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), Maiden Lane II, LLC (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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 CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

AFFIDAVIT OF JOSEPH SENSENBRENNER

State of Delaware)
) ss.:
County of New Castle)

JOSEPH SENSENBRENNER, being sworn, states:

1. I am an Assistant Deputy Attorney General for the Delaware Department of Justice.

2. I make this Affidavit in support of Delaware Department of Justice's Proposed Order to Show Cause on its Petition to Intervene.

3. The Delaware Department of Justice moved to intervene in this matter on August 10, 2011. True and correct copies of the papers in support of that motion are attached hereto as Exhibit 1.

4. Petitioner the Bank of New York Mellon ("BNYM") and the Institutional Investors opposed the Delaware Department of Justice's petition. A true and correct copy of BNYM's memorandum in opposition is attached hereto as Exhibit 2. A true and correct copy of the Institutional Investors' memorandum in opposition is attached hereto as Exhibit 3.

5. Walnut Place, LLC removed the matter to federal court on August 26, 2011. Accordingly, this Court held on October 31, 2011 that Delaware Department of Justice's pending motion to intervene was moot. A true and correct copy of the Court's order is attached hereto as Exhibit 4.

6. In federal court, this matter was assigned to Judge William H. Pauley, III. The Delaware Department of Justice filed a Reply in Support of its Petition in Intervention in Federal Court, a true and correct copy is attached hereto as Exhibit 5.

7. BNYM was given leave to file a Sur-Reply in Opposition to the Delaware Department of Justice's Petition in Intervention, a true and correct copy is attached hereto as Exhibit 6.

8. Judge Pauley considered and granted the Delaware Department of Justice's motion to intervene on November 18, 2011. *See In the Matter of the Application of The Bank of New York Mellon v. Walnut Place LLC,* 1:11-cv-05988-WHP (S.D.N.Y. Nov. 18,

2011) ("Pauley Decision"). Judge Pauley found that Delaware Department of Justice had *parens patriae* standing to protect absent investors and the integrity of the marketplace. A true and correct copy of the Pauley Decision is attached hereto as Exhibit 7.

9. On February 27, 2012, the Second Circuit Court of Appeals remanded the case back to state court.

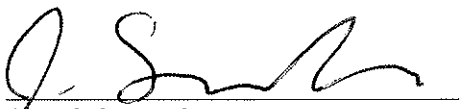
10. As indicated in a March 16, 2012 letter to the Court from the New York Attorney General, the state attorneys general were attempting in good faith to confer with BNYM and the Institutional Investors to resolve the question of intervention. A true and correct copy of the letter is attached hereto as Exhibit 8.

11. A conference call was held on March 19, 2012, during which the Court directed the parties to file orders to show cause to raise disputed issues to the Court.

12. Because the parties to this matter have commenced motion briefing on questions critical to the Article 77 and to the interest of this office, we now seek the Court's permission to intervene in order to fully participate in the resolution of those questions.

13. The Delaware Department of Justice's Verified Amended Petition in Intervention is attached hereto as Exhibit 9.

Dated: Wilmington, Delaware
April 12, 2012



Joseph Sensenbrenner
Assistant Deputy Attorney General
Delaware Department of Justice
820 N. French St.
Wilmington, DE 19801
(302) 577-8600
Counsel for Proposed Intervenor the State of Delaware

EXHIBIT 1

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), Maiden Lane II, LLC (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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)

Petitioner,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No.
651786/2011

Assigned to:
Kapnick, J.

NOTICE OF PETITION TO INTERVENE

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law, Verified Petition, the exhibits annexed and thereto, and all previous papers and proceedings in this action, the undersigned will move this Court (Barbara Kapnick, J.) on August 23, 2011, at 9:30 a.m., in submission part room 130 at 60 Centre Street, New York, New York, on August 23, 2011, or as soon thereafter as Counsel may be heard, for an order granting the State of Delaware permission to intervene as a respondent in this proceeding, directing that the State of Delaware be added as a respondent, directing that the Trustee's petition and notice of petition be amended by adding the State of Delaware as an intervenor-respondent, and granting such other and further relief as may

be just, proper, and equitable. The grounds for this petition are set forth more fully in the accompanying Memorandum of Law filed herewith.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 403(b), answering papers, if any, must be served on the undersigned no later than two days before the return date of this motion.

Dated: August 9, 2011

THE DELAWARE DEPARTMENT OF JUSTICE

By: _____

Jeremy D. Eicher (NY Bar No. 4643573)
Deputy Attorney General
Delaware Department of Justice
820 N. French St.
Wilmington, DE 19801
(302) 577-8600
Counsel for Proposed Intervenor the State of Delaware

Of Counsel:
Ian R. McConnel (DE Bar No. 4888) (Pro Hac Pending)
Gregory C. Strong (DE Bar No. 4664)
Meredith Stewart Tweedie (DE Bar No. 4960)
Deputy Attorneys General
Delaware Department of Justice
820 N. French St.
Wilmington, DE 19801
(302) 577-8533
(302) 577-8426 (fax)

To: Service List

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), Maiden Lane II, LLC (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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)

Petitioner,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No.
651786/2011

Assigned to:
Kapnick, J.

VERIFIED PETITION TO INTERVENE

For its petition pursuant to CPLR 401, 1012, and 1013 to intervene as respondent in this proceeding, proposed intervenor the State of Delaware by JOSEPH R. BIDEN, III, Attorney General of the State of Delaware (the "Delaware Department of Justice"), states and alleges upon information and belief as follows:

INTRODUCTION

1. In this proceeding pursuant to CPLR Article 77, the Bank of New York Mellon ("BNYM"), as trustee for 530 trusts ("Covered Trusts") comprised of billions of dollars in residential mortgage backed securities ("RMBS"), seeks the Court's approval of a proposed

settlement of claims against Countrywide Home Loans, Inc. and Countrywide Financial Corporation (collectively "Countrywide"), who acted as loan originators and servicers to the Covered Trusts, and Bank of America ("BoA") and its affiliated entities who acted as servicers to the Covered Trusts.[1]

2. The claims that would be resolved by the proposed settlement are related to Countrywide and BoA's pervasive failure to comply with the standards of conduct governing the creation and administration of the covered trusts. These failures contributed to the massive collapse of the market for RMBS, causing substantial harm to mortgage loan borrowers, investors and the integrity of the securities markets.

3. If approved, the terms of the proposed settlement would fully and finally release the claims of the Covered Trusts and would be binding on all of the trust beneficiaries, whether or not they are represented in this special proceeding.

4. The Delaware Department of Justice seeks permission to intervene in this proceeding: (i) to ensure that the interests of Delaware investors who are beneficiaries of the Covered Trusts are represented and protected; (ii) to preserve the Delaware Department of Justice's ability to pursue potential Delaware state law claims against BNYM, BoA, or Countrywide arising out of the conduct covered by the proposed settlement; and (iii) and to ensure that the trusts covered by the proposed settlement that were created pursuant to the provisions of the Delaware Statutory Trust Act and are governed by Delaware Law are appropriately addressed.

5. The Delaware Department of Justice objects to the proposed settlement on the basis that it does not have sufficient information to evaluate the reasonableness of the proposal.

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[1] BoA acquired Countrywide in a transaction that was finalized on July 1, 2008, and later announced that Countrywide would transfer all of its assets to unnamed subsidiaries of BoA.

I. BACKGROUND

6. On June 29, 2011, BoA announced that it had entered into an agreement with BNYM to settle all potential claims belonging to the [covered] trusts" for which BNYM serves as trustee.

7. On the same day, BNYM commenced the instant special proceeding by filing a verified petition pursuant to CPLR § 7701 seeking judicial instructions and approval of the proposed settlement.

8. BNYM also appeared *ex parte* on July 29, 2011, without notice to any of the trust beneficiaries or other potentially adverse parties, and obtained an Order to Show Cause setting forth a procedure for the approval of the proposed settlement.

9. The terms of the proposed settlement include a cash payment to the trust beneficiaries of 8.5 billion dollars, provisions requiring the master servicers to implement certain servicing improvements, and provisions addressing the cure of document exceptions.[2]

10. The proposed settlement, on behalf of the Trustee, Investors, the Covered Trusts, or any Person acting on behalf of the Trustee or Investors of the Covered Trusts, contemplates the full and final release of a number of claims including those related to: 1) the breach of the representations and warranties governing the sellers of mortgage loans to the Covered Trusts and the master servicers of the Covered Trusts, 2) the breach of the recordkeeping requirements contained in the Pooling and Servicing Agreements and Sales and Servicing Agreements (collectively "PSAs") governing the trusts including the requirement that deficiencies in

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[2] Proposed Settlement at ¶¶ 3, 5, and 6.

mortgage files be identified and corrected, and 3) claims that BoA and Countrywide charged excessive fees and costs for their inadequate services.[3]

11. The proposed settlement with BoA was negotiated by a group of 22 institutional investors and BNYM. No other trust beneficiaries took part in the settlement negotiations. The proposed settlement is undoubtedly complex and billions of dollars are at stake. There is limited access to the information exchanged between the parties to the proposed settlement during settlement negotiations. In light of this, the Delaware Department of Justice does not have sufficient information to evaluate the adequacy of the settlement or its full impact on the interest of the State of Delaware.

II. INTERESTS OF THE DELAWARE DEPARTMENT OF JUSTICE

12. The Delaware Department of Justice has both common law and statutory authority to protect the interest of the State of Delaware generally, and the interests of Delaware citizens and investors more specifically, and should be permitted to intervene to ensure those interests are properly represented and that a fair and reasonable settlement of this matter is achieved.

A. THE PROPOSED SETTLEMENT MAY NOT ADEQUATELY ADDRESS HARM TO DELAWARE INVESTORS

13. The Delaware Department of Justice, based upon the review of the extremely limited universe of available facts concerning the proposed settlement, has significant concerns that the proposed settlement does not adequately remedy the harm suffered by the beneficiaries of the Covered Trusts, some of whom are undoubtedly Delaware investors. Many of these investors have not intervened in this litigation and, indeed, may not even be aware of it. The PSAs that govern the creation and administration of the Trusts permit such participation only by

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[3] Proposed Settlement at ¶ 9.

investors who individually or jointly hold a twenty five percent or greater interest in the trust, typically representing hundreds of millions of dollars. With its intervention, the Delaware Department of Justice will ensure that the interests of absent Delaware investors are adequately represented.

14. The Delaware Department of Justice's intervention is particularly important given the evidence suggesting that BNYM negotiated the settlement on behalf of the trust beneficiaries under a conflict of interest. The proposed settlement confers substantial direct benefits to BNYM, primarily by a provision, contained in a side letter to the proposed settlement agreement, in which BoA agrees to expressly guarantee the indemnification obligations of Countrywide to BNYM under the terms contained in the PSAs. This expanded indemnification provision also covers BNYM's negotiation and implementation of the terms of the settlement. The potential conflicts of BNYM go directly to the heart of the issue in this special proceeding, which is "did BNYM act reasonably in negotiating this settlement?"

B. PRESERVING CLAIMS OF THE DELAWARE DEPARTMENT OF JUSTICE

15. The Delaware Department of Justice also has a significant interest in preserving its potential claims against the parties to the proposed settlement that arise out of the conduct covered by the proposed settlement. The Delaware Department of Justice seeks to intervene pursuant to its statutory and common law authority to protect Delaware investors. The Delaware Department of Justice has statutory authority to "remedy any harm caused by securities law violations." 6 *Del. C.* § 7301(b). The Delaware Department of Justice also has statutory authority to pursue remedies for deceptive trade practices that are harmful to Delaware residents or consumers. 6 *Del. C.* § 2533(d). The Delaware Department of Justice is charged with

protecting the interests of all Delaware investors, including those Delaware investors who are beneficiaries (directly or indirectly) of the covered trusts.

16. While the Department's investigation of BNYM is still in preliminary stages, potential violations of Delaware law by BNYM in connection with the settlement may have occurred, to include but not limited to the following:

A) The acts and practices of BNYM alleged herein may have violated 6 *Del. C.* § 7303(2), in that BNYM may have made untrue statements of material fact and/or omitted to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading. BNYM's conduct as described above may have violated the Delaware Securities Act insofar as the Trust PSA requires the Trust annually to certify the following "servicing criteria":

- "Collateral or security on mortgage loans is maintained as required by the transaction agreements or related mortgage loan documents."
- "Mortgage loan and related documents are safeguarded as required by the transaction agreements;" and
- "Any addition, removals or substitutions to the asset pool are made, reviewed and approved in accordance with any conditions or requirements in the transaction agreements." [*See generally*, Trust PSA, [Ex W to NY Petition]].

The Delaware investors in the Trusts may have been misled by BNYM into believing that BNYM would review the loan files for the mortgages securing their investment, and that any deficiencies would be cured.

B) The acts and practices of BNYM alleged herein also may have violated Delaware's Deceptive Trade Practices Act, 6 *Del. C.* § 2432(12), in that BNYM's conduct created "a likelihood of confusion or misunderstanding" in the investors in the Trusts, for the reasons cited above.

C. TREATMENT OF DELAWARE STATUTORY TRUSTS

17. Delaware has a substantial interest in ensuring that Delaware vehicles, including Delaware statutory trusts, are not being utilized to facilitate violations of the law. Delaware has a substantial interest in ensuring that claims related to trusts created pursuant to the provisions of the Delaware Statutory Trust Act are resolved by the appropriate procedure under the Act.

18. Delaware trusts may not subject to the jurisdiction of the New York courts in connection with a special proceeding brought under Article 77 dealing with express trusts governed by New York law.

19. This is particularly true when, as in this case, the trust agreements that create and govern trusts formed under the Delaware Statutory Trust Act contain specific provisions indicating that Delaware law governs those agreements and that the trusts will be located and administered in Delaware.

20. In fact, by default, a Delaware statutory trust, pursuant to Title 12, § 3809 of the Delaware Code, is governed by Delaware law absent a provision in the Trust Agreement indicating otherwise.

21. In the matter *sub judice*, at least two of the 530 trusts covered by the proposed settlement are Delaware Statutory Trusts and governed by Delaware law:

a. CWHEQ 2006-A

a.i) Exhibit A to the Executed Proposed Settlement Agreement indicates that CWHEQ 2006-A is a trust covered by the settlement;

a.ii) The Trust Agreement, relevant excerpts attached as Exhibit A, contains a specific provision that the agreement is governed by Delaware law and that the trust is to be located and administered in Delaware;

b. CWHEQ 2007-G

a.i) Exhibit A to the Executed Proposed Settlement Agreement indicates that CWHEQ 2007-G is a trust covered by the settlement;

a.ii) The Trust Agreement, relevant excerpts attached as Exhibit B, contains a specific provision that the agreement is governed by Delaware law and that the trust is to be located and administered in Delaware.

RELIEF REQUESTED

The Delaware Department of Justice respectfully requests that the Court grant its petition to intervene.

Dated: August 9, 2011

THE DELAWARE DEPARTMENT OF JUSTICE

By: _____

Jeremy D. Eicher (NY Bar No. 4643573)
Deputy Attorney General
Delaware Department of Justice
820 N. French St.
Wilmington, DE 19801
(302) 577-8500
Counsel for Proposed Intervenor the State of Delaware

Of Counsel:
Ian R. McConnel (DE Bar No. 4888) (Pro Hac Pending)
Gregory C. Strong (DE Bar No. 4664)
Meredith Stewart Tweedie (DE Bar No. 4960)
Deputy Attorneys General
Delaware Department of Justice
820 N. French St.
Wilmington, DE 19801
(302) 577-8533
(302) 577-8426 (fax)

VERIFICATION

I, Jeremy D. Eicher, hereby affirm under penalty of perjury that the following is true and correct:

I am a member of the New York and Delaware Bars in good standing and a Deputy Attorney General for the Delaware Department of Justice. I have read the foregoing Verified Petition and know the contents thereof. All statements of fact therein are true and correct to the best of my knowledge and belief.

Executed this 9th day of August 2011, in Wilmington, Delaware

By: _____
Jeremy D. Eicher

_____
NOTARY PUBLIC

SHERRY V. HOFFMAN
NOTARIAL OFFICER
Attorney No. 2031
Pursuant to 29 Del. C. #4323(a)(3)

EXHIBIT A

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Exhibit 99.4

EXECUTION COPY

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CWHEQ, INC.
Depositor

WILMINGTON TRUST COMPANY
Owner Trustee

TRUST AGREEMENT
Dated as of February 24, 2006

CWHEQ REVOLVING HOME EQUITY LOAN TRUST,
SERIES 2006-A

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Table of Contents

The Owner Trustee hereby declares that it will hold the Assets on the terms of this Agreement, for the benefit of the Certificateholders, subject to the obligations of the Trust under the Transaction Documents. The Trust is a statutory trust under the Statutory Trust Statute and this Agreement is the governing instrument of the statutory trust. The Owner Trustee shall have all rights and obligations in this Agreement and in the Statutory Trust Statute for accomplishing the purposes of the Trust. The Owner Trustee shall file with the Secretary of State of the State of Delaware a Certificate of Trust of the Trust.

Section 2.07 Liability of a Certificateholder.

Except to the extent otherwise provided in this Agreement or in the other Transaction Documents, the Certificateholders shall be entitled to the same limitation of personal liability extended to stockholders of private corporations for profit organized under the general corporation law of the State of Delaware.

Section 2.08 Title to Trust Property.

Legal title to all the Assets shall be vested in the Trust as a separate legal entity except where applicable law in any jurisdiction requires title to any part of the Assets to be vested in a trustee, in which case title shall be vested in the Owner Trustee or any co-trustee or separate trustee, as the case may be.

Section 2.09 Location of Trust.

The Trust will be located in Delaware and administered in Delaware. Any bank accounts maintained by the Owner Trustee on behalf of the Trust shall be located in Delaware or Illinois. The Trust shall not have any employees in any State other than Delaware. Nothing in this Agreement shall restrict the Owner Trustee from having employees within or without Delaware. Payments will be received by the Trust only in Delaware, Illinois, or California, and payments will be made by the Trust only from Delaware or Illinois.

Section 2.10 Representations and Warranties of Depositor.

The Depositor represents and warrants to the Owner Trustee as of the date of this Agreement, and as to any Transaction Document, as of its date that:

(a) Organization and Good Standing. The Depositor is a corporation duly organized and validly existing under the laws of Delaware, with full power and authority to own its properties and to conduct its business as presently owned or conducted and to execute, deliver, and perform this Agreement and any other document related to this Agreement to which it is a party and to perform its obligations as contemplated by them.

(b) Due Qualification. The Depositor is duly qualified to do business as a Delaware corporation in good standing and has obtained all necessary licenses and approvals in each jurisdiction in which failure to so qualify or to obtain required licenses or approvals would have a material adverse effect on its ability to perform its obligations under this Agreement and the Transaction Documents to which the Depositor is a party.

(c) Due Authorization; Enforceability. The Depositor has full power and authority to execute, deliver, and perform this Agreement and the Transaction Documents to which it is a party and to carry out their respective terms. The Depositor has full power and authority to sell and assign the Assets. The execution, delivery, and performance by the Depositor of this Agreement and the Transaction Documents to which the Depositor is a party have been duly authorized by the Depositor by all necessary action. This Agreement and the Transaction Documents executed by the Depositor have been duly executed and delivered and constitute the valid and legally binding obligations of the Depositor enforceable against the Depositor in accordance with their terms.

(d) No Conflict. The Depositor's execution and delivery of this Agreement and the Transaction Documents to which the Depositor is a party, performance of the transactions contemplated by them, and fulfillment of their terms applicable to the Depositor do not conflict with any requirements of law applicable to the Depositor or conflict with, result in any breach of any of the provisions of, or with or without notice or lapse of time constitute a default under, any indenture, contract, or other instrument to which the Depositor is a party or by which it or its properties are bound.

CWHEQ, Inc.,
c/o Wilmington Trust Company
Rodney Square North
1100 North Market Street
Wilmington, DE 19890
Attention: Corporate Trust Administration
Telephone: (302) 651-1000
Facsimile: (302) 651-8882

(b) Any notice required or permitted to be given to the Certificateholders shall be given by first-class mail, postage prepaid, at the addresses of the Certificateholders. Any notice so mailed within the time prescribed in this Agreement shall be conclusively presumed to have been duly given, whether or not the Certificateholder receives the notice.

Section 11.04 Severability.

Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to that jurisdiction, be ineffective to the extent of the prohibition or unenforceability without invalidating the remaining provisions of this Agreement, and that prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable the provision in any other jurisdiction.

Section 11.05 Separate Counterparts.

This Agreement may be executed by the parties to this Agreement in separate counterparts, each of which when so executed and delivered shall be an original, but all the counterparts shall together constitute but one instrument.

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Section 11.06 Successors and Assigns.

All covenants and agreements in this Agreement shall be binding on, and inure to the benefit of, each of the Depositor and its permitted assignees, the Owner Trustee and its successors, and each Certificateholder and any of its successors, all as provided in this Agreement. Any request, notice, direction, consent, waiver or other instrument or action by any Certificateholder shall bind its successors.

Section 11.07 Nonpetition Covenant.

Notwithstanding any prior termination of this Agreement, the Depositor and the Owner Trustee, by entering into this Agreement, and each Certificateholder, by accepting a Certificate, agree that they shall not, before the date that is one year and one day after the termination of the Agreement, file or participate in the filing of any petition against the Trust that could cause the Trust to incur an Insolvency Event. Nothing in this Agreement shall prohibit the Owner Trustee from participating in or filing proofs of claim in any such proceeding instituted by any other person.

Section 11.08 No Recourse.

Each Certificateholder by accepting a Certificate acknowledges that the Certificate represents the beneficial interest in the Trust only and does not represent interests in or obligations of the Depositor, the Servicer, the Administrator, the Owner Trustee, the Indenture Trustee, or any Affiliate of any of them and no recourse may be had against those parties or their assets, except as may be expressly stated or contemplated in this Agreement, the other Transaction Documents, or the Certificates.

Section 11.09 Headings.

The headings of the various Articles and Sections in this Agreement are for convenience of reference only and shall not define or limit any of the provisions of this Agreement.

Section 11.10 GOVERNING LAW.

THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE, WITHOUT REFERENCE TO ITS PROVISIONS THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION.

Section 11.11 Rule 144A Information.

EXHIBIT B

EX-99.4 5 efc7-2205_ex994.htm EXHIBIT 99.4

EXHIBIT 99.4

EXECUTION COPY

CWHEQ, Inc.
Depositor

WILMINGTON TRUST COMPANY
Owner Trustee

TRUST AGREEMENT

Dated as of August 10, 2007

CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2007-G

Assets and make distributions to any Certificateholder and the holders of Notes.

The Trust shall not engage in any activity other than in connection with the foregoing activities or other than as required or authorized by this Agreement or the other Transaction Documents.

Section 2.04 Appointment of Owner Trustee.

The Depositor appoints the Owner Trustee as trustee of the Trust effective as of the date of this Agreement to have all the rights and obligations in this Agreement.

Section 2.05 Initial Capital Contribution of Assets.

The Depositor hereby remits to the Owner Trustee the sum of $1. The Owner Trustee hereby acknowledges receipt in trust from the Depositor of the foregoing contribution. The Depositor shall pay

organizational expenses of the Trust as they may arise or shall promptly reimburse the Owner Trustee on request for any such expenses paid by the Owner Trustee.

Section 2.06 Declaration of Trust.

The Owner Trustee hereby declares that it will hold the Assets on the terms of this Agreement, for the benefit of the Certificateholders, subject to the obligations of the Trust under the Transaction Documents. The Trust is a statutory trust under the Statutory Trust Statute and this Agreement is the governing instrument of the statutory trust. The Owner Trustee shall have all rights and obligations in this Agreement and in the Statutory Trust Statute for accomplishing the purposes of the Trust. The Owner Trustee shall file with the Secretary of State of the State of Delaware a Certificate of Trust of the Trust.

Section 2.07 Liability of a Certificateholder.

Except to the extent otherwise provided in this Agreement or in the other Transaction Documents, the Certificateholders shall be entitled to the same limitation of personal liability extended to stockholders of private corporations for profit organized under the general corporation law of the State of Delaware.

Section 2.08 Title to Trust Property.

Legal title to all the Assets shall be vested in the Trust as a separate legal entity except where applicable law in any jurisdiction requires title to any part of the Assets to be vested in a trustee, in which case title shall be vested in the Owner Trustee or any co-trustee or separate trustee, as the case may be.

Section 2.09 Location of Trust.

The Trust will be located in Delaware and administered in Delaware. Any bank accounts maintained by the Owner Trustee on behalf of the Trust shall be located in Delaware. The Trust shall not have any employees in any State other than Delaware. Nothing in this Agreement shall restrict the Owner Trustee from having employees within or without Delaware. Payments will be received by the Trust only in Delaware or California, and payments will be made by the Trust only from Delaware.

Section 2.10 Representations and Warranties of Depositor.

The Depositor represents and warrants to the Owner Trustee as of the date of this Agreement, and as to any Transaction Document, as of its date that:

(a) *Organization and Good Standing*. The Depositor is a corporation duly organized and validly existing under the laws of Delaware, with full power and authority to own its properties and to conduct its business as presently owned or conducted and to execute, deliver, and perform this Agreement and any other document related to this Agreement to which it is a party and to perform its obligations as contemplated by them.

shall not, before the date that is one year and one day after the termination of the Agreement, file or participate in the filing of any petition against the Trust that could cause the Trust to incur an Insolvency Event. Nothing in this Agreement shall prohibit the Owner Trustee from participating in or filing proofs of claim in any such proceeding instituted by any other person.

Section 11.08 No Recourse.

Each Certificateholder by accepting a Certificate acknowledges that the Certificate represents the beneficial interest in the Trust only and does not represent interests in or obligations of the Depositor, the Servicer, the Administrator, the Owner Trustee, the Indenture Trustee, or any Affiliate of any of them and no recourse may be had against those parties or their assets, except as may be expressly stated or contemplated in this Agreement, the other Transaction Documents, or the Certificates.

Section 11.09 Headings.

The headings of the various Articles and Sections in this Agreement are for convenience of reference only and shall not define or limit any of the provisions of this Agreement.

Section 11.10 Governing Law.

THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE, WITHOUT REFERENCE TO ITS PROVISIONS THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION.

Section 11.11 Rule 144A Information.

As long as any of the securities of this Trust are "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act, the Administrator on behalf of the Trust shall provide to any Noteholder or Certificateholder and to any prospective purchaser from any of them designated by any of them on the request of the Noteholder, Certificateholder, or prospective purchaser, any information required to be provided the holder or prospective purchaser to satisfy the conditions of Rule 144A(d)(4) under the Securities Act.

In Witness Whereof, the parties to this Agreement have caused this Agreement to be duly executed by their respective officers hereunto duly authorized, as of the day and year first above written.

CWHEQ, Inc.
Depositor

By: /s/ Elizabeth Chen
Name: Elizabeth Chen
Title: Senior Vice President

WILMINGTON TRUST COMPANY

By: /s/ J. Christopher Murphy
Name: J. Christopher Murphy
Title: Financial Services Officer

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), Maiden Lane II, LLC (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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)

Petitioner,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No.
651786/2011

Assigned to:
Kapnick, J.

MEMORANDUM OF JOSEPH R. BIDEN, III, ATTORNEY GENERAL OF THE STATE OF DELAWARE (THE "DELAWARE DEPARTMENT OF JUSTICE"), IN SUPPORT OF ITS PETITION TO INTERVENE

The Bank of New York Mellon ("BNYM", or the "Trustee") filed this Article 77 proceeding on June 29, 2011, to obtain judicial approval of a proposed settlement of the claims of 530 trusts (the "Covered Trusts"), including a small number of Delaware statutory trusts, for which BNYM serves as trustee or indenture trustee. BNYM seeks a judicial finding that the proposed settlement is reasonable and within BNYM's powers as

trustee. The proposed settlement, if approved, would eliminate the claims of the trusts, including the Delaware statutory trusts, against Countrywide entities ("Countrywide") and Bank of America ("BoA"). BNYM seeks to make that finding binding upon all beneficiaries of the Trusts, without giving beneficiaries or their representatives the opportunity to challenge BNYM's claim that the proposed settlement is reasonable and within its powers as trustee. The relevant facts relating to the background of the proposed settlement are more fully set forth in the Delaware Department of Justice's Petition to Intervene (the "Petition"), filed herewith. *See* Petition ¶¶ 6-11.

The Delaware Department of Justice objects to the approval of the proposed settlement at this time. The Delaware Department of Justice seeks permission to intervene in this proceeding: (i) to ensure that the interests of Delaware investors who are beneficiaries of the Covered Trusts are represented and protected; (ii) to preserve the Delaware Department of Justice's ability to pursue state law claims, including claims for securities fraud and deceptive trade practices, against BNYM, BoA or Countrywide, arising out of the conduct covered by the potential settlement; and (iii) to ensure that the trusts covered by the proposed settlement (either directly or indirectly) that were created pursuant to the provisions of the Delaware Statutory Trust Act and are governed by Delaware law appropriately are addressed. This is the Delaware Department of Justice's Memorandum of Law in support of his Petition to Intervene pursuant to New York CPLR 401, 1012 and 1013.

ARGUMENT

Interested parties may intervene in an Article 77 proceeding with leave of the court. CPLR 401. Pursuant to CPLR 1012(a), intervention by a party shall be permitted as a matter of right if "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." Intervention is permissible pursuant to CPLR 1013 if "the person's claim or defense and the main action have a common question of law or fact . . . [and] the intervention will [not] unduly delay the determination of the action or prejudice the substantial rights of any party."

I. THE DELAWARE INTERVENTION OF THE DELAWARE DEPARTMENT OF JUSTICE IS NECESSARY TO PROTECT THE INTERESTS OF ABSENT BENEFICIARIES INCLUDING DELAWARE INVESTORS

A. There is a Risk that Unrepresented Delaware Investors May be Bound by the Judgment

The relief sought by BNYM in this proceeding contains broad language[1] suggesting that unrepresented beneficiaries, including Delaware investors, statutory trusts and beneficiaries "may be bound by the judgment." CPLR 1012(a)(3). The proposed settlement also contains a sweeping release of claims provision, under which all trust beneficiaries' claims are fully and finally resolved by the terms of the agreement. The Delaware Department of Justice seeks to intervene to protect the interests of Delaware citizens, including the aforementioned Delaware investors.

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[1] BNYM's Proposed Order and Judgment states that it would bind "all Trust Beneficiaries . . ., and any Persons claiming by, through, or on behalf of any of the Trustee, the Trust Beneficiaries, or the Covered Trusts . . . are bound by this Final Order and Judgment", to a finding that "[t]he Trustee acted in good faith . . . " and would "bar[] and enjoin[] [those parties] from instituting, commencing, or prosecuting, any suit, proceeding, or other action asserting against the Trustee any claims arising from or in connection with the Trustee's entry into the Settlement." (*See Settlement*, Ex. B to New York Memorandum of Law In Support of Motion to Intervene).

B. The Delaware Department of Justice Has Both Statutory and Common Law Authority to Represent Absent Delaware Investors

The Delaware Department of Justice has a significant interest in preserving potential claims against the parties to the proposed settlement that arise out of the conduct covered by the proposed settlement. The Delaware Department of Justice seeks to intervene pursuant to its statutory and common-law authority to protect Delaware investors. The Delaware Department of Justice has statutory authority, pursuant to the Delaware Securities Act, to "remedy any harm caused by securities law violations." 6 *Del. C.* § 7301 (b). The Delaware Department of Justice, like other state attorneys general acting pursuant to their *parens patriae* authority, also has common-law authority to protect the interests of its citizens and investors in the market. *See People ex. Rel Spitzer v. Grasso*, 11 N.Y.3d 64, 69 n.4 (2008). The Delaware Department of Justice legally is charged with protecting the interests of all Delaware investors, including those Delaware investors who are beneficiaries of the Covered Trusts. The Delaware Department of Justice also has statutory authority to pursue remedies for deceptive trade practices that are harmful to Delaware residents or consumers. 6 *Del. C.* § 2533(d). Finally, the Delaware Department of Justice's intervention is essential given the evidence suggesting that BNYM negotiated the settlement on behalf of the trust beneficiaries under a conflict of interest. *See* Petition ¶ 14. It is therefore particularly important that the interests of absent beneficiaries, including Delaware investors, are represented.

II. THE DELAWARE DEPARTMENT OF JUSTICE SHOULD BE ALLOWED TO INTERVENE TO PRESERVE DELAWARE LAW CLAIMS.

While the Delaware Department of Justice has limited information regarding the merits of the settlement, the details of the potential misconduct leading to the proposed settlement are widely reported. The Delaware Department of Justice therefore has a legitimate basis upon which to assume, pending verification through confirmatory discovery, that Delaware's interests may adversely be affected by the proposed settlement.

A. The Delaware Department of Justice's Potential Claims May Be Impaired by a Judgment in This Proceeding

The Delaware Department of Justice has a unique interest in protecting the Delaware interests that potentially are affected by the proposed settlement. Intervention pursuant to CPLR 1012 or 1013 is appropriate 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 Delaware Department of Justice from pursuing certain claims or remedies for such violations.[2] While the Delaware Department of Justice's potential claims, including its securities fraud and deceptive trade practices claims, should fall within the definition of "claims not released" in the proposed settlement agreement (¶ 10(c)), there is no guarantee that BNYM, Countrywide or BoA would not assert that the Delaware Department of Justice's claims are barred by the terms of the proposed settlement, once approved.

[2] There is some precedent from the Third Circuit Court of Appeals suggesting that an investor may, through a contract with a third party, bargain away the State's ability to pursue restitution on his or her behalf. *See Olde Discount Corp. v. Tupman*, 1 F.3d 202 (3d Cir. 1993).

a.i. The Delaware Department of Justice's Potential Securities Fraud Claim

As stated previously, the Delaware Department of Justice's investigation is still in preliminary stages. The Delaware Department of Justice believes, however, that the acts and practices of BNYM alleged herein may have violated the Delaware Securities Act, 6 *Del. C.* § 7303(2), in that BNYM may have made untrue statements of material fact and/or omitted to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading. BNYM's conduct as described above may have violated the Delaware Securities Act insofar as the Trust PSA requires the Trust annually to certify the following "servicing criteria":

- "Collateral or security on mortgage loans is maintained as required by the transaction agreements or related mortgage loan documents."
- "Mortgage loan and related documents are safeguarded as required by the transaction agreements;" and
- "Any addition, removals or substitutions to the asset pool are made, reviewed and approved in accordance with any conditions or requirements in the transaction agreements."[3]

The Delaware investors in the Trusts may have been misled by BNYM into believing that BNYM would review the loan files for the mortgages securing their investment, and that any deficiencies would be cured.

a.ii. The Delaware Department of Justice's Potential Deceptive Trade Practices Claim

The acts and practices of BNYM alleged herein also may have violated Delaware's Deceptive Trade Practices Act, 6 *Del. C.* §§ 2532(a)(7) and 2532(a)(12), in that BNYM's conduct created "a likelihood of confusion or misunderstanding" in the

[3] *See generally*, Trust PSA, Exhibit W to New York Motion to Intervene.

investors in the Trusts. The Delaware Deceptive Trade Practices Act, which is based on the Uniform Deceptive Trade Practices Act, is intended to be broadly construed to encompass a wide range of potentially deceptive practices.[4] While the Delaware Department of Justice's investigation is preliminary, the fact that the Delaware investors in the trusts may have been misled by BNYM concerning the scope of review of the loan files for the mortgages securing their investment may give rise to a Deceptive Trade Practices claim under Delaware law.

B. Questions Presented by the Delaware Department of Justice's Claims Would be Similar to Questions Presented by This Proceeding

Even if the Delaware Department of Justice is not entitled to intervene as a matter of right, the Delaware Department of Justice should be permitted to intervene because the claims that it might assert against BNYM, Countrywide, or BoA on behalf of the relevant Delaware interests share "common questions of law or fact" with this proceeding. CPLR 1013.

This proceeding will address the question of whether the Trustee breached its fiduciary duty in negotiating the settlement and whether the settlement is fair and reasonable. *See* Settlement Ex. B (Proposed Order and Judgment) ¶ (k) (proposing finding that the "Trustee acted in good faith, within its discretion, and within the bounds of reasonableness in determining that the Settlement Agreement was in the best interests of the Covered Trusts.") In addressing these issues, the proceeding necessarily will address the merits and likelihood of success of investors' claims against Countrywide and BoA. Such claims contain common questions of law or fact with the Delaware

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[4] *Delaware Solid Waste Authority v. Eastern Shore Environmental, Inc.*, 2002 WL 537691, at *6 (Del. Ch. Mar. 28, 2002) (The intent of Section 2532(a)(12) is to enable courts to prevent "new kinds of deceptive trade practices").

Department of Justice's potential securities fraud and deceptive trade practices claims. The Delaware Department of Justice's participation would therefore assist the court in ascertaining all of the relevant facts of the proposed settlement.

III. THE DELAWARE DEPARTMENT OF JUSTICE SHOULD BE ALLOWED TO INTERVENE TO ENSURE THAT THE COVERED TRUSTS THAT WERE CREATED UNDER DELAWARE LAW ARE APPROPRIATELY ADDRESSED

The Delaware Department of Justice has a substantial interest in ensuring that Delaware vehicles, including Delaware statutory trusts, are not being used to facilitate violations of the law. Delaware also has a substantial interest in ensuring that the claims relating to trusts created pursuant to the provisions of the Delaware Statutory Trust Act are resolved by the appropriate procedure under the Act. The Delaware Department of Justice believes that an Article 77 Proceeding is not the appropriate venue for resolving those issues relating to Delaware Statutory Trusts, particularly where, as here, the trust agreements that create and govern trusts formed under the Delaware Statutory Trust Act are governed by Delaware law.[5] *See* Petition ¶¶ 18-20.

[5] *See* 12 *Del. C.* § 3809 ("Except to the extent otherwise provided in the governing instrument of a statutory trust or in this subchapter, the laws of this State pertaining to trusts are hereby made applicable to statutory trusts").

CONCLUSION

For the foregoing reasons, the Delaware Department of Justice respectfully requests that the Court grant its motion and amend the caption to add it as an Intervenor in this Article 77 proceeding, and award such other and further relief as the Court deems appropriate.

Dated: August 9, 2011

THE DELAWARE DEPARTMENT OF JUSTICE

By: _____

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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), Maiden Lane II, LLC (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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)

Petitioner,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No.
651786/2011

Assigned to:
Kapnick, J.

NOTICE OF MOTION TO ADMIT COUNSEL PRO HAC VICE

PLEASE TAKE NOTICE that upon the annexed affidavit of movant in support of this motion and the Certificate of Good Standing annexed thereto we will move this Court before the Honorable Barbara R. Kapnick at the Supreme Court of the State of New York, County of New York, in the Motion Support Office Courtroom, 60 Centre Street, Room 130, New York, New York, on August 23, 2011, at 9:30 a.m., or as soon thereafter as counsel may be heard, pursuant to Rule 520.1 of the Rules of the New York, for an Order allowing the admission of movant, a member of the Delaware Department of Justice and a member in good standing of the Bar of the

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), Maiden Lane II, LLC (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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)

Petitioner,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No.
651786/2011

Assigned to:
Kapnick, J.

PROPOSED ORDER GRANTING MOTION TO INTERVENE OF THE DELAWARE DEPARTMENT OF JUSTICE

Proposed Intervenor the Delaware Department of Justice, having duly moved for an order pursuant to CPLR 401, 1012 and 1013 permitting it to intervene as a party in the above-captioned proceeding, and granting such other relief as the Court deems appropriate,

IT IS HEREBY ORDERED that the Delaware Department of Justice's Petition to intervene is GRANTED, and that the caption in the above-captioned proceeding shall by amended to add the Delaware Department of Justice as a party, as follows:

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), Maiden Lane II, LLC (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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), Western Asset Management Company (intervenor), and the Delaware Department of Justice (Intervernor)

Petitioner,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No.
651786/2011

Assigned to:
Kapnick, J.

ENTER,

J.S.C.

EXHIBIT 2

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 15

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

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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 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 in good faith and within the bounds of reasonableness in entering into the Settlement Agreement.[1] But the DAG can point to no authority supporting 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) and 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 ensure that the interests of Delaware and its citizens and investors are properly represented "and that a fair and reasonable settlement of this matter is achieved" (Pet. ¶ 12); (2) because he has an interest in ensuring that two Delaware trusts "are not being utilized to facilitate violations of law . . . and that claims related to trusts created pursuant to the provisions of the Delaware Statutory Trust Act are resolved by the appropriate procedure" (*id.* ¶ 17); and (3) 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

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

(*id.* ¶ 15).[2] None of these alleged interests, however, 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.[3]

---

[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 conflict of interest." (Pet. ¶ 14.) 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. (Dkt. No. 135 at 20–21.)

[3] The DAG describes this Article 77 proceeding in two ways that the Trustee is compelled to correct at the outset. Both mistakes appear to bolster the DAG's position that his intervention is necessary because Certificateholders cannot act on their own behalf. The first is the assertion that the PSAs "permit . . . participation" in this Article 77 proceeding "only by investors who individually or jointly hold a twenty five percent or greater interest in the trust, typically representing hundreds of millions of dollars." (Pet. ¶ 13.) The PSAs say no such thing, nor does the C.P.L.R. To the contrary, the Order to Show Cause (Dkt. No. 13) gives the opportunity to object to all "Potentially Interested Persons," defined to include all "holders of certificates or notes evidencing various categories of ownership interest in the Trusts." (Ingber Aff., Dkt. No. 11, ¶ 4(a).) And indeed, many of the Intervenors do not hold a twenty-five percent interest in any Trust. There is no twenty-five percent requirement.

Second, the DAG argues that the Trustee seeks to bind all trust beneficiaries "without giving beneficiaries or their representatives the opportunity to challenge BNYM's claim that the proposed settlement is reasonable and within its powers as trustee." (DAG's Memorandum of Law ("DAG MOL") 2.) That statement, too, is wrong. It ignores that the whole purpose of this proceeding is to afford investors an opportunity to be heard. The Trustee, which brought this special proceeding, has not opposed the intervention of ***any*** Certificateholder who seeks to object to the Settlement. It objects to the DAG's intervention only because, like the NYAG, he has no standing to intervene and the intervention would fundamentally alter, unduly expand and needlessly delay the proceeding.

ARGUMENT

I. The Petition to Intervene Must Be Denied, Because the DAG Lacks Standing to Object to the Settlement.

A. 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).[4] 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.[5] The DAG invokes the *parens patriae* doctrine, which he says allows him to litigate "to protect the interests of its citizens and investors in the market," and to "protect[] the interests of all Delaware investors, including those Delaware investors who are beneficiaries of the Covered Trusts." (DAG MOL 4.) But the DAG does not have the authority to object to the settlement of private claims seeking monetary relief[6] on behalf of a

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[4] Not surprisingly, the DAG does not contend that he has greater authority than the NYAG to intervene in this proceeding. Rather, by citing *People v. Grasso* (DAG MOL 4), the DAG appears to concede the applicability of New York law to the determination of whether he has standing to intervene in this Article 77 proceeding. The apparent concession is understandable because "[t]he law of the forum determines the jurisdiction of the courts, the capacity of parties to sue or to be sued, the remedies which are available to suitors and the procedure of the courts." *Mertz v. Mertz*, 271 N.Y. 466, 473 (1936).

[5] "[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 I")*, 54 A.D.3d 180, 190 n.4 (1st Dep't 2010) (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."

[6] The Settlement also provides for improvements in servicing and the cure of past document deficiencies, but because these changes are motivated by the Certificateholders'

discrete group of private investors. 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 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 I*, 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 *Alfred L. 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 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.

The DAG's *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

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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.

settling. Courts have not hesitated to find an attorney general's standing lacking for this reason. *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.

Alfred L. 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 I*, 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 I* 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 4) does not alter this result. The First Department addressed that notion in *Grasso I* 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 *Alfred L. 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").[7]

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 I*, 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,

[7] Here, there can be no question of the competency of the Certificateholders. They are, in the main, sophisticated investors, including, for example, proposed intervenor-respondent AIG and the various pension and hedge funds that have sought to intervene. These entities are not and never have been the proper objects of *parens patriae*, the "nursing quality."

the state as *parens patriae* lacks standing to prosecute such a suit." *Seneci*, 817 F.2d at 1017; *see also Grasso I*, 54 A.D.3d at 195–96 ("where, 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. ¶ 12)—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 citizens and investors" (Pet. ¶ 12) 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 Certificateholders from Delaware (a showing that the DAG has not made), any cognizable

interest that they may have is purely monetary. 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).

The DAG's contention that he has standing to object to the Settlement because the "Delaware Department of Justice has a substantial interest in ensuring that Delaware vehicles, including Delaware statutory trusts, are not being used to facilitate violations of law" and that "claims relating to trusts created pursuant to the provisions of the Delaware Statutory Trust Act are resolved by the appropriate procedure under the Act" is equally unavailing. (DAG MOL 8; *see also* Pet. ¶ 17.) As an initial matter, the Trust Agreements to which the DAG refers and which are the instruments created under, and governed by, Delaware law are not implicated in this Article 77 proceeding, because the claims being settled are governed by independent agreements—the Indentures and related Sale and Servicing Agreements—which were executed contemporaneously with the Trust Agreements and which are governed by New York law. (*See* Indentures and Sale and Servicing Agreement, Dkt. No. 11-1 at A-266–267.)

For instance, pursuant to the Indenture, the Delaware statutory trust grants to BNYM, as indenture trustee, *inter alia*:

- "the interest of the Issuer in the Sale and Servicing Agreement and the Purchase Agreement (including the Issuer's right to cause the Mortgage Loans to be repurchased);" (Indenture, Dkt. No. 11-1 at A-266, at Granting Clause)[8]

[8] For the Court's convenience, the relevant pages from the Indenture and Sale and Servicing Agreement are included in an addendum to this memorandum of law.

- "all present and future claims, demands, causes of action, and chooses in action regarding any of the foregoing;" (*Id.*)

Additionally, the Indenture provides the Trustee with the right to "exercise all of the rights of the Issuer to direct actions of the Master Servicer pursuant to the Sale and Servicing Agreement" (*Id.* § 3.07(a)). These provisions, along with other provisions of the Indentures and the related Sale and Servicing Agreements, represent the claims that are addressed by the Settlement Agreement and the key issues that are implicated in this Article 77 proceeding. Accordingly, the Indentures and corresponding Sale and Servicing Agreements are the operative instruments for purposes of this Article 77 proceeding. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. Williams*, 223 A.D.2d 395, 396 (1st Dept. 1996*)* (rejecting argument that agreements executed contemporaneously should be read together and that the choice of law provision in one agreement should be applied to claims arising out of the agreements executed contemporaneously). Notably, these agreements provide that they "shall be governed and construed in accordance with the laws of the State of New York, without reference to its provisions that would result in the application of the laws of another state." (*See, e.g.*, Indenture, Dkt. No. 11-1 at A-266, § 11.13; Sale and Servicing Agreement, Dkt. No. 11-1 at A-267, § 9.02.)

Moreover, neither the Delaware Statutory Trust Act nor any other Delaware statute provides the DAG with the right to object to a private settlement merely because it involves Delaware entities or agreements governed by Delaware law. The Trustee has not found any authority that would support the DAG's claim that he has standing to object to the Settlement on these grounds, nor has the DAG cited any. The wholly speculative possibility that a controversy concerning a Delaware statutory trust may not be resolved "by the appropriate procedures under the Act" does not constitute a quasi-sovereign interest. With respect to that possibility, the Delaware Statutory Trust Act provides that Delaware is not the exclusive jurisdiction for legal

proceedings concerning Delaware statutory trusts. *See* 12 Del. C. § 3804(e) (West 2011) ("In the governing instrument of the statutory trust or other writing, a trustee or beneficial owner or other person may consent to be subject to the *nonexclusive jurisdiction of the courts of, or arbitration in, a specified jurisdiction*, or the exclusive jurisdiction of the courts of the State [of Delaware].") (emphasis added). Although this Article 77 proceeding is the appropriate forum in which to seek judicial approval of the Settlement it would not matter if it were not the right forum. After all, even assuming what is doubtful at best, that Delaware Certificateholders may object to the Settlement as a result of their individual decisions to purchase notes through a securitization that employs a vehicle governed by Delaware law (which they do not since, as noted above, the Trust Agreement creating that vehicle is not relevant to this proceeding), they are free to intervene and attempt to object and make that argument.

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

The DAG 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.*, No. 401110/06, 2007 WL 2330924, at *7 (Sup. Ct. N.Y. Cnty. July 9, 2007), 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)).

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, Dkt. No. 101-04.) 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 is tangentially connected to a Delaware trust, he could intervene in virtually any private litigation settlement that involved 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 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 its authority to sue or its 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 remedy[ing] the harm" to themselves (Pet. ¶ 13), 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 BNYM), 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 in good faith and within the bounds of reasonableness in entering into the Settlement. 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).[9]

* * *

The conclusion that the DAG lacks authority to object to the Settlement is dispositive of his motion to intervene. Because he lacks standing in this Article 77 proceeding, the DAG cannot intervene based on other potential claims that he is free to bring in a separate lawsuit. In essence, the DAG would manufacture standing by virtue of his "potential" Delaware Securities Act and Deceptive Trade Practices Act claims. As the First Department made clear in *Grasso I*, however, "[a] [party] surely cannot confer authority to sue or standing upon himself by making factual allegations that are not necessary to his case." 54 A.D.3d at 205. On the contrary, "[a] proposed intervenor is not permitted to raise issues which are not before the court in the main action." *E. Side Car Wash, Inc. v. K.R.K. Capital, Inc.*, 102 A.D.2d 157, 160 (1st Dep't 1984).

[9] In fact, the first entities to intervene as respondents in this Article 77 proceeding—the Walnut Place LLC entities—are entities organized under Delaware law represented here by sophisticated counsel. (*See* Dkt. No. 24.)

Because that is exactly what the DAG seeks to do here, the Court need not reach the other suggested grounds for intervention. In short, C.P.L.R. §§ 1012 and 1013 assume the standing of a prospective intervenor to be a party to a pending action, rather than conferring that standing *sub silentio*, and simply regulate the circumstances under which the prospective intervenor may become a party in the action.

II. The DAG Cannot Intervene Based On His Potential Claims.

Although the Court need not and should not consider the "potential" claims proffered by the DAG as a basis for intervention, those inchoate claims do not meet the standards set forth in the C.P.L.R. Contrary to the DAG's argument (DAG MOL 3), no one may intervene as-of-right in a special proceeding, because "[a]fter a proceeding is commenced, no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, except by leave of court." C.P.L.R. § 401. Thus, intervention is never mandatory. The Advisory Committee Report on Section 401 explains that "[t]he court in a special proceeding is thus given the degree of control over parties necessary to preserve the summary nature of the proceeding." N.Y. Adv. Comm. on Prac. & Proc., Legis. Doc. No. 17, at 155 (1959); *see also* Vincent C. Alexander, Practice Commentaries C401:2 (2010) ("The usual CPLR devices allowing for free joinder of parties after commencement of the action are rendered inoperative by CPLR 401."). Therefore, C.P.L.R. § 1013, and certainly C.P.L.R. § 1012, do not provide the governing standard here. Nonetheless, because the DAG addresses them, and because they may provide useful guidance on the exercise of the Court's discretion, we discuss them as well.

A. The DAG Cannot Intervene As-Of-Right Under C.P.L.R. § 1012(a)(2).

The standard for intervention under C.P.L.R. § 1012(a)(2) has two prongs, although, as just noted, intervention in a special proceeding always requires leave of court. The proposed intervenor must show that "the representation of the person's interests by the parties is or may be

inadequate" **and** that "the person is or may be bound by the judgment." The DAG cannot make either of these necessary showings.

Even where representation of a party's interests is inadequate, intervention is still not allowed where the intervenor "will not be bound by any judgment in the underlying" litigation. *Kaczmarek v. Shoffstall*, 119 A.D.2d 1001, 1002 (4th Dep't 1986). 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 5.) 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).) New York courts have squarely held that an attorney general's claims are not released by a private settlement. In *State v. McLeod*, the court considered a bankruptcy court release that included "a permanent injunction against 'any entity' from pursuing" certain claims, including for breach of fiduciary duty. No. 403855/02, 2006 WL 1374014, at *7 (Sup. Ct. N.Y. Cnty. Feb. 9, 2006). It held that "the fact that McLeodUSA's shareholders may have discharged their claims against McLeod would not

diminish the State's legal authority to enforce the Martin Act on behalf of the investing public." *Id.* (footnote omitted).

People v. Applied Card Systems is also particularly instructive on this point. In *Applied Card Systems*, the Court of Appeals barred the attorney general from seeking restitution to individual investors who had settled their claims, but it did so precisely because that result "does not . . . substantially prejudice the public interest served by the Attorney General in pursuing this action." 11 N.Y.3d 105, 125 (2008), *cert denied, Cross Country Bank, Inc. v. N.Y.*, 555 U.S. 1136 (2009). The Court of Appeals confirmed that even after settlement "the [attorney general's] claims for injunctive relief, civil penalties, and costs remain undisturbed," the attorney general may "seek restitution on behalf of those not bound by the settlement," and the attorney general "might be able to obtain disgorgement—an equitable remedy distinct from restitution—of profits that respondents derived from all New York consumers, whether within the . . . settlement class or not." *Id.* By finding that so many remedies remain and that loss of the one remedy that was settled does not substantially prejudice the attorney general, *Applied Card Systems* fatally undermines the DAG's attempt to intervene in this case. *See also Olde Discount Corp. v. Tupman*, 1 F.3d 202, 211 (3d Cir. 1993) (finding that although Delaware's statutory right to seek restitution for securities violations was preempted by the Federal Arbitration Act "Delaware [] retains many avenues for the exercise of its proper role in dealing with alleged violations of [the] securities laws") (cited by DAG at DAG MOL 5).

B. Permissive Intervention Under C.P.L.R. § 1013 Is Not Proper Because the DAG's Claims Share No Common Issues With This Proceeding and Would Cause Undue Delay.

C.P.L.R. § 1013 permits the Court, in its discretion, to allow intervention "when the person's claim or defense and the main action have a common question of law or fact." An important consideration, however, is "whether the intervention will unduly delay the

determination of the action or prejudice the substantial rights of any party." Thus, "when deciding whether to grant such a request, a court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation." *Pier v. Bd. of Assessment Review*, 209 A.D.2d 788, 789 (3d Dep't 1994). Intervention should be denied where it "would confuse the issues and would not result in benefit to the" parties in interest. *Osman v. Sternberg*, 168 A.D.2d 490, 491 (2d Dep't 1990). Undue delay is a sufficient basis to deny intervention in any case, but it is an especially compelling concern in a special proceeding, which is intended to be expeditious: "Speed, economy and efficiency are the hallmarks of this procedure." Vincent C. Alexander, Practice Commentaries C401:1 (2010) ("The purpose of [Article 77] is to provide for a special proceeding, as an alternative to the procedure by action, in trust accountings in the interests of expedition and economy. In other words, the purpose is to simplify the practice in relation to express trusts and eliminate cumbersome and expensive procedures.") (footnote omitted); 22 Christine M. Gimeno, Carmody-Wait, New York Practice § 131:1 (2d ed. 2011).

In the first place, the nebulous character of the "potential" claims the DAG might bring at some uncertain date in the future under the Delaware Securities Act and Deceptive Trade Practices Act compels denial of his petition to the extent it relies on those claims. Of course, concrete analysis of formless claims lurking somewhere in these statutes is not possible. More importantly, for this reason, the reasoned exercise of discretion required by C.P.L.R. § 1013 also is impossible. Furthermore, the DAG does not disavow any intention of asserting Delaware statutory claims as counterclaims in this proceeding. As discussed above (and below) New York law governing intervention would preclude the DAG from asserting any such counterclaims.

The DAG nonetheless is inviting this Court to authorize him to issue a blank check, good for any claims he regards as sufficiently related under the Delaware Securities Act or the Deceptive Trade Practices Act. That is manifestly unreasonable, and contravenes the express requirement of C.P.L.R. § 1014 that a "motion to intervene . . . be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought."

The DAG's argument for permissive intervention also is flawed because it rests on two basic misconceptions. The first is the assumption, made without any citation, that "a common question" means only that the intervenor seeks to raise some issue in common with the main case, regardless of the effect on the rest of the case. To the contrary, "[i]t is established law that a proposed intervenor is not permitted to raise issues which are not before the court in the main action." *Pier v. Bd. of Assessment Review*, 158 Misc. 2d 732, 735 (Sup. Ct. Schenectady Cnty. 1993), *aff'd*, 209 A.D.2d 788 (3d Dept. 1994); *see also E. Side Car Wash*, 102 A.D.2d at 160 (same); *City of Rye, Non-Partisan Civic Ass'n v. MTA*, 58 Misc. 2d 932, 938 (Sup. Ct. N.Y. Cnty. 1969), *rev'd on other grounds*, 24 N.Y.2d. 627 (1969) ("This is not an issue raised by plaintiffs in this action and is not properly before this court in the present action. An intervenor should not be permitted to raise issues not involved in the action.").

The DAG's second misconception is his conclusory and unsupported assertion that this Article 77 proceeding and his "potential" claims against the Trustee contain common questions of law or fact. (DAG MOL 7.) Any potential Delaware Securities Act and Deceptive Trade Practice Act claims, on the one hand, and this Article 77 proceeding, on the other, would raise discrete and non-overlapping issues: the Trustee's pre-Settlement conduct with respect to servicing of mortgage loans versus the question of the Trustee's good faith and reasonableness in entering into the Settlement. Any statutory claims under Delaware law based on pre-Settlement

conduct would both rest on shaky foundations and raise a whole host of issues unrelated to the Settlement. The DAG alleges that the Trustee may have violated the Delaware Securities Act and Deceptive Trade Practices Act "insofar as the Trust PSA requires the Trust annually to certify [certain] 'servicing criteria'" and that "Delaware investors in the Trusts may have been misled by BNYM into believing BNYM would review the loan files for the mortgages securing their investment, and that deficiencies would be cured." (DAG MOL 6–7.) But, the alleged servicing obligations that the Trustee allegedly breached do not arise from the Delaware Trust Agreements. The alleged obligations can be found in either the Pooling and Servicing Agreements or Sale and Servicing Agreements, both of which are governed by New York law. (*See, e.g.,* Pooling and Servicing Agreement, Dkt. No. 11-1 A-197, Ex. S; Sale and Servicing Agreement, Dkt. No. 11-1 A-267, Ex. F.)

Even putting aside the DAG's misconception concerning the governing law, he is wrong for other reasons. The Indenture expressly states that "[n]either the Indenture Trustee nor the Co-Trustee shall be responsible for . . . the completeness of any Mortgage Loan [or] the acts or omissions of any of the Depositor, the Master Servicer, any subservicer, or any mortgagor under a Mortgage[.]" (Indenture, Dkt. No. 11-1 at A-266, §6.04.) The servicing certification that the Trustee executed on an annual basis also makes clear that it is "[b]ased solely on the information delivered to the [Trustee] by the Master Servicer" and that the "Trustee is not certifying as to the accuracy, completeness or correctness of the information which it received from the Master Servicer and did not independently verify or confirm the accuracy, completeness or correctness of the information provided by the Master Servicer." (Sale and Servicing Agreement, Dkt. No. 11-1 at A-267, Ex. E-2.)

The Court, of course, need not resolve these issues on the merits now. More importantly for this motion, the Court will have no occasion to decide them in this Article 77 proceeding either. These allegations about the Trustee's pre-Settlement conduct relating to loan documentation have no bearing on the question of whether the Trustee acted reasonably and in good faith in entering into the Settlement. Thus, the Delaware Securities Act and Deceptive Trade Practices Act claims that apparently rest on those allegations are simply irrelevant. (DAG MOL 5–7.) And, as noted above, the Settlement does not release those claims.

In short, even if the DAG had satisfied the threshold requirements of standing (and he has not), none of the arguments made in his application implicate a sufficient basis for this Court to exercise its discretion to allow intervention pursuant to C.P.L.R. § 401.

CONCLUSION

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

Dated: New York, New York
August 19, 2011

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

ADDENDUM

Execution Copy

CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2007-G

Issuer

and

THE BANK OF NEW YORK

Indenture Trustee

INDENTURE

Dated as of August 15, 2007

THIS INDENTURE, dated as of August 15, 2007, between CWHEQ Revolving Home Equity Loan Trust, Series 2007-G, a Delaware statutory trust and the INDENTURE TRUSTEE, as indenture trustee,

WITNESSETH THAT

Each party agrees for the benefit of the other party and for the benefit of the Secured Parties as follows.

GRANTING CLAUSE

The Issuer Grants to the Indenture Trustee for the Classes of Notes and series referred to in the Master Glossary of Defined Terms as of the Closing Date, as Indenture Trustee for the benefit of the relevant Secured Parties, all of the Issuer's interest existing now or in the future in:

- the Mortgage Loans including their Asset Balances (including all Additional Balances) and the Mortgage Files and all property that secures the Mortgage Loans and all property that is acquired by foreclosure or deed in lieu of foreclosure, and all collections received on each Mortgage Loan after the Cut-off Date (excluding payments due by the Cut-off Date);

- the Issuer's rights under hazard insurance policies related to the Mortgage Loans;

- the interest of the Issuer in the Sale and Servicing Agreement and the Purchase Agreement (including the Issuer's right to cause the Mortgage Loans to be repurchased);

- all rights under any guaranty executed in connection with the Mortgage Loans ;

- the Collection Account and the Payment Account maintained to hold collections related to the Mortgage Loans and their contents; and

- all present and future claims, demands, causes of action, and choses in action regarding any of the foregoing and all payments on and all proceeds from any of the foregoing, including all proceeds of their conversion, voluntary or involuntary, into cash or other liquid property, all cash proceeds, accounts, notes, drafts, acceptances, chattel paper, checks, deposit accounts, insurance proceeds, condemnation awards, rights to payment of every kind, and other forms of obligations, instruments, and other property that at any time constitute any part of or are included in the proceeds of any of the foregoing (collectively, the "***Collateral***").

The Issuer agrees that the foregoing Grants are intended to grant in favor of the Indenture Trustee, for the respective benefit of the Secured Parties, a first priority, continuing

- with respect to the execution and filing of any Financing Statements and Continuation Statements

has been taken that is necessary to perfect the Security Interest of this Indenture in the Mortgage Loans, and reciting the details of the action.

(b) By September 30 in each calendar year beginning in 2008, the Issuer shall furnish to the Indenture Trustee an Opinion of Counsel either stating that, in its opinion, no action is necessary to maintain the perfected Security Interest of this Indenture in the Mortgage Loans or stating that, in its opinion, all action has been taken

(i) with respect to the recording, filing, re-recording, and refiling of this Indenture, any indentures supplemental to this Indenture, and any other requisite documents and

(ii) with respect to the execution and filing of any Financing Statements and Continuation Statements

necessary to maintain the perfected Security Interest created by this Indenture in the Mortgage Loans and reciting the details of the action. The Opinion of Counsel shall also describe the recording, filing, re-recording, and refiling of this Indenture, any indentures supplemental to this Indenture, and any other requisite documents and the execution and filing of any Financing Statements and Continuation Statements that will, in counsel's opinion, be required to maintain the perfected Security Interest of this Indenture in the Mortgage Loans until the same date in the following calendar year.

Section 3.07. ***Performance of Obligations.***

(a) The Issuer will not take any action (and will not permit others to take any action) that would release any person from any of their material obligations under any of the Transaction Documents, that would create any Security Interests that are not provided for in the Transaction Documents, or that would change or impair the validity or effectiveness of the Transaction Documents or any Security Interest granted under them, except as expressly provided in the Transaction Documents. The Indenture Trustee, as pledgee of the Mortgage Loans and an assignee of the Issuer's rights under the Sale and Servicing Agreement may exercise all of the rights of the Issuer to direct the actions of the Master Servicer pursuant to the Sale and Servicing Agreement.

(b) The Issuer may contract with other persons to assist it in performing its duties under this Indenture, and the performance of those duties by a person identified to the Indenture Trustee in an Officer's Certificate shall be considered to be action taken by the Issuer.

(c) The Issuer will punctually perform all of its obligations under the Transaction Documents, including properly filing all Financing Statements and Continuation Statements required to be filed by the Transaction Documents. Except as provided in Section 9.01, the Rating Agency Condition must be satisfied in connection with any amendment, termination, or

agreement and the Indenture Trustee will cause payments to be made and notices to be given in accordance with them.

Section 11.07. ***Conflict with Trust Indenture Act.***

If any provision of this Indenture limits, qualifies, or conflicts with another provision of this Indenture that is required to be included in this Indenture by the Trust Indenture Act, the required provision shall control.

The provisions of TIA Sections 310 through 317 that impose duties on any person (including the provisions automatically included in this Indenture unless expressly excluded by this Indenture) are a part of and govern this Indenture, whether or not physically in this Indenture.

Section 11.08. ***Effect of Headings and Table of Contents.***

The Article and Section headings and the Table of Contents are for convenience only and shall not affect the construction of this Indenture.

Section 11.09. ***Successors and Assigns.***

All agreements in this Indenture and the Notes by the Issuer shall bind its successors and assigns, whether so expressed or not. All agreements of the Indenture Trustee in this Indenture shall bind its successors, assigns, co-trustees, and agents.

Section 11.10. ***Separability.***

If any provision in this Indenture or in the Notes is invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions of this Indenture and the Notes shall not be affected in any way.

Section 11.11. ***Benefits of Indenture.***

Nothing in this Indenture or in the Notes, express or implied, shall give to any person, other than the parties to this Indenture and their successors under this Indenture, the Master Servicer (under Article VIII), any person with an ownership interest in the Trust, and the Noteholders, any benefit or any legal or equitable right under this Indenture.

Section 11.12. ***Legal Holidays.***

If the date on which any payment is due is not a Business Day, then (notwithstanding any other provision of the Notes or this Indenture) payment need not be made on that date, but may be made on the next Business Day with the same force as if made on the date on which nominally due, and no interest shall accrue for the period after the nominal due date.

Section 11.13. ***Governing Law.***

THIS INDENTURE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REFERENCE TO ITS PROVISIONS THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER STATE.

Execution Copy

CWHEQ, INC.
Depositor

COUNTRYWIDE HOME LOANS, INC.
Sponsor and Master Servicer

CWHEQ REVOLVING HOME EQUITY LOAN TRUST,
SERIES 2007-G
Trust

THE BANK OF NEW YORK
Indenture Trustee

SALE AND SERVICING AGREEMENT
Dated as of August 15, 2007

REVOLVING HOME EQUITY LOAN ASSET BACKED NOTES,

SERIES 2007-G

constitutes an actual breach of a representation and warranty in Section 2.04, in all cases plus accrued and unpaid interest thereon at the applicable Loan Rate.

The Indenture Trustee as agent for any REMIC created under the Trust Agreement shall adopt and sign such a plan of complete liquidation upon the written request of the Master Servicer and the receipt of the Opinion of Counsel referred to in Section 8.02(a) and take any other action in connection therewith reasonably requested by the Master Servicer.

ARTICLE IX

MISCELLANEOUS PROVISIONS

Section 9.01 ***Amendment.***

This Agreement may be amended from time to time by the Sponsor, the Master Servicer, the Depositor, the Owner Trustee, and the Indenture Trustee, if the Rating Agency Condition is satisfied. However, no amendment that significantly changes the permitted activities of the Trust may be promulgated without the consent of a majority of the aggregate Outstanding Amount of the Notes. For this purpose no Notes owned by the Sponsor or any of its affiliates may vote, nor shall their Notes be considered outstanding. This Agreement may also be amended from time to time by the Sponsor, the Master Servicer, the Depositor, the Owner Trustee, and the Indenture Trustee, with the consent of Holders of not less than 66⅔% of the aggregate Outstanding Amount of the Notes.

The Indenture Trustee may enter into any amendment of this Agreement as to which the Rating Agency Condition is satisfied, and when so requested by an Issuer Request, the Indenture Trustee shall enter into any amendment of this Agreement

(1) that does not impose further obligations or liabilities on the Indenture Trustee, and

(2) as to which either the Rating Agency Condition is satisfied or Holders of not less than 66⅔% of the aggregate Outstanding Amount of the Notes have consented.

Before the execution of the amendment, the party to this Agreement requesting the amendment shall notify each Rating Agency of the substance of the amendment.

Section 9.02 ***Governing Law.***

THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REFERENCE TO ITS PROVISIONS THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER STATE.

Section 9.03 ***Notices.***

All notices, demands, instructions, consents, and other communications required or permitted under this Agreement shall be in writing and signed by the party giving the same and shall be personally delivered or sent by first-class or express mail (postage prepaid), national overnight courier service, or by facsimile transmission or other electronic communication

EXHIBIT E-2

FORM OF BACKUP CERTIFICATION
(INDENTURE TRUSTEE)

CWHEQ, INC.,
REVOLVING HOME EQUITY LOAN ASSET-BACKED NOTES,
SERIES 200[ ]-[ ]

I, _____, a _____ of The Bank of New York (the "Company"), certify to Countrywide Home Loans, Inc. (the "Master Servicer") and/or CWHEQ, Inc. (the "Depositor"), as applicable, and their respective officers, directors and affiliates, with the knowledge and intent that they will rely upon this certification in connection with the certification that the Master Servicer or the Depositor is required to file on behalf of the Trust (as defined below) pursuant to Section 302 of the Sarbanes-Oxley Act of 2002, that:

(1) I have reviewed (i) the report on assessment of the Company's compliance with the servicing criteria set forth in Item 1122(d) of Regulation AB (the "Servicing Criteria"), provided in accordance with Rules 13a-18 and 15d-18 under the Securities Exchange Act of 1934, as amended (the "Exchange Act") and Item 1122 of Regulation AB (the "Company Information"), and the registered public accounting firm's attestation report provided in accordance with Rules 13a-18 and 15d-18 under the Exchange Act and Section 1122(b) of Regulation AB (the "Attestation Report") that were delivered by the Company to the Master Servicer pursuant to the Sale and Servicing Agreement for the Series listed on Exhibit 1 hereto (the "Sale and Servicing Agreement"), and (ii) all reports on Form 10-D containing statements (collectively, the "Distribution Date Statements") to certificateholders filed in respect of the period included in the year covered by the annual report of the trust (the "Trust") formed pursuant to such Sale and Servicing Agreement;

(2) Assuming the accuracy and completeness of the information delivered to the Company by the Master Servicer as provided in the Sale and Servicing Agreement and subject to paragraph (4) below, the distribution information determined by the Company and set forth in the Distribution Date Statements included in the year covered by the annual report of the Trust on Form 10-K for the calendar year 2006 is complete and does not contain any material misstatement of fact with respect to the period of time covered by such annual report;

(3) Based solely on the information delivered to the Company by the Master Servicer as provided in the Sale and Servicing Agreement, (i) the distribution information required under the Sale and Servicing Agreement to be included in the Trust's Distribution Date Statements and (ii) the servicing information required to be provided by the Master Servicer to the Company for inclusion in the Trust's Distribution Date Statements, to the extent received by the Company from the Master Servicer in accordance with the Sale and Servicing Agreement, is included in such Distribution Date Statements;

(4) The Company is not certifying as to the accuracy, completeness or correctness of the information which it received from the Master Servicer and did not

independently verify or confirm the accuracy, completeness or correctness of the information provided by the Master Servicer;

(5) To the best of my knowledge, the Company Information, taken as a whole, does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in the light of the circumstances under which such statements were made, not misleading with respect to the period of time covered by the Company Information and any material instance of noncompliance with the Servicing Criteria has been disclosed in the Company Information;

(6) I am responsible for reviewing the activities performed by the Company as a person "performing a servicing function" under the Sale and Servicing Agreement and Indenture for the Series listed on Exhibit I (the "Indenture"), and, based on my knowledge and the compliance review conducted in preparing the Company Information, except as disclosed in the Company Information or the Attestation Report, the Company has fulfilled its obligations under the Sale and Servicing Agreement and Indenture in all material respects; and

(7) The Company Information and Attestation Report required to be provided by the Company and any Subcontractor (as defined in the Sale and Servicing Agreement) pursuant to the Sale and Servicing Agreement have been provided to the Master Servicer and the Depositor.

Date:_____

By: _____
Name:
Title:

EXHIBIT F

FORM OF SERVICING CRITERIA TO BE ADDRESSED IN
ASSESSMENT OF COMPLIANCE STATEMENT

The assessment of compliance to be delivered by the Trustee shall address, at a minimum, the criteria identified below as "Applicable Servicing Criteria":

Reference	Servicing Criteria	Applicable Servicing Criteria
	General Servicing Considerations	
1122(d)(1)(i)	Policies and procedures are instituted to monitor any performance or other triggers and events of default in accordance with the transaction agreements.	**X**
1122(d)(1)(ii)	If any material servicing activities are outsourced to third parties, policies and procedures are instituted to monitor the third party's performance and compliance with such servicing activities.	
1122(d)(1)(iii)	Any requirements in the transaction agreements to maintain a back-up servicer for the pool assets are maintained.	
1122(d)(1)(iv)	A fidelity bond and errors and omissions policy is in effect on the party participating in the servicing function throughout the reporting period in the amount of coverage required by and otherwise in accordance with the terms of the transaction agreements.	
	Cash Collection and Administration	
1122(d)(2)(i)	Payments on pool assets are deposited into the appropriate custodial bank accounts and related bank clearing accounts no more than two business days following receipt, or such other number of days specified in the transaction agreements.	**X (as to accounts held by Trustee)**
1122(d)(2)(ii)	Disbursements made via wire transfer on behalf of an obligor or to an investor are made only by authorized personnel.	**X (as to investors only)**
1122(d)(2)(iii)	Advances of funds or guarantees regarding collections, cash flows or distributions, and any interest or other fees charged for such advances, are made, reviewed and approved as specified in the transaction agreements.	
1122(d)(2)(iv)	The related accounts for the transaction, such as cash reserve accounts or accounts established as a form of over collateralization, are separately maintained (e.g., with respect to commingling of cash) as set forth in the transaction agreements.	**X (as to accounts held by Trustee)**
1122(d)(2)(v)	Each custodial account is maintained at a federally insured depository institution as set forth in the transaction agreements. For purposes of this criterion, "federally insured depository institution" with respect to a foreign financial institution means a foreign financial institution that meets the requirements of Rule 13k-1(b)(1) of the Securities	**X [i] (subject to SEC clarification)**

Reference	Servicing Criteria	Applicable Servicing Criteria
	Exchange Act.	
1122(d)(2)(vi)	Unissued checks are safeguarded so as to prevent unauthorized access.	
1122(d)(2)(vii)	Reconciliations are prepared on a monthly basis for all asset-backed securities related bank accounts, including custodial accounts and related bank clearing accounts. These reconciliations are (A) mathematically accurate; (B) prepared within 30 calendar days after the bank statement cutoff date, or such other number of days specified in the transaction agreements; (C) reviewed and approved by someone other than the person who prepared the reconciliation; and (D) contain explanations for reconciling items. These reconciling items are resolved within 90 calendar days of their original identification, or such other number of days specified in the transaction agreements.	**X**

	Investor Remittances and Reporting	
1122(d)(3)(i)	Reports to investors, including those to be filed with the Commission, are maintained in accordance with the transaction agreements and applicable Commission requirements. Specifically, such reports (A) are prepared in accordance with timeframes and other terms set forth in the transaction agreements; (B) provide information calculated in accordance with the terms specified in the transaction agreements; (C) are filed with the Commission as required by its rules and regulations; and (D) agree with investors' or the trustee's records as to the total unpaid principal balance and number of pool assets serviced by the servicer.	X
1122(d)(3)(ii)	Amounts due to investors are allocated and remitted in accordance with timeframes, distribution priority and other terms set forth in the transaction agreements.	X
1122(d)(3)(iii)	Disbursements made to an investor are posted within two business days to the servicer's investor records, or such other number of days specified in the transaction agreements.	X
1122(d)(3)(iv)	Amounts remitted to investors per the investor reports agree with cancelled checks, or other form of payment, or custodial bank statements.	X
	Pool Asset Administration	
1122(d)(4)(i)	Collateral or security on pool assets is maintained as required by the transaction agreements or related pool asset documents.	
1122(d)(4)(ii)	Pool assets and related documents are safeguarded as required by the transaction agreements.	
1122(d)(4)(iii)	Any additions, removals or substitutions to the asset pool are made, reviewed and approved in accordance with any conditions or requirements in the transaction agreements.	X
1122(d)(4)(iv)	Payments on pool assets, including any payoffs, made in accordance with the related pool asset documents are posted to the servicer's obligor records maintained no more than two business days after receipt, or such other number of days specified in the transaction agreements, and allocated to principal, interest or other items (e.g., escrow) in accordance with the related pool asset documents.	
1122(d)(4)(v)	The servicer's records regarding the pool assets agree with the servicer's records with respect to an obligor's unpaid principal balance.	
1122(d)(4)(vi)	Changes with respect to the terms or status of an obligor's pool assets (e.g., loan modifications or re-agings) are made, reviewed and approved by authorized personnel in accordance with the transaction agreements and related pool asset documents.	
1122(d)(4)(vii)	Loss mitigation or recovery actions (e.g., forbearance plans, modifications and deeds in lieu of foreclosure, foreclosures and repossessions, as applicable) are initiated, conducted and concluded in accordance with the timeframes or other requirements established by the transaction agreements.	
1122(d)(4)(viii)	Records documenting collection efforts are maintained during the period a pool asset is delinquent in accordance with the transaction agreements. Such records are maintained on at least a monthly basis, or such other period specified in the transaction agreements, and describe the entity's activities in monitoring delinquent pool assets including, for	

	example, phone calls, letters and payment rescheduling plans in cases where delinquency is deemed temporary (e.g., illness or unemployment).	
1122(d)(4)(ix)	Adjustments to interest rates or rates of return for pool assets with variable rates are computed based on the related pool asset documents.	
1122(d)(4)(x)	Regarding any funds held in trust for an obligor (such as escrow accounts): (A) such funds are analyzed, in accordance with the obligor's pool asset documents, on at least an annual basis, or such other period specified in the transaction agreements; (B) interest on such funds is paid, or credited, to obligors in accordance with applicable pool asset documents and state laws; and (C) such funds are returned to the obligor within 30 calendar days of full repayment of the related pool assets, or such other number of days specified in the transaction agreements.	

1122(d)(4)(xi)	Payments made on behalf of an obligor (such as tax or insurance payments) are made on or before the related penalty or expiration dates, as indicated on the appropriate bills or notices for such payments, provided that such support has been received by the servicer at least 30 calendar days prior to these dates, or such other number of days specified in the transaction agreements.	
1122(d)(4)(xii)	Any late payment penalties in connection with any payment to be made on behalf of an obligor are paid from the servicer's funds and not charged to the obligor, unless the late payment was due to the obligor's error or omission.	
1122(d)(4)(xiii)	Disbursements made on behalf of an obligor are posted within two business days to the obligor's records maintained by the servicer, or such other number of days specified in the transaction agreements.	
1122(d)(4)(xiv)	Delinquencies, charge-offs and uncollectible accounts are recognized and recorded in accordance with the transaction agreements.	
1122(d)(4)(xv)	Any external enhancement or other support, identified in Item 1114(a)(1) through (3) or Item 1115 of Regulation AB, is maintained as set forth in the transaction agreements.	**X**

[NAME OF MASTER SERVICER] [NAME OF INDENTURE TRUSTEE] [NAME OF SUBSERVICER]

Date: _____

By: _____
Name:
Title:

EXECUTION COPY

CWALT, INC.,
Depositor

COUNTRYWIDE HOME LOANS, INC.,
Seller

PARK GRANADA LLC,
Seller

PARK MONACO INC.,
Seller

PARK SIENNA LLC,
Seller

COUNTRYWIDE HOME LOANS SERVICING LP,
Master Servicer

and
THE BANK OF NEW YORK,
Trustee

POOLING AND SERVICING AGREEMENT
Dated as of November 1, 2006

ALTERNATIVE LOAN TRUST 2006-OA19

MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA19

EXHIBIT S

[FORM OF]
SERVICING CRITERIA TO BE ADDRESSED IN
ASSESSMENT OF COMPLIANCE STATEMENT

The assessment of compliance to be delivered by [the Master Servicer] [Trustee] [Name of Subservicer] shall address, at a minimum, the criteria identified as below as "Applicable Servicing Criteria":

Servicing Criteria		Applicable Servicing Criteria
Reference	Criteria	
	General Servicing Considerations	
1122(d)(1)(i)	Policies and procedures are instituted to monitor any performance or other triggers and events of default in accordance with the transaction agreements.	
1122(d)(1)(ii)	If any material servicing activities are outsourced to third parties, policies and procedures are instituted to monitor the third party's performance and compliance with such servicing activities.	
1122(d)(1)(iii)	Any requirements in the transaction agreements to maintain a back-up servicer for the mortgage loans are maintained.	
1122(d)(1)(iv)	A fidelity bond and errors and omissions policy is in effect on the party participating in the servicing function throughout the reporting period in the amount of coverage required by and otherwise in accordance with the terms of the transaction agreements.	
	Cash Collection and Administration	
1122(d)(2)(i)	Payments on mortgage loans are deposited into the appropriate custodial bank accounts and related bank clearing accounts no more than two business days following receipt, or such other number of days specified in the transaction agreements.	
1122(d)(2)(ii)	Disbursements made via wire transfer on behalf of an obligor or to an investor are made only by authorized personnel.	
1122(d)(2)(iii)	Advances of funds or guarantees regarding collections, cash flows or distributions, and any interest or other fees charged for such advances, are made, reviewed and approved as specified in the transaction agreements.	
1122(d)(2)(iv)	The related accounts for the transaction, such as cash reserve accounts or accounts established as a form of overcollateralization, are separately maintained (e.g., with respect to commingling of cash) as set forth in the transaction agreements.	
1122(d)(2)(v)	Each custodial account is maintained at a federally insured depository institution as set forth in the transaction agreements. For purposes of this criterion, "federally insured depository institution" with respect to a foreign financial institution means a foreign financial institution that meets the requirements of Rule 13k-1(b)(1) of the Securities Exchange Act.	
1122(d)(2)(vi)	Unissued checks are safeguarded so as to prevent unauthorized access.	

Servicing Criteria		Applicable Servicing Criteria
Reference	Criteria	
1122(d)(2)(vii)	Reconciliations are prepared on a monthly basis for all asset-backed securities related bank accounts, including custodial accounts and related bank clearing accounts. These reconciliations are (A) mathematically accurate; (B) prepared within 30 calendar days after the bank statement cutoff date, or such other number of days specified in the transaction agreements; (C) reviewed and approved by someone other than the person who prepared the reconciliation; and (D) contain explanations for reconciling items. These reconciling items are resolved within 90 calendar days of their original identification, or such other number of days specified in the transaction agreements.	
	Investor Remittances and Reporting	
1122(d)(3)(i)	Reports to investors, including those to be filed with the Commission, are maintained in accordance with the transaction agreements and applicable Commission requirements. Specifically, such reports (A) are prepared in accordance with timeframes and other terms set forth in the transaction agreements; (B) provide information calculated in accordance with the terms specified in the transaction agreements; (C) are filed with the Commission as required by its rules and regulations; and (D) agree with investors' or the trustee's records as to the total unpaid principal balance and number of mortgage loans serviced by the Servicer.	
1122(d)(3)(ii)	Amounts due to investors are allocated and remitted in accordance with timeframes, distribution priority and other terms set forth in the transaction agreements.	
1122(d)(3)(iii)	Disbursements made to an investor are posted within two business days to the Servicer's investor records, or such other number of days specified in the transaction agreements.	
1122(d)(3)(iv)	Amounts remitted to investors per the investor reports agree with cancelled checks, or other form of payment, or custodial bank statements.	
	Pool Asset Administration	
1122(d)(4)(i)	Collateral or security on mortgage loans is maintained as required by the transaction agreements or related mortgage loan documents.	
1122(d)(4)(ii)	Mortgage loan and related documents are safeguarded as required by the transaction agreements.	
1122(d)(4)(iii)	Any additions, removals or substitutions to the asset pool are made, reviewed and approved in accordance with any conditions or requirements in the transaction agreements.	
1122(d)(4)(iv)	Payments on mortgage loans, including any payoffs, made in accordance with the related mortgage loan documents are posted to the Servicer's obligor records maintained no more than two business days after receipt, or such other number of days specified in the transaction agreements, and allocated to principal, interest or other items (e.g., escrow) in accordance with the related mortgage loan documents.	
1122(d)(4)(v)	The Servicer's records regarding the mortgage loans agree with the Servicer's records with respect to an obligor's unpaid principal balance.	
1122(d)(4)(vi)	Changes with respect to the terms or status of an obligor's mortgage loans (e.g., loan modifications or re-agings) are made, reviewed and approved by authorized personnel in accordance with the transaction agreements and related pool asset documents.	
1122(d)(4)(vii)	Loss mitigation or recovery actions (e.g., forbearance plans, modifications and deeds in lieu of foreclosure, foreclosures and repossessions, as applicable) are initiated, conducted and concluded in accordance with the timeframes or other requirements established by the transaction agreements.	

Servicing Criteria		Applicable Servicing Criteria
Reference	Criteria	
1122(d)(4)(viii)	Records documenting collection efforts are maintained during the period a mortgage loan is delinquent in accordance with the transaction agreements. Such records are maintained on at least a monthly basis, or such other period specified in the transaction agreements, and describe the entity's activities in monitoring delinquent mortgage loans including, for example, phone calls, letters and payment rescheduling plans in cases where delinquency is deemed temporary (e.g., illness or unemployment).	
1122(d)(4)(ix)	Adjustments to interest rates or rates of return for mortgage loans with variable rates are computed based on the related mortgage loan documents.	
1122(d)(4)(x)	Regarding any funds held in trust for an obligor (such as escrow accounts): (A) such funds are analyzed, in accordance with the obligor's mortgage loan documents, on at least an annual basis, or such other period specified in the transaction agreements; (B) interest on such funds is paid, or credited, to obligors in accordance with applicable mortgage loan documents and state laws; and (C) such funds are returned to the obligor within 30 calendar days of full repayment of the related mortgage loans, or such other number of days specified in the transaction agreements.	
1122(d)(4)(xi)	Payments made on behalf of an obligor (such as tax or insurance payments) are made on or before the related penalty or expiration dates, as indicated on the appropriate bills or notices for such payments, provided that such support has been received by the servicer at least 30 calendar days prior to these dates, or such other number of days specified in the transaction agreements.	
1122(d)(4)(xii)	Any late payment penalties in connection with any payment to be made on behalf of an obligor are paid from the servicer's funds and not charged to the obligor, unless the late payment was due to the obligor's error or omission.	
1122(d)(4)(xiii)	Disbursements made on behalf of an obligor are posted within two business days to the obligor's records maintained by the servicer, or such other number of days specified in the transaction agreements.	
1122(d)(4)(xiv)	Delinquencies, charge-offs and uncollectible accounts are recognized and recorded in accordance with the transaction agreements.	
1122(d)(4)(xv)	Any external enhancement or other support, identified in Item 1114(a)(1) through (3) or Item 1115 of Regulation AB, is maintained as set forth in the transaction agreements.	

[NAME OF MASTER SERVICER] [NAME OF TRUSTEE] [NAME OF SUBSERVICER]

Date: _____

By: _____
Name:
Title:

EXHIBIT 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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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), Maiden Lane II, LLC (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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 CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

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Index No. 651786/11

Assigned to:
Kapnick, J.

ORAL ARGUMENT REQUESTED

THE INSTITUTIONAL INVESTORS' MEMORANDUM OF LAW IN OPPOSITION TO THE DELAWARE ATTORNEY GENERAL'S MOTION TO INTERVENE

The Institutional Investors,[1] Intervenor-Petitioners in support of the Trustee's Petition by Order of this Court dated July 8, 2011 (Doc. #39), submit this Memorandum of Law in opposition to the motion to intervene filed by the Delaware Attorney General ("DAG").

I.
Introduction

The DAG seeks to intervene in this Article 77 proceeding to object to the Settlement. However, the sole issue before the Court in this proceeding is the resolution of private contract rights existing between certificateholders and the Trustee, and the DAG has appeared neither as a certificateholder nor on behalf of any certificateholder. Therefore, the DAG has no standing to intervene in this proceeding and its motion to intervene should be denied. Nonetheless, and although the DAG cannot intervene as a party, the Institutional Investors have no objection to the DAG stating its views on the Settlement to the Court in an *amicus curiae*, non-party capacity.

II.
The DAG Has No Standing to Intervene in this Proceeding

The DAG seeks leave to intervene on three grounds: 1) to protect the interests of Delaware investors; 2) to preserve Delaware's *own* claims under state law; and, 3) to assert its alleged jurisdiction over Delaware Trusts.[2] None of them confers standing to intervene in this Article 77 special proceeding.

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[1] The Institutional Investors are set forth in the above caption. Unless otherwise indicated, capitalized terms used herein have the meanings assigned to them in the Trustee's Petition (Doc. #1).

[2] DAG Petition (Doc. # 129) at ¶ 4.

A.

The DAG Lacks Standing to Represent the Interests of Delaware Investors

The DAG claims it may intervene to "protect investors" under the Delaware Securities Act, 6 *Del. C.* § 7301(b), the Delaware deceptive trade practices act, 6 *Del. C.* § 2533(d), and the common law doctrine of *parens patriae.*[3] The DAG is incorrect.

The DAG cites no Delaware authority, under these statutes or any others, that confers on it the authority to intervene in a private suit, between private parties, that seeks to resolve private contract rights. It likewise cites no case or statute authorizing it to intervene to speak on behalf of unidentified private parties to such a dispute. Absent a clear statutory grant of authority to intervene in this private suit, the DAG has no standing to do so.

The DAG's reliance on *parens patriae* to support standing is equally unavailing. The DAG cites no Delaware authority in support of this claim. The DAG is left, therefore, to rely solely on *People v. Grasso*, 11 N.Y.3d 64, 69 n.4 (2008).[4] But *Grasso* holds that "[t]o invoke the *parens patriae* doctrine, the Attorney General must prove a quasi-sovereign interest distinct from that of a particular party and an injury to a substantial segment of the states' population."[5] Here, the DAG has not, and cannot, allege the presence of either of these essential elements.

The only interests at issue in this proceeding are the private interests of certificateholders in the Covered Trusts. The resolution of these private interests does not implicate a "quasi-sovereign interest," particularly not one that is "distinct from that of a particular party."[6]

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[3] DAG Memorandum in Support of Petition to Intervene ("DAG Memo") (Doc. # 129-2) at 4.

[4] *Id.*

[5] *Grasso*, 11 N.Y.3d at 69 n.4.

[6] *Id.*

The DAG's desire to intervene to represent the "interests of absent beneficiaries"[7] undermines, rather than supports, its claim of standing. Under *Grasso,* "[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.'"[8] Finally, the DAG also has not alleged that the resolution of this proceeding will result in "an injury to a substantial segment of the state's population," as required to maintain *parens patriae* standing.[9]

Thus, the DAG has not established statutory standing, , or any common law standing under the *parens patriae* doctrine, to intervene in this proceeding.

B.
The DAG's Claimed Interest in Preserving Delaware Law Claims Does Not Create Standing to Intervene in this Proceeding

Next, the DAG asserts that it has standing to "preserve" claims it is currently investigating against the Trustee.[10] The DAG also suggests that it "might assert" certain unidentified claims against Bank of America and/or Countrywide, which it claims it must also "preserve" by intervening in this proceeding.[11] Neither of these arguments establishes the DAG's standing.

First, the only potential claim articulated by the DAG relates to the Trustee's alleged failures with respect to the quality of mortgages and the loan files,[12] matters that are not at issue

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[7] DAG Memo at 4.

[8] *People v. Grasso*, 54 A.D.3d 180, 198, 861 N.Y.S.2d 627, 642 (1st Dept. 2008), *quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982).

[9] *Grasso*, 11 N.Y.3d at 69 n.4.

[10] DAG Memo at 5-7.

[11] *Id.*

[12] DAG Petition at ¶ 16.

in this Article 77 special proceeding. Nothing in the Settlement Agreement, the releases granted in it, or the final judgment under Article 77 that the Trustee seeks, bears upon or purports to release these claims against the Trustee. Thus, the DAG is -- and will remain – able to pursue these claims in separate, stand-alone litigation.

Second, the DAG cites no authority (and the Institutional Investors have found none) authorizing a state attorney general to prevent private parties from settling private claims based on the mere possibility that the settlement might have a collateral effect on claims the attorney general *might* pursue (or was pursuing). *Olde Discount Corp. v. Tupman*,[13] cited by the DAG, does not change this analysis. Nothing in *Tupman* holds, or even remotely suggests, that a claim of "collateral effect" authorizes a state attorney general to prevent a *private party* from settling its *own* claim in order to preserve the DAG's ability to obtain relief *for the same party* via a restitution claim pursued by the DAG.[14]

Finally, the DAG's claim that the "same facts" at issue in the Settlement might also be at issue in litigation that it "might file against BNYM, Countrywide, or BoA" is irrelevant on the issue of standing. The law is clear that only parties with a cognizable interest in the controversy – which the DAG, as neither a certificateholder nor counsel for any certificateholder nor a party

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[13] *Olde Discount Corp. v. Tupman*, 1 F.3d 202 (3d Cir. 1993), cited in DAG Memo at 5 n.2.

[14] Moreover, as the New York Court of Appeals held in *People v. Applied Card Systems*, 11 N.Y. 3d 105, 125 (2008), the fact that a settlement of individual claims bars the Attorney General from seeking restitution for the settling parties "does not, however, substantially prejudice the public interest served by the Attorney General in pursuing this action" because the Attorney General's "claims for injunctive relief, civil penalties, and costs remain undisturbed," and because the Attorney General could still seek "disgorgement — an equitable remedy distinct from restitution — of profits that respondents derived from all New York consumers, whether within the . . . settlement class or not."

to the contracts at issue in the Settlement, lacks here – have standing to intervene..[15] Moreover, the DAG cites no authority (and the Institutional Investors are aware of none) conferring standing to intervene on an entity who alleges only a desire to "assist the court in ascertaining all of the relevant facts."[16]

C.
The Existence of Two Delaware Statutory Trusts
Also Does Not Confer Standing on the DAG to Intervene in this Proceeding

The DAG also relies on the fact that 2 of the 530 Covered Trusts were created under Delaware law to confer standing on it to intervene. This does not demonstrate standing. The Governing Agreements, which control the conduct of the Trustee and all other matters at issue in this proceeding, expressly provide that they are controlled by New York, not Delaware, law. Moreover, standing is not conferred on the DAG merely because a Trust organized under Delaware law is a party in litigation. If that were sufficient, then the DAG would be authorized to intervene in every contract case, every securities case, indeed in every private dispute in which one of the parties was organized under Delaware law, and that is assuredly not the law.

The matters at issue in this proceeding – the duties of a New York based Trustee with respect to all of the Covered Trusts (including the CWHEQ 2006-A and 2007-G trusts) and its decision to settle claims within its authority – are controlled by New York law. The documents that govern the activities of the Trustee with respect to each of the Covered Trusts, including its activities in entering into the Settlement, are not the Trust Agreements relied on by the DAG

[15] *See, e.g., Osman v. Sternberg*, 168 A.D.2d 490, 562 N.Y.S.2d 731, 731-32 (2d Dep't 1990) (intervention proper only "where the proposed intervenor has a real and substantial interest in the outcome of the proceeding" and should be restricted where "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").

[16] DAG Memo at 5-7.

(which are governed by Delaware law) but the separate Governing Agreements, which are explicitly governed by New York Law.[17] It is the Governing Agreements that: (i) contain the repurchase and servicing obligations that are the subject of the Settlement, (ii) create the right of the Trustee to pursue claims for a breach of these obligations, and (iii) define and establish the Trustee's duties and responsibilities to certificateholders in the Covered Trusts.[18]

The Trust Agreements on which the DAG relies have nothing to do with the claims at issue in the Settlement or the Trustee, nor is the Trustee a party to the Trust Agreements.[19] Indeed, the Trust Agreements do little more than establish the trusts, which — having been lawfully created — are then permitted to agree (as they did) to contract with a New York trustee for services to be provided under a contract governed by New York law.

This Court has jurisdiction over any lifetime trust that "has assets in the state" or "of which a trustee then acting resides in the state or, if other than a natural person, has its principal office in the state."[20] Here, the Trustee (the Bank of New York Mellon) has its principal place of

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[17] The "Governing Agreements" are the Pooling and Servicing Agreements (PSAs) that govern 513 of the Covered Trusts, and the Indentures and related Sale and Subservicing Agreements that govern the other 17 Covered Trusts. *See* Trustee Petition (Doc. # 1) at ¶ 3. These Governing Agreements, including the Indentures for the CWHEQ 2006-A and 2007-G trusts at issue in the DAG's petition, are governed by New York law. *See* Ex. A to accompanying Affirmation of Kenneth E. Warner dated August 19, 2011 (excerpts from CWHEQ 2006-A Indenture) at § 11.13 (New York choice of law clause); Ex. B to Warner. Aff. (excerpts from CWHEQ 2007-G Indenture) at § 11.13 (same).

[18] *Id.* at ¶¶ 3-5, 23-34, 48-57, 68-77 (discussing the Governing Agreements and the disputes at issue in this proceeding that arise under them).

[19] Ex. A and B to DAG Petition (Doc. # 129-1) at 1 (Trust Agreements for CWHEQ 2006-A and 2007-G listing CWHEQ, Inc. and Wilmington Trust Company as the only parties to the agreements).

[20] SURR. CT. PROC. ACT § 201(1). *See also In re the Matter of the Trust Made by Jensen*, 39 A.D. 3d 1136-37 (3d Dep't 2007) (explaining that "[a]s a court of general jurisdiction, Supreme Court has at least as much jurisdiction of a lifetime trust as would Surrogate's Court").

business in New York.[21] Moreover, by filing this action before this Court, the Trustee has consented to jurisdiction and removed any jurisdictional issue.[22] Thus, this Court has jurisdiction over the CWHEQ 2006-A and 2007-G trusts regardless of the fact that they are Delaware statutory trusts, created by Trust Agreements governed by Delaware law.

It is not surprising that there is no support for the DAG's expansive claim of authority to intervene in any proceeding involving a Delaware statutory trust or an entity governed by Delaware law.[23] Accepting this claim would have grave constitutional implications. Stated simply, to find standing on this theory would necessarily authorize the DAG to intervene in countless private lawsuits in all 50 states, solely because a Delaware corporation, trust, or other entity was involved. No such right exists, nor could it.

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[21] Trustee Petition (Doc. # 1) at ¶ 17 ("The Bank of New York Mellon is a bank organized under the laws of the State of New York having its principal place of business at One Wall Street, New York, New York 10286.").

[22] *See, e.g., Evans* v. *Perl*, 2006 WL 6091297 (N.Y. Sup. Ct. Dec. 5, 2006) (exercising jurisdiction over trustee and noting that "[a] trustee can voluntarily put him/herself before the court and be subject to its jurisdiction by asking the court for affirmative relief").

III.
CONCLUSION AND PRAYER FOR RELIEF

For all the foregoing reasons, the Institutional Investors respectfully request that the Court deny the DAG's intervention motion. If the DAG nonetheless wishes to have its views on the Settlement presented to this Court, the Institutional Investors would not object to the DAG submitting those views in an *amicus curiae*, non-party capacity.

Dated: New York, New York
August 19, 2011

WARNER PARTNERS, P.C.

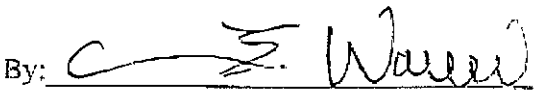
By: 

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EXHIBIT 4

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK J.S.C. PART 39
Justice

Index Number : 651786/2011
BANK OF NEW YORK MELLON
vs.
FOR AN ORDER PURSUANT TO
SEQUENCE NUMBER : 015
LEAVE TO INTERVENE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by the State of Delaware, for an order permitting it to intervene, is moot, the case having been removed to Federal Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S): _____

Dated: 10/26/11

_____, J.S.C.
BARBARA R. KAPNICK J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

EXHIBIT 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the matter of the application of	:	
THE BANK OF NEW YORK MELLON (as trustee under various pooling and servicing agreements and indenture trustee under various indentures), *et al.*,	:	
Petitioners,	:	11 Civ. 5988 (WHP)
-against-	:	REPLY MEMORANDUM
WALNUT PLACE LLC, *et al.*,	:	
Intervenor-Respondents.	:	

REPLY MEMORANDUM OF JOSEPH R. BIDEN, III, ATTORNEY GENERAL OF THE STATE OF DELAWARE (THE "DELAWARE DEPARTMENT OF JUSTICE"), IN SUPPORT OF ITS PETITION TO INTERVENE

Delaware Department of Justice
Ian R. McConnel
Gregory Strong
Meredith Stewart Tweedie
Deputy Attorneys General
820 N. French Street
Wilmington, DE 19801
(302) 577-8600

Attorneys for the State of Delaware

Proposed intervenor, Joseph R. Biden, III, Attorney General of the State of Delaware ("Attorney General") and, together with his staff at the Delaware Department of Justice, the "Delaware DOJ"), respectfully submits this memorandum of law in support of its Petition to Intervene ("Pet.") and in reply to the memorandum of law in Opposition to the Petition to Intervene ("Opp.") filed by The Bank of New York Mellon ("BNYM").

PRELIMINARY STATEMENT

The Delaware DOJ has moved to intervene in an Article 77 proceeding brought by BNYM seeking judicial approval of a proposed $8.5 billion settlement of claims against Countrywide Home Loans, Inc. and Countrywide Financial Corporation (collectively "Countrywide"), and Bank of America ("BoA"), because the claims at issue go to the heart of the financial crises in this country and the State of Delaware. The claims that would be resolved and released by the proposed settlement are related to Countrywide and BoA's failure to comply with the standards of conduct governing the creation and administration of the covered trusts. This failure contributed to the collapse of the market for residential mortgage backed securities ("RMBS"), causing substantial harm to mortgage loan borrowers, investors and the integrity of the securities markets. BNYM seeks judicial approval of a sweeping settlement that binds all investors, whether represented by counsel or not, and releases billions of dollars of claims against Countrywide and BoA. In addition, the settlement ignores the interests of homeowners who are likely to be harmed by the extra-contractual nature of the settlement. In seeking judicial approval of its actions as trustee, BNYM stands to gain from this settlement in that it may effectively extinguish claims that BNYM breached its duties as a New York trustee. Finally, going forward, the resolution of this matter likely will serve as a roadmap for future actions by RMBS trustees seeking similar settlements.

The Delaware DOJ intervenes first pursuant to the provisions of the Class Action Fairness Act ("CAFA") in conjunction with the Delaware DOJ's power to take action whenever necessary to protect its state interests. The Delaware DOJ also intervenes pursuant to its authority as *parens patriae* to protect the interests of absent investors and the integrity of the marketplace. BNYM opposes intervention on this basis by arguing that there is no quasi-sovereign interest implicated in this proceeding because it involves private claims seeking monetary relief. This contention is belied by BNYM's assertions in its Remand Motion where it argued that this proceeding involved purely equitable relief and not monetary relief. The matter is an equitable proceeding with a monetary relief component. In particular, Delaware DOJ has a strong regulatory interest under CAFA and a strong quasi-sovereign interest under its *parens patriae* authority in ensuring that the proposed settlement does not do further harm to borrowers and the economy of Delaware. This risk is acute in light of the extra-contractual mechanisms chosen by BNYM to effectuate the proposed settlement. Finally, Delaware DOJ also intervenes to protect potential state law claims that may be adversely affected if the proposed settlement is approved.

I. The Delaware DOJ Has Standing to Intervene Under the Class Action Fairness Act Because State Interests are Implicated in the Proposed Settlement

The provisions of the Class Action Fairness Act ("CAFA") in conjunction with the Delaware DOJ's power to take action whenever necessary for the protection of state interests give the Delaware DOJ standing to intervene and object to the proposed settlement. This matter was removed to federal court as a "mass action" under the provisions of CAFA, and, in exercising jurisdiction, this Honorable Court has determined that the matter fits within the definition of a "mass action." (Remand Dec. p. 21). "Under the mass action provision, if the requirements generally pertaining to class actions are met, the action is treated as though it were

a class action . . ." 761 PLI/lit 11, *2007 Overview of the Class Action Fairness Act*, at p. *40 (citing 28 U.S.C. § 1332(d)(11)(A)).

The Class Action Fairness Act requires notice of any proposed class action settlement to the appropriate state official, which in most cases is the State attorney general. 28 U.S.C. § 1715. When a proposed settlement is filed with the court, notice to the appropriate state official is required within 10 days. 28 U.S.C. § 1715(b). The Court may not enter an order granting final approval of a proposed settlement until at least 90 days after the last government official is served with the required notice. 28 U.S.C. § 1715(d).

The provisions of CAFA requiring notice to state officials and a waiting period ensure that state officials have the ability to review settlements and take action when necessary. *See* PL 109-2, The Class Action Fairness Act of 2005, S. Rep. 109-14, at p. **32 (2005 U.S.C.C.A.N 3, 2005 WL 627977). Thus, CAFA is a recognition by Congress of a State's power to review proposed settlements and take action when necessary, and casts the State in the role of *parens patriae* when its citizens or regulatory policies may be adversely affected by the settlement of a class action. *Connecticut v. Phys. Health Servs.*, 287 F.3d 110, 119 (2d Cir. 2002) (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982) (The doctrine of *parens patriae* allows States to bring suit on behalf of their citizens by asserting a "quasi-sovereign interest.")).

In enacting CAFA, and requiring that state officials whose citizens are members of the class receive notice and an opportunity to review proposed class action settlements, Congress recognized the states' interest in protecting their citizens and policies from the "abuses of the class action device." PL 109-2, p. **4. The provision requiring notice to state officials is intended to provide a check against inequitable settlements in these cases, as well as "deter

collusion between class counsel and defendants to craft settlements that do not benefit the injured parties." *Id.* at pp. **33-34.

The request for judicial approval of the proposed settlement in this matter implicates some of the same concerns Congress addressed by enacting the CAFA legislation. From the outset, there is an appearance of collusion between BNYM and BoA in crafting the proposed settlement. Certificateholders, entities that BNYM has since conceded are proper intervenors in this proceeding and entitled to be heard,[1] were excluded from participating in the settlement negotiations. (Remand Dec. p. 4 (citing Walnut Place Petition to Intervene ¶ 7)). Having excluded certificateholders from the settlement negotiations, BNYM and BoA seek to bind *all* certificateholders to the terms of the proposed settlement, whether or not they participated in the negotiations and whether or not they are represented in this proceeding. (Settlement Ex. B (Proposed Order and Judgment)). BNYM and BoA seek binding judicial approval of the proposed $8.5 billion settlement through an "arcane summary procedure in state court" typically reserved for uncontested proceedings involving matters of routine trust administration. (Remand Dec. pp. 1, 5-6). Notably, and unlike a class action, the proposed settlement does not contain an opt-out provision. BNYM benefits from the proposed settlement as well, in that, among other things, it asks the Court to make a finding that its "decision to enter into the settlement agreement was made in good faith and is reasonable." (BNYM Remand Mem. p. 2). Such a finding by the Court would likely insulate BNYM from future litigation surrounding its conduct as trustee for those trusts covered by the proposed agreement. All of these factors call into question BNYM's undisputed common law duty as trustee to avoid conflicts of interest (Remand Dec. pp. 16-17) and implicate the Attorney General's interests in protecting absent investors, homeowners, and the integrity of the marketplace, as discussed below.

[1] Opp., fn. 3, p. 2.

II. The Attorney General Has Standing to Intervene Pursuant to the Doctrine of *Parens Patriae*

It is well settled that the Attorney General has *parens patriae* standing in matters involving a quasi-sovereign interest implicating the protection of the safety, health or welfare of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. at 607. As is the case with other state attorneys general, the Delaware DOJ has a quasi-sovereign interest in protecting the integrity of the marketplace, *State v. 7040 Colonial Road Associates Co.*, 176 Misc. 2d 367, 374 (Sup. Ct. N.Y. Co. 1998). Similarly, the Delaware DOJ has a quasi-sovereign interest in protecting the investing public in Delaware from misleading statements or omissions in the purchase and sale of securities, and in seeking relief on behalf of individual (or institutional) investors who have been the victim of violations of the Delaware Securities Act. *See* 6 *Del. C.* § 7301 (b) (the Delaware DOJ has statutory authority to "remedy any harm caused by securities law violations").

In fact, a state's interest in an honest marketplace is, in and of itself, a quasi-sovereign interest. *See Georgia v. Penn R. Co.*, 324 U.S. 439 at 450-51 (1945). Courts in several states have held that a State has a quasi-sovereign interest, for purposes of establishing *parens patriae* standing, in the economic well-being of its citizens. *See, e.g.*, *Hood v. Microsoft Corp.*, 428 F. Supp.2d 537, 545 (S.D.MI 2006) ("[T]he State has a quasi-sovereign interest in the economic well-being of its citizens, which includes securing the integrity of the marketplace."); *State of Louisiana v. Borden, Inc.*, 1995 WL 59548, at *2 (E.D.La. Feb. 10, 1995) (same); *State of Maine v. Data General Corp.*, 697 F.Supp 23, at *25 (D. Maine 1988) ("A state's interest in maintaining an honest marketplace is a quasi-sovereign interest, even where the state's action will also benefit individuals") (citation omitted).

BNYM argues that the Delaware DOJ lacks standing to intervene because there is no quasi-sovereign interest at stake in this proceeding by incorrectly characterizing the proposed settlement as only "involving monetary relief to a discrete group of private investors." (Opp. pp. 3-4). BNYM attempts to bolster this incorrect characterization by citing to several cases where courts found standing lacking when a state attempted to recover money for a private entity. (Opp. pp. 4-5). Interestingly, BNYM argued the exact opposite to this Court in support of its remand motion, when it claimed to be pursuing only equitable relief. As this Honorable Court has recognized, BNYM seeks both equitable and monetary relief here. (Remand Dec. p. 9) This point is clear when the non-monetary components of the proposed settlement are considered; the servicing changes, and BNYM's request for a judicial determination that its decision to enter into the Settlement Agreement was done in good faith and is reasonable, a determination that is surely equitable in nature. (Settlement Ex. B (Proposed Order and Judgment) ¶¶ (e), (p)-(q)). In its opposition papers, BNYM asserts that, because the proposed servicing changes are motivated by the certificateholders' desire to improve the performance of the trusts in order to maximize the value of the securities, the servicing improvements are pecuniary in nature. (Opp., fn. 6, pp 3-4).

In reality, the implications of the servicing changes proposed in the settlement will extend far beyond mere pecuniary gain. BNYM acknowledges that the prospective servicing changes implemented by the settlement will affect "hundreds of thousands of loans." (BNYM Pet. p. 10). Undoubtedly, thousands of Delaware residents/borrowers, who have no voice in this settlement absent the intervention of the Delaware DOJ, will be adversely affected by the settlement's servicing provisions. The intervention of the Delaware DOJ is vital to ensuring that servicing changes have a positive impact on the affected Delaware borrowers.

The proposed settlement also affects Delaware borrowers in another key respect. Rather than following the contractual repurchase mechanisms provided for in the governing documents of the securitization as a vehicle to settle the trusts' claims, the proposed settlement instead calls for an extra-contractual cash payment without any transfer of interests in the mortgage loans. This will have a profound negative effect on Delaware borrowers who otherwise would be in a much stronger position to stay in their homes if their mortgage loans were appropriately purchased out of the trusts by BoA.

Although BNYM unsuccessfully attempted to frame this proceeding in terms of a contract dispute (Opp. p. 4.), it does not attempt to use the settlement to enforce the contractual repurchase remedy called for in the terms of the pooling and servicing agreements and sales and servicing agreements (collectively "PSAs") governing the trusts at issue to force BoA to repurchase deficient loans. Even though the Court recognized that this matter involved more than a mere contract dispute (Remand Dec. 16-17), that fact does not mean that the contracts do not matter. Courts may neither ignore the actual provisions of transaction documents nor create contractual remedies that were omitted from the governing contracts by the contracting parties. *See Schmidt v. Magnetic Head Corp.*, 468 N.Y.S.2d 649, 654 (N.Y. App.Div. 1983) ("it is fundamental that courts enforce contracts and do not rewrite them ... An obligation undertaken by one of the parties that is intended as a promise . . . should be expressed as such and not left to implication.") (citations omitted).

Each PSA has a contractual mechanism that requires the repurchase of mortgage loans out of the relevant securitization when a valid representation and warranty claim has been asserted by the trust. This is the appropriate mechanism to be used for this settlement. Using this mechanism honors the terms of the PSA. It will have the same economic effect on investors

in the trusts because the loans must be repurchased at par, and BoA may be given credit against the settlement amount for the difference between the repurchase price and the actual market value of the repurchased loans. Most importantly, use of this mechanism will ensure that the borrowers whose homes are at risk of foreclosure avoid being the unintended losers in this settlement and instead obtain the benefits of having their loans putback to an entity that both has an incentive to service them properly and is subject to defenses in foreclosure for misdeeds associated with origination of the loans. However, in lieu of enforcing the repurchase right set forth in the PSAs, BNYM proposes agreeing to an extra-contractual monetary payment that eliminates any collateral borrower benefit from this aspect of the settlement.

As servicer of the loans owned by the trusts, BoA has skewed incentives to appropriately service the loans. For example, despite its obligation to service the loans in a manner to maximize value for the trusts, BoA also must advance delinquent payments to the trusts. One key way that BoA is able to recover these payments is through recoveries on the loan following foreclosure. Thus, BoA may have an incentive to seek foreclosure even when a possible loan modification is likely to lead to a greater net recovery to the trust. If BoA were to repurchase the loans through the settlement, these skewed incentives would disappear and BoA, as both owner and servicer, would have an incentive to keep borrowers in their homes through modifications or other means where this maximized the value of the loan over time.

In addition to affecting borrowers, the servicing changes and payment mechanisms adopted in this settlement will likely serve as a model for future RMBS trustees settling similar claims. Where, as here, multiple state interests are at issue, it is paramount that the Delaware DOJ be permitted to intervene to protect those interests, not just in this proceeding but in future RMBS settlements involving similar claims.

The Delaware DOJ intends to verify, through confirmatory discovery as a party to this proceeding, the extent to which Delaware investors are adversely affected by the terms of the proposed settlement. Moreover, the fact that any Delaware investors (institutional or otherwise) invested in the Covered Trust vehicles indisputably implicates the Delaware DOJ's quasi-sovereign interest in protecting the integrity of the Delaware marketplace.

III. The Delaware Department of Justice Should be Permitted to Intervene Because Its Potential State Law Claims Share Common Questions of Law and Fact With This Proceeding

BNYM asserts that because the Delaware DOJ could assert its potential claims, including its Delaware Securities Act and Deceptive Trade practices claims, "outside of this proceeding", the Delaware DOJ's Petition should be denied. (Opp. p. 7). This is not the standard for intervention under CPLR 1013, nor is it the standard under here. As set forth in the Delaware DOJ's Petition, its potential claims have common questions of law and fact with this proceeding and implicate the State of Delaware's quasi-sovereign interest in protecting the marketplace, as well as its interest in protecting its citizens from abuses of the class action device. This is the standard under which the Delaware DOJ's Petition should be evaluated; not the fact that its claims potentially could be asserted elsewhere.[2] Moreover, as conceded in BNYM's opposition to the NYAG's Petition (NY Opp. p. 16), the Settlement could preclude the Delaware DOJ from pursuing restitution as a remedy for its proposed claims. The fact that the Delaware DOJ could possibly pursue its Securities Fraud and Deceptive Trade Practices claims in other proceedings without the availability of the important remedy of restitution is not a sufficient reason for denying intervention in this proceeding.

[2] Similarly, the fact that Delaware is not the exclusive jurisdiction for legal proceedings concerning Delaware statutory trusts has no bearing on the Delaware DOJ's right to intervene in this proceeding.

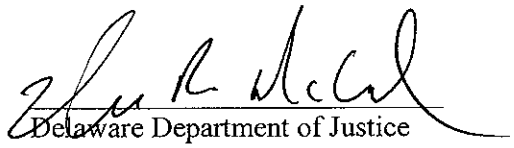
BNYM further asserts that Delaware citizens and investors, the group that the Delaware DOJ asserts will be impacted by the Settlement, do not have any cognizable interest in the Trustee's exercise of its discretion, which BNYM asserts is the "sole issue" in this proceeding. BNYM similarly contends that the Delaware DOJ should be denied the opportunity to participate in this proceeding because it has not yet been able to allege an injury to a substantial segment of the state's population. (Opp. p. 7). The Delaware DOJ has not yet had an opportunity to participate in discovery in this proceeding in order to ascertain whether, and how, Delaware citizens and investors (including institutional investors) are adversely affected by the Settlement. Moreover, this proceeding implicates the State of Delaware's quasi-sovereign interest because it will impact hundreds of billions of dollars in RMBS as well as homeowners throughout Delaware, which undoubtedly affects both the Delaware securities marketplace as well as the broader Delaware economy. Accordingly, the State of Delaware should be permitted to intervene in this proceeding to preserve its potential state law claims.

CONCLUSION

For the foregoing reasons, the Delaware DOJ respectfully requests that its Petition to Intervene be GRANTED.

Dated: October 26, 2011
Wilmington, DE

Respectfully submitted,



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Pro Hac Vice pending

EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the matter of the application of THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures) *et al.*, Petitioners, -against- WALNUT PLACE LLC *et al.*, Intervenor-Respondents.	:	Case No. 11-cv-5988 (WHP)

THE BANK OF NEW YORK MELLON'S SUR REPLY MEMORANDUM OF LAW IN OPPOSITION TO JOSEPH R. BIDEN, III'S, ATTORNEY GENERAL OF THE STATE OF DELAWARE, PETITION TO INTERVENE

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The Bank of New York Mellon

TABLE OF AUTHORITIES

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STATUTES

OTHER AUTHORITIES

Petitioner The Bank of New York Mellon ("BNYM") submits this sur reply memorandum of law in opposition to the Reply Memorandum of Joseph R. Biden, III, Attorney General of the State of Delaware ("DAG"), In Support of its Petition to Intervene ("Reply").[1]

ARGUMENT

In its Reply, the DAG raises a new argument to support its Petition to Intervene. The DAG argues that because the Court "has determined that the matter fits within the definition of a 'mass action'," the "provisions of the Class Action Fairness Act ("CAFA") in conjunction with the Delaware DOJ's power to take action whenever necessary for the protection of state interests give the Delaware DOJ standing to intervene and object to the proposed settlement." (Reply at 2). The DAG's sole basis for its standing argument is 28 U.S.C. § 1715(b)'s requirement that "notice of any proposed class action settlement [must be provided] to the appropriate state official, which in most cases is the State attorney general." (*Id.* at 3). That argument fails because (1) this proceeding is not considered a class action for any purpose—including § 1715's notice provision—other than for determining the Court's jurisdiction under CAFA, and (2) even if this proceeding were considered a "class action" under § 1715, that section does not confer standing to intervene.

First, while the Court determined that this matter constitutes a "mass action" for purposes of CAFA's jurisdictional provisions, it does not follow that this matter constitutes a "class action" for purposes of § 1715. To the contrary, CAFA makes clear that this matter cannot be considered a class action for any purpose other than determining the Court's jurisdiction under CAFA. *See Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("As with any question of

[1] At the November 3, 2011 status conference, the Court granted BNYM leave to file a sur reply in response to the Reply.

statutory interpretation," the analysis must "begin[] with the plain language of the statute."). Section 1332(d)(1)(B) defines a class action as "any civil action filed under [R]ule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action[.]" This matter does not qualify as a traditional class action because it was not commenced pursuant to Rule 23 or a similar state counterpart. (*See* Dkt. 1-1 (Verified Pet)). Section 1332(d)(11)(A) provides further that "[f]or purposes of this subsection and section 1453, a mass action shall be deemed a class action removable under" that statute. (Emphasis added). Accordingly, CAFA provides that a mass action will be deemed a "class action" for CAFA's jurisdictional provisions only; neither § 1332 nor any other provision in CAFA expands a mass action's identity as a class action beyond § 1332(d)(11) or § 1453. Congress's intent to limit a mass action's identity as a class action solely for determining jurisdiction is clearly set forth in CAFA's legislative history. *See* S. Rep. No. 109-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 44 ("Under subsection 1332(d)(11), any civil action in which 100 or more named parties seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes.") (Emphasis added).

Conversely, the DAG has cited no authority that a mass action is deemed a "class action" for purposes of 28 U.S.C. § 1715. For instance, 761 PLI/lit 11, 2007 Overview of the Class Action Fairness Act, the sole authority cited by the DAG, demonstrates precisely the opposite. The statement quoted by the DAG—"Under the mass action provision, if the requirements generally pertaining to class actions are met, the action is treated as though it were a class action . . ."—refers to CAFA's jurisdictional provisions and cites to § 1332(d)(11)(A) to support its assertion. (Reply at 2-3)

Second, even if this purported mass action were considered a "class action" for purposes of § 1715, it does not follow that a notice provision should be construed to grant the DAG standing to intervene in a proceeding where it otherwise has no standing. The plain text of § 1715 requires merely that a defendant provide the applicable state and federal officials with notice of a proposed settlement and explicitly states that "[n]othing in this section shall be construed to expand the authority of . . . Federal or State officials." 28 U.S.C. § 1715(f) (emphasis added). CAFA's legislative history confirms that § 1715 does not grant state or federal officials any new authority. In approving CAFA, the Senate Committee on the Judiciary's report asserted that "state and federal officials are not required to take any affirmative action once they receive the proposed settlement according to new section 28 U.S.C. § 1715(f); nor does this section expand their current authority in any respect." *See* Sen. Report No. 109-14, at 34 (emphasis added).

In its Reply, the DAG ignores Congress's purpose in enacting § 1715's notice provision. According to the legislative history, § 1715 was "intended to combat the 'clientless litigation' problem by adding a layer of independent oversight to prohibit inequitable settlements." Sen. Report No. 109-14, at 33. Congress was concerned with "[a]busive class action settlements in which plaintiffs receive promotional coupons or other nominal damages while class counsel receive large fees . . . ." *Id.* at 32. Here, the proposed settlement does not involve any concerns about "clientless litigation," which predicated § 1715's enactment. The DAG's attempt to construe a straightforward notice requirement as a source of substantive law to establish standing to intervene as a party is without merit. Under the DAG's reading of the statute, it would have automatic standing to intervene in every proposed class action settlement brought pursuant to

CAFA. As explained in the legislative history, Congress never intended to expand the authority of state or federal officials, let alone confer Article III standing, through the notice provision.

Finally, BNYM has found no authority (and the DAG cites none) to support the contention that the right to receive notice of a class action settlement, pursuant to § 1715, grants to a state official standing to intervene in that proceeding.[2]

CONCLUSION

For all of the foregoing reasons, the Court should deny the DAG's petition to intervene in this proceeding.[3]

Dated: New York, New York
November 9, 2011

/s/ Matthew D. Ingber

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[2] *Connecticut v. Physicians Health Services*, the only case cited by the DAG, is inapposite. *See* 287 F.3d 110, 112 (2d Cir. 2002) (not discussing 28 U.S.C. § 1715 and affirming dismissal of action because the Connecticut attorney general lacked standing to sue and could not bring the suit in a *parens patriae* capacity).

[3] At a minimum, as BNYM requested at the November 3 status conference, the Court should reserve decision on the DAG's intervention motion pending a ruling from the Court of Appeals on BNYM's petition for permission to appeal the Court's order denying the remand motion.

EXHIBIT 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

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, 11 Civ. 5988 (WHP)

:

-against- MEMORANDUM & ORDER

:

WALNUT PLACE LLC, *et al.*,

:

Intervenor-Respondents.

:

----------X

WILLIAM H. PAULEY III, District Judge:

The Attorneys General of Delaware and New York (the "State AGs") and a group of homeowners led by Mary Ellen Iesu (the "Homeowners") move to intervene in this civil action. For the following reasons, this Court grants the State AGs' motions to intervene and denies the Homeowners' motion to intervene.

BACKGROUND

On June 19, 2011, the Bank of New York Mellon ("BNYM"), as trustee for hundreds of trusts, initiated an Article 77 proceeding in New York state court. See Bank of N.Y. Mellon v. Walnut Place LLC, ---F. Supp. 2d----, 2011 WL 4953907, at *2 (S.D.N.Y. Oct. 19, 2011). BNYM sought an order (i) declaring that BNYM had behaved reasonably by entering into the Settlement Agreement, (ii) ordering BNYM, Countrywide, and Bank of America to consummate the Settlement Agreement, and (iii) releasing claims brought by investors, including

claims by Walnut Place. See Bank of N.Y. Mellon, 2011 WL 4953907, at *2.

On August 26, 2011, Walnut Place removed the Article 77 Proceeding to this Court under the "mass action" provisions of the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, and 1711-1715 ("CAFA"). By Memorandum and Order, this Court denied BNYM's motion to remand on October 19, 2011. See Bank of N.Y. Mellon, 2011 WL 4953907, at *1, *3.

The State AGs and the Homeowners now move to intervene.

A. The State AGs

The Attorneys General of Delaware and New York move to intervene on the basis of their interest in protecting the investing public. The State AGs contend that states have a quasi-sovereign interest in an honest marketplace, and they assert parens patriae standing to protect the economic well-being of their citizens.

B. The Homeowners

The Homeowners are four individual obligors on mortgages owned by one or more of the mortgage securitization trusts covered by the Settlement Agreement. (Homeowners' Pleading in Intervention and Objection to Proposed Settlement Agreement dated Aug. 30, 2011 ("Homeowners' Pet.") ¶¶ 18-27.) The Homeowners do not own certificates issued by the trusts. (Homeowners' Pet. ¶¶ 18-27.) Rather, the Homeowners object to the Settlement Agreement on the grounds that its proposed reforms to Countrywide's mortgage servicing procedures (i) "do[] nothing to end existing abuses;" (ii) "undermine[] existing efforts to stabilize the housing markets;" and (iii) "fail to set standards to protect homeowners from wrongful or unnecessary foreclosures or abusive servicing." (Homeowners' Pet. ¶¶ 2, 5, 8.)

DISCUSSION

A. The State AGs

Federal Rule of Civil Procedure 24(b)(2) permits state agencies to intervene in lawsuits based on statutes or regulations within their administrative purview. See Disability Advocates, Inc. v. Paterson, No. 03-CV-3209 (NGG), 2009 WL 4506301, at *2 (E.D.N.Y. Nov. 23, 2009). It is undisputed that the State AGs have parens patriae standing to assert their "quasi-sovereign interest" in "securing an honest marketplace in which to transact business." New York ex rel. Abrams v. Gen. Motors Corp., 547 F. Supp. 703, 705 (S.D.N.Y. 1982). And it is apodictic that the State AGs have parens patriae standing to protect citizens from breaches of fiduciary duty and to rectify those breaches. See People v. H&R Block, Inc., 847 N.Y.S.2d 903 (Table), at *8 (Sup. Ct. N.Y. Cnty. July 9, 2007).

Because "the Settlement Agreement at issue here implicates . . . the vitality of the national securities markets," Bank of N.Y. Mellon, 2011 WL 4953907, at *10, this action concerns far more than the financial interests of a few sophisticated investors. And the intervention of the State AGs in this action will protect the interests of absent investors. Accordingly, the State AGs' motions to intervene are granted. However, this Court will not consider any counterclaims by the State AGs unless and until the Court of Appeals for the Second Circuit affirms this Court's October 19, 2011 order or declines to hear the appeal.

B. The Homeowners

1. Intervention as of Right

The Homeowners are not eligible to intervene as of right because they cannot show an interest in "the property or transaction that is the subject of the action." Fed R. Civ. P.

24(a)(2). The subject matter of this action is an agreement that seeks to settle claims belonging to the securitization trusts. The Homeowners are not parties to the contracts creating the trusts, nor are they third-party beneficiaries. As such, the Homeowners lack the "direct, substantial, and legally protected interest in the subject matter of this action" that is required for intervention as of right. Compagnie Noga D'Importation Et D'Exportation S.A. v. Russian Federation, No. 00 Civ. 0632 (WHP), 2005 WL 1690537, at *4 (S.D.N.Y. July 20, 2005).

Further, this action does not limit the Homeowners' right to contest wrongful foreclosures or abusive mortgage servicing practices. Where, as here, movants may file a separate action to vindicate their rights, they cannot establish that their interests will be impaired absent intervention. See In re Holocaust Victim Assets Litig., 225 F.3d 191, 199 (2d Cir. 2000) ("Because appellants remain free to file a separate action, they have not established that they will be prejudiced if their motion to intervene is denied."). As such, the Homeowners are not entitled to intervene in this action as of right.

2. Permissive Intervention

The Homeowners are not entitled to permissive intervention because they do not have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Plainly, the Homeowners' claims regarding the servicing of their mortgages do not share "common questions" with the core issue of whether BNYM behaved properly in executing the Settlement Agreement. Further, even if the Homeowners' claims did present "common questions," this Court would still deny the Homeowners' motion to intervene because "permissive intervention will not be granted . . . where such intervention would cause undue delay, complexity or confusion in a case." SEC v. Bear Stearns & Co., Nos. 03 Civ.2937

(WHP) et seq., 2003 WL 22000340, at *2 (S.D.N.Y. Aug. 25, 2003). Accordingly, the Homeowners' motion to intervene is denied.

CONCLUSION

For the foregoing reasons, the State AGs' motions to intervene are granted and the Homeowners' motion to intervene is denied. The Clerk of the Court is directed to terminate the motion pending at ECF No. 17.

Dated: November 18, 2011
New York, New York

SO ORDERED:

WILLIAM H. PAULEY III
U.S.D.J

All Counsel of Record

EXHIBIT 8

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INVESTOR PROTECTION BUREAU

March 16, 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,

We write on behalf of proposed intervenors Eric T. Schneiderman, Attorney General of the State of New York ("NYAG"), and Joseph R. Biden III, Attorney General of the State of Delaware ("Delaware AG"), in the above action, which concerns 530 trusts organized under the laws of New York and Delaware. We write to address the issues raised in Bank of New York Mellon's ("BNYM") March 12, 2012 letter.

By way of background, NYAG moved to intervene in this action (Document Number 101, Motion Sequence Number 12) on August 4, 2011, and the Delaware AG moved to intervene on August 9, 2011 (Document Number 129, Motion Sequence Number 15). Walnut Place removed the matter on August 26, 2011 (Document Number 164). Accordingly, this Court held on October 31, 2011 that NYAG and Delaware AG's motions to intervene were moot (Document Number 201, Motion Sequence 12; Document Number 197, Motion Sequence 15). We are currently conferring with BNYM to resolve the question of intervention expeditiously.

BNYM's March 12, 2012 letter seeks inappropriately to limit both the issues raised by the settlement, and the discovery needed to fully examine those issues. We oppose this effort, and respectfully submit that the Court should not permit it. In this regard, we adopt the points made by the steering committee of proposed intervenor-respondents in its March 16, 2012 letter to the Court in response to BNYM's letter.

Respectfully submitted,

Thomas Teige Carroll
Deputy Bureau Chief
Investor Protection Bureau

EXHIBIT 9

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), Maiden Lane II, LLC (intervenor), Maiden Lane III, 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 Advisers, 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), New York Life 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 CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No.
651786/2011

Assigned to:
Kapnick, J.

AMENDED VERIFIED PETITION IN INTERVENTION

For its amended petition pursuant to CPLR 401, 1012, and 1013 to intervene as respondent in this proceeding, proposed intervenor the State of Delaware by JOSEPH R. BIDEN, III, Attorney General of the State of Delaware (the "Delaware Department of Justice"), states and alleges upon information and belief as follows:

INTRODUCTION

1. In this proceeding pursuant to CPLR Article 77, the Bank of New York Mellon ("BNYM"), as trustee for 530 trusts ("Covered Trusts") comprised of billions of dollars in residential mortgage backed securities ("RMBS"), seeks the Court's approval of a proposed

settlement of claims against Countrywide Home Loans, Inc. and Countrywide Financial Corporation (collectively "Countrywide"), who acted as loan originators and servicers to the Covered Trusts, and Bank of America ("BoA") and its affiliated entities who acted as servicers to the Covered Trusts.[1]

2. The claims that would be resolved by the proposed settlement are related to Countrywide and BoA's pervasive failure to comply with the standards of conduct governing the creation and administration of the covered trusts. These failures contributed to the massive collapse of the market for RMBS, causing substantial harm to mortgage loan borrowers, investors and the integrity of the securities markets.

3. If approved, the terms of the proposed settlement would fully and finally release the claims of the Covered Trusts and would be binding on all of the trust beneficiaries, whether or not they are represented in this special proceeding.

4. The Delaware Department of Justice seeks permission to intervene in this proceeding: (i) pursuant to its authority as *parens patriae* to protect the public interest, including the interests of absent investors and homeowners as well as the integrity of the marketplace; (ii) to protect potential state law claims that may be adversely affected if the proposed settlement is approved, including claims for securities fraud, consumer fraud and deceptive trade practices, against BNYM, BoA or Countrywide, arising out of the conduct covered by the potential settlement.

5. The DDOJ objects to the proposed settlement because it does not have sufficient information to evaluate the proposal.

[1] BoA acquired Countrywide in a transaction that was finalized on July 1, 2008, and later announced that Countrywide would transfer all of its assets to unnamed subsidiaries of BoA.

I. BACKGROUND

6. On June 29, 2011, BoA announced that it had entered into an agreement with BNYM to settle all potential claims belonging to the [covered] trusts for which BNYM serves as trustee.

7. On the same day, BNYM commenced the instant special proceeding by filing a verified petition pursuant to CPLR § 7701 seeking judicial instructions and approval of the proposed settlement.

8. BNYM also appeared *ex parte* on July 29, 2011, without notice to any of the trust beneficiaries or other potentially adverse parties, and obtained an Order to Show Cause setting forth a procedure for the approval of the proposed settlement.

9. The Delaware Department of Justice filed a Petition to Intervene in this Court on August 10, 2011.

10. BNYM filed a response to that Petition on August 19, 2011.

11. Before the Delaware Department of Justice had an opportunity to file a Reply in Support of its Petition to Intervene, the matter was removed to the Southern District of New York.

12. After filing a Reply in Support of its Petition to Intervene in the Southern District of New York, and the filing of a sur-Reply by the BNYM, on November 18, 2011 Judge Pauley issued an Order granting the intervention of the Delaware Department of Justice.

13. The matter was subsequently remanded to the New York Supreme Court.

14. The terms of the proposed settlement include a cash payment to the trust beneficiaries of 8.5 billion dollars, provisions requiring the master servicers to implement certain

servicing improvements, and provisions addressing the cure of document exceptions. *See* Settlement at ¶¶ 3, 5, and 6.

15. The proposed settlement, on behalf of the Trustee, Investors, the Covered Trusts, or any Person acting on behalf of the Trustee or Investors of the Covered Trusts, contemplates the full and final release of a number of claims including those related to: 1) the breach of the representations and warranties governing the sellers of mortgage loans to the Covered Trusts and the master servicers of the Covered Trusts, 2) the breach of the recordkeeping requirements contained in the Pooling and Servicing Agreements and Sales and Servicing Agreements (collectively "PSAs") governing the trusts including the requirement that deficiencies in mortgage files be identified and corrected, and 3) claims that BoA and Countrywide charged excessive fees and costs for their inadequate services. *See* Settlement at ¶ 9.

16. The proposed settlement with BoA was negotiated by a group of 22 institutional investors and BNYM. No other trust beneficiaries took part in the settlement negotiations. The proposed settlement is undoubtedly complex and billions of dollars are at stake. There is limited access to the information exchanged between the parties to the proposed settlement during settlement negotiations. In light of this, the Delaware Department of Justice does not have sufficient information to evaluate the adequacy of the settlement or its full impact on the interests of the State of Delaware.

II. INTERESTS OF THE DELAWARE DEPARTMENT OF JUSTICE

17. The Delaware Department of Justice has both common law and statutory authority to protect the interest of the State of Delaware generally, and the interests of Delaware citizens and investors more specifically, and should be permitted to intervene to ensure those

interests are properly represented and that a fair and reasonable settlement of this matter is achieved.

18. The Delaware Department of Justice, based upon a review of the extremely limited universe of available facts concerning the proposed settlement, has significant concerns that the proposed settlement does is inadequate. Many of the investors in the Covered Trusts have not intervened in this litigation and, indeed, may not even be aware of it. The PSAs that govern the creation and administration of the Trusts impose limitations on the right of investors to bring suit under the PSAs. Generally, the PSAs governing the creation and administration of the trusts prevent a certificateholder from instituting suit under the PSA unless a certificateholder, or group of certificateholders, evidencing not less than twenty five percent of the voting rights of the trust, typically representing hundreds of millions of dollars, has sent a notice of default to the trustee as well as a written request for the trustee to institute an action, and the trustee has refused to do so sixty days after its receipt of the notice of default. *See generally*, Trust PSA, section 10.08 [Ex B to NY Petition]. These provisions are an additional impediment to certificateholders seeking to assert their rights under the PSAs. With its intervention, the Delaware Department of Justice will ensure that the interests of absent Delaware investors are adequately represented.

19. The Delaware Department of Justice's intervention is particularly important given the evidence suggesting that BNYM negotiated the settlement on behalf of the trust beneficiaries under a conflict of interest. The proposed settlement confers substantial direct benefits to BNYM, primarily by a provision, contained in a side letter to the proposed settlement agreement, in which BoA agrees to expressly guarantee the indemnification obligations of Countrywide to BNYM under the terms contained in the PSAs. *See* Settlement at ¶ 16 & Exhibit C ("sideletter"

agreement between Countrywide and BNYM). This expanded indemnification provision also covers BNYM's negotiation and implementation of the terms of the settlement. The potential conflicts of BNYM go directly to the heart of the issue in this special proceeding.

20. Given that interested parties were excluded from the negotiation of this settlement and BNYM's potential conflict of interest in negotiating the settlement on behalf of absent parties, the Delaware Department of Justice has concerns that the proposed settlement is inadequate.

21. The proposed settlement agreement requires BoA to pay $8.5 billion into the trusts. *See* BNYM Petition at ¶ 11. The settlement amount represents a fraction of the principal balance of the loans in the covered trusts, and more information is necessary to evaluate the proposed settlement.

22. The proposed settlement agreement also requires implementation of changes to the way in which the loans in the Covered Trusts are serviced. *See* BNYM Petition at ¶ 11. Changing the minimum servicing standards represents a unique opportunity to deliver value to the investors in trust certificates by more effectively working with struggling homeowners to ensure that their loans continue to perform. Unfortunately, the proposed settlement agreement does not address how high risk loans will be serviced, except to say that qualifying loans will be transferred to approved sub-servicers, leaving implementation solely to the discretion of the sub-servicer. *See* Settlement at ¶ 5(a) and (b). The loss mitigation requirements and considerations provisions in the proposed settlement do not require the "Master Servicer to offer any modification or loss mitigation strategy to any borrower," leaving loss mitigation decisions solely to the discretion of the Master Servicer. *See* Settlement at ¶ 5(d) and (e). The lack of established servicing standards for high risk loans and the lack of standards for loss mitigation

and loan modification raise concerns that the proposed servicing changes may not add value to the trusts and deserves a more detailed review.

23. The Delaware Department of Justice also has a significant interest in preserving its potential claims against the parties to the proposed settlement that arise out of the conduct covered by the proposed settlement. The Delaware Department of Justice seeks to intervene pursuant to its statutory and common law authority to protect Delaware investors. The Delaware Department of Justice has statutory authority to "remedy any harm caused by securities law violations." 6 *Del. C.* § 7301(b). The Delaware Department of Justice also has statutory authority to pursue remedies for deceptive trade practices that are harmful to Delaware residents or consumers. 6 *Del. C.* § 2533(d). The Delaware Department of Justice is charged with protecting the interests of all Delaware investors, including those Delaware investors who are beneficiaries (directly or indirectly) of the covered trusts.

24. The acts and practices of BNYM alleged herein may have violated 6 *Del. C.* § 7303(2), in that BNYM may have made untrue statements of material fact and/or omitted to state material facts in order to make the statements made, in light of the circumstances under which they were made, not misleading. BNYM's conduct as described above may have violated the Delaware Securities Act insofar as the Trust PSA requires the Trust annually to certify the following "servicing criteria":

- "Collateral or security on mortgage loans is maintained as required by the transaction agreements or related mortgage loan documents."
- "Mortgage loan and related documents are safeguarded as required by the transaction agreements;" and
- "Any addition, removals or substitutions to the asset pool are made, reviewed and approved in accordance with any conditions or requirements in the transaction agreements." [*See generally*, Trust PSA, [Ex W to NY Petition]].

25. The Delaware investors in the Trusts may have been misled by BNYM into believing that BNYM would review the loan files for the mortgages securing their investment, and that any deficiencies would be cured.

26. The acts and practices of BNYM alleged herein also may have violated Delaware's Deceptive Trade Practices Act, 6 *Del. C.* § 2432(12), in that BNYM's conduct created "a likelihood of confusion or misunderstanding" in the investors in the Trusts, for the reasons cited above.

RELIEF REQUESTED

WHEREFORE, The Delaware Department of Justice respectfully seeks relief as follows:

1. Granting the petition to intervene, and

2. Granting such other and further relief as may be just and proper.

Dated: April 11, 2012

THE DELAWARE DEPARTMENT OF JUSTICE

By: _____

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VERIFICATION

I, Joseph Sensenbrenner, hereby affirm under penalty of perjury that the following is true and correct:

I am a member of the New York Bar in good standing and an Assistant Deputy Attorney General for the Delaware Department of Justice. I have read the foregoing Verified Petition and know the contents thereof. All statements of fact therein are true and correct to the best of my knowledge and belief.

Executed this 11th day of April 2012, in Wilmington, Delaware

By: _____
Joseph Sensenbrenner

_____
NOTARY PUBLIC

BRUCE JAHI AIKEN
NOTARY PUBLIC, STATE OF DELAWARE
My Commission Expires Upon Office