Exhibit 16
to
Affidavit of Daniel M. Reilly
in Support of Joint Memorandum of
Law in Opposition to Proposed Settlement

CONFIDENTIAL

EXPERT REBUTTAL REPORT OF PROFESSOR ADAM J. LEVITIN

In the matter of the application of The Bank of New York Mellon
No. 651786/2011 (N.Y. Sup. Ct.)

TABLE OF CONTENTS

INTRODUCTION **3**

SUMMARY OF OPINIONS OFFERED **3**

PROFESSIONAL BACKGROUND AND QUALIFICATIONS **5**

I. THE SECURITIZATION INDUSTRIAL COMPLEX **7**

A. An Overview of the Mortgage Securitization Transaction *7*

B. The Securitization Triangle *10*

1. The Role of Sponsors 11
2. The Role of Servicers 11
3. The Role of Trustees 12
   a. The "Pocket Trustee" Problem and BONY's Relationships with Bank of America 14
   b. BONY's Litigation Experts Fail to Recognize the Function of a Trustee in the Securitization Context 15

C. The Inside Investors (the "Protective Committee) *16*

D. BONY Failed to Honor its Obligations to Each Individual Covered Trust *19*

II. BONY'S ACTIONS IN NEGOTIATING THE SETTLEMENT APPEAR AIMED AT PROTECTING ITSELF AND BANK OF AMERICA RATHER THAN THE COVERED TRUSTS **21**

A. An Event of Default Occurred Under the PSAs *21*

B. BONY Undertook No Investigation of the Gibbs & Bruns Allegations *22*

C. BONY Acted to Avoid the Consequences of an Event of Default *23*

D. Evidence in the Record Shows That BONY Failed to Bring or Seriously Consider Litigation *26*

E. Evidence in the Record Shows That BONY Used the Settlement Experts to Paper Over the Position It Wished to Adopt, Rather than to Provide Objective Evaluation or to Strengthen Its Negotiating Position *27*

1. BONY's Reliance on the Settlement Experts Was Not Reasonable or Authorized by the PSAs Because It Was Not "In Good Faith and in Accordance with 'Opinion of Counsel'" 28
2. BONY Was Not Justified in Relying on Professor Adler's Report Because of Its Express Limitations 30
3. BONY Relied on Professor Adler's Opinion, But the PSA Language Analyzed by Professor Adler Was Not Applicable to All of the Covered Trusts. 31

certificateholders not getting the contractual loss allocation that was the basis for their investment.[9]

34. Accordingly, securitization splits the management and title holding functions. The mortgages are managed by the servicer. The servicer is sometimes called a "Master Servicer." Depending on the particulars of a securitization, the servicer will either handle the servicing of the loans directly or subcontract it out to "subservicers."

35. Title to the mortgages is held by a trustee. The trustee's role in mortgage securitization transactions is primarily ministerial. Beyond holding title to the mortgages, the major responsibilities of the trustee are: to verify that the mortgage loans deposited in trust have the proper documentation; to remit payments received by the trust to the certificateholders according to the trust's "cashflow waterfall"; to make periodic reports to the certificateholders on trust performance, PSA § 4.06; and to serve as a financial backstop for the servicer, so that if the servicer ceases to perform its duties, the trustee will take over the servicing function or hire a third party to do so. *See, e.g.*, Jason H.P. Kravitt et al., SECURITIZATION OF FINANCIAL ASSETS, § 9.01[B][3] (2d ed.).

36. The particular ministerial tasks a trustee performs depend on the securitization; sometimes the ministerial tasks are contracted out to various agents, such as document custodians, payment agents, and trust administrators. The trustee does not handle the daily management of the mortgages.

37. A single transactional document called a Pooling and Servicing Agreement (PSA) usually controls the transfer of the mortgages from the sponsor to the depositor, from the depositor to the trust, the creation of the trust, and the issuance of the certificates. The PSA also governs the management of the mortgages by the servicer and the trustee.

B. The Securitization Triangle

38. As the preceding section has detailed, securitization involves at least a quartet of financial entities: the sponsor, the depositor, the servicer, and the trustee. As the depositor is a wholly-owned subsidiary of the sponsor, it can be disregarded for most purposes and treated as virtually synonymous with the sponsor. The sponsor is referred to as the "seller" in Countrywide PSAs because Countrywide securitizations could include loans from more than one Countrywide origination channel (*i.e.*, Park Monaco, Park Granada, Park Sienna), each of which is a separate "seller". To avoid confusing terminology, I use the term sponsor instead of seller. Thus, a securitization transaction is really a triangle between the sponsor, servicer, and trustee. Each of these entities has distinct liability and compensation.

[9] It is important to note, that the bankruptcy remoteness of the trust does *not* mean that the trust's potential claims against the depositor and sponsor are in any way limited. Bankruptcy remoteness here is about the inability of other creditors of the sponsor to recover from the trust's assets and about the trust's inability to file for bankruptcy itself.

1. The Role of Sponsors

39. The securitization sponsor (through the depositor) sells mortgages to the trust. The sponsor's compensation in the transaction is the proceeds of the sale (typically the trust certificates). The sale includes a set of representations and warranties by the sponsor about itself and the mortgages. To the extent that mortgages do not conform with the representations and warranties, it means that the sponsor was overpaid for the mortgages.

40. The critical representations and warranties deal with the underwriting of the mortgages, the accuracy of the borrowers' credit information, and the credit and collateral documentation. If the mortgages do not conform to the representations and warranties, then the sponsor may be obligated to repurchase them. PSA §§ 2.03, 2.04. The sponsor thus has representation and warranty liability on the mortgages.

2. The Role of Servicers

41. In this case, the servicer is an affiliate of the sponsor. The servicer is compensated in a number of ways. First, the servicer receives a "servicing fee". This fee is between 25 and 50 basis points annually on the unpaid principal balance of the mortgages in the trust. The particular rate depends on the type of mortgages securitized. The servicing fee gets paid before any money flows to certificateholders in the cashflow waterfall. Second, the servicer may receive an "excess servicing fee". This fee is the spread between the interest rate on the mortgages and the interest rate the trust must pay to the certificateholders minus the servicing fee and the trustee's fee. For adjustable or step-rate loans, the excess servicing fee can vary over time. Third, the servicer gets to keep any "float" generated. Servicers collect mortgage payments on the 1st of the month, but are not obligated to remit them to the trustee until the 25th of the month. In the interim, the servicer may invest the mortgage payments (subject to investment restrictions) and keep the investment earnings. Fourth, servicers are entitled to keep most types of "ancillary fees" they collect. These include late fees, various ministerial fees charged to homeowners, and a variety of fees relating to defaults, forbearance, loan modification, and foreclosure.

42. The servicer's primary duty is to manage the mortgage loans, meaning collecting payments and remitting them to the trust and, if a loan defaults, handling the default per the standards required by the PSA. Servicers' incentives in managing defaulted loans may diverge from those of the trust because servicers are paid before the certificateholders—they are in effect the senior creditors of the trust. *See* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1 (2011). As senior creditor of the trust, servicers have little incentive to maximize the return on a loan in a foreclosure sale once their own fees are paid. Similarly, servicers are incentivized to foreclose rather than restructure a defaulted loan, even if a restructuring would maximize value for the trust, because the foreclosure results in a certain recovery of funds for the servicer. *Id.*

43. Servicers are also responsible for ensuring that mortgage documentation is correct. Upon receipt of the mortgages, the trustee is required to present the servicer with an

"exceptions report" detailing noncompliance with the trust's documentation requirements. The servicer is then obligated to remediate the documentation problems. Remediation must be done at the expense of the servicer and the sponsor (again, typically an affiliate of the servicer). In my experience, exceptions reports for a typical securitization will contain hundreds to thousands of documentation problems requiring remediation. The expense of doing so would be not insignificant, which incentivizes a servicer not to undertake the remediation of exceptions.

44. The servicer is also required to give notice of violations of the sponsor's representations and warranties, and act as a prudent servicer (which includes the duty to enforce putbacks).[10] When servicers are affiliates of sponsors, as the servicer is here, they are disincentivized from giving notice of or enforcing representation and warranty violations, which would be costly to their sponsor affiliates. Although servicers are entitled to compensation from the sponsor for their costs in enforcing putbacks of representations and warranties, this compensation is without interest and, more importantly, is only available if the putback is successful. PSA § 2.03(c). If the sponsor successfully denies the breach of the representations and warranties, then the servicer is stuck with the costs of the putback effort. As a result, servicers are strongly disincentivized to prosecute representations and warranties, particularly if the sponsor is an affiliate, as it is in the case of the 530 Covered Trusts in this Proceeding.

45. Servicers thus have contractual liability for servicing of the loans, document exception remediation, and failure to give notice of or enforce representation and warranty violations. They also have adverse incentives to comply with all of their duties. To the extent that the servicer can avoid compliance with its own duties, it not only benefits itself, but also the sponsor, which is able to retain the benefit of having sold noncompliant mortgages for compliant mortgage pricing.

46. Yet servicers are gatekeepers for the information necessary to determine their own liability. They are also the gatekeepers for the information necessary to determine the sponsor's liability for representation and warranty breaches, and their own compliance or noncompliance with their duties.[11]

3. The Role of Trustees

47. Trustees are the final part of the securitization triangle. Trustees perform some rote ministerial tasks and provide limited oversight of servicers. This oversight obligation

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[10] Additionally, servicers have liability for "advancing" payments to the trust. PSA § 4.01. If a mortgagor fails to pay on the mortgage, the servicer must advance the payment out of its own pocket to the trust, so long as recovery of the advances from the mortgagor or its property are reasonably foreseeable. The duty to advance ensures regular cashflows for investors, which is important because fixed income investor often have regular liquidity needs of their own. The servicer's advances are reimbursed—but without interest—from any recovery from the mortgagor (such as foreclosure sale proceeds), and if that is insufficient, then from the payments on the other mortgages held by the trust. The servicer's recovery of advances is also senior to the certificateholders in the cashflow waterfall.

[11] The PSAs give the Trustee the power to acquire certain information from the servicer that is necessary to determine compliance. In this case it appears [redacted]

typically requires no particular action prior to an Event of Default, and the trustee is not deemed to have knowledge of an Event of Default unless notified. PSA § 8.02(viii). Prior to an Event of Default, the trustee can be held liable for negligent actions or omissions or willful misconduct.[12]

48. Following an Event of Default the trustee must act as a prudent person would under the circumstances. PSA § 8.01.

49. Trustees are compensated with a fixed fee rate based on the unpaid principal balance of a trust. BONY's compensation for the Covered Trusts was nine-tenths of a basis point or 0.009% (0.00009) of the unpaid principal balance of a trust. PSA § 8.05. Trustees are also indemnified by the servicer for any liability, loss, or expense incurred in any legal action related to the PSA that is not taken at the direction of the certificateholders and is in good faith and taken with due care. PSA § 8.05.

50. Investors in securitizations typically have the right to enforce the duties of the servicer or the representations and warranties of the sponsor through a demand on the trustee to act. Such a demand, however, typically requires compliance with a collective action clause that mandates that it be supported by 25% of the voting rights of the certificates, sometimes in each class of certificates. PSA §§ 8.01(iii), 8.02(iv), 10.08. The trustee controls the list of the certificateholders who are otherwise anonymous to each other, unless the requisite number of certificateholders gather to demand the list from the trustee. The certificateholders must also offer the trustee indemnity for its actions. PSA § 10.08. Only if the trustee refuses to act for 60 days following notice and indemnity may a certificateholder bring suit regarding the PSA. PSA § 10.08. The trustee is removable only upon the action of certificate holders representing 51% of the voting rights of the certificates. PSA § 8.07. Thus, trustees are typically the gateway to claims against servicers, and servicers are the gateway to claims against sellers for mortgage underwriting violations.

51. The result of this set-up is a self-protective triangle that controls access to information necessary to enforce trust rights but none of the members of the triangle have any incentive—and in fact are disincentivized—to do so. As a result, it was easy for non-compliant mortgages to be securitized with the losses being borne by the certificateholders, rather than being placed on the sponsors as the result of representation and warranty enforcement. The entire design of the system by sell-side deal attorneys greatly benefits sponsors and facilitated the securitization of the bad loans that fueled the housing bubble and primed the financial system for the acute crisis in the fall of 2008.

[12] Under common law, a trustee can never be exculpated from the duties of good faith, care, and loyalty, no matter the limitations in the trust document. Robert H. Sitkoff, *Trust as "Uncorporation": A Research Agenda*, 2005 ILL. L. REV. 31, 39 (2005). *See also* Beck v. Manufacturers Hanover Trust Co., 218 A.D.2d 1, 12 (N.Y. App. Div. 1st Dep't 1995); Dabney v. Chase Nat'l Bank, 196 F.2d 668 (2d Cir. 1952) (Hand, L., J.); UNIF. TRUST CODE § 1008, 7C U.L.A. 258 (Supp. 2004); RESTATEMENT (SECOND) OF TRUSTS § 222 (1959). It is worthwhile noting that an organization form exists that offers trustees the potential for complete exculpation, including from good faith duties. This is the Delaware statutory trust. 12 DEL. CODE ANN. § 3807(a). *See also* Sitkoff, *supra*.

a. The "Pocket Trustee" Problem and BONY's Relationships with Bank of America

52. Trustees also lack any incentive to be pro-active and they are strongly incentivized to turn a blind eye to servicer malfeasance and non-compliance. This is because trustees are selected by securitization sponsors, not by investors. Trustees get their business from sponsors. While trustees represent the investors, their client is the sponsor. BofA, not the certificateholders, is BONY's customer.

53. Moreover, there are often close, repeat business relationships between securitization trustees and securitization sponsors. Fischel Report at ¶ 32. BONY, for example, gets two-thirds of its private-label residential mortgage securitization trusteeships from BofA. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 60-63 (2011). BONY was also [REDACTED] Stanley Dep. at 27-29.

54. BONY's Litigation Expert Professor Fischel assumes that these "preferred trustee" relationships are unproblematic because they are common. He is mistaken. *See In re E. Transp. Co.* (*The T.J. Hooper*), 60 F.2d 737, 740 (2d Cir. 1932) (Hand. L., J.) (common industry practice may nonetheless be negligent). Professor Fischel does not consider how the repeat business relationship might affect the incentives of the trustee when dealing with a default by the sponsor. The "preferred trustee" remains "preferred" only so long as it is compliant with the wishes of the sponsor. In other words, to be a "preferred trustee," it is necessary to also be a "pet trustee" or "pocket trustee." And that means turning a blind eye to the sponsor and affiliated servicer breaches.

55. Furthermore, despite his extensive use of public securities data for his report, Professor Fischel fails to note that BONY had as of the end of 2012 a $1.5 billion equity position in BofA (either for itself or for its clients), accounting for 1.21% of BofA's outstanding stock.[13] This position makes BONY "long" on BofA, and thus "short" on the enforcement of trust rights; to the extent that BofA can shed its MBS-related liability at low cost, it should boost BofA's equity price, which would in turn benefit BONY (or BONY's asset management clients) as a shareholder.

56. BONY claims to have a [REDACTED] Griffin Dep. at 331. [REDACTED] *Id.* at 331-32. Moreover, Robert Griffin, [REDACTED] as well as various other individuals, [REDACTED] *Id.* at 340-43.

[13] It is unclear if this is an investment for BONY's own account or an investment managed for others.

b. BONY's Litigation Experts Fail to Recognize the Function of a Trustee in the Securitization Context

57. The reports of BONY's Litigation Experts Professor Langbein and Mr. Landau are both predicated on serious misunderstandings about the function of a securitization trustee. Professor Langbein bases his report on the assumption that BONY's actions are to be judged by default trust law. Mr. Landau's report, in contrast, assumes that BONY as a securitization trustee is equivalent to a trustee under a corporate bond indenture. Not only is it hard to square the assumptions of BONY's Litigation Experts with each other, but there are fundamental flaws in both, and those flaws compromise the reliability and utility of their reports.

58. Professor Langbein appears to believe that it is general principles of trust law, such as the "Principle of Necessary Powers" or "The Power to Compromise or Settle Claims," that apply in this Proceeding. To that end, he makes repeated reference to general sources such as the Restatement (Third) of Trusts. Professor Langbein's central premise is that "a trustee has all the powers necessary to perform the trust." Langbein Report at 3.

59. Professor Langbein's contentions of broad trustee powers make no sense within the context of the economics of securitizations. Securitization trustees are paid very little (less than a single basis point!) because they are expected to do very little. Professor Langbein would have the Court believe that sophisticated investors would entrust the fate of their investment to a trustee given wide authority, but with little liability or compensation. If Professor Langbein's contentions were correct, there would be a dramatic mismatch between BONY's powers as trustee and its accountability in the exercise of those powers.

60. Professor Langbein must be read one of two ways: either his claims beg incredulity because a securitization trustee simply does not have the expansive powers described by Professor Langbein; or Professor Langbein's claims are incomplete because in describing the expansive powers under default trust law, he fails to describe the equally expansive duties attendant to the exercise of broad powers.

61. The thrust of Mr. Landau's position is that so long as the Trustee complied with "industry custom and practice" the Trustee has met its obligations and acted reasonably. Mr. Landau's description of "industry custom and practice" is flawed because the duties of a securitization trustee are distinct from those of many types of corporate trustees, including the fact that securitization trustees perform a financial backstop role for the servicer and represent multiple classes of certificateholders. However, as a threshold matter, even if Mr. Landau's discussion of industry custom and practice were correct, that is hardly evidence that the settlement should be approved. The standard for approval of the settlement is not whether the trustee complied with industry standards, not least because industry standards may be problematic. *See, e.g.*, *In re E. Transp. Co.*, 60 F.2d at 740.

C. The Inside Investors (the "Protective Committee)

62. The Inside Investors are a group of financial institutions that have banded together to act as a type of bondholder "protective committee"[14] regarding the MBS.

63. A number of the Inside Investors have business relationships with Bank of America outside of this litigation. It would be surprising if most or all of the Inside Investors were not derivatives and repo counterparties, creditors, debtors, or equityholders of Bank of America in some context. The Federal Reserve Bank of New York has a unique business-regulatory relationship with BofA, and BofA is one of Freddie Mac's major business partners with a clear interest in preserving that relationship. Federal Housing Finance Agency Office of Inspector General, *Evaluation of the Federal Housing Finance Agency's Oversight of Freddie Mac's Repurchase Settlement with Bank of America*, Evaluation Report EVL-2011-006, Sept. 27, 2011, at, 22, 25, 29, 31 n.58 (discussing how Freddie Mac failed to prosecute many repurchase claims because of its interest in maintaining its business relationship with BofA); Federal Housing Finance Agency Office of Inspector General, *Follow-up on Freddie Mac's Loan Repurchase Process,* Evaluation Report EVL-2012-007, Sept. 13, 2012, at 10, 12 (noting that Freddie Mac believed that it "would not recover enough from a more expansive loan review process to offset the loss of business from loan sellers" like BofA); Dep. Ex. 201.

64. According to NASDAQ's listing of the largest institutional holders of the stock of Bank of America Corporation, a number of the Inside Investors hold sizable equity stakes in Bank of America.[15] (It is unclear to the extent this reflects the Inside Investors own funds and those that they manage on behalf of clients, but the distinction is immaterial here.) It is possible that some of the Inside Investors are invested in securitizations not covered by the Proposed Settlement for which BofA may have liability, such as Merrill Lynch and First Franklin securitizations. Like the Trustee, the Inside Investors have interests that indicate they may be "long" on BofA, and hence "short" on maximizing recovery to the Covered Trusts. I have seen no indication that BONY verified one way or the other.

65. Deposition testimony has also established that [redacted] Waterstredt Dep. at 151-52.

66. Additionally, BofA was the largest single equityholder in Blackrock and has a seat on its board of directors. Sree Vidya Bhaktavatsalam, *Bank of America, PNC Unload $8.3 Billion of BlackRock Shares,* Bloomberg, Nov. 9, 2010 (BofA as BlackRock's largest shareholder); Sree Vidya Bhaktavatsalam, *BlackRock Says Montag Joins Board as Krawcheck, Linsz Depart*, Bloomberg, April 7, 2011 (Bank of America Corp.'s joins BlackRock's board).

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[14] I by no means suggest that the Inside Investors banded together to "protect" all investors in the Covered Trusts. In fact, it is just the opposite. Historically, protective committees were creatures of bond houses and their trustees. They would consist of hand-picked favored creditors of the bond houses, which controlled the non-public lists of bondholders and operated to protect the bond houses from other investors.

[15] http://www.nasdaq.com/symbol/bac/institutional-holdings.

67. Moreover, recent media reports suggest that one of the Inside Investors, the Federal Reserve Bank of New York, may have its own reasons to support BofA, unlike other investors. Specifically, the Federal Reserve Bank of New York confidentially agreed to support BofA in other litigation against AIG and released any claims it had against BofA in exchange for a nominal settlement payment. Gretchen Morgenson, *Promises, Promises at the New York Fed*, N.Y. Times, Mar. 3, 2013, at BU1; Gretchen Morgenson, *Don't Blink, or You'll Miss Another Bailout*, N.Y. Times, Feb. 17, 2013 at BU1. This indicates that for whatever reason (its own economic self-interest or the interests of its member banks), the Federal Reserve Bank of New York has an interest in protecting BofA from mortgage litigation.

68. Even within the Covered Trusts, the Inside Investors are not representative of other certificateholders in the following ways:

- First, the particular 189 Covered Trusts in which the Inside Investors have 25% of the Voting Rights may have a different collateral makeup than the other 341 Covered Trusts.[16] To wit, the trusts in which the Inside Investors have 25% of the Voting Rights may have more subprime or Alt-A collateral than the other trusts or vice-versa.

- Second, the Inside Investors may not be invested in similarly exposed tranches of the Covered Trusts to the certificateholders in general. They may be concentrated in the senior tranches, for example. If so, they would likely not have incurred much if any credit losses, but the market value of their certificates would be severely depressed because of the uncertainty of future losses for the trusts. The settlement might increase the market value of their certificates even if they are not compensated for actual losses. In such a situation, the Inside Investors would not be particularly concerned about the level of compensation for actual or future losses, as long as the market value of their certificates was increased. If so, their interests would not be representative of many other certificateholders

- Third, if the Inside Investors accumulated part or all of their positions in the Covered Trusts at distressed prices they would have different incentives regarding the Proposed Settlement from an investor that purchased at par. As I understand it, the Inside Investors have refused a number of discovery requests regarding the details of their positions, including dates and prices at which they purchased their positions. Absent this information, it is impossible to determine whether the Inside Investors are representative of the certificateholders in general. Nothing in the record appears to support an inference that BONY ever attempted to determine the representativeness of the Inside Investors for the certificateholders in either the 189 Covered Trusts in which the Inside Investors have at least 25% of the Voting Rights or in the other 341 Covered Trusts.

[16] At the time the Inside Investors filed their statement in support of the settlement, they held at least 25% of the voting rights in 189 Covered Trusts, but not in the remaining 341 Covered Trusts. *See* Doc. No. 124, p. 5. The Inside Investors' holdings may have changed since then, but for purposes of my report I rely on these figures.

69. Additionally, counsel for the Inside Investors has expressly stated that the Inside Investors did not represent the interests of absent certificateholders during negotiations. Doc. No. 250, at 13 (Inside Investors' Response Brief).

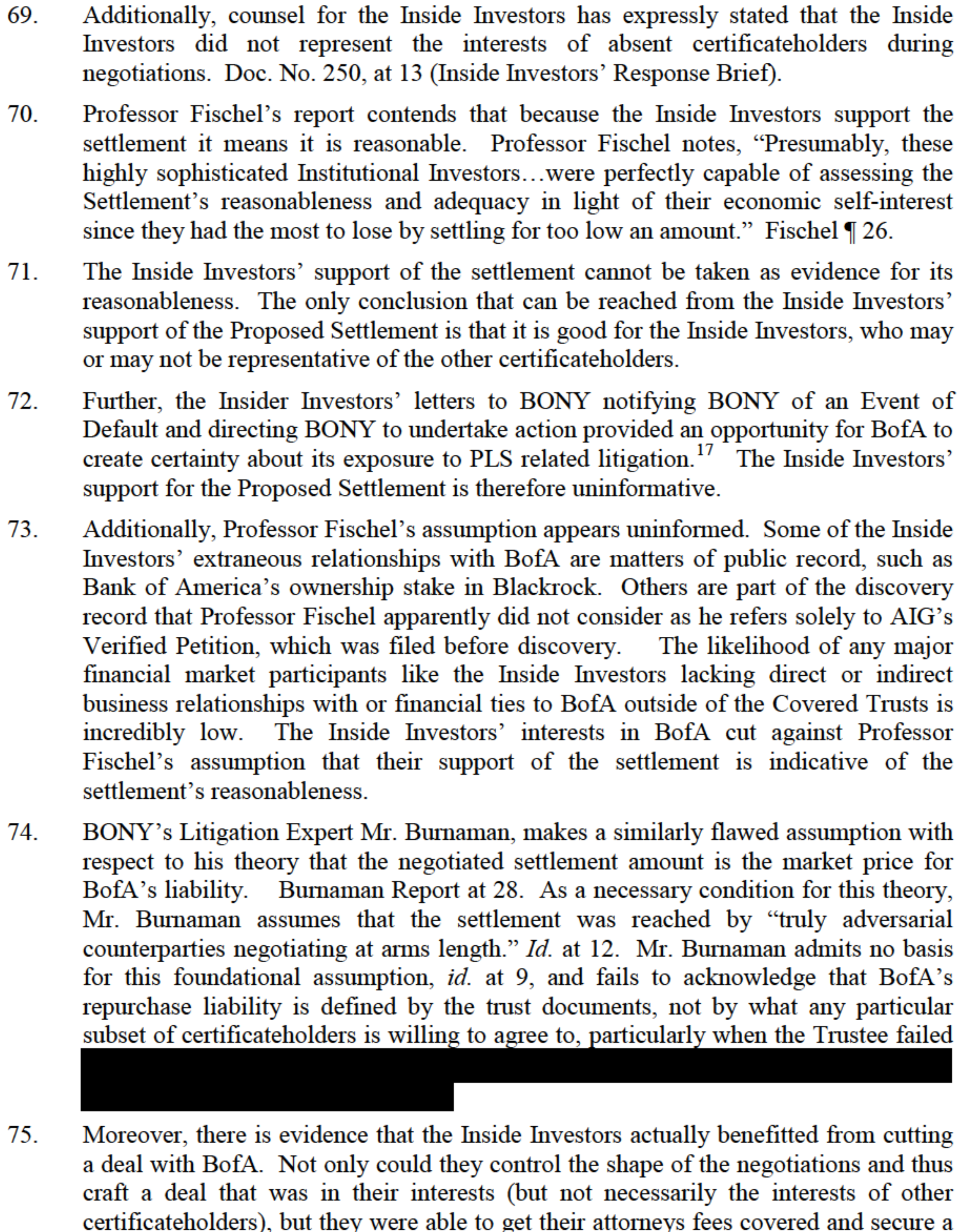
70. Professor Fischel's report contends that because the Inside Investors support the settlement it means it is reasonable. Professor Fischel notes, "Presumably, these highly sophisticated Institutional Investors…were perfectly capable of assessing the Settlement's reasonableness and adequacy in light of their economic self-interest since they had the most to lose by settling for too low an amount." Fischel ¶ 26.

71. The Inside Investors' support of the settlement cannot be taken as evidence for its reasonableness. The only conclusion that can be reached from the Inside Investors' support of the Proposed Settlement is that it is good for the Inside Investors, who may or may not be representative of the other certificateholders.

72. Further, the Insider Investors' letters to BONY notifying BONY of an Event of Default and directing BONY to undertake action provided an opportunity for BofA to create certainty about its exposure to PLS related litigation.[17] The Inside Investors' support for the Proposed Settlement is therefore uninformative.

73. Additionally, Professor Fischel's assumption appears uninformed. Some of the Inside Investors' extraneous relationships with BofA are matters of public record, such as Bank of America's ownership stake in Blackrock. Others are part of the discovery record that Professor Fischel apparently did not consider as he refers solely to AIG's Verified Petition, which was filed before discovery. The likelihood of any major financial market participants like the Inside Investors lacking direct or indirect business relationships with or financial ties to BofA outside of the Covered Trusts is incredibly low. The Inside Investors' interests in BofA cut against Professor Fischel's assumption that their support of the settlement is indicative of the settlement's reasonableness.

74. BONY's Litigation Expert Mr. Burnaman, makes a similarly flawed assumption with respect to his theory that the negotiated settlement amount is the market price for BofA's liability. Burnaman Report at 28. As a necessary condition for this theory, Mr. Burnaman assumes that the settlement was reached by "truly adversarial counterparties negotiating at arms length." *Id.* at 12. Mr. Burnaman admits no basis for this foundational assumption, *id.* at 9, and fails to acknowledge that BofA's repurchase liability is defined by the trust documents, not by what any particular subset of certificateholders is willing to agree to, particularly when the Trustee failed



75. Moreover, there is evidence that the Inside Investors actually benefitted from cutting a deal with BofA. Not only could they control the shape of the negotiations and thus craft a deal that was in their interests (but not necessarily the interests of other certificateholders), but they were able to get their attorneys fees covered and secure a

[17] Creation of certainty about PLS-related litigation exposure is hugely important to BofA because of it is believed to be one of the factors dragging down its share price and pushing its market capitalization some $85 billion dollars below its book value. http://finance.yahoo.com/q/ks?s=BAC+Key+Statistics.

release from the indemnity that they were required to provide to BONY under PSA §§ 8.02(ix). *See* Doc. No. 3, at Ex. C (Side Letter) (unwinding Inside Investor instructions).

D. BONY Failed to Honor its Obligations to Each Individual Covered Trust

76. BONY is not a generic trustee. No such entity can exist—a trustee only exists for a discrete trust corpus. In this proceeding there are 530 legally distinct trusts. Accordingly, BONY wears 530 separate legal hats in this Proceeding. BONY appears in this Proceeding as "BONY as trustee for trust 1", "BONY for trustee for trust 2", "BONY as trustee for trust 3"… all the way through "BONY as trustee for trust 530." Crosson Dep. at 79-81. In each case, BONY has distinct contractual and fiduciary duties that may in fact conflict with each other.

77. The distinct legal identity of these trusts is at the heart of securitization. The whole point of securitization is that the trusts are not Countrywide. Instead, each trust is a distinct pool of assets, a separate firm.

78. While BONY appears to believe that for administrative convenience it may treat all of its trusts as a single entity and the BONY Litigation Expert reports treat the trusts as an aggregate entity, doing so is contrary to the fundamental nature of securitization. The 530 trusts are as legally distinct as 530 people.

79. BONY owes each trust a separate and distinct duty of care, and that involves evaluating each trust's specific rights as set forth in the trusts' governing agreement. These rights often vary in subtle ways between trusts, including in the representations and warranties made to the trusts. They also may vary in terms of the rights of the certificateholders or noteholders regarding Events of Default. This is certainly the case as between 513 trusts governed by Pooling and Servicing Agreements and the 17 trusts governed by Indentures. Fulfilling a duty of care to each trust would involve, at the very least, a consideration of the specific rights of the trust.

80. Because each trust is its own separate entity and the Trustee has an individual trusteeship with respect to each Covered Trust, any settlement or potential recovery must be evaluated on a trust-by-trust basis. This is particularly true, where there may be a limited source of recovery. *See* Fischel Report at ¶ 37. Indeed, Countrywide's purportedly limited resources was allegedly a major consideration for BONY when approving the Proposed Settlement. Because of its alleged resource constraints, the recovery for any one trust reduces the assets available for the other trusts. This means that BONY's various trusteeships may be competing with one another for the same resources and BONY must now allow recovery for one trust to prejudice another.

81. The lumping together of the 530 trusts is particularly problematic because [redacted] but the Inside Investors do not even have 25% of the voting rights in 341 of the trusts. There is no evidence that BONY took any steps to determine whether those 341 trusts or any subset of them had distinct rights from those in which the Inside Investors had 25% of the voting rights.

82. A perfect example of the problems with treating the trusts as an aggregate entity is BONY's allocation methodology. If approved, each Covered Trust will be paid its pro rata share of the Settlement Amount based solely on each Trust's losses. But because each Trust is comprised of different collateral, different ratios of collateral types, and other factors affecting the likelihood that any particular Trust suffered more or less losses as a result of breaches of representations and warranties, the allocation will unduly advantage some Trusts and prejudice others. BONY could not possibly approve of such an allocation if it were actually performing its trusteeship faithfully to each Trust individually.

83. The Inside Investors lack any holdings whatsoever in many of the Covered Trusts, yet continue to prosecute the Proposed Settlement that impacts all investors in all of the Covered Trusts. The Inside Investors seek not only for a majority to oppress a minority within some trusts, but for a minority to oppress a majority in other trusts and for non-investors to oppress investors in yet other trusts. Everything about this is contrary to nearly 75 years of business trust law, where since 1939 majorities cannot bind minorities in any way that affects minorities' right to payment. Moreover, an Article 77 proceeding is not an ersatz bankruptcy proceeding under which a majority of creditors can bind a minority. The preferences of the Inside Investors are not those of all investors.

84. Nonetheless, Professor Fischel's report concludes that the Inside Investors are doing a great favor for the 341 trusts in which they do not hold 25% of the Voting Power. Fischel Report at ¶ 34. He assumes that these other 341 trusts will likely get nothing outside of the proposed settlement. Professor Fischel's assumption is unfounded.

85. The certificateholders in the other 341 trusts can—if they so choose—organize and pursue their own remedies and possibly their own settlements. Indeed, the attorneys for the Inside Investors, Gibbs & Bruns, were competing with another firm (Talcott Franklin P.C.) for organizing investors. Alison Frankel, *Did Gibbs pre-empt rival investor group in BofA's MBS deal?* REUTERS, Oct. 3, 2011, *at* http://blogs.reuters.com/alison-frankel/2011/10/03/did-gibbs-pre-empt-rival-investor-group-in-bofas-mbs-deal/. Talcott Franklin P.C. promised to take a more aggressive approach than that of Gibbs & Bruns. *Id.*

86. By expanding the Proposed Settlement to cover the other 341 trusts, the Inside Investors took power that was not theirs to use and imposed themselves on trusts and beneficiaries where they had no right to do so.

87. By dragging in the other 341 trusts, the Inside Investors effectively forestalled any alternative global settlement and thereby made their settlement possible. This was only feasible, however, if BONY was complicit. If BONY had recognized its 530 legally separate roles, it might not have consented in at least 341 cases to be part of the Proposed Settlement. BONY's disregard of the Covered Trusts' legal separateness inured to the benefit of the Inside Investors. It also benefitted BofA, which was able to negotiate a low-ball global settlement, rather than getting ratcheted into higher payments by successive settlements. And this benefitted BONY because BONY will only get BofA's future business if BofA finds BONY to be a sufficiently docile trustee. *See supra,* ¶¶ 52-56.

> *based solely on general contract principles, and taking the language of the provision at face value,* it appears to be a reasonable position that a determination of whether a breach materially and adversely affects the interests of Certificateholders *should* turn on the harm caused by the breach.

Id. at 12-13 (emphasis added). In other words, Professor Adler was expressing an opinion on the "materially and adversely affects" clause in a virtual vacuum, without knowing the context of the clause. Contracts, however, are interpreted in context.

140. If Professor Adler had known more about the context, he might well have opined differently about the "materially and adversely affects" clause.

141. By narrowly cabining Professor Adler's inquiry to generic interpretation of language out of context, BONY ensured that the opinion would be nothing more than a guess. Indeed, Professor Adler's opinion is expressed in "should" language, rather than "would." A securitization industry participant like BONY should be highly attuned to the difference between a "should" and a "would" opinion.

142. The very choice of Professor Adler as an expert was itself unusual. Professor Adler does not have experience in mortgage putback litigation. If BONY wanted expertise about the particular clause in issue, it would not have relied on a general contract law professor, but would instead have turned to someone with experience concerning mortgage putback claims.

143. [REDACTED] legal position:

> [REDACTED]

<u>3. BONY Relied on Professor Adler's Opinion, But the PSA Language Analyzed by Professor Adler Was Not Applicable to All of the Covered Trusts.</u>

144. BONY's [REDACTED] approval of the settlement relied [REDACTED] on the expert reports, [REDACTED] There are numerous problems with Professor Adler's report, but by far the most critical is that it fails to account for the fact that many of the PSAs directly contradict the proposition for which the Trustee uses his report, and Professor Adler's report contains no indication as to what PSA(s) he reviewed.

145. It is well known throughout the securitization industry that there are variations among PSAs even from certain sponsors and within certain "shelves" or series of similar securitizations. BONY's own outside counsel Mr. Kravitt testified in deposition that [REDACTED]

servicing or documentation exceptions or its assumption of Countrywide's representation and warranty liability as the successor Master Servicer under PSA § 6.04.

173. The valuation report by Brian Lin at RRMS was based solely on representation and warranty liability. Lin Report (Dep. Ex. 9). BONY's attorney Jason Kravitt stated in deposition testimony that Kravitt Dep. at 275. Loretta Lundberg, the head of BONY's default services testified that Lundberg Dep. at 337-338. And Robert Griffin, Lundberg's boss at BONY, testified that Griffin Dep. at 292.

174. BONY's failure to pursue servicing and documentation claims is particularly noteworthy, as servicing claims apply directly to BofA as successor Master Servicer. PSA § 6.04. The question of successor liability does not apply to the Covered Trusts' servicing and documentation claims, nor does the PSA § 2.03(c) material and adverse clause apply.

175. Professor Fischel opines that successful claims for servicing liability would require both factual and legal determinations that he implies are not possible. Fischel Report ¶ 40. The determinations, however, *are* possible.

176. There is ample evidence of the failure of BofA to meet its servicing duties and of resultant harm to the Covered Trusts. letters from Gibbs & Bruns to BONY set forth the various servicing violations. Dep. Exs. 18 & . The letter sent from intervenor Triaxx funds to Justice Kapnick dated February 1, 2013, sets forth evidence of BofA's self-dealing and other misconduct in connection with loan modifications and the harm to the Covered Trusts. Similarly, the FTC's 2011 $108 million settlement with Countrywide for servicer overbilling provides significant evidence of servicing violations and harm to the Covered Trusts, as Countrywide's overbilling was paid out of foreclosure sale proceeds before any recovery to the Covered Trusts. . Dep. Ex. 58.

177. Further, one of BONY's own advisors— Sabry Dep. at 31-36.

178. Additionally, the document exceptions reports prepared by BONY pursuant to § 6(a) of the Proposed Settlement show . This alone is evidence of the massive scale of

3. The Document Exception Provisions of the Proposed Settlement Are Largely Illusory

179. As it stands, the Proposed Settlement amends the PSAs by requiring a much narrower cure of documentation exceptions than required by the PSAs. Section 6 of the Proposed Settlement requires BofA to cure a document exception if and only if a

foreclosure is attempted and is unsuccessful. A successful, but more expensive or delayed foreclosure due to documentation problems would result in greater losses for the certificateholders (but not for BofA), yet is not covered by the Proposed Settlement's cure requirement.

180. Astonishingly, § 6(a)(i) excludes mortgages registered with the Mortgage Electronic Registration System (MERS) from the all of the cure requirements of the Settlement. MERS registry covers around 60% of mortgages in the United States. Kate Berry, *Foreclosures Turn Up Heat on MERS,* AM. BANKER, July 10, 2007. For more recent originations and securitized mortgages, an even higher percentage are registered with MERS.

181. Moreover, the exclusion of MERS mortgages from the documentation cure requirements is shocking because problems with the MERS registry have been a central issue in a great deal of consumer foreclosure litigation.

182. MERS has also entered into consent decrees or settlements with federal bank regulators and the Delaware Attorney General for its inadequate documentation practices and systems. *See In re MERSCORP, Inc.* Consent Order (Apr. 13, 2011), *available at* http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47h.pdf; *see also* Press Release, *Biden Secures Reforms from National Mortgage Registry* (July 13, 2012), *available at* http://attorneygeneral.delaware.gov/media/releases/2012/registry7-13.pdf; Press Release, *A.G. Schneiderman Secures $136 Million For Struggling New York Homeowners In Mortgage Servicing Settlement* (Feb. 9, 2012), *available at* http://www.ag.ny.gov/press-release/schneiderman-secures-major-settlement-allows-sweeping-mortgage-investigations-proceed; Consent Order, In the Matter of MERSCORP, Inc., OCC No. AA-EC-11-20; Board of Governors Docket Nos., 11-051-B-SC-1, 11-051-B-SC-2; FDIC-11-194b; OTS No. 11-040; FHFA No. EAP-11-01, April 12, 2011; Final Stipulation and Order, Delaware v. MERSCORP Holdings, Inc., Civ. Action No. 6987-CS (Del. Ch. Ct. July 13, 2012).

183. The exclusion of MERS mortgages from the documentation cure requirement indicates that BONY and BofA have no real intention of undertaking the—expensive and sometimes impossible—cure of faulty documentation. Instead, the losses due to faulty documentation will be borne by the certificateholders.

184. Proposed Settlement also requires BofA to cure either the "Mortgage Exceptions" or the "Title Exceptions" for any given loan, not both. Proposed Settlement § 6(b). The PSAs make no such distinction between "Mortgage Exceptions" and "Title Exceptions" and require cure of both. PSA § 2.02.

185. Moreover, the Proposed Settlement requires BofA to reimburse the Covered Trusts only for uncured document exceptions for non-MERS mortgages if there is both a "Mortgage Exception" and a "Title Exception" *and* the a loss to the Covered Trust because of the exceptions following an unsuccessful attempted foreclosure. Proposed Settlement § 6(c). Even then, reimbursement may be delayed by up to a year, and there is no provision for interest. Proposed Settlement § 6(c). PSA § 2.02 does not require both exceptions or for there to be an unsuccessful attempted foreclosure or for there to be a loss to the Covered Trust. Instead, it simply requires that the document

exceptions be cured. What this means is that the Proposed Settlement's § 6 requirement for cure of document exception cure is narrower than the PSA 2.02 cure requirement.

4. The Document Exceptions Provisions of the Settlement Effect an Amendment of the PSAs without the Requisite Certificateholder Consent

186. The Proposed Settlement's amendment of the PSAs' requirement of the cure of document exception violates the PSA requirement of consent of certificateholders representing 2/3s of the Voting Rights of each individual Covered Trust. PSA § 10.01.

H. BONY Converted Trust Property During the Settlement Process by Using the Trusts' Negotiating Leverage for Its Own Benefit

187. BONY used the Covered Trusts' negotiating power to gain or attempt to gain benefits. BONY also acted to shield BofA from liability, which is consistent with its interest in remaining BofA's "preferred trustee."

188. BONY's Litigation Experts Professor Fischel, Mr. Landau, and Professor Langbein all deny that BONY had conflicts of interest, particularly in regard to the indemnity provisions in the Forbearance Letter and Side Letter and the release in the Proposed Final Order and Judgment. Fischel Report ¶¶ 27-32; Landau Report ¶¶ 37-40, 47; Langbein Report at 9-11.

189. As an initial matter, none of BONY's Litigation Experts address the incentives BONY had by virtue of its business relationship with BofA (and possibly with the Inside Investors) or its $1.5 billion equity stake in BofA. *See supra* ¶¶ 53-55. Being the "preferred trustee" is how BONY gets its business. This is clearly a financial benefit for BONY. Despite recognizing BONY's position as BofA's "preferred trustee," Professor Fischel contends in his report that there is no evidence of BONY's benefit from the settlement. Fischel Report ¶¶ 27, 32. Professor Fischel, however, refers solely to AIG's Verified Petition (Doc. No. 131). Fischel Report ¶ 27. AIG filed its Verified Petition prior to discovery, however, and substantial evidence of conflicts has been developed in discovery, as discussed in Professor Frankel's report. Professor Fischel's report does not address this evidence. None of BONY's Litigation Experts recognize BONY's incentives to act in the interest of BofA rather than the interest of the Covered Trusts.

1. The Forbearance Agreement and the Indemnity BONY Secured

190. [redacted]

191. Specifically, on [redacted]

J. The Proposed Settlement's Servicing Provisions Have Zero Value Because They Replicate Bank of America's Pre-Existing Legal Duties

218. I have reviewed the Proposed Settlement's servicing provisions and conclude that the servicing provisions have virtually no material value because with one exception they merely recreate pre-existing legal duties for BofA, and the value of that exception depends on the quality of BofA's future servicing, which cannot be determined. Accordingly, the servicing provisions are largely, if not completely, illusory.

219. Moreover, the servicing provisions of the Proposed Settlement amend the PSAs without the requisite consent of a majority of certificateholders, despite (and indeed indicated by) the provision in the Proposed Settlement that deems the servicing provisions not to amend the PSAs. Settlement § 5(g).

220. Finally, the servicing provisions include a vague commercial impracticability provision that may permit BofA to avoid compliance, including on the basis of existing government regulations. Settlement § 5(h).

221. The Proposed Settlement has five major provisions dealing with mortgage servicing.[25] Mr. Burnaman's report, BONY's sole Litigation Expert report dealing with servicing, addresses only one of those five provisions, namely the Settlement § 5(a)-(b) requirement that BAC transfer the servicing of "High Risk" loans to specialty subservicers. Mr. Burnaman contends that the "the incremental out-of-pocket cost which BANA agreed to bear in order to transfer certain delinquent and defaulted loans to Subservicers is a direct and quantifiable benefit to the Covered Trusts." Burnaman Report at 7. He calculates its value as between $98 million and $411 million. *Id.*

222. Mr. Burnaman's valuation of the servicing transfer provision is incorrect. The value of the servicing transfer provision is zero.

223. It would appear that Mr. Burnaman does not impute any value to any of the other four provisions, as he does not discuss them in his report. To the extent that this is his opinion, I concur with it. None of the servicing provisions in the settlement have any certain material value to the trusts.

224. Table 1, below, presents a summary of the Proposed Settlement's servicing provisions and their valuation. It shows that all but one of the provisions have a value of zero (or close thereto) because BofA is already subject to existing legal duties based on federal law (the CFPB's Mortgage Servicing Rule), the National Mortgage Servicing Settlement, the OCC's Consent Order with BofA, or the PSA's prudent servicing standard, which is generally thought to incorporate relevant Fannie Mae/Freddie Mac servicing standards. The other provision, § 5(c), has uncertain, but possibly zero value, as explained below.

[25] BONY's Verified Petition ¶ 46 seems to treat cures of document deficiencies in loan files as part of servicing improvements, although it is included under a separate provision in the Proposed Settlement. To the extent that the document deficiency provisions are a servicing improvements, they have no value because they merely oblige BofA to do *less* than what it is already contractually obligated to do under PSA § 2.02 and what would be consistent with prudent servicing. *See infra* ¶ 180-187.

Table 1. Summary of Servicing Provision Valuation

Settlement Provision	Summary of Settlement Provision	Value of Settlement Provision	Basis of Valuation
§ 5(a)-(b)	Requires transfer of high-risk loans to subservicers.	$0	Already required by: • Prudent Servicing Standard (PSA § 3.01); • 12 C.F.R. § 1024.38(a)-(b); • Nat'l Mtg. Settlement §§ II.A, IV.H; • OCC Consent Order §§ III(3), IV(1)(l)-(p), IX(1)(f); • Freddie Mac Seller/Servicer Guide § 51.3.
§ 5(c)	Requires benchmarking of servicing and servicing expense reimbursement recoveries adjusted.	Dependent on loan performance, BofA's servicing performance & PSA interpretation.	Express terms of Proposed Settlement.
§ 5(d)	Requires evaluation of borrowers for modifications within 60 days of receipt of documentation.	$0	Already required by: • 12 C.F.R. § 1024.38(b)(2)(v); • Nat'l Mtg. Settlement § IV.F.4.; • OCC Consent Order § IX(1)(b); • Freddie Mac Seller/Servicer Guide § 64.6(d)(5); • Fannie Mae Single Family 2012 Servicing Guide § 205.08.
§ 5(e)	Requires prudent servicing.	$0	Already required by: • Prudent Servicing Standard (PSA § 3.01) • Nat'l Mtg. Settlement, § IV.A.2; • Freddie Mac Seller/Servicer Guide § 65.1
§ 5(f)	Requires compliance attestations and audit.	$0	Already required by: • PSA §§ 3.16, 3.17 • 12 C.F.R. §§ 1024.38(a)-(b)(1)(iv).

1. <u>Subservicing of High Risk Loans, Settlement § 5(a)-(b)</u>

225. Settlement § 5(a)-(b) requires BofA to transfer certain "High Risk" loans to specialty subservicers. Settlement § 5(a)-(b). BONY's Litigation Expert Mr. Burnaman values this provision as between $98-$411 million because BofA must shoulder the costs of the subservicing. Burnaman Report at 7, 45. Mr. Burnaman's valuation is incorrect because BofA is under an existing legal duty to engage in prudent servicing, which would include use of specialty subservicers to the extent that it was incapable of adequately servicing the mortgages.

226. Mr. Burnaman correctly notes that there is no requirement in the PSAs for BofA as master servicer to use subservicers. Burnaman Report at 32. Mr. Burnaman neglects to mention, however, that BofA is under an existing legal duty to use subservicers. This existing legal duty stems from several sources: federal mortgage servicing regulations; the April 4, 2012 National Mortgage Settlement; the Office of the Comptroller of the Currency's March 29, 2011 Consent Order regarding BofA; and the PSA's prudent servicing standard (interpreted in reference to Fannie Mae/Freddie Mac servicing guidelines).

227. Regulation X under the Real Estate Settlement Procedures Act, 12 C.F.R. Pt. 1024, imposes federal regulatory requirements on mortgage servicers. Among these requirements are that servicers adopt policies and procedures that ensure that it "*Properly evaluat[es] loss mitigation applications," "provid[es] timely and accurate information," and "[f]acilitates oversight of, and compliance by, service providers*." 12 C.F.R. § 1024.38(a)-(b). In other words, federal regulations require competent servicing. To the extent that BofA cannot itself provide such servicing for High Risk loans, BofA would need to engage subservicers in order to comply with Regulation X. The cost of subservicing transfers is one that is normally borne by the Master Servicer and is a risk that a Master Servicer presumably prices into its servicing fee, as higher risk loan pools generally have higher servicing fees.

228. In February 9, 2012, BofA entered into a settlement agreement (the "National Mortgage Settlement") with the federal government and 49 states regarding its mortgage servicing practices. On April 4, 2012, the United States District Court for the District of Columbia entered an order approving the settlement. The National Mortgage Settlement requires BofA to "maintain adequate staffing and systems". NMS § IV.H.1-2. The National Mortgage Settlement further requires BofA to "oversee and manage" various subservicers and other third-party providers of servicing activities, including by (1) performing due diligence of third-party qualifications and expertise; (2) amending agreements with third-party providers to require them to comply with the attorney general settlement; (3) ensuring that all agreements provide for adequate and timely oversight; (4) providing accurate and complete information to all third-party providers; (5) conducting periodic reviews of third-party providers; and (6) implementing appropriate remedial measures when problems and complaints arise. NMS § II.A.

229. To the extent that BofA lacks the internal capacity to adequately service the High Risk loans, compliance with the National Mortgage Settlement would require the use of subservicers.

230. On March 29, 2011 BofA agreed to a Consent Order with the Office of Comptroller of the Currency regarding its mortgage servicing practices. *In the Matter of: Bank of America, N.A. Charlotte, N.C.*, AA-EC-11-12. The Consent Order requires BofA:

- "to develop and implement an adequate infrastructure to support existing and/or future Loss Mitigation and foreclosure activities";
- to have an "organizational structure, managerial resources, and staffing to support existing and/or future Loss Mitigation and foreclosure activities";
- to have "processes to ensure the qualifications of current management and supervisory personnel responsible for mortgage servicing and foreclosure processes and operations, including collections, Loss Mitigation and loan modification, are appropriate and a determination of whether any staffing changes or additions are needed;"
- to have "processes to ensure that staffing levels devoted to mortgage servicing and foreclosure processes and operations, including collections, Loss Mitigation, and loan modification, are adequate to meet current and expected workload demands;"
- to have "processes to ensure that workloads of mortgage servicing, foreclosure and Loss Mitigation, and loan modification personnel, … are reviewed and managed";
- To have "processes to ensure that the risk management, quality control, audit, and compliance programs have the requisite authority and status within the organization so that appropriate reviews of the Bank's mortgage servicing, Loss Mitigation, and foreclosure activities and operations may occur and deficiencies are identified and promptly remedied;"
- To have "appropriate training programs for personnel involved in mortgage servicing and foreclosure processes and operations, including collections, Loss Mitigation, and loan modification, to ensure compliance with applicable Legal Requirements and supervisory measures to ensure that staff are trained specifically in handling mortgage delinquencies, Loss Mitigation, and loan modifications;"

In the Matter of: Bank of America, N.A. Charlotte, N.C., AA-EC-11-12 (Mar. 29, 2011), §§ III(3), IV(1)(l)-(p), IX(1)(f).

231. Additionally, BofA is required to service the loans "in accordance with the terms of this Agreement and customary and usual servicing standards of practice of prudent mortgage loan servicers," PSA § 3.01. This includes "represent[ing] and protect[ing] the interests of the Trust Fund in the same manner as it protects its own interest in mortgage loans in its own portfolio". PSA § 3.01. The PSAs also explicitly contemplate the possibility of subservicing. PSA § 3.02 ("Subservicing; Enforcement of the Obligations of Subservicers"). Mr. Burnaman neglects to mention this in his report.

232. It is my opinion—based on my academic study of the mortgage servicing industry and government service—that prudent mortgage loan servicing would require the use of subservicers if a master servicer's own operations are inadequate to handle the task.

233. Prudent servicing standards are often measured against the requirements of Fannie Mae and Freddie Mac for their servicers. Freddie Mac, for instance, requires that servicers warrant that they "will maintain adequate facilities and experienced staff and will take all actions necessary to" properly service the mortgages. Freddie Mac Seller/Servicer Guide § 51.3.

234. BofA is under an existing legal duty (from several sources) to adequately and prudently service the mortgage loans in the Covered Trusts. Adequate or prudent servicing would include subservicing when necessary.

2. Benchmark Adjusted Recovery of Servicing Advances, Settlement § 5(c)

235. Section 5(c) of the Proposed Settlement requires BofA to benchmark and report its servicing performance on non-High-Risk loans. BofA's ability to recover servicing Advances is adjusted based on how its monthly performance compares with the benchmarks on a net Trust-by-Trust basis. Thus, if BofA underperforms the benchmark on some loans, those are offset against the loans for which it outperforms the benchmark to derive a net effect.

236. BofA is obligated under the PSAs to make servicing Advances. This means that if a mortgagor fails to make a required monthly payment, BofA, as Master Servicer, is obligated to advance the payment to the Trust. BofA is entitled to recover its Advances from recoveries first on the individual mortgage for which it advanced and then, if that is insufficient, from payments on other mortgages. PSA §§ 3.08(a)(ii)-(iii), (v), 4.01. No interest is paid on these servicing Advances. BofA is not required, however, to make advances that it deems nonrecoverable. PSA § 4.01, definition of "Advance".

237. If BofA's net benchmark performance for a Covered Trust in any given month is severely negative, then section 5(c) of the Proposed Settlement reduces BofA's right recover the servicing Advances it makes to the Trust that month. As servicing Advances are reimbursed prior to any payment to certificateholders, a reduction in servicing Advance reimbursement frees up more cash for the certificateholders at the bottom of the cashflow waterfall (but has no effect on other certificateholders).

238. Section 5(c) does not have any necessary value to the Covered Trusts. Its value is captured only by the junior-most in-the-money tranche of certificateholder. More importantly, its value is dependent upon both the mortgages' future performance and BofA's future servicing performance. To the extent the mortgages perform, there is no Advancing required, so section 5(c)'s value is dependent on the mortgages performing poorly.

239. Moreover, the value of section 5(c) depends on BofA's future performance on a cherry-picked group of loans relative to it's the servicing industry overall. If BofA's future servicing performance for *non-High Risk loans* reasonably matches *overall* industry performance, BofA's servicing advances will not be reduced. The exclusion of the High-Risk loans from the section 5(c) benchmarks reduces the likelihood that BofA will fail to perform up to industry benchmarks and thus reduces the potential value of section 5(c) to the Covered Trusts.

240. Furthermore, the reduction of servicing Advances under section 5(c) may well be entirely illusory, not merely contingent. PSA § 3.08(a)(v) permits BofA to recover "unreimbursed Servicing Advances" at a separate point in the cashflow waterfall than "Servicing Advances". If section 5(c) only limits recovery of Servicing Advances, BofA may still be able to recover the same advances as "unreimbursed Servicing Advances" under a separate cashflow waterfall provision that would still be paid before the certificateholders. It is unclear how section 5(c) will be interpreted by BofA and BONY in light of PSA § 3.08(a)(v), but there is a quite plausible interpretation that will effectively render section 5(c) meaningless, as BofA will be prohibited from recovering of Advances under one PSA provision and instead recover them under another PSA provision, still with priority over the certificateholders. Accordingly, no certain value can be assigned to section 5(c), and BONY's Litigation Expert Mr. Burnaman assigns no value to the provision in his report.

3. Consideration of Borrowers for Loan Modifications, Settlement § 5(d)

241. Section 5(d) of the Proposed Settlement requires that for all borrowers considered for loan modification programs, BofA must consider them for all modification programs available. Settlement § 5(d). It also requires that BofA make a decision regarding a loan modification within 60 days of receiving all requested documentation from the borrower. Settlement § 5(d).

242. Section 5(d) of the Proposed Settlement provides no material value to the Covered Trusts because BofA is already under an existing legal duty to make loan modification evaluations within 60 days *or less*. Regulation X under the Real Estate Settlement Procedures Act requires that a servicer "[p]roperly evaluate a borrower who submits an application for a loss mitigation option for all loss mitigation options for which the borrower may be eligible…" 12 C.F.R. § 1024.38(b)(2)(v). Regulation X also requires that

> If a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving a borrower's complete loss mitigation application, a servicer shall:
>
> (i) Evaluate the borrower for all loss mitigation options available to the borrower; and
>
> (ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage loan.

12 C.F.R. § 1024.41(c)(1). Given that Regulation X prohibits foreclosure procedures from commencing until a mortgage is at least 120 days delinquent, 12 C.F.R. § 1024.41(f), the borrower will always have the possibility of submitting a loss mitigation application prior to the foreclosure sale. This means section 5(d) of the Proposed Settlement merely requires BofA to comply with a less stringent rule than is required by federal law. Likewise, the National Mortgage Settlement requires that BofA "shall review the complete first lien loan modification application submitted by

borrower and shall determine the disposition of borrower's trial or preliminary loan modification request no later than 30 days after receipt of the complete loan modification application, absent compelling circumstances beyond Servicer's control." National Mortgage Settlement, § IV.F.4.

243. Similarly, the OCC Consent Order requires BofA to set "appropriate deadlines for responses to borrower communications and requests for consideration of Loss Mitigation, including deadlines for decision-making on Loss Mitigation Activities, with the metrics established not being less responsive than the timelines in the HAMP program". OCC Consent Order § IX(1)(b).

244. The HAMP program requires servicers to evaluate borrower eligibility within 30 days of receiving sufficient documentation. Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages, § 4.6. Thus, the OCC Consent Order already obligates BofA to evaluate borrowers for loan modifications within 30 days, rather than the 60 days required under section 5(d) of the Proposed Settlement.

245. The Prudent Servicing Standard also suggests that an evaluation of all possible modification options is required and must be done in a timely fashion. *See* Freddie Mac Seller/Servicer Guide § 64.6(d)(5); Fannie Mae Single Family 2012 Servicing Guide § 205.08.

246. In short, BofA is already under multiple existing legal duties to perform the evaluation required by section 5(d) of the Proposed Settlement Agreement. Accordingly, section 5(d) confers no new material value to the Covered Trusts.

4. Consideration of Prudent Servicing Factors, Settlement § 5(e)

247. Section 5(e) of the Proposed Settlement requires BofA to consider several factors in its loss mitigation decisions. These include maximization of the net present value of the mortgage, the likelihood of a mortgage re-performing, whether the borrower is acting strategically, alternatives to foreclosure, the requirements of the PSA, "such other factors as would be deemed prudent in its judgment" and "all requirements imposed by applicable Law." Proposed Settlement § 5(e).

248. All that section 5(e) does is spell out the Prudent Servicing Standard in more detail. BofA was already obligated to consider all of these factors under PSA § 3.01. It is also required to consider net present value under the National Mortgage Settlement, and the Freddie Mac Seller/Servicer Guide (as applied through the Prudent Servicing Standard). Nat'l Mtg. Settlement, § IV.A.2; Freddie Mac Seller/Servicer Guide § 65.1.

249. Section IV of the National Mortgage Settlement has extensive loss mitigation requirements, including that BofA: (a) send pre-foreclosure notices that will include a summary of loss mitigation options offered; (b) thoroughly evaluate lenders for all available loss mitigation options before foreclosure referral, thereby preventing "dual tracks" where a lender may be subject to foreclosure and loan modification; (c) consider the net present value of each mortgage (and specifically a requirement that banks offer a loan modification if NPV is positive); (d) possess certain loss mitigation obligations, including customer outreach and communications, time lines to respond

to loss mitigation applications, and e-portals for borrowers to keep informed of loan modification status; (e) establish an easily accessible and reliable single point of contact for each potentially-eligible first lien mortgage borrower so that the borrower has access to an employee of the servicer to obtain information; and (f) maintain adequate trained staff to handle the demand for loss mitigation relief. NMS § IV. Section 5(e) of the Settlement does not appear to add anything to this list.

250. Accordingly, section 5(e) of the Proposed Settlement provides no new material value to the Covered Trusts.[26]

5. Compliance Attestation, Settlement § 5(f)

251. Finally, section 5(f) of the Settlement requires BofA to make monthly compliance Settlement attestations to BONY and to undergo an annual compliance audit by an auditor of BofA's choice. Settlement § 5(f). This provision adds virtually nothing to BofA's existing legal duties and accordingly should be valued at zero.

252. BofA is already required to make annual compliance attestations under the PSAs. PSA § 3.16. It is also required to have an annual compliance audit.[27] PSA § 3.17. The benefit of going from annual to monthly self-attestation is virtually zero, particularly given that most failures to comply with the Settlement's servicing requirements are deemed not to be a material breach of the Settlement. Settlement § 5(j). Because of BofA's existing legal duties, the Covered Trusts receive no new material value from section 5(f) of the Proposed Settlement.

253. In all, the servicing provisions of the Proposed Settlement provide virtually no new material value to the Covered Trusts. Mr. Burnaman's estimate of the servicing provisions value is simply incorrect because he does not recognize that BofA is already legally obligated to perform the duties required by the Proposed Settlement.

K. The Proposed Settlement Improperly Passes Modification Costs and Losses to the Covered Trusts

254. One other servicing provision is worthy of note.[28] It is perhaps the most troubling

[26] Indeed, Settlement § 5(e) arguably reduces the Proposed Settlement by deeming compliance with § 5(e) sufficient to satisfy the Prudent Servicing Standard and thereby limiting BofA's liability.

[27] The recent experience with the "independent" foreclosure review mandated by the OCC Consent Order underscores the dubious value of the annual compliance audit. Under section 5(f)(i), BofA gets to select this auditor (subject to veto by BONY). This is exactly what BofA was permitted to do under the OCC Consent Order and it produced an unjustifiably favorable audit of BofA by Promontory Financial. US Gov't Accountability Office, *Foreclosure Review: Lessons Learned Could Enhance Continuing Reviews and Activities under Amended Consent Orders*, GAO-13-277, Mar. 2013. *See also* YVES SMITH, WHISTLEBLOWERS REVEAL HOW BANK OF AMERICA DEFRAUDED HOMEOWNERS AND PAID FOR A COVER UP—ALL WITH THE HELP OF "REGULATORS" (2013). Accordingly, there should be significant skepticism about the "independence" and hence value of such an outside audit. A more effective audit would involve an auditor selected by the certificateholders.

[28] Additionally, section 5(h) gives a commercially impracticable "out" to BofA to the extent that the "Law," which includes consent decrees and settlement agreements with the government changes. Thus, the Covered Trusts cannot be sure that they will in fact get the servicing "improvements" promised under the Proposed Settlement.

provision in the entire Proposed Settlement.

255. Section 5(i) places the costs of the servicing "improvements" on BofA, but contains an enormous carve-out for "any modification or loss mitigation strategy that may be required or permitted by Law" and "any Advance that is required or permitted by Law," and "any Realized Loss associated with the implementation of such modification or loss mitigation strategy." All of these costs "shall be borne by the relevant Covered Trust." Proposed Settlement § 5(i).

256. **On its face, this provision means that the Covered Trusts must bear the cost of BofA complying with its obligations under the Law—a term defined under the Settlement Agreement, to include the National Mortgage Settlement and BofA's various other settlements with the OCC and various state Attorneys General.** In other words, the Proposed Settlement makes the Covered Trusts liable for BofA's alleged wrongdoing as a mortgage servicer or as an originator *in violation of the PSAs.*

257. Thus not only do the servicing provisions in the Proposed Settlement fail to create value for the Covered Trusts, but they appear to shift enormous liability onto the Covered Trusts.

258. BofA is currently obligated to perform as much as $17.82 billion in loan modifications under various settlements:

- BofA's modification requirements under the National Mortgage Settlement are up to $7.63 billion. Nat'l Mortgage Settlement Consent Judgment ¶5.
- BofA's modification requirements under the amended OCC Consent Order are up to $1.76 billion. OCC Amended Consent Order § IV(1).
- Countrywide's 2008 settlement with state Attorneys General includes approximately $8.43 billion in loan modifications. *See* Press Release, Oct. 6, 2008, *Attorney General Brown Announces Landmark $8.68 Billion Settlement with Countrywide*, *available at* http://oag.ca.gov/news/press-releases/attorney-general-brown-announces-landmark-868-billion-settlement-countrywide.

259. While the Covered Trusts are not the entire universe of loans that BofA can modify, the Proposed Settlement actually incentivizes BofA to put as much of the modification cost on the Covered Trusts as possible. The potential cost to the Covered Trusts may exceed the $8.5 billion that BofA will contribute to the Covered Trusts under the Proposed Settlement. **Put succinctly, section 5(i) of the Proposed Settlement could potentially render the Proposed Settlement of *negative value* to the Covered Trusts.** BofA may be coming out *ahead* with the Proposed Settlement.

260. I have not seen any evidence that BONY made an attempt to value this servicing provision or even to investigate it.