economics to a variety of legal and regulatory issues. I am also the Lee and Brena Freeman Professor of Law and Business Emeritus at The University of Chicago Law School. I have served previously as Dean of The University of Chicago Law School, Director of the Law and Economics Program at The University of Chicago, and as Professor of Law and Business at The University of Chicago Graduate School of Business, the Kellogg School of Management at Northwestern University, and at the Northwestern University Law School.

2. Both my research and my teaching have concerned the economics of corporate law and financial markets. I have published approximately fifty articles in leading legal and economics journals and am coauthor, with Judge Frank Easterbrook of

obligations that Countrywide Home Loan Servicing “allegedly failed to perform.”³⁴ However, he provides no evidence of these alleged failures to perform. Likewise, Professor Coates repeats AIG’s claim that Bank of America could have exposure to the Trusts stemming from its own servicing conduct.³⁵ However, the only evidence he offers in support of this claim is that “the institutional investor group represented by Gibbs & Bruns asserted in court pleadings that BAC servicing was the worst in the industry and identified how BAC’s servicing caused harm to the Trusts.”³⁶ But repeating allegations by the same investor group and their counsel who negotiated the Settlement and are now supporting its implementation—i.e., publicly stating that they view the Settlement as a desirable outcome and remedy for any faults in, among other things, Bank of America’s servicing—clearly provides no basis for criticizing the Trustee for settling with Bank of America.³⁷

V. THE BEHAVIOR OF THE INSTITUTIONAL INVESTORS SUPPORTS THE REASONABLENESS AND ADEQUACY OF THE SETTLEMENT

21. The Trustee in this case did not make the decision to settle unilaterally. The Settlement was also the product of negotiations involving sophisticated financial institutions that own, or are the advisors to entities that own, Certificates with a face value of billions of dollars. Significantly, the Objectors have not alleged, let alone provided any evidence, that any of the Institutional Investors were misled into supporting the Settlement.

34. Compare AIG Petition to Intervene dated August 8, 2011 (“AIG Petition”) ¶ 41 with Coates Report at 10-11.

35. Compare AIG Petition ¶ 42 with Coates Report at 11.

36. Coates Report at 11.

37. Institutional Investors’ Statement at 1-2 & ¶¶ 44-48.

22. Exhibit C [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Consequently, the Institutional Investors had a significant interest in reaching a reasonable and adequate settlement.

23. The total amount of assets owned or managed by the Institutional Investors is a proxy for their sophistication. We collected information on assets owned or managed from various sources including the SEC's Investment Adviser Public Disclosure website, 10-Qs filed with the SEC, Annual Reports, and press reports. Exhibit D shows that just prior to the Petition Date, the institutions for which we found data owned or managed a combined total of more than \$8.4 trillion. Individually, the Institutional Investors reported assets owned or managed of between \$13.9 billion and \$3.6 trillion with a median of \$336 billion. That these sophisticated institutional investors support the Settlement is powerful economic evidence of its reasonableness and adequacy.

24. Objector AIG claims "[t]here is evidence that the Inside Institutional Investors were conflicted when negotiating the proposed settlement."³⁸ But AIG only points to one of the 22 Institutional Investors that allegedly was conflicted, Blackrock.³⁹ AIG nowhere explained why, even assuming Blackrock had a conflict, the other 21 Institutional Investors would defer to Blackrock's allegedly conflicted view.

38. AIG Petition ¶ 49.

39. *Id.*

Like AIG, the other objectors claim that that “[m]any of the twenty-two corporate investors that negotiated the Proposed Settlement appear to have significant ongoing business dealings with Bank of America, raising conflict-of-interest concerns.”⁴⁰ This claim, however, is unpersuasive because these objectors provide no evidence about what these “apparent” relationships are or why they would lead the Institutional Investors to act contrary to their economic best interests.

25. Moreover, other investors in the Trusts covered by the Settlement have recognized that the Institutional Investors represent a diverse group of market participants with a strong interest in maximizing recoveries. The Federal Housing Finance Agency (“FHFA”), as conservator for Fannie Mae and Freddie Mac, for example, has stated that the FHFA “is aware of no basis upon which it would raise a substantive objection to the proposed settlement at this time. ... Additionally, FHFA is encouraged that a number of significant market participants support the proposed settlement.”⁴¹ Along the same lines, Monarch Alternative Capital LP (“Monarch”), an investment advisor for funds that hold certificates in original face amount in excess of \$630 million in twenty of the Trusts but did not participate in the Settlement negotiations, sent a letter to the Court in this matter stating its support for the Settlement:

Monarch believes the Settlement will provide significant immediate benefits to the beneficiaries of the Trusts and should be approved expeditiously. Certificateholders should not be held hostage to a legal battle that threatens to delay (and potentially destroy) the entire Settlement based on the actions of what appears to be a small minority

40. Pension Funds Petition to Intervene dated July 6, 2011 ¶ 3.

41. Federal Housing Finance Agency, “Federal Housing Finance Agency Action Regarding Court Consideration of Proposed Bank of America Settlement,” August 30, 2011.

of objecting holders. We urge the Court to approve the Settlement promptly for the benefit of all of the Trusts' Certificateholders.⁴²

26. Finally, AIG also criticizes the Trustee's reliance on the Settlement Amount Opinion of Brian Lin dated June 7, 2011 (the "Lin Report")⁴³ because Mr. Lin purportedly "adopted loss assumptions that are far more favorable to [Bank of America] than those the [Institutional Investors] presented" and "blindly adopted the critical breach and success rate metrics proposed by [Bank of America] as opposed to higher rates he says a third party forensic underwriting project revealed."⁴⁴ But this claim makes no sense because these supposedly "more favorable" loss assumptions and higher "breach and success rate metrics" were presented in a spreadsheet provided by the very same Institutional Investors who support the Settlement.⁴⁵ Presumably, these highly sophisticated Institutional Investors – who possessed these allegedly higher loss assumptions but nevertheless requested that the Trustee enter into the Settlement – were perfectly capable of assessing the Settlement's reasonableness and adequacy in light of their economic self-interest since they had the most to lose by settling for too low an amount.

VI. THE ALLEGATIONS THAT THE TRUSTEE IS CONFLICTED ARE FUNDAMENTALLY FLAWED

27. Allegations of conflict are particularly important to address because they affect how much deference should be accorded the Trustee in its decision to

42. Letter from Adam R. Sklar, Managing Principal, Monarch Alternative Capital, to The Honorable Barbara R. Kapnick, dated February 4, 2013.

43. The Bank of New York Mellon's Consolidated Response To Objections, Exhibit D-5.

44. AIG Petition ¶ 39.

45. Lin Report pp. 1-3. Mr. Lin describes the source of these rates as "the Investor Group represented by Gibbs & Bruns." *Id.* at 1.

enter into the Settlement. The Objectors in this case claim that this decision by BNY Mellon was tainted by a disabling conflict of interest because it had “much to gain” from the Settlement.⁴⁶ Significantly, however, the Objectors do not and apparently cannot point to any financial benefit, direct or indirect, that BNY Mellon received from entering into the Settlement.

28. Rather, the Objectors’ allegations of conflict are based in part on a side letter to the proposed Settlement Agreement (the “Side Letter”) in which BAC Servicing confirms certain aspects of the indemnities in the Governing Agreements.⁴⁷ AIG claims the Side Letter provides the Trustee with indemnification (the “Indemnification”) that is “broader than [sic] it would have been entitled to under the trust agreements,” specifically indemnification “for its actions taken and/or omissions to act in response to ... [a] letter from the Inside Institutional Investors ... which, 60 days later, triggered an Event of Default and heightened trustee duties under the trust agreements.”⁴⁸ The Objectors also point to BNY Mellon’s “significant ongoing business relationship with [Bank of America] that, as a result, further calls into question [BNY Mellon’s] purported impartiality” with respect to the Settlement.⁴⁹

29. These claims are misguided. First, assuming for the sake of argument that the Side Letter expands the scope of the Trustee’s indemnification agreement,⁵⁰ this would not necessarily create a conflict. In fact, the opposite is more

46. See, e.g. AIG Petition ¶ 22.

47. *Id.* ¶ 26 and Exhibit C to the Settlement Agreement.

48. AIG Petition ¶ 26.

49. *Id.* ¶ 27.

50. BNY Mellon argues the Side Letter does not expand the indemnities in the PSAs at all. The Bank of New York Mellon’s Consolidated Response to Objections, at 9-

32. AIG also claims the Trustee “has a significant ongoing business relationship with [Bank of America] that, as a result, further calls into question [the Trustee’s] purported impartiality and the proper discharge of its fiduciary duties.”⁵⁵ AIG ignores, however, that the Trustee’s relationship with Bank of America is commonplace because trustees and issuers routinely have business relationships. For example, Citigroup has been JPMorgan’s preferred trustee on its ABS and MBS securitizations and HSBC has had a similar favored position on Wells Fargo’s ABS and MBS securitizations.⁵⁶

VII. THE SETTLEMENT IS REASONABLE AND ADEQUATE IN LIGHT OF UNCERTAINTY ABOUT THE VALUE OF THE CLAIM INCLUDING THE AMOUNT RECOVERABLE IN LITIGATION AND THE DELAY THAT WOULD ACCOMPANY LITIGATION

A. The Value of the Claim and the Ability to Collect is Uncertain

33. Uncertainty regarding the value of the Trusts’ claims and their ability to collect on any judgment is further support for the adequacy and reasonableness of the Settlement. As I explain further below, there is even substantial uncertainty in this case about the number of Trusts that would even be able to bring a claim in the absence of the Settlement. And even if the claims could be brought, their value is unclear because of the difficulty of determining whether a breach existed and if so whether it had a material and adverse effect on the interests of the Certificateholders and the circumstances under which, if such a breach existed, it could be cured. The existence and

of the Trustee).

55. AIG Petition ¶ 27.

56. Issuer/Trustee Combos for US ABS and MBS Issuance, 2004-2011, Asset-Backed Alert.