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

In the matter of the application of

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

Petitioners,

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

Index No. 651786-2011

Kapnick, J.

Motion Sequence No. 27

THE BANK OF NEW YORK MELLON'S OPPOSITION TO THE MOTION TO INTERVENE BY ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

(continued)

Page

CASES (CONT'D)

STATUTES

Petitioner, The Bank of New York Mellon ("BNYM" or the "Trustee"), solely in its capacity as trustee, respectfully submits this memorandum of law in opposition to the Amended Petition to Intervene ("Pet.") by Eric T. Schneiderman, Attorney General of the State of New York ("NYAG").

PRELIMINARY STATEMENT

The NYAG seeks to intervene in an expedited special proceeding addressing a single question—whether The Bank of New York Mellon ("BNYM" or the "Trustee") acted within the bounds of its reasonable discretion in entering into the Settlement Agreement ("SA"). The NYAG initially moved to intervene to assert claims for breach of fiduciary duty and violations of the Martin Act and the Executive Law, and because he purportedly has an interest in objecting to the Settlement.[1] The NYAG now moves to intervene "on a narrower basis . . . and relies solely on the NYAG's objection to the proposed settlement." (NYAG MOL II 1.)[2] Even the NYAG's narrower basis relies on a startling theory of standing under the *parens patriae* doctrine, claiming the authority to intervene in an effort to enhance the pecuniary recovery of a discrete group of private investors. Consistent with well-settled law on the *parens patriae* doctrine, New York state and federal courts consistently have rejected such an expansive view of the *parens patriae*

---

[1] Because the NYAG's amended pleading removes all counterclaims against the Trustee, the Trustee has tailored its response accordingly and does not address the fundamental defects in the counterclaims, or the compelling reasons why the assertion of counterclaims would have no bearing on the NYAG's standing. Those were addressed in our original response (Dkt. No. 135), and, to the extent relevant to the Court's consideration of the NYAG's Petition, are incorporated herein by reference.

[2] The NYAG filed a memorandum of law, dated April 13, 2012 ("NYAG MOL II") with his renewed request for leave to intervene in this proceeding that refers the Court to the arguments raised in its memorandum of law, dated August 4, 2011 ("NYAG MOL I"). Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Trustee's Verified Petition, Dkt No. 1.

doctrine. Not surprisingly, in the eight months that have elapsed since his original filing, the NYAG still remains unable to cite to any precedent supporting his intervention or his theory of standing.

The NYAG also describes this Article 77 proceeding in a way that the Trustee is compelled to correct at the outset. Unless corrected, the misdescription would appear to bolster the NYAG's position that his intervention is necessary because investors cannot act on their own behalf. The NYAG asserts that the Trustee seeks to bind all trust beneficiaries "without ever giving beneficiaries or their representatives an opportunity to test its claim that the proposed settlement is reasonable and within its powers as trustee." (NYAG MOL I 2.) That statement is plainly wrong. 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*** investor who seeks to object to the Settlement. It objects to the NYAG's involvement only because, unlike the investors, he has no standing to intervene.

ARGUMENT

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

The NYAG cannot intervene to object to the Settlement, because he lacks standing to bring that objection.[3] Standing is a mandatory, threshold issue, and the requirement applies "at

[3] "[A]s the Court of Appeals has made clear, '[c]apacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing.' '[C]apacity concerns a litigant's power to appear and bring its grievance before the court,' and may depend on a litigant's status or . . . authority to sue or be sued.' By contrast, '[s]tanding involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast [] the dispute in a form traditionally capable of judicial resolution.'" *People v. Grasso ("Grasso III")*, 54 A.D.3d 180, 190 n.4 (1st Dep't 2008) (citations omitted). Because the NYAG 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."

all stages of the proceeding." *Grasso III*, 54 A.D.3d at 197 (quoting *Safir v. Dole*, 718 F.2d 475, 481 (D.C. Cir. 1983)). The NYAG invokes the *parens patriae* doctrine, which he says allows him to litigate "to protect the investing public at large," "to seek redress on behalf of individual investors," "to protect citizens from breaches of fiduciary duty and rectify those breaches," to "uphold[] the integrity, efficacy, and strength of the financial markets in New York State," to "secur[e] and honest marketplace" and "to uphold[] the rule of law generally." (NYAG MOL I 5; NYAG MOL II 2.) But the NYAG does not have the authority to block the settlement of private claims seeking monetary relief on behalf of a discrete group of sophisticated private investors.[4] Any ruling to the contrary would constitute a radical and unprecedented expansion of the NYAG's power to intervene in private litigation.

Parens patriae is the State's "nursing quality." *People v. Ingersoll*, 58 N.Y. 1, 30 (1874). It is grounded in and bounded by the 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 NYAG to represent "private parties who feel aggrieved [and] . . . have ample remedies to redress their wrongs by proceedings in their own names." *Grasso III*, 54 A.D.3d at 193–94 (quoting *People v. Lowe*, 117 N.Y. 175, 195 (1989)). "To invoke the doctrine, the Attorney General must prove a quasi-sovereign interest distinct from that of a particular party and injury to a substantial segment of the state's population." *People v. Grasso ("Grasso II")*, 11 N.Y.3d 64, 69 n.4 (2008) (citing *Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)).

This special proceeding is brought to approve the acts of a trustee for mortgage-securitization trusts, in attempting to settle contract disputes between the trusts and their

[4] The settlement also provides for improvements in servicing and the cure of past document deficiencies, but because these changes are designed to enhance the investors' 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.

sophisticated investors, on the one hand, and certain parties to privately negotiated PSAs, on the other. The claims sought to be settled do not implicate financial markets or exchanges (the Certificates are not traded on any exchange), and the Settlement in fact expressly carves out securities claims based on disclosures to potential investors. That the Settlement involves a large dollar figure and heavy media coverage does not mean that a quasi-sovereign interest is at stake. The *parens patriae* standard is not met here, for two independent reasons.

A. *Parens patriae* does not confer standing to prosecute private claims.

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

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

Snapp & Son, Inc., 458 U.S. at 601–02.

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 NYAG. 58 N.Y. at 12–13. Notably, in *Ingersoll*, the Court of Appeals denied the NYAG's effort to intervene even though the money was claimed by a ***municipal*** corporation. In *Lowe*, where "the Attorney General similarly sought to recover money for a private corporation from trustees who allegedly committed misconduct" (described in *Grasso III*, 54 A.D.3d at 199), the

Court of Appeals stressed that "[i]t is not sufficient for the People to show that wrong has been done to some one; the wrong must appear to be done ***to the People*** in order to support an action by the People for its redress." *Lowe*, 117 N.Y. at 192 (emphasis added). And in *Grasso III* itself, the court concluded that "to grant standing to the Attorney General to prosecute an action seeking only the recovery of money for a for-profit entity to redress an alleged wrong that was not 'perpetrated directly against the State'" would invite "'grave and doubtful constitutional questions.'" 54 A.D.3d at 199–200 (quoting *Ingersoll*, 58 N.Y. at 13, and *Jones v. United States*, 526 U.S. 227, 239 (1999)). The apparent desire of some private investors to increase the Settlement Payment or recover damages from the Trustee, therefore, cannot support *parens patriae* standing.

That some investors might not participate in this proceeding (NYAG MOL I 3–4, NYAG Pt. 2) does not alter this fundamental limitation on *parens patriae* standing. The First Department addressed that notion in *Grasso III* and held that "[t]he parens patriae standing of the Attorney General . . . does not permit him 'to represent the interests of particular citizens who, for whatever reason, cannot represent themselves.'" 54 A.D. 3d at 198 (quoting *Snapp & Son, Inc.*, 458 U.S. at 600). Indeed, the rule that "[t]he state cannot merely litigate as a volunteer the personal claims of its competent citizens" pervades the caselaw. *People v. Seneci*, 817 F.2d 1015, 1017 (2d Cir. 1987); *see also Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) ("It has . . . become settled doctrine that a state has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens"); *New York v. Cain*, 418 F. Supp. 2d 457, 470 (S.D.N.Y. 2006) ("a state can no more bring suit on behalf of a particular citizen as a personal attorney than it can as an

assignee").[5] The NYAG's assertion of *parens patriae* standing in this proceeding is all the more indefensible, because many investors support the Settlement. Thus, the NYAG also would be litigating as a volunteer *against* the personal claims of other competent citizens.

B. Money relief does not implicate any quasi-sovereign interest.

Further, any quasi-sovereign interest that the NYAG may have in protecting financial markets is not implicated by, and therefore cannot create standing to bring, a suit seeking nothing more than pecuniary relief on behalf of private investors. "[W]hether a plaintiff has standing 'depends in substantial measure on the nature of the relief sought.'" *Grasso III*, 54 A.D.3d at 207 (quoting *Warth v. Seldin*, 422 U.S. 490, 515 (1975)). "Where the complaint only seeks to recover money damages for injuries suffered by individuals, the award of money damages will not compensate the state for any harm done to its quasi-sovereign interests. Thus, the state as *parens patriae* lacks standing to prosecute such a suit." *Seneci*, 817 F.2d at 1017; *see also Grasso III*, 54 A.D.3d at 195–96 ("whe[re], as here, the Attorney General seeks only monetary relief that would inure to the benefit of the owners of a for-profit entity . . . [t]he prosecution of such a cause of action would vindicate only the interests of private parties, not any public interest").

---

[5] As noted above, the NYAG may have standing to sue on behalf of ***in***competent individual citizens (*see Ingersoll*, 58 N.Y. at 30 (discussing "infants, idiots and the like")), though this power is now largely statutory (*see, e.g., Kochanski v. City of N.Y.*, 76 A.D.3d 1050, 1052 (2d Dep't 2010) (discussing Social Services Law §§ 62, 398)). But *Seneci*, among others, adds the explicit qualifier that that power never did extend to "competent citizens," as does *Ingersoll* itself, which concluded that "a [municipal] corporation . . . is not within this class of incompetents in need of the exercise of this nursing quality of the State government." 58 N.Y. at 30. The *Grasso III* passage quoted above in the text casts doubt on the lingering applicability of the non-statutory doctrine even to incompetents. In any event, it is clear that sophisticated investors of the type that purchased these certificates, including, for example, intervenor-respondent AIG and the various pension and hedge funds that have intervened, are not the proper objects of the state's solicitude, the "nursing quality" that is the necessary condition for the exercise of *parens patriae* standing.

It is important to distinguish the NYAG's purported interests in objecting to the Settlement—his sole basis for intervening in this proceeding, on the one hand, from his interests in the potential Martin Act and Executive Law claims that he contends this Article 77 proceeding could potentially impair. Although the Trustee believes that the latter claims would be meritless, the NYAG would have standing ***outside*** of this proceeding to bring them. As to the Settlement objection, he has no standing—in this or any other proceeding.

The NYAG seeks to ensure that the Settlement "fairly and comprehensively addresses harm to . . . investors [in the trusts]" (NYAG MOL I 6)—but that "harm" is purely monetary, and so are the investors' interests. It is significant that even the NYAG characterizes his interest as derivative of "such investors," the predominantly institutional investors in these Trusts. No "'substantial segment of the state's population" (*Grasso II*, 11 N.Y.3d at 69 n.4) has an interest in this Settlement. The "many borrowers" to which the NYAG's pleading refers (¶ 17), meanwhile, do not have cognizable interests in the Trustee's exercise of its discretion, the sole issue in this proceeding. The NYAG's failure even to mention, let alone satisfy, the "substantial segment" requirement is a fatal deficiency in his application. *See Grasso II*, 11 N.Y.3d at 69 n.4 ("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).

Although the NYAG speaks of financial-market interests (NYAG MOL I 5), he does not seek any ***relief*** that would address them. Nor could he in an Article 77 proceeding. The Court here cannot devise a settlement from scratch, or rewrite the parties' agreement; the Trustee's request, and the Court's authority under New York trust law, is limited to a decision on whether the Trustee acted within its reasonable discretion in entering into this Settlement. The Trustee's alleged failure to seek broader remedies that supposedly would restore confidence in New

York's financial markets—in other words, the alleged failure of the Trustee to arrogate to itself the State's regulatory role—comes nowhere near "bad faith." It is immaterial, therefore, that "the Attorney General alleges that the defendant's conduct has caused substantial injury to the integrity of the state's marketplace and the economic well-being of all of its citizens," because there is no relevant remedy available in this proceeding. *Seneci*, 817 F.2d at 1017; *see also Operation Rescue*, 80 F.3d at 71 (distinguishing damages to reimburse other parties, as to which the NYAG lacked standing, from "injunctive relief, noncompensatory fines, and compensation for any economic loss *New York* may have suffered").[6]

The difference between injunctive and monetary relief also distinguishes some of the decisions that the NYAG cites. In *People v. Merkin*, a case seeking restitution for investors in a Madoff feeder fund, Justice Lowe emphasized that "[t]he AG's focus is on obtaining injunctive relief designed to 'vindicate the State's quasi-sovereign interest in securing an honest marketplace for all consumers'"—a focus completely absent here. No. 450879/209, 2010 WL 936208, at *9 (Sup. Ct. N.Y. Cnty. Feb. 8, 2010) (quoting *People v. H&R Block, Inc.*, No. 401110/06, 2007 WL 2330924, at *7 (Sup. Ct. N.Y. Cnty. July 9, 2007)). The court said the same thing in *H&R Block, Inc.*, pointing out that injunctive relief was "[t]he Attorney General's focus" and deciding not to "ignore th[at] primary purpose." 2007 WL 2330924, at *7. A hypothetical in an earlier *People v. Grasso ("Grasso I")* opinion is also instructive. There, the First Department noted that "[f]rom the[] . . . assertions of the dissent" that the NYAG was protecting the fair and honest operations of the New York Stock Exchange, "one might think that

[6] Thus, the NYAG's evident belief that the servicing improvements should be modified in one or more various respects is irrelevant. After all, disapproval of the Trustee's decision to enter into the Settlement would do nothing to effectuate the changes the NYAG believes to be desirable. Again, the critical point is that no intervenor in this action can ever seek, let alone compel, any injunctive relief.

. . . the Attorney General was seeking in this action to effectuate ***structural reforms***," an effort that might warrant *parens patriae* standing. 42 A.D.3d 126, 142 (1st Dep't 2007) (emphasis added). Here, by contrast, and as in reality in *Grasso III*, the NYAG does not and cannot seek injunctive relief or "structural reforms"—and could not do so in the limited context of this Article 77 proceeding.[7] Finally, neither *State v. 7040 Colonial Rd. Assoc.* (176 Misc. 2d 367 (Sup. Ct. N.Y. Cnty. 1998)) nor *People v. Morris* (No. 0025/09, 2010 WL 2977151 (Sup. Ct. N.Y. Cnty. July 29, 2010)) is even relevant (NYAG MOL I 5)—both quotations in the NYAG's brief address the NYAG's standing under the Martin Act, not under *parens patriae*. It is only *parens patriae* that could support the NYAG's Settlement objection, making the broad language in those cases inapplicable.

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

The district court's ruling granting the NYAG leave to intervene is null and void. *See Glatzer v. Bear Stearns & Co.*, 201 Fed. Appx. 98, 98 (2d Cir. 2006) (vacating judgment and decision on defendant's motion to dismiss, because the district court lacked subject matter jurisdiction and erred in denying plaintiff's motion to remand); *In re C and M Prop., LLC v. Burbidge*, 563 F.3d 1156, 1162 (10th Cir. 2009) ("Any district court order putatively deciding any aspect of a claim remanded to state court is but an advisory opinion, the expression of stray sentiments by a court powerless to decide anything"). Nevertheless, in support of his Amended

[7] The Settlement also provides for improvements in servicing and the cure of past document deficiencies, but because these changes are motivated by the Certificateholders' interest in maximizing the value of their securities by improving the performance of the trusts, they only reinforce the pecuniary nature of the interests at stake. That these servicing improvements and cures are prospective in nature, however, neither makes them "akin to an injunction" nor does it change the fact that the NYAG has not sought here (because he cannot) any type of injunctive relief or structural servicing reforms.

Petition to Intervene, the NYAG appears to argue that the district court's ruling supports his petition for leave to intervene. (NYAG MOL II 2.)

The NYAG contends that the Court should grant him leave to intervene because the district court held that it is "apodictic that the State AGs have *parens patriae* standing to protect citizens from breaches of fiduciary duty and to rectify those breaches." (NYAG MOL II 3.) The district court's finding that the NYAG had *parens patriae* standing to intervene was thus premised, in large part, on the NYAG's claim that the Trustee allegedly breached its fiduciary duty to the Certificateholders. That claim has been withdrawn and cannot provide any basis for this Court to grant the NYAG standing to intervene.

But regardless of whether those claims remained, we respectfully disagree with the District Court's assertion. The controlling case law (including *H&R Block, Inc.*, the case cited by the district court) is unambiguous: a finding of *parens patriae* standing requires that the NYAG "'(1) identify a quasi-sovereign interest in the public's well being; (2) that touches a 'substantial segment' of the population; and (3) articulate 'an interest apart from the interests of the particular private parties . . . .'" 2007 WL 2330924, at * 7 (quoting *Snapp & Son, Inc.*, 458 U.S. at (1982)). As discussed above, the NYAG falls far short of satisfying this rigid requirement.

In granting the NYAG's motion to intervene, the district court also relied on its own, earlier ruling in this case for the proposition that "the Settlement Agreement at issue here implicates . . . the vitality of the national securities markets." *Id.* But the district court did not consider or address the First Department's holding in *Grasso I* that a claimed need "'to protect public confidence in [a securities market] and the investing community,'" 42 A.D. 3d at 143, does not confer standing on the NYAG to intervene in a private contract dispute. *People v. Gen.*

Motors Corp., cited by the district court, is consistent with *Grasso I*. In *Gen. Motors Corp.*, the court held that the attorney general had *parens patriae* standing because it sought "wide-ranging injunctive relief designed to vindicate the State's quasi sovereign in securing an honest marketplace for all consumers[.]" 547 F. Supp. 703, 707 (S.D.N.Y. 1982) (emphasis added). Here, by contrast, the NYAG does not and cannot seek injunctive relief—and could not do so in the limited context of this Article 77 proceeding.

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

The NYAG has not cited, and the Trustee has not been able to find, any case in which the NYAG has intervened in an Article 77 proceeding or to block a private, non-class settlement of any kind. The circumstances in which the NYAG ***has*** made use of *parens patriae* or has intervened, moreover, underscore the analysis above. In *Merkin* and *H&R Block, Inc.*, the NYAG relied on *parens patriae* standing as a plaintiff when seeking forward-looking injunctions against continuing conduct directed to retail investors. In other cases, the NYAG has intervened pursuant to express authority under Executive Law § 71 to defend the constitutionality of state statutes. *E.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124 (1981)), *rev'd on other grounds*, 458 U.S. 419 (1982). Indeed, if the NYAG could intervene on *parens patriae* grounds even in a case that presents no direct public interest, his express authority under Executive Law § 71 to defend the constitutionality of state statutes would be surplusage.

There is no compelling policy reason to allow the NYAG to intervene here either. The investors themselves are a diverse group, and while they all share the NYAG's ultimate goal of "comprehensively address[ing] harm to" themselves (NYAG MOL I 6), 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 in opposition to the NYAG's motion. Others, including AIG, have sought to intervene as respondents (unopposed by the Trustee), objecting to the Settlement on grounds very similar to those asserted by the NYAG. Yet others may participate while reserving judgment. This is not a case in which the NYAG would protect a single block of investors against a trustee (although even that would be unprecedented); the Article 77 proceeding is a dispute among groups of sophisticated investors about whether the Trustee acted within the bounds of its reasonable discretion in entering into the Settlement. The diversity of participating investors both ensures that all viewpoints will be represented and means that the NYAG cannot claim to represent all of the absentees, many of whom likely support the Settlement (and indeed on that basis chose not to object).

The mere incantation of the phrases "integrity and strength of the financial markets" and "secure an honest marketplace" does not give the NYAG a reason to intervene either—the "financial markets" cannot be adversely affected by a settlement that provides financial relief to private investors and improves loan servicing related to their private investments. That the NYAG may prefer (for whatever reasons) a different type of settlement for private investors does not confer standing. Neither does the mere fact that financial institutions and (non-exchange-traded) securities are involved. In *Grasso III*, the court acknowledged that "the Attorney General brings his claims in his capacity as the State's chief law enforcement officer, not merely as a surrogate for the corporation," but it nonetheless expressed skepticism that money relief in favor of the New York Stock Exchange—an institution surely more central to the financial markets than the trusts here—"somehow is relevant to the integrity of trading." 54 A.D.3d at 198, 204.

The NYAG here seeks to expand his standing beyond all previously recognized limits. If the NYAG can intervene simply because he believes that a settlement amount fails to adequately

deter future misconduct or to include injunctive provisions he deems appropriate, he could intervene in virtually any class action where businesses or financial markets are involved. Moreover, the NYAG then could assert any counterclaims that he regards as related. In fact, if taken literally, the authority that the NYAG asserts to intervene to protect "the rule of law generally" (NYAG MOL I 5) would appear to allow his intervention in almost any private litigation settlement. The consequences of that proposition are breathtaking. Not only would it discourage settlement and subject private litigants to great uncertainty, it would allow the NYAG to intervene in areas where private parties can better represent themselves. The court in *In re Baldwin-United Corp.* recognized this risk and warned that "[t]he 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 NYAG'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. The conclusion that the NYAG lacks authority to object to the Settlement is dispositive of his motion for leave to intervene.[8]

[8] Although the NYAG states that he "relies solely on the NYAG's objection to the proposed settlement" he also asserts that the Court should grant him leave to intervene because the "Article 77 proceeding . . . could potentially impair claims that NYAG may otherwise assert against the trustee[.]" (NYAG MOL II 2.) The Trustee has been very clear on this point: the Settlement Agreement releases no claims against the Trustee. Any protection would derive from the Court's action should it find that the Trustee acted within its proper discretion and adopt the injunctive provision in the proposed final order and judgment. But even that injunctive provision is limited to the Trustee's conduct relating to the Settlement. As shown above, the NYAG has no legally cognizable interest in those actions, and even if he does, that interest is more than adequately represented by private investors. In any event, for the reasons discussed in the Trustee's original opposition to the NYAG's motion to intervene (Dkt. No. 135), the NYAG's potential or actual assertions of claims against the Trustee do not create standing.

CONCLUSION

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

Dated: New York, New York
April 20, 2012

s/Matthew D. Ingber

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

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

Attorneys for Petitioner
The Bank of New York Mellon