Exhibit B

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., Transame\rica 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 12

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) 506-2380

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)

TABLE OF AUTHORITIES

(continued)

Page

CASES (CONT'D)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES

(continued)

Page

OTHER AUTHORITIES (CONT'D)

PRELIMINARY STATEMENT

The New York Attorney General ("NYAG") seeks to transform an expedited special proceeding addressing a single question—whether The Bank of New York Mellon ("BNYM" or the "Trustee") acted in good faith and within the bounds of reasonableness in entering into the Settlement Agreement ("SA")—into a wide-ranging plenary lawsuit. There is no precedent for such an intervention or for the NYAG's theory of standing. The NYAG's lawsuit, if it survived a motion to dismiss (which is unlikely), would adjudicate a set of claims against the Trustee that arise from alleged conduct long before and unrelated to the Settlement. It would require fact discovery having nothing to do with the Article 77 Proceeding. It would require separate expert discovery and motion practice. It could require a full-blown jury trial. In short, this unprecedented plenary-litigation-within-a-special-proceeding would be a logistical nightmare, could take years to resolve, and would hijack what should be an expedited proceeding. And it is completely unnecessary—the NYAG's Martin Act and Executive Law claims could be brought in a proper forum.

Fortunately, the Court need not face these logistical issues because the NYAG has no standing to intervene. He seeks to bring two sets of claims. The first consists of his objection to the Settlement plus a duplicative claim for breach of fiduciary duty that could produce damages only in the impossible scenario in which the Court approved the Settlement ***and*** found the Settlement to be a breach of fiduciary duty. Those claims rely on a theory of standing that no New York court has recognized before: they are brought solely to enhance the pecuniary recovery of a discrete group of private investors, claims that New York courts consistently hold are outside the NYAG's authority. The other claims are brought under the Martin Act, the Executive Law, and another common-law claim for breach of fiduciary duty, and they have

nothing to do with this proceeding—the Settlement does not release them, and the Trustee does not ask the Court to make any findings relevant to those claims. They allege conduct occurring years before the Settlement and have no bearing on the question of whether the Trustee acted in good faith in entering into the Settlement. Those claims would be an enormous sideshow that would radically distort the nature of this special proceeding.

Finally, the NYAG describes the Article 77 proceeding in two ways that we are compelled to correct at the outset. Both mistakes appear to bolster the NYAG's position that his intervention is necessary because investors cannot act on their own behalf. The first is the assertion that the PSAs "permit . . . participation" in the 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." Verified Pl. in Intervention ("NYAG Pl.") ¶ 12. The PSAs say no such thing, nor does the C.P.L.R. To the contrary, the Order to Show Cause gives the opportunity to object to all "Potentially Interested Persons," defined as, among others, all "holders of certificates or notes evidencing various categories of ownership interest in the Trusts." Ingber Aff. ¶ 4(a). And indeed, many of the Intervenors come nowhere near holding a 25% interest in any Trust. There is no 25% requirement.

Second, the NYAG argues 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's Memo. of Law ("NYAG MOL") 2. That statement, too, is 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 and the intervention would fundamentally alter, expand, and delay the proceeding.

Unfortunately, these are only two of the errors that the NYAG makes in describing the Article 77 proceeding, the Settlement Agreement, the role of the Trustee, and the PSAs. We address certain of his other mistakes in Part II.B.3.

But as we discuss immediately below, most fundamentally, the NYAG's motion should be denied because he lacks standing to object to the Settlement and to intervene in this special proceeding.

ARGUMENT

I. The Motion to Intervene Must Be Denied, Because the NYAG Lacks Standing to Object to the Settlement.

A. *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.[1] Standing is a mandatory, threshold issue, and the requirement applies "at all stages of the proceeding." *People v. Grasso*, 54 A.D.3d 180, 197 (1st Dep't 2008) (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 "uphold[] the integrity, efficacy, and strength of the

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

financial markets in New York State," and "to uphold[] the rule of law generally." NYAG MOL 5. 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.[2] 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 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*, 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 ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 69 n.4 (2008) (citing *Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982)).

This special proceeding is brought to approve the acts of a trustee for mortgage-securitization trusts, in attempting to settle contract disputes between the trusts and their sophisticated investors, on the one hand, and certain parties to privately negotiated 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

[2] 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.

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.

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

The NYAG's *parens patriae* standing does not extend to prosecuting claims on behalf of private parties, let alone to preventing such parties from consensually settling. Courts have not hesitated to find the NYAG's standing lacking for this reason. *See, e.g.*, *People by Vacco 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.

Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601–02 (1982).

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*, 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* 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 3–4) does not alter this result. The First Department addressed that notion in *Grasso* 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*, 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 by Abrams 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 ex rel. Spitzer 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").[3]

[3] 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

2. 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*, 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*, 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").

It is important to distinguish the NYAG's purported interests in objecting to the Settlement, on the one hand, from his interests in the Martin Act and Executive Law claims. Although the Trustee believes that the latter claims are 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 6)—but that "harm" is purely monetary, and so are the investors' interests. It is significant that even the NYAG characterizes his interest as

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30. The *Grasso* 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, proposed intervenor-respondent AIG and the various pension and hedge funds that have sought to intervene, are not and never have been the proper objects of *parens patriae*, the "nursing quality."

derivative of "such investors," the predominantly institutional investors in these Trusts. No "'substantial segment' of the population" (*People v. Grasso*, 11 N.Y.3d 64, 69 n.4 (2008)) 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 to even mention, let alone satisfy, the "substantial segment" requirement is a fatal deficiency in his application. *See Grasso*, 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, he does not seek ***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 Article 77, is limited to a decision on whether the Trustee acted in good faith and within the bounds of reasonableness in entering into this Settlement. The Trustee's alleged failure to seek broader remedies that 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."[4] 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. That result is supported by *Seneci*, in which the court held that because "the monetary relief sought by the complaint is

[4] The NYAG also contends that the Trustee was required to act as a "prudent person." That standard does not apply (*see* Part II.B.3. below), but in any event, that standard is one of a "prudent person ***managing his own affairs***." An objection that the Trustee did not behave as a prudent government official, managing the affairs of the State, would be irrelevant under Article 77.

not designed to compensate the state for those damages, the asserted presence of such damages cannot serve as the foundation for the state's authority to act here as the representative of its citizens." *Id.* at 1017–18; *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"). Both *Seneci* and *Operation Rescue* are also noteworthy in that the NYAG's standing to bring certain claims did not give him the standing to pursue other claims. The NYAG's attempt in this case to bring claims under the Martin Act and the Executive Law, therefore, does not rescue his objection to the Settlement.

The difference between injunctive and monetary relief also distinguishes some of the decisions that the NYAG cites. In *People ex rel. Cuomo v. Merkin*, in 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. Co. Feb. 8, 2010) (quoting *People ex rel. Spitzer v. H&R Block, Inc.*, No. 401110/06, 2007 WL 2330924, at *7 (Sup. Ct. N.Y. Co. July 9, 2007)). The court said the same thing in *H&R Block*, 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 *Grasso* 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 . . . 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*, 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. Finally, neither *State v. 7040 Colonial Road Associates* (176 Misc. 2d 367 (Sup. Ct. N.Y. Co. 1998)) nor *People v. Morris* (No. 0025/09, 2010 WL 2977151 (Sup. Ct. N.Y. Co. July 29, 2010)) is even relevant (NYAG MOL 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.

B. 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*, 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 6), they have various opinions on how to accomplish that goal. Some strongly support the Settlement: among others,

22 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 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 NYAG cannot claim to represent all of the absentees, many of whom likely support the Settlement (and indeed will on that basis choose not to object).

The mere recitation of the phrase "integrity and strength of the financial markets" 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*, 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 sufficient injunctive provisions, he could intervene in virtually any class action where businesses or financial markets are involved, ***and*** then 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 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, 1328 (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 the motion to intervene. Because he lacks standing in this Article 77 proceeding, the NYAG cannot intervene based on other claims that could be brought in a separate lawsuit. 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. Practice § 178 (4th ed. 2011 update); *see also Kruger v. Bloomberg*, 1 Misc. 3d 192, 195 (Sup. Ct. N.Y. Co. 2003). But the NYAG cannot under any circumstances be

a "party for all purposes" because—unlike a certificate holder—he lacks standing to object to the Settlement.

The NYAG's lack of standing to object to the Settlement is conclusive for another reason. In essence, the NYAG would manufacture standing by adding Martin Act and Executive Law claims and then bootstrapping them into the Article 77 proceeding. As the First Department made clear in *Grasso*, 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." *East Side Car Wash, Inc. v. K.R.K. Capital, Inc.*, 102 A.D.2d 157, 160 (1st Dep't 1984). Because that is exactly what the NYAG 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 NYAG Cannot Intervene Based On His Other Claims.

If the Court reaches the other claims proffered as a basis for intervention, it should hold that the NYAG fails the standards set forth in the C.P.L.R. Contrary to the NYAG's argument, 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 NYAG addresses them, and because they may provide useful guidance on the exercise of the Court's discretion, we discuss them as well.

We also note that that there is an independent reason—separate from those discussed below—why the NYAG's claim for breach of fiduciary duty cannot be a ground for intervention—namely, he lacks standing to bring it. Unlike the two statutory claims, the only basis for NYAG standing on fiduciary duty is, indisputably, *parens patriae*. The NYAG lacks *parens patriae* standing for the reasons explained above.

A. The NYAG 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 NYAG 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 NYAG asserts that "a judgment in this proceeding may interfere with his ability to assert claims against BNYM, BoA, or Countrywide." NYAG MOL 6. As to his Martin Act and Executive Law claims against BNYM, that is flat wrong—those claims are not released. The language quoted in the NYAG's own brief shows that the release is limited to "the Bank of America Parties and/or the Countrywide Parties." NYAG MOL 7 (quoting Proposed Final Order ¶ (o)).

As to the fiduciary duty claim, it is true that a judgment here and adoption by the Court of the Proposed Final Order and Judgment would conclusively approve the Trustee's actions ***in connection with the Settlement***. But as shown above, the NYAG has no interest in those actions, and if he does, that interest is represented by private investors. Further, there could be no damages from a claim for breach of fiduciary duty based on the Settlement itself: unless the Court finds that the Trustee acted in good faith and within the bounds of reasonableness, the Settlement will not be approved. The gravamen of the fiduciary duty claim therefore must lie in the Trustee's pre-settlement conduct, as to which any finding here almost certainly would be irrelevant.[5]

Finally, as to all of the claims, the Settlement Agreement is not binding on the NYAG. 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." SA § 9(a). Paragraph (o) of the Proposed Final Order uses similar language. The NYAG, however, purports to be asserting quasi-sovereign interests. New York courts have recognized this point and held that the NYAG's Martin Act 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 *8 (Sup. Ct. N.Y. Co. 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).

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[5] The NYAG also mentions "potential claims" that he might have against Countrywide and BoA. NYAG MOL 6. However, the NYAG seems to understand (NYAG MOL 7 n.2) that whatever those claims are, they are expressly carved out from the release. *See* Settlement Agreement § 10(c).

The NYAG misses the relevance of *People ex rel. Spitzer v. Applied Card Systems* on this point. NYAG MOL 7. The Court of Appeals did bar the NYAG 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). The Court of Appeals confirmed that even after settlement "the [NYAG's] claims for injunctive relief, civil penalties, and costs remain undisturbed," and the NYAG "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 NYAG, *Applied Card* fatally undermines the NYAG's attempt to intervene in this case.

B. Permissive Intervention Under C.P.L.R. 1013 Is Not Proper Because the NYAG'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).

The NYAG's Martin Act and Executive Law claims, and the non-settlement portion of his fiduciary duty claim, share few, if any, common issues with the relief sought in this Article 77 proceeding. Instead, they would raise a host of unrelated legal and factual questions. If not dismissed on the pleadings, those claims would require extensive discovery that would have no bearing on, and would not overlap with discovery in, the main case.

1. Intervention to raise new claims is impermissible in a special proceeding.

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).

Hence, "[t]he special proceedings [under C.P.L.R. 7701] . . . are not adaptable for adversarial litigation." 22 Christine M. Gimeno, Carmody-Wait, New York Practice § 131:3 (2d ed. 2011). Thus, in *In re Houston's Trust*, the court affirmed the denial of leave to intervene to bring claims for fraud and conversion against a trustee, holding that "the type of adversary plenary litigation envisioned by the action brought by the" intervenors was inconsistent with the Article 77 proceeding. 30 A.D.2d 999, 1000 (3d Dep't 1968). Citing the same principle, in *Gregory v. Wilkes*, the court found that a suit alleging fraud and undue influence against a trustee could proceed separately from a proceeding under the predecessor to Article 77. 26 Misc. 2d 641, 642 (Sup. Ct. N.Y. Co. 1960). These cases recognize that the utility of Article 77 would be critically undermined if a trustee were subject to "plenary litigation" involving unrelated or

ostensibly related claims by non-beneficiaries every time it sought judicial instruction. The Court should not endorse that result here.

2. The NYAG may not intervene to raise issues extraneous to the main proceeding.

The NYAG's argument for permissive intervention rests on two basic misconceptions, one legal and one factual. The legal error is the assumption, made without any citation, that "a common question" means only that the intervenor seeks to raise some claim that has 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 Co. June 30, 1993); *see also East 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. Co. 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.").

Hence, courts routinely deny intervention on the ground that the injection of unrelated claims ***necessarily*** causes undue delay. *See Bache Commodities Ltd. v. Garcia*, No. 650473/08, 2010 WL 3211863, at *4 (Sup. Ct. N.Y. Co. 2010) ("allowing Fluxo-Cane to assert its defenses and potential claims against Bache, would raise arguments not otherwise available to the defendants in the [main] Action, which would inherently delay and complicate determination of the action"). While some courts have allowed intervenors to raise additional issues, they have done so only after finding that "there has been no showing that intervention would cause undue

delay." *Berkoski v. Bd. of Trustees of Inc. Vill. of Southampton*, 67 A.D.3d 840, 844 (2d Dep't 2009).[6]

Pier is a closely analogous case. There, the court declined an intervention that would have added a counterclaim alleging that the main action sought to compel the governmental defendant to engage in unlawful discrimination. 158 Misc. 2d at 735. The NYAG, too, seeks to argue that the relief sought in the main action—entry into the Settlement Agreement—would form the basis for a separate cause of action, here for breach of fiduciary duty. The NYAG's other claims, of course, have even less connection to the main proceeding. It is also noteworthy that the intervenor in *Pier* was "the executive agency responsible for implementing and enforcing article 41 of the Mental Hygiene Law," which the court acknowledged "has a general interest in the outcome of this . . . proceeding." *Id.* at 736. The court nonetheless was wary of "converting a tax certiorari proceeding, the resolution of which often hinges upon the conflicting testimony of real estate appraisers, into a forum of public debate over policy issues." *Id.* at 737. The same factors counsel restraint here.

3. There are no common issues between the Article 77 proceeding and the NYAG's proposed claims, which would lead to substantial and unavoidable delay.

The NYAG's second misconception is the factual assertion that the Article 77 proceeding "will necessarily address the merits and likelihood of success of investors' claims against Countrywide and BoA." NYAG MOL 10. Litigating the claims against Countrywide is not the purpose of the Article 77 proceeding; indeed, one important aim of the Settlement is to ***avoid*** the cost, uncertainty, and delay of litigating those claims. Rather, as noted above, the standard under

[6] *See also St. Joseph's Hosp. Health Ctr. v. Dep't of Health*, 224 A.D.2d 1008, 1008 (4th Dep't 1996); *Empire State Assoc. of Adult Homes, Inc. v. Perales*, 139 A.D.2d 41, 45 (3d Dep't 1988) ("no showing of undue delay"); *Vill. of Spring Valley v. Vill. of Spring Valley Hous. Auth.*, 33 A.D.2d 1037, 1037 (2d Dep't 1970) ("the intervention will not unduly delay the proceeding").

Article 77 is whether the trustee acted dishonestly, with improper motives, failed to use judgment, or acted unreasonably in entering into the Settlement. *See In re Stillman*, 107 Misc. 2d 102, 110 (Sur. Ct. N.Y. Co. 1980). Full discovery on the merits of the Trustee's potential claims against Countrywide and Bank of America is not necessary to that determination, and, in fact, would undermine one of the key benefits of the Settlement.

The NYAG's conclusory and unsupported assertion that the Article 77 proceeding is "closely intertwined" with his claims against BNYM (NYAG MOL 6) is simply incorrect. The Martin Act and Executive Law claims, on the one hand, and the Article 77 proceeding, on the other, raise discrete and non-overlapping issues: the trustee's pre-settlement conduct with respect to document exceptions versus the question of the trustee's good faith and reasonableness in entering into the Settlement.

Starting with the NYAG's objections to BNYM's conduct relating to the Settlement, those objections are both misguided and duplicative of those made by investors. Most importantly here, they also do not overlap with the NYAG's purported claims against the Trustee. By way of example only, the NYAG mistakenly alleges that the Settlement "advances BNYM's own financial interests . . . by broadening its rights to indemnification for losses to investors or others." NYAG Pl. ¶ 16. That is incorrect. As the NYAG acknowledges, the PSAs—not general common-law principles—control. And it is undisputable that the PSAs provide BNYM with the right to the indemnity that it received. *See* PSA § 8.05. In fact, the "side letter" simply acknowledges that the indemnity that the PSAs ***already provide*** encompasses the Trustee's activities in connection with the Settlement. It provides *nothing* new. *See* SA, Ex. C. Nor does the Settlement Agreement modify the PSA indemnity, including its express carve-out for "negligence, bad faith, or willful misconduct." *See* PSA § 8.05.

While Bank of America Corporation does agree to guaranty the indemnity of certain claims, that guaranty applies only to any liability incurred by BNYM ***by entering into the Settlement***. The Trustee already was entitled to that indemnity and guaranty by Section 8.02(vi) of the PSAs, which expressly excuses it from "risk[ing] or expend[ing] its own funds or otherwise incur[ring] any financial liability in the performance of any of its duties or in the exercise of any of its rights or powers" under the PSAs, if "adequate indemnity against such risk of liability is not assured to it."[7] In any event, the indemnity applies only to risk arising out of the Settlement, risks that BNYM could have avoided entirely by not agreeing to the Settlement in the first place, and risks that will be addressed in this proceeding: either the Court approves the Settlement by finding that the Trustee acted in good faith and within the bounds of reasonableness, or it does not and the parties assume their pre-Settlement positions. The indemnity makes BNYM no better off than it would be without the Settlement and so could not have been—and unquestionably was not—an inducement for the Trustee to enter into the Settlement. And most importantly for present purposes, this issue has no bearing on the NYAG's claims against the Trustee.

The claims based on pre-Settlement conduct—the Martin Act and Executive Law claims and part of the fiduciary duty claim—rest on equally shaky foundations and raise a whole host of issues unrelated to the Settlement. Briefly, the NYAG alleges that BNYM had wide-ranging duties to safeguard investors' interests in ways not contemplated by the PSAs, and that it

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[7] The NYAG also erroneously claims that "[u]nder the PSAs, Countrywide agreed to indemnify the Trustee for certain claims . . . . But as BNYM concedes in its petition here, Countrywide has inadequate resources. A side-letter agreement . . . expands the benefit of the PSAs' indemnification provisions by having BoA, now Countrywide's parent company, expressly guarantee the indemnification obligations of Countrywide." NYAG Pl. ¶ 16 (citation omitted). In fact, the Master Servicer is BAC Home Loans Servicing, L.P. (*see* Guaranty at 1), which has now merged into, and is part of, Bank of America National Association.

committed fraud by representing its compliance with the PSA. The NYAG is wrong for many reasons. To name just a few:

- The NYAG alleges that BNYM was a fiduciary. It was not. The Trustee's duties are limited to those expressly set forth in the PSAs, unless and until an Event of Default has occurred. *See* PSA § 8.01.

- The NYAG alleges that an Event of Default occurred under Section 7.01(ii) of the PSAs because "Countrywide" failed to deliver complete mortgage files to the Trustee. NYAG Pl. ¶¶ 29–30. But what that section ***actually*** says is that an Event of Default occurs only upon material non-compliance by the "Master Servicer." The obligation to deliver loan files falls not on the Master Servicer, but on the "Seller."[8] The Seller's failure to deliver documents is not a failure by the Master Servicer that could trigger an Event of Default.

- The NYAG asserts that "exception reports" gave the Trustee actual knowledge of these alleged defaults. In fact, those reports merely trigger a 90-day cure period—by definition they are not notices of a "breach." *See* PSA § 2.02(a). Further, nothing in the PSA permits any party to declare an Event of Default based on a failure by the Seller or Master Servicer to deliver documents to the Trustee under Section 2.02 of the PSA—the Seller's breaches of its duties under Section 2.02 are not Events of Default, and the Master Servicer is not the party with a duty to deliver documents under that section.

- The NYAG alleges that the Trustee had knowledge of Events of Default because of its annual Compliance Assessments. NYAG Pl. ¶¶ 41–43. Item 1122 of SEC Regulation AB, however, the source of the certification obligation, expressly declines to impose substantive obligations on trustees. Rather, it requires the trustee only to verify its own compliance with the

[8] References in the PSA to "Countrywide" are to the Seller, not the Master Servicer. *See* PSA § 1.01 (definition of "Countrywide").

transaction contracts. The NYAG seeks to manufacture ***extra-***contractual duties through the certifications.

- The NYAG alleges that BNYM was required to review the "adequacy" of the loan files. NYAG Pl. ¶ 30–34, 38. In fact, the PSAs expressly say that "the Trustee ***shall not*** make any determination as to whether (i) any endorsement is sufficient to transfer all right, title and interest of the party so endorsing, as noteholder or assignee thereof, in and to that Mortgage Note or (ii) any assignment is in recordable form or is sufficient to effect the assignment of and transfer to the assignee thereof under the mortgage to which the assignment relates." PSA § 2.02(a).[9]

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 the Article 77 proceeding

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[9] The NYAG also makes several erroneous statements about the Settlement Agreement itself. Two points about the servicing improvements warrant correction now. For one thing, the NYAG claims that "the loan servicing improvements . . . say nothing about the methods the subservicers are required to use in servicing the high-risk loans—the matter of most importance to investors looking to recoup or salvage value from loans at risk." NYAG Pl. ¶ 20. But the value of boutique subservicers is precisely that they can tailor servicing to the individual needs of borrowers. A formulaic methodology would destroy that value. The NYAG also fails to appreciate that the Settlement Agreement ties the subservicers' compensation to loan performance, directly aligning their incentives with those of investors.

The NYAG also asserts that the current Servicer's "poor track record" renders the settlement's loan-modification provisions inadequate. NYAG Pl. ¶ 22. That misses the point. The Settlement Agreement requires that the majority of high-risk loans be transferred away from the current Servicer to new subservicers. The *Bloomberg* article cited by the NYAG itself supports that approach, explaining that the larger servicers, like Bank of America, have implemented modifications less successfully than the more "nimble" boutiques to which the Settlement Agreement would transfer responsibility.

Finally, the NYAG argues that "the proposed cash payment [in the Settlement] is far less than the massive losses investors have faced and will continue to face." NYAG Pl. ¶ 17. Of course it is—litigation settlements are always less than the plaintiffs' theoretical maximum recovery, and here there is not even a colorable claim that Countrywide could be responsible for all losses incurred by investors in mortgage-backed securities in the midst of the worst housing market collapse in recent history.

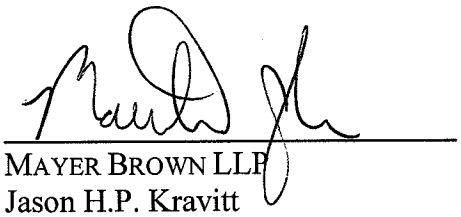
either. These pre-Settlement allegations about loan documentation have no bearing on the question of whether the Trustee acted reasonably and in good faith in entering into the Settlement. Nor do the Martin Act or Executive Act claims that rest on those allegations. NYAG Pl. ¶¶ 37–43. As noted above, the Settlement neither releases those claims nor alters any indemnity that covers them. If the Court were forced to address all of the factual and legal issues raised by the NYAG's claims, "undu[e] delay" would be the certain result.

For example, the NYAG's statutory claims would be subject to an early motion to dismiss, which would involve briefing, hearing, and decision. Discovery in the NYAG's plenary litigation will be unrelated to discovery in the main proceeding and could involve far more voluminous document productions. There would be no overlapping fact witness depositions. There would be separate expert depositions and reports. There would be summary judgment motions on the NYAG's claims and, perhaps, a trial. It would be a full-blown, adversarial litigation, and that raises a host of questions: Should the main proceeding be stayed pending resolution of the NYAG's claims? Or vice versa? Should unrelated discovery be consolidated? Can an Article 77 hearing on whether the Trustee acted in good faith, and a trial on whether the Trustee committed securities fraud, be conducted in one proceeding? And if not, what is the purpose of the NYAG's intervention? How can a special proceeding—the hallmarks of which are "speed, economy and efficiency"—continue as a special proceeding when a respondent injects allegations of securities fraud against a trustee and against other parties, who are neither trustees nor beneficiaries? What should the Court do about the thousands of investors who *support* the Settlement, and who are losing money each day the Settlement is not approved? These problems lead to only conclusion: the NYAG's claims do not belong in this special proceeding.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Motion.

Dated: New York, New York
August 16, 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) 506-2380

Attorneys for Petitioner
The Bank of New York Mellon