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.

Motion Sequence No. 26

THE BANK OF NEW YORK MELLON'S OPPOSITION TO THE PETITION TO INTERVENE BY JOSEPH R. BIDEN III, ATTORNEY GENERAL OF THE STATE OF DELAWARE

DECHERT LLP
Hector Gonzalez
James M. McGuire
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

MAYER BROWN LLP
Jason H. P. Kravitt
Matthew D. Ingber
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon

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Petitioner, The Bank of New York Mellon ("BNYM" or the "Trustee"), solely in its capacity as trustee, respectfully submits this memorandum of law in opposition to the Amended Petition to Intervene ("Pet.") by Joseph R. Biden III, Attorney General of the State of Delaware ("DAG").

PRELIMINARY STATEMENT

The DAG seeks to intervene in an expedited special proceeding addressing a single question—whether the Trustee acted within the bounds of its reasonable discretion in entering into the Settlement Agreement.[1] Not surprisingly, in the eight months that have elapsed since his original filing, the DAG still remains unable to point to any authority supporting his intervention, and he asks this Court to confer upon him a type of standing that no other court has ever permitted.

The DAG, like the Attorney General of The State of New York (the "NYAG"), has no standing to object to the Settlement between the Trustee (on behalf of investors who own the certificates that are the subject of the proposed Settlement), Bank of America, and Countrywide. Invoking the doctrine of *parens patriae*, the DAG argues that the Court should permit him to intervene in this Article 77 proceeding (1) "to protect the public interest, including the interest of absent investors and homeowners as well as the integrity of the marketplace" (Pet. ¶ 4) and (2) to preserve certain claims—under the Delaware Securities Act and Deceptive Trade Practices Act—that he "potentially" may have against the Trustee, which supposedly share common issues of fact and law with this Article 77 proceeding (*id.*).[2] None of these alleged interests, however,

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[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Trustee's Verified Petition, Dkt No. 1.

[2] The DAG also claims that his "intervention is particularly important given the evidence suggesting that BNYM negotiated the settlement on behalf of the trust beneficiaries under a

warrant the DAG's intervention in this Article 77 proceeding. The DAG cannot under any circumstances be a party because—unlike a Certificateholder—he lacks standing to object to the Settlement. If the Court were to countenance the DAG's effort to intervene and object to the Settlement, it would provide the DAG with the right to intervene in virtually any private settlement that involved Delaware citizens or entities without regard to the essential conditions limiting the doctrine of *parens patriae*. The DAG's sweeping assertion of standing is unprecedented and would have significant adverse consequences to private settlements and business transactions. For the reasons discussed below, the DAG's Petition should be denied.

ARGUMENT

I. The *Parens Patriae* Doctrine Does Not Confer Standing to Intervene.

A basic precept of intervention law is that "[o]nce let in, the intervenor becomes a party for all purposes." David D. Siegel, N.Y. Prac. § 178 (4th ed. 2011 update); *see also Kruger v. Bloomberg*, 1 Misc. 3d 192, 195 (Sup. Ct. N.Y. Cnty. 2003). But the DAG cannot under any circumstances be a "party for all purposes" because—unlike a Certificateholder—he lacks standing to object to the Settlement.[3] The DAG invokes the *parens patriae* doctrine, which he says allows him to litigate "to protect the public interest, including the interests of absent

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conflict of interest." (Pet. ¶ 19.) No conflict of interest exists and the Trustee respectfully refers the Court to its response to the NYAG's Motion to Intervene, where that same claim is refuted.

[3] "[A]s the Court of Appeals has made clear, '[c]apacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing.' '[C]apacity concerns a litigant's power to appear and bring its grievance before the court,' and may depend on a litigant's status or . . . authority to sue or be sued.' By contrast, '[s]tanding involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast [] the dispute in a form traditionally capable of judicial resolution.'" *People v. Grasso ("Grasso III")*, 54 A.D.3d 180, 190 n.4 (1st Dep't 2008) (citations omitted). Because the DAG appears to base both his standing and his capacity on the *parens patriae* doctrine, and because the absence of either is fatal to his ability to litigate these claims, we address the two issues together and refer to them collectively as "standing."

investors and homeowners, as well as the integrity of the marketplace," and to "protect potential state law claims that may be adversely affected if the proposed settlement is approved[.]" (DAG MOL 3.) But the DAG does not have the authority to object to the settlement of private claims seeking monetary relief[4] on behalf of a discrete group of private investors. The DAG is also not authorized to intervene in a proceeding where he otherwise lacks standing to protect a nebulous group of absent Delaware borrowers. Any ruling to the contrary would constitute a radical and unprecedented expansion of the DAG's power to intervene in private litigation.

Parens patriae is the State's "nursing quality." *People v. Ingersoll*, 58 N.Y. 1, 30 (1874). It is grounded in and bound by a state's need to "care for and protect those who are incapable of caring for themselves, as infants, idiots and the like." *Id.* It does not allow the DAG to represent "private parties who feel aggrieved [and] . . . have ample remedies to redress their wrongs by proceedings in their own names." *Grasso III*, 54 A.D.3d at 193–94 (quoting *People v. Lowe*, 117 N.Y. 175, 195 (1989)). "To invoke the doctrine, the Attorney General must prove a quasi-sovereign interest distinct from that of a particular party and injury to a substantial segment of the state's population." *People v. Grasso ("Grasso II")*, 11 N.Y.3d 64, 69 n.4 (2008) (citing *Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)).

This special proceeding is brought to approve the acts of a trustee for mortgage-securitization trusts, in attempting to settle contract disputes between the Trusts and their sophisticated investors, on the one hand, and certain parties to privately-negotiated contracts, on the other. The claims sought to be settled do not implicate financial markets or exchanges, and the Settlement in fact expressly carves out securities claims based on disclosures to potential

[4] The Settlement also provides for improvements in servicing and the cure of past document deficiencies, but because these changes are motivated by the Certificateholders' interest in maximizing the value of their securities by improving the performance of the trusts, they only reinforce the pecuniary nature of the interests at stake.

investors. (Settlement Agreement ¶ 10, Dkt. No. 3.) That the Settlement involves a large dollar figure and has generated media coverage does not mean that a quasi-sovereign interest is at stake. As demonstrated below, the DAG has not made and cannot make the necessary showing to invoke the *parens patriae* doctrine.

Parens patriae standing does not extend to prosecuting claims on behalf of private parties for monetary relief, let alone to preventing such parties from consensually settling. For this very reason, courts have not hesitated to find that attorneys general lack standing. *See, e.g.*, *People v. Operation Rescue Nat'l*, 80 F.3d 64, 71 (2d Cir. 1996) ("[State's] standing does not extend to the vindication of the private interests of third parties"). As the U.S. Supreme Court has explained:

> if the State is only a nominal party without a real interest of its own[,] then it will not have standing under the *parens patriae* doctrine. . . . [A] State may, for a variety of reasons, attempt to pursue the interests of a private party, and pursue those interests only for the sake of the real party in interest. Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party.

Snapp & Son, Inc., 458 U.S. at 600–02.

In *Ingersoll*, the court explained that "[t]he title to and ownership of the money sought to be recovered must determine the right of action, and if the money did not belong to the State, but did belong to some other body having capacity to sue, this action cannot be maintained" by the attorney general. 58 N.Y. at 12–13. Notably, in *Ingersoll*, the Court of Appeals denied the attorney general's effort to intervene even though the money was claimed by a ***municipal*** corporation. In *Lowe*, where "the Attorney General similarly sought to recover money for a private corporation from trustees who allegedly committed misconduct" (described in *Grasso III*, 54 A.D.3d at 199), the Court of Appeals stressed that "[i]t is not sufficient for the People to show that wrong has been done to some one; the wrong must appear to be done ***to the People*** in order to support an action by the People for its redress." *Lowe*, 117 N.Y. at 192 (emphasis added).

And in *Grasso III* itself, the court concluded that "to grant standing to the Attorney General to prosecute an action seeking only the recovery of money for a for-profit entity to redress an alleged wrong that was not 'perpetrated directly against the State'" would invite "'grave and doubtful constitutional questions.'" 54 A.D.3d at 199–200 (quoting *Ingersoll*, 58 N.Y. at 13, and *Jones v. United States*, 526 U.S. 227, 239 (1999)). The apparent desire of some private investors to increase the Settlement Payment or recover damages from the Trustee, therefore, cannot support *parens patriae* standing.

That some investors may not choose to participate in this Article 77 proceeding (DAG MOL 5) does not alter this fundamental limitation on *paren patriae* standing. The First Department addressed that notion in *Grasso III* and held that "[t]he 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.'" 54 A.D.3d at 198 (quoting *Snapp & Son, Inc.*, 458 U.S. at 600). Indeed, the rule that "[t]he state cannot merely litigate as a volunteer the personal claims of its competent citizens" pervades the caselaw. *People v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987); *see also Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) ("It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens"); *New York v. Cain*, 418 F. Supp. 2d 457, 470 (S.D.N.Y. 2006) ("a state can no more bring suit on behalf of a particular citizen as a personal attorney than it can as an assignee").[5] Like the NYAG, the DAG's assertion of *parens patriae* standing in this proceeding

[5] Here, there can be no question of the competency of the Certificateholders. They are, in the main, sophisticated investors, including, for example, intervenor-respondent AIG and the various pension and hedge funds that have intervened in this proceeding without objection by the Trustee. These entities are not and never have been the proper objects of *parens patriae*, the "nursing quality."

is all the more indefensible, because many investors support the Settlement. Thus, the DAG also would be litigating as a volunteer *against* the personal claims of other competent citizens.

Further, any quasi-sovereign interest that the DAG may have in protecting its citizens is not implicated by, and therefore cannot create standing to object to, a private settlement that the DAG believes may not offer private investors adequate pecuniary relief. "[W]hether a plaintiff has standing 'depends in substantial measure on the nature of the relief sought.'" *Grasso III*, 54 A.D.3d at 207 (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)). "Where the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests. Thus, the state as *parens patriae* lacks standing to prosecute such a suit." *Seneci*, 817 F.2d at 1017; *see also Grasso III*, 54 A.D.3d at 195–96 ("whe[re], as here, the Attorney General seeks only monetary relief that would inure to the benefit of the owners of a for-profit entity . . . [t]he prosecution of such a cause of action would vindicate only the interests of private parties, not any public interest"). The DAG seeks to ensure that "the interest of the State of Delaware generally, and the interests of Delaware citizens and investors more specifically, . . . are properly represented and that a fair and reasonable settlement of this matter is achieved" (Pet. ¶ 17)—but those "interests" are purely monetary.

It is important to distinguish the DAG's purported interests in objecting to the Settlement, on the one hand, from his interests in his "potential" Delaware Securities Act and Deceptive Trade Practices Act claims, on the other. Although the Trustee believes that any claims under these statutes would be meritless, the DAG may have standing ***outside*** of this proceeding (and state) to bring them. As to the Settlement objection, however, he has no standing—in this or any other proceeding—and the right to assert Delaware statutory claims elsewhere does not provide

standing for him to object here. *Cf. Lefkowitz v. Lebensfeld*, 51 N.Y.2d 442, 447 (1980) (even though a statute "allows the Attorney-General to institute proceedings to secure proper administration of [charitable] entities . . . the [statute] does not provide for an action against third parties who are allegedly liable to the charitable organization").

The Petition should be denied for an independent reason. Not surprisingly, the DAG vaguely invokes the interests of Delaware investors and borrowers (DAG MOL 5-9) that are ostensibly implicated by the Settlement. This amorphous group does not have any cognizable interest in the Trustee's exercise of its discretion, the sole issue in this proceeding. If there are any absent Certificateholders from Delaware (a showing that the DAG has not made), any cognizable interest that they may have is purely monetary. The "thousands of Delaware homeowners," which the DAG has not confirmed, in its verified pleading or otherwise, actually exist, (*id.* 6-9), also do not have cognizable interests in the Trustee's exercise of its discretion. With respect to this unidentified subset, the DAG has failed even to allege, let alone establish, the requisite injury to a "substantial segment of the state's population." *Grasso II*, 11 N.Y.3d at 69 n.4. This failure is a fatal deficiency in his application. *See id.* ("the Attorney General must prove a quasi-sovereign interest distinct from that of a particular party *and* injury to a substantial segment of the state's population") (emphasis added).

II. The District Court's Ruling Granting the DAG Leave to Intervene is Null and Void and Does Not Support the DAG's Amended Petition to Intervene

The district court's ruling granting the DAG leave to intervene is null and void. *See Glatzer v. Bear Stearns & Co.*, 201 Fed. Appx. 98, 98 (2d Cir. 2006) (vacating judgment and decision on defendant's motion to dismiss, because the district court lacked subject matter jurisdiction and erred in denying plaintiff's motion to remand); *In re C and M Prop., LLC v. Burbidge*, 563 F.3d 1156, 1162 (10th Cir. 2009) ("Any district court order putatively deciding

any aspect of a claim remanded to state court is but an advisory opinion, the expression of stray sentiments by a court powerless to decide anything"). The DAG nevertheless argues that the district court's ruling supports his petition for leave to intervene. (DAG MOL 6.) That argument is meritless.

The DAG contends that the Court should grant him leave to intervene because the district court found that he "has a quasi-sovereign interest in securing the integrity of the markets and protecting the interests of absent investors" and that it is "apodictic that the State AGs have *parens patriae* standing to protect citizens from breaches of fiduciary duty and to rectify those breaches." (DAG MOL 5-6.) The Trustee, however, neither acted under a conflict of interest nor breached any fiduciary duty since it is not a fiduciary. *See, e.g.*, *Hazzard v. Chase Nat'l Bank*, 159 Misc. 57, 83-84 (Sup. Ct. N.Y. Cnty. 1936) ("The trustee under a corporate indenture . . . has his rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement."); *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 816 (2d Cir. 1985) ("Unlike the ordinary trustee . . . an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement."); *Dresner Co. Profit Sharing Plan v. First Fidelity Bank, N.A., N.J.*, No. 95-CV-1924, 1996 WL 694345, at *5 (S.D.N.Y. Dec. 4, 1996) (Mukasey, J.) ("plaintiff's claim for breach of the prudent person standard, breach of fiduciary duty and negligence based on the trustee's pre-petition non-feasance must fail").

But regardless of whether the trustee acted under a conflict of interest (it did not) or breached any purported fiduciary duty (it did not), we respectfully disagree with the district court's assertion. The controlling case law (including *People v. H&R Block, Inc.*, the case cited by the district court in support of its assertion) is unambiguous: a finding of *parens patriae* standing requires that the DAG "(1) identify a quasi-sovereign interest in the public's well being;

(2) that touches a 'substantial segment' of the population; **and** (3) articulate 'an interest apart from the interests of the particular private parties . . . .'" No. 401110/06, 2007 WL 2330924, at *7 (Sup. Ct. N.Y. Cnty. July 9, 2007) (quoting *Snapp & Son, Inc.*, 458 U.S. at 607) (emphasis added). As discussed above, the DAG falls far short of satisfying this rigid requirement.

In granting the DAG's motion to intervene, the district court also relied on its own, earlier ruling in this proceeding for the proposition that "the Settlement Agreement at issue here implicates . . . the vitality of the national securities markets." *Id.* But the district court did not consider or address the First Department's holding in *People v. Grasso ("Grasso I")* that a claimed need "'to protect public confidence in [a securities market] and the investing community,'" 42 A.D. 3d 126, 143 (1st Dep't 2007), does not confer standing on an attorney general to intervene in a private contract dispute. *People v. Gen. Motors Corp.*, cited by the district court, is consistent with *Grasso I*. In *Gen. Motors Corp.*, the court held that the attorney general had *parens patriae* standing because it sought "wide-ranging injunctive relief designed to vindicate the State's quasi sovereign interest in securing an honest marketplace for all consumers[.]" 547 F. Supp. 703, 707 (S.D.N.Y. 1982) (emphasis added). Here, by contrast, the DAG does not and cannot seek injunctive relief—and could not do so in the limited context of this Article 77 proceeding.

III. Allowing the DAG's Extraordinary Attempt to Intervene Would Radically and Improperly Expand the DAG's Power.

Eight months after the DAG initially moved to intervene in this proceeding, he still has not cited, and the Trustee has not found, any case in which an attorney general has intervened in an Article 77 proceeding or sought to block a private, non-class settlement of any kind. The circumstances in which attorneys general ***have*** made use of the *parens patriae* doctrine underscore the above analysis. In *People v. Merkin*, No. 450879/209, 2010 WL 936208, at *9

(Sup. Ct. N.Y. Cnty. Feb. 8, 2010) and *People v. H&R Block, Inc.*, 2007 WL 2330924, at *7, an attorney general relied on *parens patriae* standing as a plaintiff when seeking forward-looking injunctions against continuing conduct directed to retail investors. In other cases, an attorney general intervened pursuant to express authority under C.P.L.R. § 1012(b) and Executive Law § 71 to defend the constitutionality of state statutes (*e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124 (1981), *rev'd on other grounds*, 458 U.S. 419 (1982)).

The DAG, however, seeks to expand his standing far beyond all previously recognized limits. In fact, the extent of the DAG's purported standing is greater even than that sought by the NYAG in this proceeding. (*See* generally NYAG MOL I, Dkt. No. 101-04 and NYAG MOL II, Dkt. No. 243-2.) If the DAG can intervene here simply because he believes that a private settlement amount may fail to compensate adequately private investors who are Delaware citizens or that the Settlement may possibly impact Delaware borrowers, he could intervene in virtually any private litigation settlement that could potentially involve Delaware entities, investors, or citizens. Given the large number of corporations that are organized under Delaware law, the consequences of that proposition are breathtaking. Not only would it discourage settlements and subject private litigants to great uncertainty, it would allow the DAG to intervene in areas where private parties can look after their own interests. Indeed, on the DAG's reasoning, the attorney general of every state with a citizen who is a Certificateholder or underlying borrower would have standing to object to the Settlement. The court in *In re Baldwin-United Corp.* recognized this risk and warned that "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." 607 F. Supp. 1312, 1330 (S.D.N.Y. 1985). The DAG's inability to articulate any

limiting principle on his authority to sue or his ability to intervene is a warning of the far-reaching consequences of a ruling in his favor.

Moreover, there is no sound policy reason to allow the DAG to intervene. The investors themselves are a diverse group, and while they all share the DAG's ultimate goal of adequately remedying the harm to themselves, they have various opinions on how to accomplish that goal. Some strongly support the Settlement: among others, twenty-two of the world's largest institutional investors—with tens of billions of dollars in holdings—have intervened in support of the Settlement and oppose the DAG's petition. (*See* Institutional Investors' Petition To Intervene, Dkt. No. 14.) Others, including AIG, have sought to intervene as respondents (unopposed by the Trustee), objecting to the Settlement on grounds very similar to those asserted by the DAG. (*See, e.g.*, Dkt. Nos. 61, 85, 90, 130–31.) Yet others may participate while reserving judgment. This is not a case in which the DAG would protect a single block of investors against a trustee (although even that would be unprecedented); this Article 77 proceeding has generated a dispute among groups of sophisticated investors about whether the Trustee acted within the bounds of its reasonable discretion in entering into the Settlement. It is not the case that intervention is necessary to "ensure that the interests of absent Delaware investors are adequately represented (DAG Pt. ¶ 18). The diversity of participating investors both ensures that all viewpoints will be represented and means that the DAG cannot claim to represent all of the absentees (only some of whom may be Delaware citizens), many of whom likely support the Settlement (and indeed will on that basis choose not to object). In fact, the first entities to intervene as respondents—the Walnut Place LLC entities—are organized under Delaware law and are represented here by sophisticated counsel. (*See* Dkt. No. 24.) Moreover, in addition to the Walnut Place LLC entities, several other Delaware entities are participating in

this proceeding as either intervenor-respondents or non-intervenor objectors. The conclusion that the DAG lacks authority to object to the Settlement is dispositive of his motion to intervene.[6]

CONCLUSION

For all of the foregoing reasons, the Court should deny the DAG's Petition to Intervene.

Dated: New York, New York
April 20, 2012

s/Matthew D. Ingber

DECHERT LLP
Hector Gonzalez
James M. McGuire
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

MAYER BROWN LLP
Jason H.P. Kravitt
Matthew D. Ingber
1675 Broadway
New York, New York 10019
(212) 506-2500

Attorneys for Petitioner
The Bank of New York Mellon

[6] Because the DAG lacks standing in this Article 77 proceeding, he cannot intervene based on other potential claims that he is free to bring in a separate lawsuit. The DAG asserts that he "has a legitimate basis upon which to assume . . . that Delaware's interests may adversely be affected by the proposed settlement . . . because BNYM, Countrywide, or BoA may take the position that the Settlement and the facts found by this court, if made binding upon all beneficiaries, precludes the [DAG] from pursuing certain claims or remedies for such violation." (DAG MOL 9.) As we informed the DAG and the Court eight months ago (Dkt. No. 138 at 14), that is flatly wrong—the DAG's inchoate Delaware Securities Act and Deceptive Trade Practice Act claims are not released by the Settlement Agreement. The Settlement Agreement is not binding on the DAG. The Settlement releases only those claims brought "by, through, or on behalf of any of the Trustee, the Investors, or the Covered Trusts or under the Governing Agreements." (Settlement Agreement, Dkt. No. 3, § 9(a).) Indeed, paragraph (o) of the Proposed Final Order, quoted by the DAG, uses similar language. Paragraph (o) shows that the release is limited to "the Bank of America Parties and/or the Countrywide Parties." (Proposed Final Order, Dkt. No. 7, ¶ (o).) In any event, for the reasons discussed in the Trustee's original opposition to the DAG's motion to intervene (Dkt. No. 138), the DAG's potential assertions of claims against the Trustee, BofA, or Countrywide do not create standing.