STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INVESTOR PROTECTION BUREAU

April 23, 2012

BY ELECTRONIC FILING

Hon. Barbara R. Kapnick
Supreme Court of the State of New York
60 Centre Street, Room 555
New York, NY 10007

Re: *In the Application of The Bank of New York Mellon, et al.*
(Index No. *651786/2011,* Kapnick, J.)

Dear Justice Kapnick,

I write concerning this office's Order to Show Cause on its Motion to Intervene in the above-captioned action. Earlier today I spoke to a clerk of the Court who opined that no reply brief could be filed because the Court had crossed out the draft portions of the Order to Show Cause providing for such a filing. We now request this Court's permission to file the attached reply brief because both Bank of New York Mellon and the institutional investors have raised several new points in their opposition papers that require a response.

Respectfully submitted,

Thomas Teige Carroll
Deputy Bureau Chief
Investor Protection Bureau

Enclosure

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), *et al.*, Petitioners, -against- WALNUT PLACE LLC, *et al.*, Intervenor-Respondents.	Index No. 651786/2011 Assigned to: Kapnick, J.

REPLY BRIEF MEMORANDUM OF ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN FURTHER SUPPORT OF AN ORDER TO SHOW CAUSE ON HIS MOTION TO INTERVENE

The New York Attorney General has renewed his motion to intervene in this Article 77 proceeding to ensure that the sweeping and "market-reforming settlement" (Institutional Investors Br. at 7) at issue here—"the largest private litigation settlement in history" (*id.* at 5)—is consistent with "an honest marketplace in which to transact business." *State of New York ex rel. Abrams v. Gen. Motors*, 547 F. Supp. 703, 705 (S.D.N.Y. 1982). The Attorney General intervenes, first and foremost, under his authority and responsibility as *parens patriae* to protect the integrity of the securities marketplace, including the interests of absent investors who may be bound by the judgment (CPLR 1012(a)(2)). (Doc # 243-7 (filed Apr. 13, 2012) (AG's S.D.N.Y. Reply Br.) at 2-7.) Independently, the Attorney General also intervenes pursuant to CPLR 1012(a)(2) because a decree in this proceeding may affect separate claims for relief that he indisputably has standing to bring under the Martin Act, Executive Law § 63(12), and the

common law. (*Id.* at 7-8.) At a minimum, the Attorney General's separate claims for relief share "common question[s] of law or fact" with the instant proceeding. CPLR 1013.

In opposition, the Bank of New York Mellon ("BNYM") and the Institutional Investors make some new arguments and repeat many of the arguments that they previously made—and that the U.S. District Court for the Southern District of New York rejected, *see In re Bank of New York Mellon v. Walnut Place LLC*, No. 11-5988, 2011 WL 5843488 (S.D.N.Y. Nov. 18, 2011). Among the new arguments, the Institutional Investors now argue that intervention should be denied because the Attorney General is no longer seeking to assert counterclaims (Institutional Investors Br. at 18); because the Attorney General's objections are beyond the limited jurisdiction of this proceeding (*id.* at 10); and because the Attorney General's intervention could lead to a "potential 'regulatory taking'" (*id.* at 12-13). But these new arguments, like those asserted before, lack any merit.

I. The Attorney General Has Standing to Intervene Pursuant to His *Parens Patriae* Authority.

The Attorney General has standing to intervene because this proceeding implicates (1) "a quasi-sovereign interest in the public's well-being"; (2) "that touches a 'substantial segment' of the population"; and (3) is "an interest apart from the interests of the particular private parties." *People v. H&R Block, Inc.*, 16 Misc. 3d 1124(A), 2007 N.Y. Slip Op. 51562(U), at *7 (Sup. Ct. N.Y. Co. 2007) (quoting *Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982)).

First, the Attorney General has *parens patriae* standing to assert 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 *Gen. Motors*, 547 F. Supp. at 705; *H&R Block*, 2007 N.Y. Slip Op. 51562(U), at *8);

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); *People v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378, 379 (1st Dep't 2008). More specifically, the Attorney General has standing to participate in litigation that "take[s] a step toward eliminating fraudulent and deceptive business practices," *Gen. Motors*, 547 F. Supp. at 705, including the prevention or correction of breaches of fiduciary duty, *see H&R Block*, 2007 N.Y. Slip Op. 51562(U), at *7-8; *Gen. Motors*, 547 F. Supp. at 706 n.5; *Merkin*, 2010 N.Y. Slip Op. 50430(U), at *9-10. Second, the Attorney General's interest in protecting the integrity of the marketplace touches upon a substantial segment of the population. *See H&R Block*, 2007 N.Y. Slip Op. 51562(U), at *8 (interest in protecting the marketplace touches *all consumers*). And third, the Attorney General's interest in protecting the integrity of the marketplace is distinct from the interests of the private parties involved, even though some of the relief sought will accrue to an identifiable group of private parties. *See Gen. Motors*, 547 F. Supp. at 707; *see also H&R Block*, 2007 N.Y. Slip Op. 51562(U), at *8; *Merkin*, 2010 N.Y. Slip Op. 50430(U), at *10. Accordingly, the Attorney General has standing in this proceeding to ensure (among other things) that BNYM's requested order approving the settlement is a fair and reasonable resolution of the trusts' claims, and that the settlement was negotiated and pursued in the best interests of certificateholders.

BNYM and the Institutional Investors assert that this Article 77 proceeding does not implicate the Attorney General's quasi-sovereign interests, but their arguments are based on two profound mischaracterizations of this action. First, BNYM contends that this proceeding "seek[s] nothing more than *pecuniary relief* on behalf of private investors" (BNYM Br. at 6) (emphasis added). But BNYM argued precisely the opposite in federal court: there, it contended that "there is *no claim for monetary relief* in the Article 77 proceeding" and that the proceeding

involved "*only* equitable relief." (BNYM Memorandum of Law in Support of Motion to Remand at 2, 7, Dkt. # 55, *In re Bank of New York Mellon v. Walnut Place LLC*, No. 11-5988 (S.D.N.Y. Sept. 1, 2011) (emphasis added)).

Neither of BNYM's sharply contrasting characterizations of this proceeding is correct. The proceeding sounds largely in equity and also involves significant monetary relief: BNYM asks the court to exercise its equitable jurisdiction to bless its decision to enter into the Settlement Agreement (Proposed Order and Judgment ¶¶ (m)-(n)), and the settlement in turn require monetary payments, as well as prospective service improvements (BNYM Pet. ¶¶ 1, 37-38). BNYM requests that the Court issue a declaration that all trust beneficiaries will be bound by the settlement, regardless of whether they appeared in or actually received notice of this proceeding. (Proposed Order and Judgment ¶¶ (o)-(q).) BNYM also seeks multiple declarations approving of its discretionary decision to enter into the proposed settlement—including a finding that BNYM "appropriately evaluated the terms, benefits, and consequences of the Settlement and the strengths and weaknesses of the claims being settled." (*Id.* ¶ (i).) As to the terms of the proposed settlement itself, BNYM has acknowledged that, in addition to a proposed monetary payment totaling $8.5 million, a "principal component[]" (BNYM Pet. ¶ 37) of the underlying settlement is a set of provisions providing for *prospective* changes in servicing practices—including procedures for loan modifications and for curing document deficiencies. Finally, even after the conclusion of this proceeding, BNYM asks this Court to maintain continuing jurisdiction over "all matters relating to the Settlement . . . including the administration, interpretation, effectuation, or enforcement of the Settlement Agreement." (*Id.* ¶ (u).) The substantial equitable relief requested by BNYM belies its assertion that this case is purely about monetary recovery and easily distinguishes the handful of cases cited by BNYM in which courts

rejected *parens patriae* standing when the Attorney General "*only* [sought] to recover money damages for injuries suffered by individuals" (BNYM at 6 (quoting *People ex rel Abrams v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987)).

Second, BNYM and the Institutional Investors assert that this proceeding is nothing more than a "private contract dispute" (Institutional Investors Br. at 1) affecting only "a discrete group of sophisticated private investors" (BNYM Br. at 3). That contention views this proceeding too narrowly. Contrary to BNYM's and the Institutional Investors' claims, this proceeding implicates the State's quasi-sovereign interest because it seeks approval of a "market-reforming settlement" (Institutional Investors Br. at 7) that will directly affect hundreds of billions of dollars in RMBS. That dramatic remedy implicates the integrity of the securities marketplace and has effects that go beyond the parties to the settlement agreement and those investors already participating in this litigation (*see* AG's S.D.N.Y. Reply Br. at 5-6). Among other effects, approval of this settlement would extinguish the possible claims of thousands of individual and institutional investors against BoA and Countrywide;[1] the settlement's prospective servicing modifications will affect "hundreds of thousands of loans" and homeowners (BNYM Pet. ¶ 10); and any court ruling approving the settlement may become a model for future settlements by BNYM and other trustees to resolve similar abuses involving residential mortgage-backed

[1] BNYM argues that "[t]he whole purpose of this proceeding is to afford investors an opportunity to be heard" (BNYM Br. at 2), and thus suggests that the interests of all investors are already adequately represented in the proceeding. The Institutional Investors suggest that all absent certificateholders support the settlement because, "[a]s a matter of law, certificateholders who have chosen not to object are deemed to support the settlement." (Institutional Investors Br. at 5 n.4.) Both arguments ignore the likely possibility that some certificateholders are absent because they did not receive notice of the proceeding.

securities, particularly if this Court makes the specific and wide-ranging findings of reasonableness that BNYM requests (*see* BNYM Pet. ¶¶ 58-67, 93-96).[2]

This is not to deny that this proceeding *also* implicates private interests. But the mere fact that this proceeding arises from private transactions does not diminish the State's quasi-sovereign interest. Private transactions always underlie any *parens patriae* action brought to protect the integrity of the marketplace. There is nothing inconsistent about the Attorney General's assertion of the State's quasi-sovereign interest in a proceeding that simultaneously seeks to protect purely private interests. *See Gen. Motors Corp.*, 547 F. Supp. at 706-07; *H&R Block*, 2007 N.Y. Slip Op. 51562(U) at *8 ("That the Attorney General seeks recovery on behalf of an identifiable group does not require this Court to ignore the primary purpose of the fiduciary duty claim and to characterize it as one brought solely for the benefit of a few private parties.").

Here, the significance and scope of this proceeding easily justify the State's quasi-sovereign interest in protecting the marketplace. BNYM and the Institutional Investors claim that no precedent supports the Attorney General's intervention in an Article 77 proceeding such as this one (BNYM Br. at 1-2; Institutional Investors Br. at 3-4)—but that is only because there has never *been* an Article 77 proceeding as large or as "market-reforming" as this one (Institutional Investors Br. at 5, 7). Outside of Article 77, courts have regularly found *parens patriae* standing in cases alleging private misconduct that is narrower and has fewer systemic effects than the abuses alleged 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

[2] The Institutional Investors criticize the Attorney General for over-estimating Countrywide's repurchase exposure as $242 billion. (Institutional Investors Br. at 14.) But one of the objectors, Walnut Place, supported this estimate of Countrywide's repurchase exposure. (Doc # 24 (filed July 5, 2011) (Walnut Place Pet. to Intervene) at 10.) In any event, the Institutional Investors do not claim that their own figure of $173 billion undercuts the Attorney General's *parens patriae* standing.

preparers in marketing IRA products); *Merkin*, 2010 N.Y. Slip Op. 50430(U) (deception by an investment adviser in managing portfolios).[3] Here, the sweeping relief requested by BNYM, and the significant effects that this proceeding will have on the securities marketplace, support the Attorney General's *parens patriae* standing to intervene.

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 Products, Inc. v. Street Smart Realty, LLC*, 77 A.D.3d 197, 202 (1st Dep't 2010); *see also 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"). BNYM and the Institutional Investors have asserted 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). (Doc # 135 (filed Aug. 16, 2011) (BNYM Opp.) at 16; *see also* Institutional Investors Br. at 15-16.) BNYM also suggests that the decree sought here would protect the Trustee against claims relating to the settlement. (BNYM

[3] The Institutional Investors claim (Br. at 3-4) that the Court of Appeals and Appellate Division decisions in the *Grasso* litigation undermine the Attorney General's *parens patriae* standing here. But those cases are inapposite for two reasons. First, the Court of Appeals held that the Attorney General could not bring independent claims under his *parens patriae* authority only because the Legislature had enacted a "comprehensive enforcement scheme" in the Not-For-Profit Corporation Law that authorized him to pursue the same misconduct. 11 N.Y.3d at 70. Here, by contrast, the Institutional Investors have pointed to no analogous legislative scheme that would displace the Attorney General's common-law *parens patriae* standing. Second, the Appellate Division concluded that the Attorney General's action "would vindicate only the interests of private parties, not any public interest" because it sought "only monetary relief" for those private parties. 54 A.D.3d at 194-95. Here, by contrast, this proceeding implicates more than mere monetary relief for private litigants.

Br. at 13 n.8; *see also* Institutional Investors Br. at 15.) The risk that this proceeding will preclude the Attorney General from seeking restitution or bringing claims relating to the settlement is alone sufficient to support intervention. CPLR 1012(a)(3).

The Institutional Investors repeatedly emphasize that the Attorney General has not yet filed the claims that might be affected by this proceeding. (Institutional Investors Br. at 18.) But nothing in CPLR 1012(a)(2) requires that the party who might be bound by a judgment have claims already pending—and the Institutional Investors do not cite any authority for such a requirement. In *Yuppie Puppy Pet Product*, for example, the intervenor's separate action had not been filed when the party sought intervention in the trial court, but the Appellate Division made clear that intervention should have been permitted. 77 A.D.3d at 202-03. Moreover, this is not a case where the Attorney General is attempting to intervene based on an undefined hypothetical claim. In his earlier filings, the Attorney General has *already* identified the claims that might be impaired and articulated the factual basis for those claims. (Doc # 101-1 (filed Aug. 4, 2011) (Affirmation of Amir Weinberg), Ex. A (Verified Pleading in Intervention).)

The Institutional Investors contend that the potentially binding nature of this proceeding is irrelevant because the Attorney General's interests are "already adequately represented in this proceeding." (Institutional Investors Br. at 16.) But the certificateholder objectors' interests are not coextensive with the Attorney General's. For one thing, the objectors are principally concerned with their own private interests. The Attorney General, by contrast, also seeks to protect absent investors and the securities marketplace as a whole—broader quasi-sovereign interests that no private party can be relied upon to protect. Moreover, while the objectors have focused principally on the amount of the settlement payment, which they contend vastly understates Bank of America's and Countrywide's liability, the Attorney General seeks to

intervene in large part to clarify the proposed settlement's forward-looking non-monetary terms, including its revised servicing standards. Because the Attorney General's interests are thus not identical to the private certificateholders', this Court should permit his intervention to prevent this proceeding from impairing his independent claims against BNYM, Bank of America, and Countrywide.[4]

III. The Remaining Objections Also Lack Merit.

The Institutional Investors raise several additional arguments against the Attorney General's intervention, but all of them are meritless. First, the Institutional Investors imagine several complications that might arise if the Attorney General is allowed to intervene. (Institutional Investors Br. at 7, 12.) But these hypothetical complications are purely of their own invention. Tellingly, the Institutional Investors point to no instance when the Attorney General unduly complicated this proceeding in federal court after he was permitted to intervene there—nor could they, because there were no such complications. And of course, this Court has the tools to manage this litigation to ensure that the case proceeds in an orderly manner.

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[4] The Institutional Investors also contend that the Attorney General cannot intervene based on the potentially binding nature of this proceeding because he has argued elsewhere that his Martin Act authority does not preempt private parties' common-law fraud or contract claims. (Institutional Investors Br. at 18 n.20 (citing Brief of Amicus Curiae Attorney General of the State of New York in *Assured Guar. (UK) Ltd. v. J.P.Morgan Inv. Mgm't, Inc.*, 2011 WL 7452124).) But the Attorney General's argument in *Assured Guaranty* is not at odds with his position here. In *Assured Guaranty*, the Attorney General argued, and the Court of Appeals held, that the Martin Act did not wholly preclude private common-law claims because it was not *categorically* true that such private litigation would interfere with the Attorney General's enforcement of the Martin Act. But the Attorney General did not argue that private litigation would *never* implicate quasi-sovereign interests or threaten to impair particular Martin Act causes of action—nor did he preemptively agree to exclude himself from private lawsuits that would implicate such interests. To the contrary, the Attorney General's argument naturally presupposed that traditional principles of intervention, such as those raised here, would be available to protect any interest of the Attorney General that might be threatened in any particular case brought by a private party.

Second, the Institutional Investors contend that it is "beyond the jurisdiction of this Court" to entertain any objection to the proposed settlement's servicing standards, and that the Attorney General therefore cannot seek to intervene based on his interest in clarifying and strengthening those standards. (*Id.* at 10.)[5] But BNYM brought this proceeding specifically to obtain judicial approval of the proposed settlement "*in all respects*" (Proposed Judgment ¶¶ (m)-(n))—including over a dozen pages of "servicing improvements" (Proposed Settlement at 14-28). Thus, inquiries into the settlement's servicing provisions are squarely within the scope of this proceeding.

Finally, the Institutional Investors complain that the Attorney General's intervention could lead to a "potential ''regulatory taking'' of the investors' rights under the PSAs." (Institutional Investors Br. at 12-13.) But of course the Attorney General's *mere participation* would have no such effect—unless the Institutional Investors believe that additional discovery requests infringe on their constitutional rights. Instead, only this Court's ruling on the Article 77 petition would concretely affect the parties' rights. And neither the Institutional Investors nor BNYM can plausibly claim that any order from this Court would constitute a "regulatory taking"—those parties *voluntarily* initiated this proceeding and invited judicial review, and by doing so necessarily acknowledged that this Court has the full authority to reject the proposed settlement altogether, or any of the proposed findings offered by BNYM. In any event, if the Institutional Investors believe that possible modifications of the settlement would raise constitutional concerns, they may raise such arguments to the Court if and when such modifications are proposed. The Institutional Investors' potential constitutional arguments may

[5] The Institutional Investors also complain that the Attorney General's criticism of the servicing improvements is factually false. (Institutional Investors Br. at 13-14.) That is a dispute between the parties that this Court should determine on the merits; it is not an adequate basis for rejecting intervention at the outset.

go to the merits of BNYM's request for judicial approval of the settlement, but they have no relevance to the Attorney General's request to intervene in this proceeding.

Dated: April 23, 2012
New York, New York

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

By: /s/ Thomas Teige Carroll
THOMAS TEIGE CARROLL

Deputy Bureau Chief
Investor Protection Bureau
120 Broadway, 23rd Floor
New York, New York 10271
(212) 416-8225

Counsel for Proposed Intervenor-Respondent

Of Counsel:

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
LESLIE DUBECK
Assistant Solicitors General