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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

[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.").

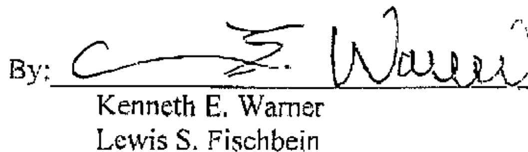
[22] *See, e.g., Evans* v. *Perl*, 2006 WL 6091297 (N.Y. Sup. Ct. Dec. 5, 2006) (exercising jurisdiction over trustee and noting that "[a] trustee can voluntarily put him/herself before the court and be subject to its jurisdiction by asking the court for affirmative relief").

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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