

Exhibit 12
to
Affidavit of Daniel M. Reilly
in Support of Joint Memorandum of
Law in Opposition to Proposed Settlement

In The Matter Of:
BONY v.

February 7, 2013

Anne Marie Scribano

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 2 amount was fair. The expert was asked to evaluate the
 3 different methodologies of the counterparties. That's what
 4 he did. That's what the report speaks to. And that's it.
 5 If we're getting into the fairness of the
 6 settlement amount, your Honor, which we've consistently --
 7 Ms. Patrick, as early as this morning, made the point
 8 again -- believed is not the standard here, then anything
 9 that we did as a trustee is actually completely irrelevant
 10 to the Court and that will be a whole new presentation of
 11 evidence on the settlement fairness and the amount of the
 12 settlement, whether it's fair. That's not what we're
 13 presenting, your Honor.
 14 And they make, you know, they consistently throw
 15 out the different findings in the order, the proposed order.
 16 That's our burden. If, at the end of the day, we don't meet
 17 point F, the Court will strike that out. And if that, you
 18 know, defeats the purpose, it defeats the purpose. But
 19 they're basically saying "Your Honor, we're really concerned
 20 that they're not going to meet their burden." That's a
 21 first for me, your Honor, in litigation, that my opponent is
 22 actually concerned about whether I meet my burden or not.
 23 It's our burden. Whatever we submit as the order -- the
 24 proposed order, if we don't meet that burden, your Honor, we
 25 loose that point.
 26 So it's just -- we've been hearing this same trope

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 2 about how we have to, you know, meet this line, meet this
 3 line. It's our burden. We believe we will meet it. It's
 4 not up to the objectors to tell us how to meet our burden.
 5 And that's really why -- your Honor, the relevance
 6 point, we're not saying this is a burden. We are not saying
 7 it's a burden in the slightest, your Honor. But relevance
 8 matters. It is a principal position that I think matters
 9 for a case that's been going on for as long as this has been
 10 going on.
 11 THE COURT: Okay. Thank you.
 12 Can we take a couple minutes for all of us up
 13 here?
 14 And then whatever -- which is your next motion?
 15 MR. REILLY: Common interest privilege. Mr.
 16 Loeser will be doing that.
 17 THE COURT: We'll do that one next.
 18 MR. REILLY: Thank you.
 19 (Pause in proceedings)
 20 THE COURT: Okay. Yes?
 21 MR. GONZALEZ: Your Honor, just in an effort to
 22 make sure I don't have too much of a tin ear, I just -- I
 23 was thinking about what the Court said, and we certainly
 24 would be prepared to turn over any materials that might
 25 exist in their file that Mr. Lin may have relied on, so we
 26 can do that as a compromise, your Honor.

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 2 THE COURT: Okay.
 3 MR. ROLLIN: Your Honor, I'm not sure what that
 4 means in terms of what we're not getting.
 5 THE COURT: What?
 6 MR. ROLLIN: I'm not sure what that means in terms
 7 of what we're not getting.
 8 THE COURT: I'll tell you, I was just going to
 9 start with the next motion, but, honestly, we went in the
 10 back and I took a look at specifically what you asked for,
 11 and that was exactly what my decision was going to be, so
 12 let's just do it and go through it. He already offered to
 13 produce, prior to this, the industry reports, as we know.
 14 And I thought that the first subsection of your document
 15 request which was facts, data, things that Mr. Lin relied
 16 upon. I think you heard what I said. That's what I would
 17 expect you would get when you're dealing with an expert. I
 18 really don't go for the, you know, the bills, the invoices.
 19 I mean, you know, at some point, I don't think that's
 20 relevant. The drafts. I was going to -- that's what I was
 21 going to say on the record, so that's what I'm going to say
 22 on the record. Of course, he said it, but it just made it
 23 even easier. That's exactly what I was going to order.
 24 The rest of the things really are not relevant,
 25 they just go beyond -- I understand relevance isn't "okay,
 26 enough is enough" or 1,100 pages or a million pages, none of

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 2 that. Relevance is sort of, you know, something that the
 3 judge decides with some discretion based on the facts of the
 4 case.
 5 And we keep looking for precedent for this case
 6 and don't ever find any. So the next person who has an
 7 Article 77 should have it a little easier maybe.
 8 So the things that were listed in section A of
 9 your request, that he's agreed to produce, I'm directing him
 10 to produce the rest of the things.
 11 I'm not -- that's my ruling. It was going to be
 12 my ruling.
 13 So, good, now let's get to the next motion.
 14 Thank you very much.
 15 MR. ROLLIN: Thank you, your Honor.
 16 THE COURT: You're -- I'm sorry, I don't remember
 17 everyone's name.
 18 MR. LOESER: Derek Loeser, your Honor.
 19 THE COURT: You're going to deal with motion
 20 sequence --
 21 MR. LOESER: The common interest.
 22 THE COURT: Common interest, okay.
 23 MR. LOESER: Your Honor, I stood here before so
 24 I'll stand in this spot.
 25 THE COURT: If you like that spot.
 26 MR. LOESER: Your Honor, I represent the Federal

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2 of law and you're going to have to answer it. I think it's
3 going to be presented --
4 THE COURT: First, I want to know what your
5 answer -- that's what you think?
6 MR. REILLY: That's what I think.
7 And I think that's what Ms. Patrick fairly thought
8 from the e-mail that she's sending. She's saying "We're not
9 going to stop this from happening. We're willing to hold
10 off on sending the notice to the trustee that says you have
11 to sue." That's basically what she's saying. "I can stop
12 on this. I won't do that. I'll tell you I won't do that.
13 But I am not going to let you avoid getting to this side of
14 the red."
15 The trustee is going to say, I believe, "No event
16 of default occurred, we didn't want it to occur and it
17 didn't occur."
18 Now, if that happened and that legal issue was
19 sitting squarely in their laps at that time, what advice did
20 they get? What did they say to the lawyers? "Help us
21 establish a strategy where we can prevent this," which would
22 be to the contrary of the interests of certificate holders,
23 but might be to the benefit of the trustee.
24 Yes?
25 THE COURT: What did -- I'm sorry -- I mean,
26 obviously, we're not going to get through two-and-a-half

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2 THE COURT: Do they change?
3 MR. INGBER: No.
4 What's different, okay, what's different is that,
5 before an event of default, the trustee doesn't have to
6 exercise any rights whatsoever. It has to fulfill its
7 obligations, it's duties. It doesn't have to fulfill any
8 rights. It doesn't have to exercise any of its rights
9 before an event of default. After an event of default, it
10 has to exercise those rights that a prudent trustee would
11 exercise. That is the difference between before an event of
12 default and an after an event of default.
13 And the reason why I said it's irrelevant is
14 because the trustee exercised the right -- the trustee
15 exercised the right to pursue remedies against Bank of
16 America and Countrywide. It had nine months of
17 negotiations, which culminated in the largest private
18 settlement in history. It did more than any other trustee
19 was doing at the time. So it not only acted prudently, it
20 acted above and beyond what every trustee was doing. So the
21 argument about whether an event of default occurred or
22 didn't occur is -- it's a non sequitur, in a way, it's a red
23 herring, because we fulfilled whatever obligations we had
24 post event of default by having these discussions, by
25 looking for a remedy that was in the best interests of the
26 trust and having that discussion, that nine-month discussion

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2 more motions with everybody talking in the next 35 minutes
3 and, unfortunately, this isn't federal court, I can't get
4 one minute. I already know that.
5 Can you answer me -- this has been an issue that's
6 come up all day long. So what is your position on the event
7 of default situation? Do you think it never happened and
8 why?
9 MR. INGBER: Okay. The answer is it never
10 happened because there was a forbearance agreement that was
11 signed and it's irrelevant whether it happened or not.
12 THE COURT: Well, wouldn't -- I mean, is he wrong,
13 Mr. Reilly, is he wrong to say that, once there's an event
14 of default, the trustee's obligations switch, become higher,
15 like his chart over there is explaining?
16 MR. INGBER: Here's what happens. And this, by
17 the way, has nothing to do with the question of whether
18 legal advice was put at issue. But let me answer your
19 question directly.
20 THE COURT: I'm interested. Humor me.
21 MR. INGBER: I understand, but let me answer the
22 question directly.
23 THE COURT: It's been so interesting so far.
24 MR. INGBER: At all times, the trustee has to
25 fulfill its obligations that are under the contract, before
26 an event of default and after an event of default.

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2 culminating in this settlement agreement. So this has
3 nothing to do with -- the question of whether there's an
4 event of default is irrelevant and it has nothing to do with
5 the question of whether we've put legal advice at issue.
6 What we -- and I'd like to respond. I know we're
7 running out of time. I'd like to respond to some of the
8 points before we --
9 THE COURT: Okay. What about the second thing on
10 his chart, the second item, where he says the event of
11 default would also, in addition to requiring you to act as a
12 prudent person -- and you're telling me you acted as an
13 exceedingly prudent person --
14 MR. INGBER: Yes.
15 THE COURT: -- whether it occurred or not.
16 But what about the obligation to give notice of the event of
17 default to all the certificate holders, not just Ms.
18 Patrick's clients, but their clients and everybody else?
19 MR. INGBER: If there is, in fact, an event of
20 default -- and let's be clear about what was going on at the
21 time. Ms. Patrick issued what's called a notice, a notice
22 of nonperformance.
23 THE COURT: Okay.
24 MR. INGBER: That was not a notice of an event of
25 default, it was a notice of nonperformance. And it
26 purported to trigger a 60-day cure period.