

Exhibit 34
to
Affidavit of Daniel M. Reilly
in Support of Joint Memorandum of
Law in Opposition to Proposed Settlement

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

-----X
In the Matter of the Application of

Index No. 651786/

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

Assigned to Kapnick, J.

Petitioners,

for an order, pursuant to C.P.L.R.
Rule 7701, seeking judicial instructions
and approval of a proposed settlement.

-----X

* C O N F I D E N T I A L *

VIDEOTAPED DEPOSITION

OF

ROBERT E. BAILEY

New York, New York

Monday, December 3, 2012

Reported by:
ANNETTE ARLEQUIN, CCR, RPR, CCR, CLR
JOB NO. 55069

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2 the witness to give himself his own
3 instruction.

4 If we want to take -- we've been
5 going for about an hour and 20 minutes. If
6 we want to take a break now, I'll raise
7 this concern that Mr. Bailey has with him
8 and we can come back after the break, and
9 we can pick up again with or without the
10 instruction.

11 MR. REILLY: Let's do this: Let me
12 finish out some questions here and then
13 let's put that on the agenda for the break.

14 BY MR. REILLY:

15 Q. When the institutional investors made
16 settlement demands to Bank of America, did you
17 approve them beforehand?

18 MR. GONZALEZ: Objection to form.

19 Vague.

20 A. So I understand the question, did the
21 institutional investors propose settlement
22 numbers to the trustee and the trustee then
23 approved the number prior to it being offered to
24 Bank of America? Is that your question?

25 Q. Yes.

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2 A. No.

3 Q. Did you have any role in discussing
4 with the institutional investors what settlement
5 amount they were going to demand from Bank of
6 America?

7 MR. GONZALEZ: Objection to form.
8 Vague.

9 A. No. I recall discussions, I recall
10 discussions around how you get to a number. I
11 don't recall discussions about a number.

12 Q. And those discussions you're talking
13 about are discussions between Bank of New York
14 Mellon and Ms. Patrick and her clients?

15 A. No. The discussions I'm talking
16 about are the discussions that took place at the
17 meetings at Wachtell Lipton.

18 Q. So if Ms. Patrick and her clients
19 decided to make a settlement offer to settle the
20 claims in the covered trusts, they were doing
21 that on their own?

22 MR. GONZALEZ: Objection to form.
23 Vague.

24 A. To the best of my knowledge, yes.

25 MR. REILLY: Let's take a break.

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2 of the GSE settlement. I believe there were two
3 fundamental differences between the GSE
4 settlement and what was viewed as the private
5 label settlement.

6 I believe one of those differences
7 was the nature of representations and warranties
8 made by the seller of the deals. I believe the
9 GSE's had a different rep and warranty than it
10 did the private label transactions.

11 And I also recall discussions around
12 the nature of the underlying portfolios. The
13 GSE portfolio had a -- my recollection is there
14 were discussions that the GSE portfolio had a
15 different quality mix of loans supporting it
16 than did the private label transactions.

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2 ■ ■■■■■■
3 Q. Okay. Do you recall as you sit here
4 today, having conversations with or
5 participating in conversations with Ms. Patrick
6 about whether loans would be reviewed and
7 underwritten, re-underwritten?

8 A. I believe I testified earlier that
9 the initial meeting with Ms. Patrick at
10 Pillsbury's offices, whenever that occurred,
11 yes, she was asking for an invest -- not she was
12 asking. She was asking that there be a loan
13 file review is my recollection.

14 Q. And there was not, correct; before
15 the settlement was reached or before the
16 verified petition was filed, correct?

17 A. Correct.

18 Q. And why not?

19 MR. GONZALEZ: Objection to form.

20 And I'll instruct the witness to the
21 extent he can answer the question without
22 divulging attorney-client communications,
23 he can do so.

24 Otherwise I would instruct the
25 witness not to answer.

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2 A. My understanding is that once
3 settlement discussions began between Bank of
4 America and the institutional investors, that
5 the protracted nature of loan file review,
6 especially on a scale represented by what
7 eventually became the 530 trusts, presented
8 serious issues.

9 Again, a loan file review, my
10 understanding of the parties' discussions, a
11 loan file review would not definitively answer
12 the question that had been raised by Bank of
13 America which concerned the nature of the rep
14 and warranty, which went, as I think we
15 discussed earlier, to the causation issue; even
16 if there is a breach, a material breach, does
17 that mean or does it require that that breach on
18 a loan-by-loan basis establish a, or is there a
19 causal link between that breach and a loss to
20 the certificate holder.

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20

Q. Ms. Patrick on behalf of her clients

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never agreed that the direction and

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indemnification was insufficient, correct?

23

MR. GONZALEZ: Objection to form.

24

Vague.

25

A. There was a purported direction and

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2 As a general matter, under a PSA, my
3 understanding is that a trustee can be liable
4 for breach of contract claims to the extent that
5 it does not fulfill its obligations under the
6 PSA.

7 Q. Breach of contract claims brought by
8 the certificate holders?

9 A. They could be brought by the
10 certificate holders, yes.

11 Q. For not meeting its obligations, the
12 trustee's obligations under the Pooling and
13 Servicing Agreements.

14 A. Correct.

15 Q. Any other liability that you were
16 aware of that the Bank of New York Mellon as a
17 trustee could have under the Pooling and
18 Servicing Agreements as of the fall of 2010?

19 MR. GONZALEZ: Objection to the
20 extent it calls for a legal conclusion.

21 But with the same instruction as
22 before, you can try to answer that
23 question.

24 A. Again, as a general matter, the
25 claim, to the extent they have any claim, by

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2 certificate holders would be a breach of
3 contract claim against the trustee.

4 Q. Did you believe that in the fall of
5 2010 that the trustee could be sued for breach
6 of fiduciary duty in performing its role as a
7 trustee in Pooling and Servicing -- under
8 Pooling and Servicing Agreements?

9 MR. GONZALEZ: I'm going to give the
10 witness the same instruction I gave a few
11 answers ago. If he doesn't remember it
12 I'll repeat it, but if you have a general
13 understanding based on your experience, you
14 can answer that, although I'll object that
15 it calls for a legal conclusion.

16 A. My general understanding under a PSA
17 is that the trustee is not subject to an
18 enhanced standard of duty unless and until there
19 has been a servicer event of default.

20 Q. Did Kathy Patrick or any of the
21 institutional investors ever allege that the
22 trustee could be liable for breach of fiduciary
23 duties in Bank of New York Mellon's role as a
24 trustee in the covered trusts?

25 A. No, not to my knowledge.

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2 that's what I was saying.

3 BY MR. REILLY:

4 Q. The trustee has an obligation to
5 protect the interests of the certificate
6 holders, correct?

7 MR. GONZALEZ: Objection to form.
8 Calls for a legal conclusion.

9 A. At a very general level, yes.

10 Q. And are the certificate holders
11 beneficiaries under the trust?

12 MR. GONZALEZ: Objection to form.
13 Calls for a legal conclusion.

14 A. I don't know the answer to that
15 question off the top of my head.

16 Q. When the trustee hired counsel to
17 represent it in a situation in which the trustee
18 was serving as trustee, did that counsel act on
19 behalf of and for the protection of the
20 certificate holders?

21 A. No. That --

22 MR. GONZALEZ: Objection to form.
23 Calls for a legal conclusion.

24 You can answer.

25 A. My understanding is Mayer Brown

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14 institutional investor group in around May of
15 2011, correct?

16 A. I don't recall that.

17 (Deposition Exhibit Bailey 280, Email
18 chain beginning with email dated 5/31/11
19 from Kravitt to Bailey with attachment,
20 Bates stamped BNYM_CW-00271630 through 633
21 and pages follow not Bates stamped, marked
22 for identification, as of this date.)

23 Q. I'm going to hand you what was
24 previously marked as Exhibit 280.

25 A. Are we done with this one or should I

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2 for the PLS trust, correct?

3 MR. GONZALEZ: Objection to form.

4 Mischaracterizes the witness' prior
5 testimony.

6 A. I don't know if there was
7 disagreement in the use of the GSE model.

8 I know there was different views on
9 the factors to be considered in trying to make
10 the GSE model applicable to the private label
11 transactions.

12 Q. And one of the differences in the GSE
13 portfolios and the PLS portfolios was the
14 quality and type of loans that made up those
15 portfolios, correct?

16 A. I believe there was a difference
17 between the portfolio, the loan types in the GSE
18 portfolios and the loan types in the private
19 label transactions.

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2 Q. And then I'm now looking at
 3 subsection 1B, and that states that the master
 4 servicer has been specifically notified by MBIA
 5 and the FDIC and Assured Guaranty, along with
 6 other mortgage and monoline insurers of loans
 7 that violated reps and warranties, correct?

8 A. Yes, that's what it says.

9 Q. And then in subsection C it states
 10 that the master servicer has failed to enforce
 11 sellers' repurchase obligations as required by
 12 Section 2.03 of the PSA; is that correct?

13 A. Yes, that's what it says.

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[Redacted text block consisting of multiple lines of blacked-out information]

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9 Q. And you were the primary in-house
10 contact person at Bank of New York Mellon with
11 Mayer Brown for purposes of these settlement
12 negotiations, correct?

13 A. I was the primary internal legal
14 touch point for Mayer Brown, yes.
15 Was I the only touch point? No.

16 Q. But you were the primary internal
17 legal touch point, correct?

18 A. As --

19 MR. GONZALEZ: Objection to form.
20 Vague.

21 A. Yes, but again, was I the only one?
22 No.

23 Q. You were kept apprised of all major
24 developments in the settlement negotiations,
25 correct?

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2 MR. GONZALEZ: Objection to form.

3 Calls for speculation.

4 A. I believe I was.

5 Q. Would Mayer Brown have issued

6 requests to Bank of America or Countrywide

7 without consulting with Bank of New York Mellon

8 before doing so?

9 MR. GONZALEZ: Objection to form.

10 Vague.

11 A. I would find that highly unlikely.

12 Q. In the ordinary course, so outside

13 the time frame of settlement negotiations, does

14 the master servicer advise Bank of New York

15 Mellon when it modifies loans, do you know?

16 A. I have no idea.

17 Q. Or if it enforces repurchases against

18 sellers of loans?

19 A. I have no idea.

20 Q. As of the date the Settlement

21 Agreement was signed, had the master servicer

22 ever notified Bank of New York Mellon of any

23 breaches of any representation or warranty on

24 any loan in any of the 530 trusts?

25 A. I have no idea. I don't know.

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8 Q. I'm going to go now to paragraph 2 of
9 the notice of nonperformance.

10 And in this paragraph the inside
11 institutional investors state that the master
12 servicer violated its prudent servicing
13 obligations under Section 3.01, correct?

14 A. Yes, that's what it says.

15 Q. And under A it says by failing to
16 maintain accurate and adequate loan and
17 collateral files?

18 A. Yes.

19 Q. And under B that they failed to
20 demand the seller's cure deficiencies and
21 mortgage records?

22 A. Yes.

23 Q. And under D, the master servicer
24 incurred wholly avoidable servicing fees and
25 advances?

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2 record -- read the question back, please?

3 (Question was read back as follows:

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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R. E. Bailey - Confidential

[REDACTED]

17

Q. Okay. Let's look at Exhibit 89.

18

(Document review.)

19

Q. This is an email from Mr. Kravitt to

20

Mr. Koplow and Mr. Mirvis and others at Mayer

21

Brown. The others are bcc'd. And it says,

22

"Hello, gentleman. I hope that each of you and

23

yours are well. Matt and I would like to speak

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with you about what the trustee would like to

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receive if there's a settlement and there is a

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R. E. Bailey - Confidential

THE VIDEOGRAPHER: This concludes
today's deposition. The time is 6:12 p.m.
We're off the record.

(Time noted: 6:12 p.m.)



ROBERT E. BAILEY

Subscribed and sworn to before me
this 4th day of February 2013.



MANOHARAN MAHADEVA
Notary Public, State of New York
No. 01M76096639
Qualified in Westchester County
Commission Expires August 11, 2015

Albany, New York.

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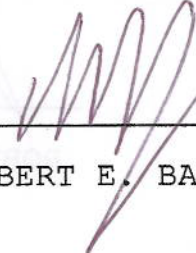
ERRATA SHEET FOR THE TRANSCRIPT OF:

CASE NAME: MATTER OF THE APPLICATION OF BNYM

Date: DECEMBER 3, 2012

DEPONENT: ROBERT E. BAILEY - CONFIDENTIAL

Pg.	Ln.	Now Reads	Should Read	Reason
3	5	Bank	The Bank	Party name
6	5	Bans	Bank	Transcription error
30	19-20	the fact	its own	Transcription error
55	13	trustees	trustee	Transcription error
63	20	unwielding	unwieldy	Transcription error
69	18	Yeah, I don't...	I don't...	Clarify the record
85	8	of	under	Incorrect transcription
85	9-10	than it did	than did	Transcription error
108	3	BNYW8699	BNYM-CW8699	Transcription error



ROBERT E. BAILEY

SUBSCRIBED AND SWORN BEFORE ME

THIS 8th DAY OF February 2012. 2013



(Notary Public)

MANOHARAN MAHADEVA
 Notary Public, State of New York
 No. 01M/0080853
 Qualified in Westchester County
 Commission Expires August 11, 2015

MY COMMISSION EXPIRES: _____

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ERRATA SHEET FOR THE TRANSCRIPT OF:

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CASE NAME: MATTER OF THE APPLICATION OF BNYM

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Date: DECEMBER 3, 2012

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DEPONENT: ROBERT E. BAILEY - CONFIDENTIAL

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Pg. Ln. Now Reads Should Read Reason

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19 9 were with Transcription error

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54 10 lends loans Transcription error

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55 17 craft tracked Transcription error

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178 5 related relayed Transcription error

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206 10-11 if it was looked at or not if we looked at it or not yet Clarify the record

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253 9 him her Clarify the record

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281 22 a I Transcription error

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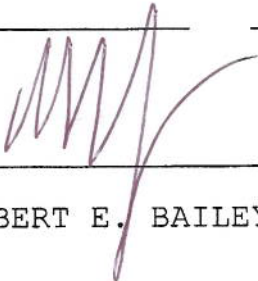
286 13 prospective respective Transcription error

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 ROBERT E. BAILEY

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SUBSCRIBED AND SWORN BEFORE ME

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THIS 8th DAY OF February 2012.2013.

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(Notary Public)

 MANOHARAN MAHADEVA
 Notary Public, State of New York
 No. 01MA6098839
 Qualified in Westchester County
 Commission Expires August 11, 2013

25

MY COMMISSION EXPIRES: _____

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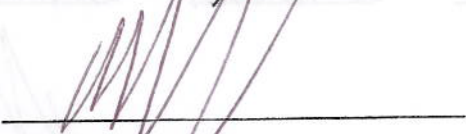
ERRATA SHEET FOR THE TRANSCRIPT OF:

CASE NAME: MATTER OF THE APPLICATION OF BNYM

Date: DECEMBER 3, 2012

DEPONENT: ROBERT E. BAILEY - CONFIDENTIAL

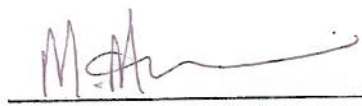
Pg.	Ln.	Now Reads	Should Read	Reason
123	17	<u>told</u>	<u>talled</u>	Transcription error
123	18	<u>that the</u>	<u>the</u>	Transcription error
177	7	<u>Deborah</u>	<u>Debra</u>	Misspelling
177	7	<u>Fidali</u>	<u>Fudali</u>	Misspelling
177	16	<u>Fidali</u>	<u>Fudali</u>	Misspelling
179	10	<u>Fidali</u>	<u>Fudali</u>	Misspelling
224	14	<u>Kenny</u>	<u>"K"</u>	Transcription error
253:16 and throughout		<u>Emphysis</u>	<u>Empha Sys</u>	Misspelling
307	23	<u>indemnify</u>	<u>indemnity</u>	Transcription error



 ROBERT E. BAILEY

SUBSCRIBED AND SWORN BEFORE ME

THIS 8th DAY OF February 2012. 2013



(Notary Public)

MANOHARAN MAHADEVA
 Notary Public, State of New York
 No. 01MA6096859
 Qualified in Westchester County
 Commission Expires August 11, 2015

MY COMMISSION EXPIRES: _____

MAYER • BROWN

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Main Fax +1 212 262 1910
www.mayerbrown.com

Matthew D. Ingber
Direct Tel +1 212 506 2373
Direct Fax +1 212 849 5973
mingber@mayerbrown.com

December 18, 2012

VIA ELECTRONIC MAIL

TO: STEERING COMMITTEE

Re: *In re the Application of The Bank of New York
Mellon* (Index No. 651786-2011)

Dear Counsel:

Pursuant to Paragraph 2(c) of the protective order signed by the parties and so ordered by Justice Kapnick on June 14, 2012 (the "Protective Order"), The Bank of New York Mellon designates the following portions of the deposition of Robert Bailey as "Confidential," as it is defined in the Protective Order:

December 3, 2012 Transcript Page/Line Designation
13:24-77:24
78:9-129:4
129:15-152:22
154:11-168:24
169:16-182:15
183:2-256:9
256:21-269:20
270:4-280:16
281:4-283:25
284:8-303:8
303:23-327:19
328:9-335:7

December 18, 2012

Page 2

Please feel free to call or email me if you have any questions.

Very truly yours,

Matthew Ingber (DC)

Matthew D. Ingber

Mayer Brown LLP
1675 Broadway
New York, New York 10019-5820

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Main Fax +1 212 262 1910
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Matthew D. Ingber
Direct Tel +1 212 506 2373
Direct Fax +1 212 849 5973
mingber@mayerbrown.com

April 26, 2013

VIA ELECTRONIC MAIL

Michael A. Rollin
Reilly Pozner LLP
1900 Sixteenth Street
Suite 1700
Denver, CO 80202

Re: *In re the Application of The Bank of New York
Mellon* (Index No. 651786/2011)

Dear Mike:

I am writing in response to your March 11, 2013 and April 17, 2013 letters regarding confidentiality designations of discovery materials. In addition to the materials we agreed to de-designate per our April 3, 2013 and April 22, 2013 letters, we will also remove confidentiality designations from the deposition transcript excerpts listed in Exhibit A (attached). The remaining excerpts should retain their "confidential" designations in accordance with section 1(d) of the Protective Order.

Please call my colleague, Chris Houpt, or me if you have any questions.

Very truly yours,


Matthew D. Ingber

cc: All counsel

Mayer Brown LLP

Michael A. Rollin
April 26, 2013
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EXHIBIT A

Michael A. Rollin
April 26, 2013
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Michael A. Rollin

April 26, 2013

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Michael A. Rollin

April 26, 2013

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Michael A. Rollin

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Entire Transcript

<u>Bingham</u>
Entire Transcript