Exhibit 18

to

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

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

In the matter of the application of

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

Index No. 651786-2011

Kapnick, J.

Expert Reply Report of Tamar Frankel

I have been asked by the firm of Reilly Pozner LLP to examine and evaluate three reports submitted by the applicants' experts, namely those of Professor John H. Langbein (hereinafter Professor Langbein), Mr. Robert I. Landau (hereinafter Mr. Landau) and Professor Daniel R. Fischel (hereinafter Professor Fischel).

The following points summarize the opinions I discuss in more detail below:

- The Trustee's assumption of expansive powers necessarily gives rise to expanded duties. *See infra* ¶ 1.

- If Professor Langbein's position holds and default trust law applies, the commensurate duties apply. *See infra* ¶ 5.

- Trustees do not have *rights* with respect to trust property. They have *entrusted powers and duties relating to trust property. See infra* ¶ 9.

- The Trustee does not have the power to declare whether an Event of Default has occurred or forbear on an Event of Default. The Event of Default is a state of affairs that exists regardless of the Trustee's declaration or purported forbearance. *See infra* ¶ 10.

- The Trustee may not circumvent the Governing Agreements' amendment procedures by extending the mandated 60-day cure period. *See id.*

- The timing of the Trustee's advisor reports raises serious questions about the Trustee's performance of its duty of care. *See infra* ¶ 12.

- It is not the role of a Trustee to be objective, but rather an *advocate* for the beneficiaries. Yet, here the Trustee acted as an objective judge at best, and at worst took action adverse to the Covered Trusts. *See infra* ¶ 15.

- The Trustee's delegation of negotiations to the Insiders constituted a violation of its fiduciary duties to the Outsiders. The Trustee failed in its duty to act as an *advocate* for the Outsiders. *See infra* ¶¶ 23-24.

- The Trustee's failure to notify the Outsiders constitutes a violation of its duty of care. Such a notice does not require canvassing all investors as Professor Langbein suggests, and was part of the Trustee's usual practice. *See infra* ¶¶ 20-22.

- A trustee may not benefit from the entrusted property and power. These were given to it for the sole purpose of performing its services *for the benefit of its beneficiaries*. Yet this Trustee used its trust powers to benefit itself, including an indemnity and a release. *See infra* ¶¶ 32-38.

as noted, the requested indemnification was far from being "routine." It demonstrated the Trustee's concern of being exposed to claims by the Outsiders when they would discover how, why and for how much, the Trustee settled their claims without their knowledge. The Trustee worried about its own liability, and rightly so. Additionally, the Trustee appears to have been acting under the direction of investors.[42] Therefore, pursuant to PSA Section 8.05(i)(c), the Trustee lost its indemnification from the Master Servicer. [redacted]

32. Professor Fischel and Mr. Landau's assertions[43] are similar to Professor Langbein's. Professor Fischel adds however, a sharper note: even if the Trustee did receive an expanded indemnity, the receipt does not pose a conflict of interest.[44] The Trustee used its entrusted powers to seek benefits for itself. Regardless of whether it was a "confirmation" or a new or expanded indemnity, the Trustee used its trust powers to obtain the benefit of certainty with respect to the uncertain legitimacy of its actions, and [redacted].[45]

33. Mr. Landau waters down the importance of the release which the trustee sought. First, he writes, the release is "nothing more than a request . . . in a draft of the Proposed Final Order and Judgment that the court be permitted to consider language preventing certain types of claims against the Trustee."[46] Second, seeking a release does not constitute conflict if it is "subject to Court approval."[47] Third, the request was never submitted to the Court so it "is a non-issue."[48] However, even if it was "just a thought" which persisted for some time, it demonstrates the Trustee's concerns for its liability and its attempts (though unsuccessful) to be covered for such possible liabilities. This continued concern points to conflicting interests. It is hard to truly serve and identify with the interests of those whom you worry will sue you.

34. Professor Langbein repeats the same arguments and adds: "Frankel has rummaged through debris on the cutting room floor in search of a conflict of interest and not finding any actual conflict, she is left to point wistfully to one that might have been."[49]

35. Mr. Landau and Professor Langbein's comments[50] are confusing: First, a bar on claims, which the Trustee seeks, is in effect a release. Second, a conflict is demonstrated even if the release was requested during the process of negotiations but did not make it to the final document. The quest for a release demonstrates great attention to self-protection. This attitude presents a conflict of interest: asking how can I protect myself, rather than

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[42] [redacted] (BNYM_CW00285677—BNYM-_CW00285678); [redacted] (BNYM_CW00285661—BNYM_CW00285674); Hr. Tr. 7:5-34 (Sept. 9, 2011) (S.D.N.Y.).
[43] Professor Fischel ¶¶ 27-32; Mr. Landau ¶¶ 37-40
[44] Professor Fischel at ¶ 29.
[45] Dep. Ex. 62, BNYM_CW-00270712-15 at -00270712.
[46] Mr. Landau ¶ 47.
[47] *Id.*
[48] *Id.*
[49] Professor Langbein at 10.
[50] Mr. Landau ¶ 47; Professor Langbein at 9-11.

how can I protect the interests of those who trusted in me and relied on me? Provisions that did not make it to the final draft may indicate conflicts just as those that saw the light of day before the Court.

36. The mistaken conclusions in these three opinions are based on an erroneous view of what a fiduciary's conflict of interest means and the rationale for the prohibition on conflicts of interest. The mistake relates to the view of a trustee as the recipient of the rights and property of other people for the joint interest: the Trustee is a partner of the beneficiaries in the property and power which they bestow on it. Under this mistaken view, each partner can tend to its own interests while, of course, performing its promises, like a good honest person.

37. That, however, is a wrong and dangerous view of the prohibition on conflicts of interest behavior by a trustee. A trustee may receive compensation for its services. A trustee may not benefit from the entrusted property and power which are given to it for the sole purpose of performing its services *for the benefit of its beneficiaries*. In this case the Trustee attempted to use its purported or real power to relieve itself of potential liabilities. This relief is valuable. The valuable relief was sought not by an exchange with the beneficiaries of the trust but by the use of purported or legitimate trustee power. Yet trust powers do not belong to the Trustee for its own benefit, and were never given to the Trustee for that purpose. They were powers in trust for the benefit of the trusting owners. Therefore, the Trustee was not allowed to exercise these powers for its own benefit-that is, to release itself of liabilities.

38. Regardless of whether the Trustee was allowed to reach the Settlement or not, its use of trust powers or attempt to use trust powers to benefit itself is a violation of its duties to avoid conflicting interests. Bargaining on behalf of the Trust and extracting or attempting to extract benefits for itself, is precisely what conflict of interest is about. There is no difference between a trustee that gains protection from claims by negotiating a deal by using its trust powers, and a trustee that receives cash for negotiating a deal by using trust powers. Both are prohibited. Both taint the use of trust power with a wrong.

Standard of Review

39. Professor Fischel states that "[a]llegations of conflict are particularly important to address because they affect how much deference should be accorded to the Trustee in its decision to enter into the Settlement."[51] He correctly connects the standard of review to the question of whether the Trustee was conflicted. Courts should not defer to the decisions of a conflicted trustee.

40. Professor Langbein states that in "circumstances in which a trustee acts in respect to a matter over which the trustee has discretion, the court will apply an abuse-of-discretion standard when reviewing the trustee's exercise of that discretion."[52] Otherwise "any

[51] Professor Fischel ¶ 27.
[52] Professor Langbein at 11.