Exhibit D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the matter of the application of	:	
	:	
THE BANK OF NEW YORK MELLON	:	
(as trustee under various pooling and	:	
servicing agreements and indenture trustee	:	
under various indentures), *et al.*,	:	
	:	
Petitioners,	:	
	:	No.1:11-cv-5988 (WHP)
v.	:	ECF Case
	:	
WALNUT PLACE LLC, *et al.*,	:	
	:	
Intervenor-Respondents.	:	

REPLY MEMORANDUM OF ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
IN FURTHER SUPPORT OF MOTION TO INTERVENE

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Proposed Intervenor Counter-Plaintiff

The New York Attorney General has moved to intervene in this proceeding brought under Article 77 of the New York C.P.L.R. because it involves matters of tremendous public importance—indeed, it "implicates . . . the vitality of the national securities markets." Oct. 19, 2011, Mem. & Order ("Remand Decision"), at 21. Residential mortgage-backed securities (RMBS) were at the center of the recent financial crisis. This proceeding, the first of its kind and a potential model for other actions, covers hundreds of New York trusts and more than $400 billion in RMBS. Bank of New York Mellon (BNYM) seeks judicial approval of a sweeping settlement that would release hundreds of billions of dollars of claims against Bank of America (BoA) and Countrywide Financial Corporation for fraud and other misconduct, thereby preventing numerous absent investors from being made whole on those claims. BNYM also seeks an order that would effectively preclude investors' claims against BNYM for breaching its duties as a New York trustee.

The Attorney General intervenes, first and foremost, under his authority and responsibility as *parens patriae* to protect the integrity of the securities marketplace, as well as the interests of absent investors. BNYM cannot and does not dispute that this *parens patriae* authority exists. Rather, in opposing intervention, BNYM asserts that "any quasi-sovereign interest that the NYAG may have in protecting financial markets is not implicated by . . . a suit seeking nothing more than pecuniary relief on behalf of private investors." (Opp. at 7).

But BNYM's opposition mischaracterizes this proceeding. First, this case is, at least in part, an equitable proceeding involving court supervision of BNYM in its capacity as trustee of New York RMBS trusts. Second, the underlying settlement itself is not limited to monetary payments. The settlement also requires BoA to take steps—albeit grossly inadequate ones—to

modify loans and make servicing changes prospectively. The inadequacy of these forward-looking provisions is a key reason for the Attorney General's objection to the settlement.

Independently, the Attorney General intervenes because a decree in this proceeding may affect claims that he indisputably has standing to bring under New York's Martin Act, General Business Law § 352, *et seq.*, Executive Law § 63(12), and the common law. This "[p]roceeding will necessarily test BNYM's compliance with New York law," including its "mandatory duty to avoid conflicts of interest." Remand Decision at 17, 19. This duty to avoid conflicts—a duty whose very existence BNYM "has only just recognized," *id.* at 17—will also undergird the Attorney General's claims against BNYM. And BNYM admits (Opp. at 16) that it believes this proceeding would preclude the Attorney General from seeking restitution under the Martin Act and § 63(12). The Attorney General should be permitted to intervene to protect these claims.

These grounds for intervention are entirely independent of the Attorney General's proposed counterclaims. But in any event, BNYM's complaints about the counterclaims are overblown. The counterclaims are not an effort to "hijack" this proceeding, as BNYM contends (Opp. at 7). Rather, the counterclaims rely on questions of law and fact that overlap with the matters that BNYM seeks to present. And the Court has ample tools to manage this case, including any counterclaims, to avoid undue delay.

I. The Attorney General Has Standing to Intervene As Parens Patriae.

As BNYM concedes (Opp. at 4), the Attorney General has *parens patriae* standing to assert a "a quasi-sovereign interest in protecting the integrity of the marketplace" and in ensuring that financial markets operate honestly and transparently. *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 69 n.4 (2008) (citing *New York ex rel. Abrams v. Gen. Motors*, 547 F. Supp. 703, 705 (S.D.N.Y. 1982) ("The State's goal of securing an honest marketplace in which to transact

business is a quasi-sovereign interest"), and *People v. H&R Block, Inc.*, 16 Misc. 3d 1124(A), 2007 N.Y. Slip Op. 51562(U), at *8 (Sup. Ct. N.Y. Co. 2007)); *People v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378, 379 (1st Dep't 2008); *People ex rel. Cuomo v. Merkin*, 26 Misc.3d 1237(A), 2010 N.Y. Slip Op. 50430(U), at *9 (Sup. Ct. N.Y. Co. 2010). More specifically, the Attorney General has standing to bring actions that "take a step toward eliminating fraudulent and deceptive business practices." *Gen. Motors*, 547 F. Supp. at 705. And such standing exists even if some of the relief sought will accrue to an identifiable group of private parties. *Id.* at 707; *see also H&R Block, Inc.*, 2007 N.Y. Slip Op. 51562(U), at *8 (court will not "ignore the primary purpose of the fiduciary duty claim" and "characterize it as one brought solely for the benefit of a few private parties"); *Merkin*, 2010 N.Y. Slip Op. 50430(U), at *10 (similar).[1]

BNYM's argument that this action does not implicate the Attorney General's quasi-sovereign interest because it "seek[s] nothing more than pecuniary relief on behalf of private investors" (Opp. at 7), profoundly mischaracterizes the nature of this proceeding.

A. BNYM Seeks Substantial Equitable Relief in This Proceeding.

BNYM has described this proceeding in drastically different ways when expedient. In its opposition to the Attorney General's intervention motion, BNYM asserted that this case involves "nothing more than pecuniary relief." (Opp. at 7). By contrast, in support of remand from this Court, BNYM argued that this case involved *no* claims for monetary relief. (BNYM Remand Mem. [Dkt. # 55] at 2, 7.) As this Court has ruled, neither characterization is correct. This

[1] Several statutes specifically authorize the Attorney General to pursue suits based on injures private parties. *E.g.*, N.Y. Exec. Law § 63(12) (authorizing suits based on "persistent fraud or illegality in the . . . transaction of business"); N.Y. Exec. Law § 63-c (authorizing suits to recover property held by certain entities despite such entities having own capacity to sue); 15 U.S.C. § 15c(a)(1) (authorizing States' attorneys general to "secure monetary relief . . . for injury sustained by natural persons [residing in such state] to their property" for antitrust injuries).

proceeding sounds largely in equity and also involves significant monetary relief: BNYM asks the court to exercise its equitable jurisdiction to bless BNYM's decision to enter into the Settlement Agreement, and the settlement in turn requires monetary payments, as well as prospective servicing improvements. (BNYM Remand Mem. at 2; *see also* Proposed Order and Judgment ¶¶ (e), (p)-(q).)

It is well established that the Attorney General has *parens patriae* standing to prevent or rectify breaches of fiduciary duty. *See H&R Block, Inc.*, 2007 N.Y. Slip Op. 51562(U), at *7-8; *Gen. Motors Corp.*, 547 F. Supp. at 706 n.5; *Merkin*, 2010 N.Y. Slip Op. 50430(U), at *9-10. Accordingly, the Attorney General has standing in this proceeding to ensure (among other things) that BNYM's requested order approving the settlement is consistent with "BNYM['s] mandatory duty to avoid conflicts of interest." Remand Decision at 17.

In urging the court to ignore the equitable nature of this proceeding (*see* Opp. at 4-5, 7), BNYM relies on a handful of cases that reject *parens patriae* standing when the State "*only* seeks to recover money damages for injuries suffered by individuals" (*id.* at 7 (quoting *People ex rel Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) (emphasis added)). But this action does not fit that description: BNYM asks the court, sitting in equity, to approve its conduct as trustee and enter an order asserting continuing jurisdiction over "all matters relating to the Settlement . . . , including the administration, interpretation, effectuation, or enforcement of the Settlement Agreement" (Proposed Order ¶ u).

Moreover, in addition to monetary payments, a "principal component[]" of the underlying proposed settlement involves prospective changes in practices akin to an injunction. (BNYM Pet. ¶ 37.) In particular, the settlement agreement requires:

- BAC Home Loans Servicing LP ("BAC HLS"), a BoA subsidiary, to "implement various servicing improvements and remedies" and "benchmark its servicing performance against specific industry standards" (*id.* ¶¶ 42-43);
- BAC HLS and other servicers to apply loss-mitigation strategies, including potential loan modifications (*id.* ¶ 44); and,
- "procedures to cure certain document deficiencies in the loan files" (*id.* ¶ 46).

Although the Attorney General believes the proposed servicing improvements are deeply inadequate, it is beyond dispute that they are prospective in nature and ostensibly meant to improve the transparency and reliability of these securities and settle the market for mortgage-backed bonds. (*Id.* ¶ 93 (describing purpose of provisions).)

B. The Effect of this Proceeding Extends Far Beyond the Private Parties Already Present Before the Court.

BNYM is also incorrect in asserting that this proceeding affects only "a discrete group of sophisticated private investors" (Opp. at 4). The proceeding implicates the State's quasi-sovereign interest because it will modify hundreds of billions of dollars in RMBS. That dramatic remedy directly "implicates . . . the vitality of the national securities markets" (Remand Decision at 21), and has effects that go beyond the parties to the settlement agreement and those investors already participating in this litigation.

(1) The relief sought in this proceeding would extinguish the possible claims of thousands of individual and institutional investors against BoA and Countrywide, whether or not those investors participated in or even had notice of this proceeding. (BNYM Pet. Mem. at 18-21 (acknowledging that notice system may not reach all investors).)[2]

[2] BNYM contends that the diversity of participants in this proceeding "ensures that all viewpoints will be represented." (BNYM Opp. at 11.) But this Court cannot assume that certificateholders with potentially divergent interests are adequately represented by the investors who received notice and were able to intervene on BNYM's unilateral schedule.

(2) The prospective servicing modifications implemented by the settlement will affect "hundreds of thousands of loans" and homeowners. (BNYM Pet. ¶ 10.)

(3) The abuses that the proposed settlement is intended to address—namely, improper transfer and documentation of the mortgage loans underlying residential mortgage-backed securities—have had and will likely continue to have wide-ranging and destabilizing effects on the real estate and financial markets. *See generally* Congressional Oversight Panel, *November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation* 5 (Nov. 16, 2010).

(4) Finally, there is a substantial likelihood that any court ruling approving the settlement will become a model for future settlements by BNYM and other trustees to resolve similar abuses involving RMBS. This outcome is particularly likely if this Court makes the broad findings of reasonableness that BNYM requests—including findings that the pennies-on-the-dollar settlement here is fair (BNYM Pet. ¶¶ 63-67); that the vague and undefined servicing improvements are adequate (BNYM Pet. ¶¶ 93-96); and that the settlement is a proper exercise of the trustee's discretion as to each of the 530 settling trusts (BNYM Pet. ¶¶ 58-62.)

The mere fact that this proceeding arises from private transactions does not diminish the State's quasi-sovereign interest. Private transactions underlie any *parens patriae* action brought to protect the integrity of the marketplace. *E.g.*, *Gen. Motors Corp.*, 547 F. Supp. at 704-05 (State acts as *parens patriae* when seeking relief for prospective purchasers). But the State indisputably has the authority to address pervasive or systemic market misconduct. *Cf.* Exec. Law § 63(12) (authorizing suits by the Attorney General in cases of "repeated fraudulent or illegal acts"). Indeed, courts have regularly found *parens patriae* standing to pursue private misconduct that is narrower and has fewer systemic effects than the abuses at issue in this

proceeding. *See, e.g.*, *Liberty Mut. Ins.*, 52 A.D.3d 378 (bid-rigging in casualty insurance sales); *H&R Block*, 2007 N.Y. Slip Op. 51562(U) (fraud by tax preparers in marketing IRA products); *Merkin*, 2010 N.Y. Slip Op. 50430(U) (deception by investment adviser in managing portfolios).

II. Independently, Intervention Should Be Granted Because the Decree May Impair Claims of the Attorney General Against BNYM, BoA, and Countrywide.

"It is axiomatic that the potentially binding nature of the judgment on the proposed intervenor is the most heavily weighted factor in determining whether to permit intervention." *Yuppie Puppy Pet Prods., Inc. v. Street Smart Realty, LLC*, 77 A.D.3d 197, 202 (1st Dep't 2010); *see Auerbach v. Bennett*, 64 A.D.2d 98, 105 (2d Dep't 1978) (allowing intervention where adverse decision would "fatally cripple . . . suits pending for the same relief").

Here, BNYM itself asserts that the decree sought here *will* result in the "loss of . . . one remedy"—namely, restitution—that is traditionally available to the Attorney General in claims under the Martin Act and Executive Law § 63(12). (Opp. at 16 (arguing that claims for restitution would be barred under *Spitzer v. Applied Card*, 11 N.Y. 3d 105, 125 (2008).) And BNYM does not even argue that other parties will adequately represent the Attorney General's interests. (*See* Opp. at 16.) The risk that the settlement will preclude the Attorney General from seeking restitution is alone sufficient to support intervention. BNYM "cannot be permitted to have it both ways, arguing on the one hand that [the Attorney General] cannot be permitted to intervene in this action . . . and then arguing on the other that the judgment" will eliminate his ability to seek restitution. *Id.* .

This proceeding also could impair additional claims by the Attorney General against BNYM. The Attorney General has alleged that BNYM failed to serve as a proper trustee and is liable under New York common law, Executive Law § 63(12), and the Martin Act (NYAG Pet. ¶¶ 36-43; *see also* NYAG Pet. ¶¶ 23-34 (alleging that BNYM systematically ignored its

obligations as trustee by failing to ensure the proper transfer of loans from Countrywide to the trusts, failing to review the mortgage loan documentation delivered by Countrywide, and failing to notify investors of any documentation defects it discovered). Indeed, BNYM admits that the Attorney General's fiduciary-duty claim—that is, whether BNYM complied with New York law, Remand Decision at 19—is "duplicative" of the very question to be resolved in this proceeding (Opp. at 1). This case may further prejudice the Attorney General's claims against BNYM by implying that its potential defenses to liability have any merit. BNYM has justified the pennies-on-the-dollar settlement proposed here by describing several potential defenses against liability that Countrywide and BoA could raise based on provisions of the PSA. (*see, e.g.*, Petition ¶ 69). But BNYM may very well assert the same defenses, based on the same provisions of the PSA, against the Attorney General's claims. Thus, a finding that those defenses warrant the deeply discounted settlement proposed here might prejudice claims against BNYM.

Likewise, this proceeding may affect the Attorney General's claims against Countrywide and BoA (*see* NYAG Memo at 9). The proposed settlement releases Countrywide and BoA from any claims "arising out of or relating to (i) the origination, sale, or delivery of Mortgage Loans to the Covered Trusts . . . (ii) the documentation of the Mortgage Loans . . . and (iii) the servicing of the Mortgage Loans." Settlement Agreement § 9(a). The release purports to bind not just the parties to the settlement agreement but also "any Persons claiming by, through, or on behalf of" any of those parties. *Id.* And there is no assurance that Countrywide and BoA agree with BNYM's assertion that the proposed settlement does not release the Attorney General's claims against Countrywide and BoA. (Opp. at 15 n.5.)

III. The Proposed Counterclaims Are Germane and Will Not Cause Undue Delay.

The above arguments, and not the proposed counterclaims, are the basis for the Attorney General's intervention. But contrary to BNYM's assertions, the counterclaims are related to this proceeding and will not hamper its timely resolution.

First, the proposed counterclaims relate to the matters raised by BNYM's petition. The proposed counterclaims highlight BNYM's self-serving negotiation of the proposed settlement and demonstrate that BNYM faces potentially significant liability for its own misconduct in overseeing the covered trusts. Because the proposed settlement insulates BNYM from liability under a broad indemnification provision, BNYM has a direct financial interest in the approval of the settlement that conflicts with its duty to investors.[3]

BNYM contends that the proposed settlement does not extend BNYM's indemnification beyond what the PSAs already provide (Opp. at 20-21). But the parties took pains to negotiate a carefully worded "side letter" addressing indemnification that would have been pointless if it were merely redundant of the PSAs. Indeed, the side letter indemnifies BNYM against liability arising from its negotiation or consummation of the settlement agreement, activities not expressly covered by the PSAs' indemnification provisions. (*Compare* Settlement Agreement Exh. C at 2, *with* PSA § 8.05.) And the side letter increased the *value* of the existing indemnification by having BoA assume the indemnification obligations of the much smaller (and now defunct) Countrywide Home Loans Servicing (*see* Settlement Agreement Exh. C, Exh. 2).[4]

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[3] Because the Attorney General's claims bear on issues that BNYM itself proposes to resolve in this proceeding, *Matter of Pier v. Bd. of Assessment Review of Town of Niskayuna*, 158 Misc.2d 732 (N.Y. Sup. Ct. 1993), is inapposite. *See id.* at 735.

[4] PSA § 8.02(vi) does not independently entitle BNYM to indemnification by BoA, as BNYM claims (Opp. at 21). That provision merely clarifies that BNYM may decline to act if it will not be reimbursed or indemnified.

Second, the proposed counterclaims are fully compatible with the timely resolution of this proceeding. Even if the Court permits BNYM to pursue the "arcane summary procedure" of Article 77 in federal court, Remand Decision at 1, the mere fact that special proceedings are "intended to be expeditious" does not automatically preclude counterclaims, as BNYM suggests (Opp. at 17). *See, e.g.*, *Posner v. S. Paul Posner 1976 Irrevocable Family Trust*, 260 A.D.2d 268, 269 (1st Dep't 1999) (permitting intervenor's counterclaim against trustee); *Matter of Greater N.Y. Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716, 720 (1998) (recognizing that an intervenor in special proceeding "becomes a party for all purposes," including the ability to assert counterclaims). Moreover, this Court has many tools available to manage complex litigation involving multiple parties. *See* Fed. R. Civ. P. 42(b) ("[T]he court may order a separate trial of one or more . . . counterclaims"); *cf.* C.P.L.R. 407 (similar).

BNYM's speculation that the Attorney General's counterclaims would cause delay ignores both the extraordinary significance of the proposed settlement and the already-sprawling nature of this proceeding. This proceeding will "determine the acceptability of a global settlement impacting 530 separate legal entities," Remand Decision at 11, involving thousands of investors and hundreds of billions of dollars. Moreover, dozens of investors, all of whom are parties to this proceeding, have already filed objections to the settlement. As BoA itself acknowledged in announcing the settlement, the parties have long expected that this approval process "could take a substantial period of time."[5] Against this backdrop, the Attorney General's counterclaims will hardly cause undue delay.

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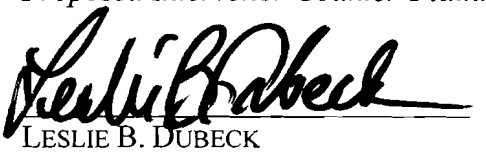
[5] Bank of America, Press Release (June 29, 2011), *available at* http://mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1580644.

Dated: New York, NY
October 26, 2011

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York

Proposed Intervenor Counter-Plaintiff

By: 
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