IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re Family Dollar Stores, Inc., Pest Infestation Litigation	**MDL No. 3032**
This Document Relates To:	**Case No. 2:22-md-03032-SHL-TMP**
ALL CASES	

INTRODUCTION

Family Dollar Stores, Inc. ("Family Dollar") lacks the authority to release claims brought by State Attorneys General, including claims for equitable restitution. The Amended Class Action Settlement Agreement and Release ("Tentative Settlement") that Family Dollar and the Class Plaintiffs have submitted for preliminary approval, however, illegally purports to do so. The States of Mississippi, Maryland, Louisiana, Hawaii, Ohio, Connecticut, South Carolina, Montana, and Pennsylvania file this *amici curiae* brief, by and through their Attorneys General, in support of the State of Arkansas' objection that private parties cannot release a State's quasi-sovereign *parens patriae* claims for equitable restitution and other relief. Amici States take no position on any other aspect of the Tentative Settlement. Amici States are not currently litigating similar claims against Family Dollar but retain all of their rights without waiver or exclusion that could result from the current version of the Tentative Settlement.

INTEREST OF AMICI CURIAE

The Amici States, through their Attorneys General – the chief law enforcement officers of their respective states – have a duty to enforce the law and protect their citizens. Attorneys General have enforcement rights accorded to sovereigns, which are different and distinct from the rights

accorded private class representatives. Amici States have a strong interest in preserving the rights and powers that are integral to the performance of the States' duty to protect its economy and citizens. For this reason, the States submit this *amici curiae* brief to protect their sovereignty and the law enforcement authority granted to Attorneys General.

ARGUMENT

I. PRIVATE PARTIES LACK AUTHORITY TO RELEASE THE CLAIMS OF STATES.

A. The Authority to bring Sovereign and Quasi-Sovereign Claims Rests with States.

State Attorneys General are the chief law enforcement officers of their states, and they have unique sovereign interests in enforcing their laws to protect the health and well-being of their state. When a State Attorney General pursues equitable restitution, the State seeks to vindicate a quasi-sovereign interest through a remedy that is distinct from, and superior to, a private individual litigant's request for monetary damages.

In recognizing these distinctions between private litigation and public enforcement actions, courts have routinely held that private parties lack the authority to release a government agency's superior claims for relief to vindicate sovereign or quasi-sovereign interests belonging to the state or government. For example, in *Sec'y United States Dep't of Lab. v. Kwasny*, the Third Circuit considered whether a previous, private judgement entered against Mr. Kwansy for violations of the Employee Retirement Income Security Act ("ERISA") could preclude a subsequent enforcement action brought by the Secretary of Labor against Mr. Kwansy, even where the Secretary of Labor sought recovery of funds implicated in the prior judgment. 853 F.3d 87, 90 (3d Cir. 2017). The Court recognized that a "private litigant cannot represent" the Secretary of Labor's "interest in maintaining the integrity of, and public confidence in, the pension system" which is "broader than the interests of private litigants" involved in the earlier action. *Id.* at 95-96; *see also*

Wilmington Shipping Co. v. New England Life Ins. Co., 496 F.3d 326, 340 (4th Cir. 2007) (holding that private plaintiffs do not adequately represent interests of Secretary of Labor in ERISA suits and "is not bound by the results reached by private litigants"). Many other decisions are to similar effect. *E.g.*, *Spinelli v. Capital One Bank, USA*, 2012 WL 3609028 at *2 (M.D. Fla. Aug. 22, 2012) (holding court approval of private settlement did not bind the states of Mississippi and Hawaii because their Attorneys General did not participate in the litigation); *Commodity Futures Trading Comm'n v. Commercial Hedge Servs., Inc.*, 422 F. Supp. 2d 1057, 1061 (D. Neb. 2006) (concluding that prior private settlement did not bar the Commodities Future Trading Commission from seeking restitution from defendants because "when private parties settle their disputes without the approval or consent of the Commission, those settlements cannot preclude the Commission from later seeking additional or more full restitution or any other remedy."); *Sec'y of Lab. v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) ("The Government is not barred . . . from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commenced or concluded."); *cf. Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 690 (1961) (noting that "the Government is not bound by private antitrust litigation to which it is a stranger"). Non-governmental parties' settlements do not provide distinct deterrence function reserved to law enforcement and are therefore not binding on the government.

Similarly, as the Eighth Circuit has recognized:

> Even though a private litigant understandably may believe it wise to compromise claims to gain prompt and definitive relief, such a settlement does not further the broader national public interests represented by the [government agency] and reflected in Congress's delegation of [the Act's] enforcement powers to the [government agency]. Indeed, and quite apart from whether the individual victims are satisfied with their private settlements, full and ample restitution, and other equitable remedies such as disgorgement of profits, serve distinct deterrence functions that are vital to the national public interest. Therefore, when private

> parties settle their disputes without the approval or consent of the [government agency], those settlements cannot preclude the [government agency] from later seeking additional or more full restitution or any other remedy.

U.S. Commodity Future Trading Comm'n v. Kratville, 796 F.3d 873, 889 (8th Cir. 2015) (quotations and citations omitted); *see also Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1424 (11th Cir. 1998) (holding that private class settlement did not bar government agency's restitution claims because the government's enforcement action was pursuing "national public interests separate and distinct from those of the private litigants"); *Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177, 1181 n.4 (7th Cir. 1987) (holding that Illinois Attorney General was not bound by prior private litigation, stating that "to assume that private individuals can be properly viewed as representative of a particular government is a . . . daring analytical leap").

In fact, in recognizing the distinction between and the superiority of a public enforcement action to a private lawsuit, courts have held that State Attorneys General have the authority to release private claims but not vice versa. For example, in *Curtis*, the Minnesota Attorney General brought a public enforcement action against tobacco companies in 1994 for violation of Minnesota's consumer protection statutes and sought remedial relief, including restitution and disgorgement, for violation of Minnesota's consumer protection statutes and sought remedial relief, including restitution and disgorgement. 813 N.W.2d at 896. The Minnesota Attorney General's case subsequently reached a settlement that, among other things, required the tobacco companies to pay over $100 million to Minnesota annually in perpetuity. *Id.* at 896-97. Later, a private class filed a lawsuit under Minn. Stat. § 8.31, subd. 3a—Minnesota's private attorney general statute—for alleged violations of the same consumer protection statutes that Minnesota had previously settled in its enforcement action. *Id*. at 897. The Minnesota Supreme Court affirmed the dismissal of the class action based on the language of the release from Minnesota's enforcement action, holding that "the State AG has the authority to settle and release a private

litigant's subdivision 3a claims." *Id*. at 901. Following the long-tradition of the cases cited above, however, the Court held that the inverse was not permissible:

> *We conclude that a private litigant pursuing a subdivision 3a claim does not have the authority to settle or release the section 8.31 claims of the State without the express consent of the State.* A private litigant, however, does have the authority to settle its own subdivision 3a claim with a responsible party, and a district court may approve a settlement of a subdivision 3a class action of all similarly situated private litigants who could bring a subdivision 3a lawsuit. *But that settlement agreement and release are not binding on the State without express written consent of the State AG, approved by the court.*

Id. (emphasis added.)

Family Dollar's Tentative Settlement violates this well-settled caselaw by purporting to bind State Attorneys General to the company's private settlement, which it cannot do. The Court should reject Family Dollar's unlawful attempt to interfere with State Attorneys General's right to vindicate their quasi-sovereign, *parens patriae*, and law enforcement interests through their own litigation against Family Dollar. To the extent that State Attorneys General obtain equitable restitution in the form of monetary payments derived from transactions involving class members who receive financial compensation under the Tentative Settlement, the Court can set off the amounts paid to class members against any recovery by the State Attorneys General through well-established precedent. *See, e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295-96 (2002) (noting that EEOC could not obtain double recovery based on prior settlement and acknowledging prior private settlement amounts would be offset from government recovery).

B. The Parties' Attempt to Release State Law Enforcement Claims Is Contrary to the Requirements of Article III Standing.

As explained, "a State has a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). State Attorneys General, as the chief law enforcement officers of their

state, have broad and unique authority to act in a *parens patriae* capacity to vindicate these quasi-sovereign interests.

Class representatives are required to satisfy the standing requirements of Article III. But Plaintiffs are individual consumers and cannot satisfy these requirements as to claims brought by States in their quasi-sovereign or sovereign capacities, including their *parens patriae* and proprietary capacities.

To have constitutional standing, a plaintiff must show injury-in-fact, causation, and redressability. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). These Article III standing requirements must be satisfied in every federal action. "The law of Article III standing . . . is built on separation-of-powers principles." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). It "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Id*. One purpose of Article III is to limit the reach of judicial power into such areas. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) ("[A]llowing courts to oversee legislative or executive action would significantly alter the allocation of power . . . away from a democratic form of government.") (quotations and citations omitted).

Here, Plaintiffs lack standing to maintain a State's *parens patriae* claims because they cannot satisfy the injury-in-fact requirement of Article III. Under the *parens patriae* doctrine, "'States litigate to protect 'quasi-sovereign' interests.'" *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 215 (2d Cir. 2013), quoting *Connecticut v. Cahill*, 217 F.3d. 93, 97 (2d Cir. 2000). A State's quasi-sovereign interests are "distinct from the interests of particular private parties" and include a State's "interest in the health and well-being – both physical and economic – of its residents in general." *Id*. (quoting *Snapp*, 458 U.S. at 607). In a *parens patriae* action, a State satisfies the injury-in-fact requirement of Article III by demonstrating an injury to its quasi-sovereign interests.

See Snapp, 458 U.S. at 601 ("[T]o have . . . standing the State must assert an injury to . . . a 'quasi-sovereign' interest.").

As private parties, Class Plaintiffs have no quasi-sovereign interests. By definition, quasi-sovereign interests are "distinct from the interests of particular private parties." *Purdue Pharma L.P.*, 704 F.3d at 215. Because they have no quasi-sovereign interests, Class Plaintiffs cannot demonstrate any injury-in-fact concerning those interests. Class Plaintiffs therefore have no Article III standing with regard to the States' *parens patriae* claims.

Class Plaintiffs cannot remedy their lack of Article III standing to bring *parens patriae* claims by showing injury-in-fact for other claims. "It is well established that a plaintiff must demonstrate standing for each claim [s]he seeks to press. . . . *[W]ith respect to each asserted claim,* [a] plaintiff must always have suffered a distinct and palpable injury to [her]self." *Mahon*, 683 F.3d at 64 (emphasis in original; quotations and citations omitted). Even if there were an arguable basis for *parens patriae* standing for a putative private class (and to be clear, there is not) that fact would not establish Article III standing. Class Plaintiffs themselves must have Article III standing and injury-in-fact. *Id*. (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)) "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured. *See Cent. States SE. & SW. Areas Health & Welfare Fund v. Merck-Medco Managed Care*, L.L.C., 433 F.3d 181, 199 (2d Cir. 2005) (quoting *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) (Burger, C.J., concurring and dissenting): "it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.").

In sum, Article III standing "is a federal jurisdictional question determining the power of the court to entertain the suit, and a plaintiff must demonstrate standing for each claim he seeks to

press and for each form of relief that is sought." *Boley v. Universal Health Services, Inc.,* 36 F.4th 124, 131 (3d Cir. 2022) (citing*, TransUnion LLC v. Ramirez,* 141 S. Ct. 2190, 2280 (2021).

Where, as here, the Parties attempt to invoke the power of a court through the class action settlement mechanism to release claims that the class representatives have no standing to assert, the proposed settlement must be rejected. *See, e.g., Ass'n for Disabled Americans, Inc. v. 7-Eleven, Inc.*, No. CIV. 3:01-CV-0230-H, 2002 WL 546478, at *5 n.4 (N.D. Tex. Apr. 10, 2002) (concluding that the Court was not authorized "to release claims by way of a settlement that the plaintiffs would have no standing to raise in any court"). As the Supreme Court has emphasized, "[i]n an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011). To approve the Tentative Settlement in this litigation would permit the Parties to use releases to circumvent standing requirements that Class Plaintiffs fail to meet and that prevent them from pursuing claims in federal court. *Ass'n For Disabled Americans*, 2002 WL 546478 at *5 n.4 (allowing parties to release claims they have no standing to bring "would essentially allow the parties to adjudicate claims through the release clause of a class settlement that Article III precludes them from adjudicating before the Court."). *Parens patriae* claims belong only to the sovereign, and only the sovereign can assert and release them. Therefore, the Court should deny preliminary approval of the Tentative Settlement in its current form.

II. THE COURT SHOULD NOT APPROVE ANY SETTLEMENT THAT COULD BE USED TO FRUSTRATE THE CLAIMS OF STATES.

The Tentative Settlement's release would include "anyone claiming through [a Releasing Party] or acting or purporting to act for them or on their behalf." (ECF No. 181-1 at PageID 3529.) For the reasons set forth above, this language cannot release Attorney Generals' right to bring a

parens patriae claim on behalf of their state consumers. Private parties cannot interfere with the State's *parens patriae* authority to enforce their state laws, they cannot usurp and nullify the rights of the chief law enforcement officers of each state, and this Court should reject any efforts for private parties to accomplish those things.

Each state has a sovereign interest in the enforcement of its own laws. *See, e.g.*, *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008); *Priorities USA v. Nessel*, 860 Fed. Appx. 419, 423 (6th Cir. 2021); *Mississippi v. Stewart*, 184 So. 44, 46 (Miss. 1938). State Attorneys General are the chief law officers of their respective states and are charged with applying their sovereign law enforcement powers. *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 536 (2009); *EMW Women's Surgical Center, P.S.C. v. Beshear*, 920 F.3d 421, 445 (6th Cir. 2019); *Graveline v. Benson*, 2020 WL 2104719 at *2 (E.D. Mich. 2020) ; *Frazier v. Mississippi*, 504 So. 2d 675, 690 (Miss. 1987) ("[T]he Attorney General… is by common law, statute, and our Constitution the chief legal officer for this State.").

State Attorneys General have broad and comprehensive statutory powers to investigate violations of the laws respecting unfair, discriminatory, and other unlawful practices in business, commerce, or trade. These include Mississippi's Consumer Protection Act, Miss. Code Ann. § 75-24-1 *et seq*., as well as the corresponding consumer protection acts of each state. These laws are broad remedial consumer protection statutes that State Attorneys General aggressively prosecute. *See* Miss. Code Ann. §§ 75-21-9; 75-24-11; 75-24-19; 75-24-23. State Attorneys General also have extensive common-law powers that are inherent in their office. *Gandy v. Reserve Life Ins. Co.*, 279 So. 2d 648, 659 (Miss. 1973) ("The Attorney General is a constitutional officer possessed of all the power and authority inherited from the common law as well as that specifically conferred upon [her] by statute."); *Mississippi v. Warren*, 254 Miss. 293, 308-309 (Miss. 1965).

State Attorneys General's statutory and common law *parens patriae* authority permit them to seek equitable restitution for all consumers impacted by a pattern and practice of unlawful conduct. *See* Miss. Code Ann. §§ 11-45-11; 75-24-11; *See, e.g.*, *Mississippi v. BASF Corp.*, 2006 WL 308378 at *13 (Miss. Ch. 2006); *Kentucky Laborers Dist. Council Health and Welfare Trust Fund v. Hill & Knowlton, Inc.*, 24 Supp. 2d 755, 773 (W.D. Ky. 1998) (citing *Com. ex rel. Beshear v. ABAC Pest Control*, 621 S.W.2d 705, 706 (Ky. Ct. App. 1981).

Courts have long recognized that in obtaining such relief under the *parens patriae* doctrine, the Attorney General is asserting a quasi-sovereign, public interest of the state. *Snapp*, 458 U.S. at 607. It is also expressly provided by statute in Mississippi pursuant to Section 75-24-11. *Mississippi v. Entergy Mississippi, Inc.*, 2012 WL 3704935 at *8 (S.D. Miss. Aug. 25, 2012) ("Mississippi law provides precedent supporting the ability of the State to recover restitution under Section 75–24–11 for both itself, in its proprietary interests, and for Mississippi residents, under a theory of unjust enrichment."); *Nessel ex rel. Michigan v. AmeriGas Partners, L.P.*, 954 F.3d 831, 835 (6th Cir. 2020). ("The Attorney General brings this lawsuit in order to vindicate the State's sovereign and quasi-sovereign interest in deterring Defendants from engaging in unfair trade practices and recompensing Michigan consumers who suffered from Defendants' alleged acts, as the Michigan Legislature has authorized her to do.").

Class Plaintiffs and Family Dollar do not have the authority to represent the States' interests or the ability to release their claims. The State of Arkansas has sued Family Dollar for consumer protection violations that harm the public interest, and the company is attempting to use a private settlement to thwart the State's public law enforcement action. Class plaintiffs also cannot represent the States's law enforcement interests, as a private litigant's attempt to seek money

damages is distinct from a State Attorney General's interest in protecting the public and pursuing equitable restitution for the public interest.

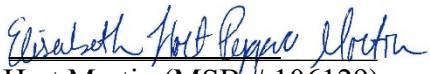
CONCLUSION

The parties to this action have negotiated a Tentative Settlement in which the Releasing Parties purport to release *parens patriae* claims seeking various forms of relief. *Parens patriae* claims belong uniquely and exclusively to the states acting through their attorneys general and cannot be brought or released through private class actions.

For these reasons, the Amici States urge the Court to reject the Tentative Settlement unless revised to prevent the overbroad release from improperly restraining the exercise of law enforcement and *parens patriae* authority by state and local law enforcement agencies, including state attorneys general.

Respectfully submitted this the 20th day of October, 2023.

LYNN FITCH, ATTORNEY GENERAL
STATE OF MISSISSIPPI

By: 
Hart Martin (MSB # 106129)
Deputy Director and Special Assistant Attorney General
Consumer Protection Division
Mississippi Attorney General's Office
Post Office Box 220
Jackson, Mississippi 39205
P: (601) 359-4223
F: (601) 359-4231
Hart.martin@ago.ms.gov

Attorney for State of Mississippi

ANTHONY G. BROWN, ATTORNEY GENERAL
STATE OF MARYLAND

By:_____

Philip D. Ziperman
Deputy Chief
Consumer Protection Division
Office of the Maryland Attorney General
200 St. Paul Place, 16th Floor
Baltimore, MD 21202
P: (410) 576-6417
F: (410) 576-6566
pziperman@oag.state.md.us

Attorney for State of Maryland

JEFF LANDRY, ATTORNEY GENERAL
STATE OF LOUISIANA

By: _____

Asyl Nachabe, La. Bar No. 38846
Assistant Attorney General
Louisiana Department of Justice
Consumer Protection Section
1885 N. 3rd Street
Livingston Building, 4th Floor,
Baton Rouge, Louisiana 70802
P: (225) 326-6400
F: (225) 326-6499
NachabeA@ag.louisiana.gov

Attorney for State of Louisiana

ANNE E. LOPEZ, ATTORNEY GENERAL
STATE OF HAWAI'I

By:_____

Christopher T. Han (JD No. 11311)
Deputy Attorney General
Commerce and Economic Development Division
Department of the Attorney General

425 Queen Street
Honolulu, Hawai‘i 96813
P: (808) 586-1180
F: (808) 586-1205
christopher.t.han@hawaii.gov

Attorney for State of Hawai‘i

DAVE YOST, ATTORNEY GENERAL
STATE OF OHIO

By: _____

Teresa A. Heffernan (Ohio Bar No. 0080732)
Section Counsel
Consumer Protection Section
Office of the Ohio Attorney General
30 E. Broad St., 14th Floor
Columbus, Ohio 43215
P: (614) 466-1305
F: (866) 521-9921
Teresa.Heffernan@OhioAGO.gov

Attorney for State of Ohio

WILLIAM TONG, ATTORNEY GENERAL
STATE OF CONNECTICUT

By: Brendan T. Flynn

Brendan T. Flynn
Juris No. 419935
Michael C. Wertheimer
Juris No. 412504
Assistant Attorneys General
Office of the Attorney General
165 Capitol Ave.
Hartford, Connecticut 06106
P: (860) 808-5400
F: (860) 808-5593
Brendan.Flynn@ct.gov
Michael.wertheimer@ct.gov

Attorneys for State of Connecticut

ALAN WILSON, ATTORNEY GENERAL
STATE OF SOUTH CAROLINA

By: Anna C. Smith

Anna C. Smith (SC Bar No. 104749)
Assistant Attorney General
Consumer Protection and Antitrust Division
Office of the South Carolina Attorney General
PO Box 11549
Columbia, SC 29211
P: (803) 734-0536
F: (803) 734-0097
annasmith@scag.gov

Attorney for State of South Carolina

AUSTIN KNUDSEN, ATTORNEY GENERAL
STATE OF MONTANA

By: _____

Anna Schneider
Montana Bar Number: 13963
Bureau Chief, Office of Consumer Protection
302 N. Roberts Street,
Helena, MT 59601
Phone: (406)-594-9936
Anna.schneider@mt.gov

Attorney for State of Montana

MICHELLE A. HENRY, ATTORNEY GENERAL
COMMONWEALTH OF PENNSYLVANIA

By: */s/ Sarah A. E. Frasch*

Sarah A. E. Frasch (PA Bar No. 203529)
Chief Deputy Attorney General
Bureau of Consumer Protection
Pennsylvania Office of Attorney General
15th Floor, Strawberry Square

Harrisburg, Pennsylvania 17120
1-800-441-2555
sfrasch@attorneygeneral.gov

Attorney for Commonwealth of Pennsylvania