SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

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

Index No. 651786-2011

Kapnick, J.

THE INSTITUTIONAL INVESTORS' RESPONSE TO THE NEW YORK ATTORNEY GENERAL'S MOTION TO INTERVENE

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The Amended Petition ("Pet.") filed by the New York Attorney General (NYAG) does not establish his standing to intervene in this proceeding. This is a mandatory threshold the NYAG must meet. *People v. Grasso*, 54 A.D.3d 180, 197 (1st Dep't 2008). To establish standing, the NYAG must demonstrate it has "a sufficiently cognizable stake in the outcome so as to cast [] the dispute in a form traditionally capable of judicial resolution." *Id.* Here, the NYAG pleads none of the customary indicia of standing: it is neither a holder of Certificates issued by the Covered Trusts nor a party to, or third party beneficiary of, any of the contracts at issue in this proceeding. It therefore could not—of its own accord—file suit to enforce any of the Pooling and Servicing Agreements (PSAs) at issue in this proceeding. *See, e.g.*, *East West Bank v. 32 Tower, LLC*, No. 30798-2011, 2011 WL 5515436, at *3 (Sup. Ct. N.Y. Cty. Nov. 9, 2011) ("In order to have standing to challenge or enforce a contract, an entity must be a party thereto or a third-party beneficiary thereof . . . .") (citation omitted); *Hoffman v. Unterberg*, 9 A.D.3d 386, 388 (2d Dep't 2004) ("The plaintiff cannot sue to recover damages for breach of contract because he is not a party to [the contract.]").

The sole ground of standing alleged by the NYAG is his *parens patriae* authority "to safeguard the welfare of New Yorkers and the integrity of the securities marketplace." Pet. at ¶3. The NYAG argues this "parental" role gives him the right to intervene in this private contract dispute to "ensure that a fair and comprehensive resolution of all claims is reached and that no proposed settlement is approved absent adequate participation by all injured parties." Pet. at ¶5. *Parens patriae*, however, does not permit the Attorney General to intervene as the ultimate arbiter of the "fairness" of a private settlement the Trustee has achieved in a private contract dispute involving the Covered Trusts. "Freedom of contract is the general rule . . ." in private contract disputes. *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 288 (1932); *accord*

In re Brooklyn Bridge Southwest Urban Renewal Project, 46 Misc.2d 558, 562, 260 N.Y.S.2d 229 (Sup. Ct. N.Y. Cty. 1965); *Billie Knitwear v. New York Life Ins. Co.*, 174 Misc. 978, 979 (Sup. Ct. N.Y. Cty. 1940) *aff'd.* 288 N.Y.682, 43 N.E.2d 80 (N.Y. 1942). The PSAs are private contracts whose legitimacy is not at issue in this proceeding. The PSAs are also clear: whether a settlement is in the best interests of certificateholders is a decision to be made by the Trustee, in the exercise of its discretion, not the NYAG. PSA §§8.01, 8.02 and 10.08. Article 77 is also equally clear: whether the Trustee acted within the scope of the discretion afforded to it under the PSAs is a decision for this Court, upon application by the Trustee. Only parties with standing are entitled to be heard on that issue. CPLR § 7701. Because he lacks standing, and because the public policy goals the NYAG admits he seeks to achieve through his intervention far exceed the scope of the *parens patriae* doctrine and this Article 77 proceeding, the NYAG's Petition in Intervention should be denied.

I. The Attorney General Lacks Standing.

New York law does not permit the Attorney General to intervene in this private contract action in an effort to create his preferred public policy outcome. More than eight months ago, BNY Mellon challenged the NYAG to identify "any case in which the NYAG has intervened in an Article 77 proceeding or to block a private, non-class settlement of any kind." Doc. # 135 (filed Aug. 16, 2011) ("BNY Mellon Opp.") at 10. The NYAG did not respond then; it still remains mute on this critical point.

A. No Case or Statute Authorizes the NYAG to Intervene in this Private Contract Dispute.

The NYAG remains unable to cite *any* statute enacted by the New York Legislature that authorizes him to intervene in this private contract dispute. Article 77 contains no such authorization. The NYAG's citation of the Martin Act is also unavailing. Pet. at ¶10. The

Martin Act case the NYAG cites—*State v. 7040 Colonial Road Associates Co.*, 176 Misc.2d 367, 374 (N.Y. Sup. Ct. 1998)—simply recognizes the NYAG's authority "to seek redress on behalf of individual investors who have been the victims of Martin Act violations." *Id.* But the NYAG has not intervened here to assert *any* affirmative claims for relief on behalf of individual investors:[1] instead, the NYAG has intervened to achieve what it concedes are its own, public policy goals, so the Martin Act affords him no standing. Executive Law § 63, formerly cited by the NYAG to support its cross-claims, is equally irrelevant because nothing in it confers standing on the NYAG to intervene in this private contract dispute.

The NYAG's reliance on his common law authority "to safeguard the welfare of New Yorkers and the integrity of the securities marketplace," Pet. at ¶ 2, and "protect[] the economic health and well-being of all investors who reside or transact business in the State of New York," Pet. at ¶ 10, is a shibboleth that does not establish standing. As the Appellate Division held in *Grasso*, "It would not matter at all, for example, if permitting the Attorney General to prosecute the non-statutory causes of action were 'vital to the public confidence in the NYSE and the investing community.' It would not matter because although such a grave and urgent state of affairs would warrant an appeal by the Attorney General to the Legislature to change the law, it would not be a warrant for the Attorney General or any member of the executive branch to displace the policy choices made by the Legislature." *People v. Grasso*, 42 A.D. 3d 126, 144, 836 N.Y.S.2d 40 (1st Dep't 2007).

The NYAG's citation to a footnote in the later opinion of the New York Court of Appeals, *see* Pet. ¶ 10, *citing People ex. rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 69 n.4 (2008), does not change the result. The Court of Appeals merely observed what is true: "In varying contexts,

[1] Such individual damage claims would far exceed the scope of the Article 77 proceeding now pending before the Court and would, if asserted, constitute an independent basis on which to deny intervention.

courts have held that a state has a quasi-sovereign interest in protecting the integrity of the semarketplace." *Id.* (emphasis added). The Court of Appeals nonetheless *affirmed* the decision of the Appellate Division, which held that the NYAG's claim of a "quasi-sovereign interest in protecting the securities markets" was *insufficient* to afford it standing to intervene in a private contract dispute. *Id.*, 11 N.Y.3d at 72. The NYAG is thus unable to cite *any* policy choice by the Legislature, or any case, that would authorize it to intervene in this private contract dispute. Since no statute authorizes its intervention, and since the NYAG is neither a party to the PSAs or a Certificateholder, it lacks standing to intervene and its Petition should be dismissed.

B. *Parens Patriae* Likewise Does Not Afford the NYAG Standing or the Right to Intervene to Impede the Orderly Process of a Summary Article 77 Proceeding.

The NYAG's resort to the *parens patriae* doctrine is questionable and does not cure the NYAG's defective standing. The *parens patriae* doctrine does not contemplate—much less authorize—the NYAG's attempt to shape public policy by interfering in lawful, private contracts.[2] Though the NYAG is entitled to make its own enforcement decisions, his determination that he wishes to intervene does not meet his burden to demonstrate his standing to intervene under the *parens patriae* doctrine.

We begin with what is obvious: the NYAG's claim that he has intervened to "ensure the integrity of the securities marketplace," Pet. Int. at ¶3, ignores the fact that the marketplace he seeks to protect is *overwhelmingly in favor of this settlement*. The vast majority of Certificateholders have not objected to this settlement; as a matter of law, this is a vote in favor of its approval. Twenty-two of the world's largest financial institutions worked for more than a year to try to achieve this resolution. They and BNY Mellon achieved this settlement without

[2] BNY Mellon's earlier brief set out the many reasons *why* this doctrine does not confer standing on the NYAG. The Institutional Investors adopt those arguments and will not repeat them.

help or assistance from the NYAG's office. They did so in a manner that complied strictly with the requirements of the governing PSAs. If "market integrity" means anything, surely it means the contractual expectations of the parties to the PSAs should be respected, particularly when investors comply with, and the Trustee acts pursuant to, the PSAs to obtain the largest private litigation settlement in history.

This Court must also consider whether there is any need for, or likely benefit to Certificateholders from, the NYAG's intervention. When approved, the benefits of the settlement will flow *solely* to the investors in the Covered Trusts, so *parens patriae* intervention is not appropriate.[3] Separately, the Court can take judicial notice of the fact that more than sixty large investors have appeared in this proceeding to represent their interests. The State cannot merely "litigate as a volunteer the personal claims of its competent citizens," *Abrams*, 817 F.2d at 1017 *citing Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976).[4] Here, there are serious reasons to question whether the NYAG's intervention will protect investors or whether, instead, it will jeopardize their PSAs, thwart the efficient progress of this case, and cause them to lose

[3] "It is not sufficient for the People to show that wrong has been done to someone; the wrong must appear to be done ***to the People*** in order to support an action by the People for its redress." *People v. Lowe*, 117 N.Y. 175, 195 (1989) *accord People by Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987) (where money paid as a result of the action "will not compensate the state for any harm done to its quasi-sovereign interests . . . the state as *parens patriae* lacks standing to prosecute such a suit.").

[4] Even if those private citizens were unable to represent themselves (they are not), intervention for the purpose of litigating their private contract rights is not authorized under the *parens patriae* doctrine. *Grasso*, 54 A.D.3d at 198 ("The *parens patriae* standing of the Attorney General … does not permit him 'to represent the interests of particular citizens who, for whatever reason, cannot represent themselves.'") *quoting Snapp*, 458 U.S. at 600. More to the point is this: as a matter of law, Certificateholders who have chosen not to object are deemed to support the settlement. The NYAG cannot claim, therefore, that his *opposition* is necessary to represent the interests of those who, in fact, *support* the settlement.

millions (if not billions) of dollars in settlement value. Since the NYAG plainly lacks standing, the Court can and should prevent all of this by denying the NYAG's Petition in Intervention.

We reiterate: The PSAs are private contracts. The securities markets are critically dependent upon the enforcement—and enforceability—of private contracts. If Certificateholders cannot obtain the benefits of their contracts when they are enforced by Trustees like BNY Mellon, there will be no functioning securities market for the NYAG to protect. *Compare In re Baldwin-United Corp.*, 607 F. Supp. 1312, 1330 (S.D.N.Y. 1985) ("While the Court has been interested in receiving comment from the various state officials . . . the important interests are those held by the plaintiff class members . . . . The state officials should not be able to frustrate the choices of their residents, when it is the individual policyholder who stands to gain or lose relief.").

The fact that the NYAG has intervened belatedly to try to achieve "borrower relief," Pet. ¶20, also creates—rather than resolves—concerns about the "integrity of the market." The "borrower relief" the NYAG seeks is not authorized by the PSAs. *See* Part II, *infra*. Instead, the PSAs require that the Trusts be managed for the benefit of certificateholders. The NYAG's intervention will therefore impose considerable delay while he pursues relief that is unobtainable under the PSAs. This will serve only to *deprive* the marketplace of the substantial benefits that would be achieved by the Settlement's prompt approval. This is not an insignificant matter: Certificateholders have $8.5 billion, plus valuable servicing improvements and document cures, at stake. Every day this settlement is not approved is deeply prejudicial to innocent Certificateholders and *costs* them more than $1 million. These factors weigh very heavily

against granting intervention to the NYAG, who acknowledges he has intervened to achieve a purpose *extraneous* to these private contracts.[5]

Granting the NYAG intervention is problematic for another reason: he previously sought to interject in these proceedings a wholly independent claim against BNY Mellon. If the NYAG is made a party to these proceedings, he might well try to assert that claim again. This would result in further delay and distraction from the core issues in this otherwise summary Article 77 Proceeding. The NYAG's claim against BNY Mellon was also unhelpful to securing the integrity of the securities markets. Alone among Trustees, BNY Mellon stepped forward to assist Certificateholders by obtaining an enormously beneficial, market-reforming settlement. The NYAG responded by filing suit *against* BNY Mellon,[6] an action it later dropped (but that it reserves the right to re-file).[7] The NYAG's action against BNY Mellon created the misimpression among Trustees that the biggest risk they face is in doing the right thing, i.e. doing *something* to help investors, rather than continuing to do virtually nothing. This impression has been compounded by the fact that the NYAG has taken *no* action against any

[5] *See Osman v. Sternberg*, 168 A.D.2d 490 (2d Dep't 1990) ("Generally, intervention … should be restricted where the outcome of the matter to be determined will be needlessly delayed, the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute."); *accord Quality Aggregates v. Century Concrete Corp.*, 213 A.D.2d 919, 920 (3d Dep't 1995) (same).

[6] *Compare In re Baldwin-United*, 607 F. Supp. at 1328 ("Although the attorneys general now declare they are charged with enforcement of state consumer protection laws . . . they apparently took no action . . . until . . . they filed objections to the proposed settlements.").

[7] Contrary to the NYAG's suggestion, nothing in the Settlement Agreement or its approval will in any way bar a subsequent claim against BNY Mellon. Precisely because the NYAG is *not* a proper party to this action, if he is not permitted to intervene, collateral estoppel and res judicata could not be invoked by BNY Mellon in any subsequent proceeding. The Settlement Agreement also does *not* release any claims against BNY Mellon. Finally, the fact that the NYAG has not committed to the Court that it will not seek to re-urge those claims *in this proceeding* if it is permitted to intervene is an *independent* reason to deny intervention: the assertion of these extraneous claims would impose additional, unwarranted delay that would injure the Covered Trusts and their Certificateholders.

other Trustee, even though collectively, the other Trustees control billions of dollars of RMBS repurchase and servicing claims and have done little or nothing to enforce them.

Finally, the NYAG's insistence that he has intervened to seek "disclosure of crucial information," Pet. at ¶15, should be considered in the fuller context of the NYAG's actions in the National Mortgage Settlement. Though that settlement (depending upon how it is implemented) creates the risk of injury to investors in private RMBS Trusts, it was negotiated without the apparent involvement of any them. The NYAG then chose to effectuate that settlement through a *consent* judgment proceeding in Washington, D.C. The final consent judgment was entered by a federal court *without* a hearing—and *without any notice* to affected certificateholders.

In these circumstances, the *parens patriae* does not authorize—much less require—the Court to grant leave to intervene to a party that seeks to fundamentally remake both private contracts and a pending settlement between private parties. The NYAG's Petition should be denied.

II. *Parens Patriae* Does Not Confer Standing on the NYAG to Mandate Particular Servicing Outcomes for Private Investors in the Settlement of a Private Contract Dispute.

The PSAs at issue here govern private investment trusts, created by private parties, to conduct a lawful economic activity. They are highly-detailed contracts with key terms that protect the interests of Trust Certificateholders. *See generally* Institutional Investors' Brief in Opposition to Motion to Convert Proceeding, Doc. No. 250 (filed April 13, 2012), at 20-24. One of the most critical of these is the PSAs' mandate that mortgage servicers must service the mortgage loans "for the benefit of Certificateholders." PSA §3.01. Though the Institutional Investors have supported prudent loan modifications for deserving borrowers,[8] all such

[8] Because appropriate loan modifications *may* (in appropriate circumstances) be in the best interests of Certificateholders, the Settlement Agreement creates a subservicing queue, loss mitigation criteria, and a

modifications must be considered *solely* from the perspective of the Certificateholders' best interests. PSA §3.01. The NYAG does not contend, nor could he, that there is anything unlawful about the PSAs' requirement that the Trusts must be managed in the best interests of their Certificateholders. That is what the Trusts promised to do. It is what the contracts require them to do. Those contracts must be enforced as written.

The NYAG, however, has informed the Court that at least one purpose of its intervention is to seek to impose *his* view of prudent servicing on all Certificateholders in the Trusts. The NYAG does not suggest there is anything unlawful about the existing servicing provisions in the PSAs or those in the Settlement Agreement. Pet. at *passim*. He has intervened, however, to urge the Court to impose a *different* (and undefined) set of servicing and modification standards. Pet. at ¶¶ 19-20. These complaints are beyond the jurisdiction of this Court and cannot form the basis of an intervention.

The NYAG complains, for example, that the *Settlement Agreement* makes loan modifications wholly optional. Pet. at ¶ 19. This requirement was not imposed by the Settlement Agreement; it is mandated by the PSAs. Under the PSAs, *all* servicing decisions are subject to the Master Servicer's prudent, discretionary judgments. PSA §3.01. The Master Servicer is required to make "reasonable efforts in accordance with the customary and usual standards of practice of prudent mortgage servicers to collect *all payments called for* under the terms and provisions of the Mortgage Loans." *Id.* at § 3.05(a) (emphasis added). While the Master Servicer "may in its discretion," provide certain forms of loan modifications such as waivers of late payment charges or extensions of due dates, *id.*, nothing in the PSAs *mandates* that the Master Servicer pursue any particular loan modification strategy. Nothing in the *parens*

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subservicer compensation structure to facilitate appropriate loan modifications for deserving borrowers. *See* Settlement Agreement ¶5. These provisions create an economic incentive for highly competent and skilled servicers to provide modifications that *work*, and that benefit Certificateholders. *Id.*

patriae doctrine permits the NYAG to intervene to demand modifications to these material provisions of a lawful, private contract.

Also beyond the jurisdiction of this Court is the NYAG's complaint that the Settlement Agreement is deficient because it does not "afford sufficient borrower relief." Pet. at ¶¶ 19 and 20. "Borrower relief" is emphatically *not* the servicing standard under the PSAs. The servicing standard is solely, and only, what a prudent mortgage servicer would do "in the best interests of Certificateholders." PSA §3.01. Likewise, it is the PSAs—not the Settlement Agreement—that mandate a continuing deference to the servicer's consideration of "such other factors as would be deemed prudent [in the servicer's] judgment." *Compare* Pet. at ¶19 (arguing the Settlement is deficient because allowing the servicer to continue to make prudent servicing judgments is, allegedly, a "substantial escape hatch") *with* PSA §§3.01 and 3.05 (stating that the Master Servicer "may grant," but is not required to grant, certain modifications in the best interests of Certificateholders).

The NYAG has been candid with the Court: the goal of his intervention is to change the Settlement Agreement by mandating the loan modifications and "borrower relief" outcomes he prefers as a matter of public policy. Pet. at ¶¶19-20. But this goal ranges far beyond the permissible scope of this Article 77 proceeding and far beyond the Attorney General's *parens patriae* authority. The Attorney General is not a party to these private contracts. He has no standing to enforce them, *Grasso, supra,* much less standing to seek a judicial mandate that the PSAs be altered in such a highly material and *unprecedented* way. The PSAs do not permit the entry of a judicial fiat mandating a set of servicing outcomes dictated by the NYAG; rather, they include an *existing* servicing standard that even the *parties* to the PSAs are powerless to seek to change in this proceeding. Only through an amendment of the PSAs—which requires an almost-

certainly unobtainable vote of 66 2/3% of the Certificateholders—could the NYAG achieve such a radical alteration of the servicing standards embodied in the PSAs. The NYAG, of course, would lack standing to seek an amendment of the PSAs, or provide the required consent. He is neither the Depositor, the Master Servicer, the Trustee, nor the Seller for any of the Covered Trusts, *see* PSA §10.01 (listing parties authorized to seek an amendment of the PSA), and is not a Certificateholder with authority to vote to consent to such an amendment. *See id.* (requiring 66 and 2/3% vote of affected Certificateholders to amend PSA in a manner that adversely affects in any material respect the interest of Certificateholders). That is precisely why the NYAG lacks standing: he is not a party to the contract and he cannot seek to enforce or amend it. Seen in this light, the NYAG's assertion of *parens patriae* cannot be accepted because it would permit the NYAG to intervene in *every* private contract dispute to achieve his desired, public policy outcomes.

We make these points because the NYAG's intervention offers the prospect of lengthy—and ultimately futile—litigation over the NYAG's effort to "improve" the terms of the PSAs. Nothing in the *parens patriae* doctrine, and nothing in the law, requires the Court to permit the NYAG to intervene for this purpose.[9] In an analogous context, the Appellate Division observed that "Intervention is a device to allow judicial economies, rather than a technique to permit

[9] The result of permitting the NYAG to intervene to advocate these positions – that have no basis in the relevant agreements and nothing to do with sole issue presented here for resolution – would be needless and prejudicial delay occasioned by the need to address these collateral issues. *See Pier v. Board of Assessment Review of the Town of Niskayuna*, 209 A.D.2d 788, 790 (3d Dep't 1994) (denying municipal agency's motion to intervene in property tax valuation proceeding because agency sought to raise new issues that would result in "delay and obfuscation of the core issue"); *Bache Commodities Ltd. v. Garcia*, 2010 WL 3211863, at *4 (N.Y. Sup. Ct. 2010) (denying intervention that "would raise new arguments . . . which would inherently delay and complicate determination of the action"). *See also East Side Car Wash, Inc. v. K.R.K. Capitol, Inc.*, 102 A.D.2d 157, 160 (1984) ("A proposed intervenor is not permitted to raise issues which are not before the court in the main action.").

already-litigated cases to transmute into new cases based on different facts and legal theories that were not adjudicated in the underlying action." *Jiggetts v. Dowling*, 21 A.D.3d 178, 181 (1st Dep't 2005). Here, the same principle applies: the NYAG should not be permitted to ensnarl this simple and straightforward Article 77 Proceeding in the mire of public policy issues more appropriately suited to resolution by the New York Legislature or the Congress.

Given the NYAG's stated goals, an order permitting the Attorney General to intervene for the purpose of altering the servicing standards in these private contracts would not only far exceed the scope of the *parens patriae* doctrine and the matters at issue in this Article 77 proceeding: it would also set the stage for an even more complex constitutional argument concerning a potential "regulatory taking" of the investors' rights under the PSAs. Both the New York Court of Appeals and the Supreme Court of the United States have emphasized that "the primary, but not exclusive, inquiry [in a regulatory taking] turns on 'the extent to which the regulation has interfered with distinct investment-backed expectations.'" *Consumers Union of U.S., Inc.* v. *State*, 5 N.Y.3d 327, 378, 840 N.E.2d 68 (N.Y. 2005), *quoting Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). "The Takings Clause limits a state's power to acquire private property by inducing the owners to surrender it in exchange for a needed government authorization." *Id.*, 5 N.Y.3d at 379, *citing Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987) (R.S. Smith, J).

Over $170 billion remains invested in securities issued by the Covered Trusts on the express, investment-backed expectation, *Penn Central*, 438 U.S. at 124, that the Trusts' mortgages would be serviced exclusively "for the benefit of Certificateholders." PSA §3.01. The Certificateholders also have over $8.5 billion at stake in the Trustee's settlement. The Attorney General's effort to have this Court impose a fundamentally different servicing standard

under the PSAs—as a condition of entering the judgment in the Article 77 proceeding—would be tantamount to a regulatory taking, were the Court to permit it. Precisely because the NYAG is not a party to the PSAs, the Court should not permit him to intervene and confront the Certificateholders with a choice between a regulatory Scylla and Charybdis: a) accede to the NYAG's demand for an unauthorized and fundamental alteration of the PSA Servicing Standards as the "price" of obtaining the NYAG's imprimatur on the Settlement, or b) litigate, potentially for years, to protect the existing PSA servicing standards against the NYAG's effort to alter them without the required vote of 66 2/3% of the Certificateholders.

III. The Factual Errors in the NYAG's Petition Do Not Improve His Case for Intervention.

Because the NYAG lacks standing to intervene, the Court need not consider the substance of the underlying objections the NYAG has sought to lodge in its proposed pleading. We note, however, that the Court cannot assume the accuracy of the NYAG's allegations, as the following table demonstrates:

Erroneous Allegation	**Fact**
"Thus, the proposed settlement imposes no concrete requirements or procedures on servicers with respect to loan modifications." ¶20.	Paragraph 5(e), (a)-(g) sets out detailed and objective standards for the implementation of modifications, including: 1. Whether a modification is NPV positive (a mathematical calculation); 2. A requirement that the NPV calculation be based on an objective, independent price opinion from a third party broker; and 3. Consideration of whether a borrower has defaulted strategically to leverage a modification. Paragraph 5(d) also requires that the servicer underwrite a borrower for all modification programs at the same time, to provide prompt assistance to borrowers and to reduce delays

	(decision required within 60 days). **Source: Settlement Agrmt. ¶5.**
"…performing loans (even when restructured) yield greater returns to investors than foreclosed properties …" ¶18.	1. This depends entirely on the borrower and the nature of the "performance." 2. To cite just one example, affording a borrower who *can* make their full loan payment the right to pay "interest only" does not yield a *greater* return for investors. **Source: Statement of FHFA Director Edward De Marco Before the Committee on Banking, Housing and Urban Affairs, U.S. Senate, Dec. 1, 2010** (disputing efficacy of certain forms of loan modifications and arguing against a blanket foreclosure moratorium), *available at* http://banking.senate.gov.
"The proposed $8.5 billion payment is dwarfed by the alleged $242 billion in unpaid principal balances that Countrywide may be required to repurchase under the PSAs." ¶16.	1. The entire unpaid balance of the Covered Trusts is ***$173 billion***, not $242 billion. **Source: Amherst Mortgage Insight Report: "Bank of America Settlement—Impact on Securities Valuation." July 28, 2011 at Ex.1.** 2. The AG's $242 billion estimate of the repurchase exposure *exceeds* the entire unpaid balance of the Trust. None of the Objectors agrees with this estimate; instead, the breach rates they posit range from 15% (FHFA) to 40% (AIG) to 66% (Walnut)—all *before* application of litigation discounts. **Source: Stmt. in Support at ¶¶29-37.**
"Before filing this proceeding, BNYM negotiated the settlement with only a small group of investors and did not notify or obtain any input from other investors until the terms of the proposed settlement had been finalized." ¶15.	1. Bank of America and BNY Mellon had lengthy discussions with at least two objectors, AIG and Walnut Place, before the settlement was implemented. **Source: Stmt. in Support at ¶¶86-91 and related exhibits.** 2. The existence of the ongoing negotiations was also a matter of public record. Neither the NYAG nor any other certificateholder contacted the Institutional Investors to ask that

	they be involved in the discussions. **Source: Stmt. in Support at ¶¶ 62-74, esp. ¶¶73-74.**

IV. The NYAG's Claim that a Judgment in this Proceeding Could Impair Claims It May Assert Does Not Justify Its Intervention

The NYAG asserts it is entitled to intervene in this proceeding because, under *Spitzer v. Applied Card Sys., Inc*,.[10] a final judgment, approving the Trustee's decision to enter into the Settlement Agreement, could "potentially impair claims that NYAG may otherwise assert against the trustee."[11] This assertion is meritless.

First, a judgment in this action will be addressed solely to the Trustee's exercise of discretion in entering into the Settlement. Therefore, it could have no preclusive effect on any claim by the NYAG arising out of other conduct. With respect to the Trustee's decision to enter into the Settlement, the holding in *Applied Card* was quite limited: it held only that, where a person's claim is resolved by a final judgment, *res judicata* bars the NYAG from seeking the remedy of restitution for the same person in a later enforcement action.[12] However, the *Applied Card* court made clear that *res judicata* did not bar the NYAG's underlying *claim*. To the contrary, the court ruled the NYAG remained free to prosecute its claim for *other* remedies, such as injunctive relief, civil penalties, costs, or disgorgement.[13] The Court of Appeals explained that, because these other remedies remained available, "[o]ur holding does not, however,

[10] 11 N.Y.3d 105 (2008).

[11] *See* NYAG's Memo in Support of Order to Show Cause (Doc. No. 243-2) at 2, *citing* NYAG's Reply Memorandum in Support of Intervention (Doc. No. 243-7) at 7-8, *citing Applied Card*.

[12] *Applied Card*, 11 N.Y. 3d at 124-25.

[13] *Id*. at 125.

substantially prejudice the public interest served by the Attorney General in pursuing this action."[14]

Thus, under the holding in *Applied Card*, a judgment approving the Trustee's decision to settle would not bar a later *claim* by the NYAG based on the Trustee's decision to enter into the Settlement. At most, it would bar the NYAG from seeking the *remedy* of restitution in such an action. However, this limited remedy preclusion "does not . . . substantially prejudice the public interest served by the Attorney General in pursuing [such an] action," and therefore does not justify intervention in this matter.

Second, even if it were the case that the NYAG could be bound by a judgment in this case, that alone would not warrant intervention. Intervention is permitted "where the person is or may be bound by the judgment" *and* "the representation of the person's interest by the parties is or may be inadequate."[15] Here, the NYAG has not argued, because he cannot, that his interests are not already adequately represented in this proceeding.

The sole issue in the case is whether the Trustee's exercise of discretion in deciding to enter into the Settlement is consistent with its duties to certificateholders. The NYAG seeks to intervene to challenge this decision, but a group of active, well-financed, and motivated certificateholder objectors – whose standing is not in dispute – have already appeared to do so. Every argument the NYAG seeks to make concerning the Trustee's conduct in entering into the Settlement has already been made by these objectors. Thus, the NYAG's intervention adds

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[14] *Id*.

[15] CPLR § 1012. *See also Quality Aggregates*, 213 A.D.2d at 920 ("When the determination of the action will be needlessly delayed, *and the rights of the respective intervenors are already adequately represented*, and there are substantial question as to whether those seeking to intervene have any real present interest in the property which is the subject matter of the dispute, *intervention should not be permitted*") (emphasis added); *Osman*, 168 A.D.2d at 490 (same).

nothing, and his interest in challenging the Trustee's decision to enter into the Settlement is adequately represented.

For these purposes, it makes no difference that the objectors and the NYAG may have different motives for advancing the same position. In *Washington Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, the Second Circuit addressed this very issue and rejected the argument that it supported the right of a state agency to intervene in a private action for a refund under an electric power contract.[16] The Second Circuit affirmed the denial of intervention because the state agency's interest was adequately represented by the plaintiff, who was already advancing the same position that the agency sought to advance.[17] The court explained that:

> [The plaintiff and the state agency] may have differing motives for recovering the money paid to [the defendant]; the former wants the money back for itself, while the latter wants to assure that money due consumers is returned to them. However, a putative intervenors' interest is not inadequately represented merely because its motive to litigate is different from that of a party to the action. Where there is an identity of interest between a putative intervenor and a party, adequate representation is assured. Here, [the plaintiff and the state agency] have an identity of interest regarding the single issues before the court, that a refund should be paid to [the plaintiff].[18]

The same holds true here. The NYAG and the objectors "have an identity of interest regarding the single issue before the court,"[19] so the NYAG has no right to intervene and there is no need to permit it to intervene, either.

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[16] 922 F.2d 92 (2d Cir. 1990).

[17] *Id*. at 98.

[18] *Id*.

[19] *Id*.

Finally, this Court should reject the NYAG's assertion that it is entitled to intervene because a final judgment might have some preclusive effect, under *Applied Card*, in an action that NYAG might (or might not) decide to file later. Granting intervention on this basis would represent a dramatic expansion of the NYAG's right to intervene in, and interfere with, private litigation. Under this theory, the NYAG would have a right to intervene in any private action, pending in any court, so long as a private litigant seeks to resolve a private claim that *might* have a preclusive effect on a claim that the NYAG *might* want to file in the future. The NYAG has not cited a single case holding it has a right to intervene in a private action on this basis. Nor has he cited any other authority supporting the virtually limitless right of intervention he claims here.[20]

[20] The NYAG's argument that it is entitled to intervene because resolution of these private contract claims might affect its Martin Act claim is also inconsistent with the position he took on a similar issue before the New York Court of Appeals. Acting as *amicus curiae*, the NYAG successfully urged the New York Court of Appeals to rule that the Martin Act (and the authority it vested in the NYAG) did *not* preempt private parties' common law fraud or contract claims. "[T]he purpose or design of the Martin Act *is in no way impaired by private common-law claims that exist independently of the statute*, since statutory actions by the Attorney General and private common-law actions both further the same goal, namely, combating fraud and deception in securities transactions. *The existence of private common-law actions does not hamper the Attorney General's ability to enforce the Martin Act*." *See* Exhibit C to the Warner Affirmation, filed herewith, Brief of Amicus Curiae Attorney General of the State of New York, 2011 WL 7452124 at *34 (N.Y.) (emphasis added). The Court of Appeals agreed and rejected the argument that the Martin Act preempted parties from pursuing private common law contract or fraud claims. *See Assured Guar. (UK) Ltd. v. J.P.Morgan Inv. Mgm't., Inc*., 18 N.Y.3d 341, 962 N.E.2d 765, 770-771 (N.Y. 2011) ("a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act…and would not exist but for the statute. But, an injured investor may bring a common law claim (fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common law remedies.").

The NYAG's *Assured Guaranty* argument applies with equal force here. The claims pending in this Article 77 case are private contract claims. They do not depend at all on the Martin Act for their viability. Accordingly, to permit the NYAG to intervene on the theory that these wholly private claims "might impair" his Martin Act jurisdiction would be to afford him the precise preemptive authority he argued *did not exist* under the Martin Act. What was true then, "The

V. The Federal District Court's Ruling Does Not Establish the NYAG's Standing.

The NYAG relies extensively on Judge Pauley's ruling granting it leave to intervene. Judge Pauley's ruling is a judicial nullity: the Second Circuit ruled Judge Pauley lacked jurisdiction to enter it.

Judge Pauley also did not consider, or address, several serious standing barriers to the NYAG's intervention that this court must consider before granting the NYAG's motion. For example, Judge Pauley held the NYAG's intervention should be granted because he found it "apodictic that the State AGs have *parens patriae* standing to protect citizens from reaches of fiduciary duty and to rectify those breaches." NYAG Submission, Ex. 6, Slip Op. at 3. Setting aside the breath-taking scope of this assertion—and the curious notion that state AGs have *parens patriae* standing to intervene in *every* private case alleging a breach of fiduciary duty—this argument is at odds with New York law. *Abrams*, 817 F.2d at 1017 (state cannot "litigate as a volunteer the personal claims of its competent citizens"). The ostensibly "self-evident" ground on which Judge Pauley found the NYAG had standing was also premised largely on the NYAG's allegations of a breach of fiduciary duty by BNY Mellon. Slip Op. at 3. The NYAG has since dropped those allegations from its intervention. They thus provide no basis on which this Court could grant the NYAG standing to intervene. Judge Pauley also relied on an earlier ruling he made to conclude the NYAG should be granted leave to intervene because "the Settlement Agreement at issue here implicates . . . the vitality of the national securities markets." *Id.* Nowhere did Judge Pauley consider—much less address—the Appellate Division's clear holding in *People v. Grasso* that a claimed need "to protect public confidence in [a securities market] and

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existence of [this] private common law action does not hamper the Attorney General's ability to enforce the Martin Act," NYAG Brief, 2011 WL 7452124 at *34, is true now. The NYAG's intervention should be denied.

the investing community," *Id.*, 42 A.D. 3d at 143, 836 N.Y.S. 2d at 53, does *not* confer standing on the NYAG to intervene in a private contract dispute. *Grasso* controls this court's decision whether to permit the NYAG to intervene. Under *Grasso,* the NYAG does not have standing. Its Petition should be dismissed.

Conclusion

The NYAG has not established any entitlement to intervene as of right, because it lacks standing. Precisely because it has no standing, the Court should also deny the NYAG's application for permissive intervention. The relief the NYAG seeks would violate the PSAs and expand this proceeding far beyond the limited scope mandated by Article 77. It would also impose lengthy, prejudicial, and ultimately futile delays in pursuit of relief this court cannot grant. For all of these reasons, the Petition in Intervention of the NYAG should be denied.

Dated: New York, New York

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