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BANK & LENDER LIABILITY

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WHAT'S INSIDE

DISCRIMINATION

Muslim woman accuses bank of discrimination for closing her accounts

A Senegalese Muslim woman says a New York bank closed her accounts because of her race and religion while she traveled from the U.S. to five primarily Muslim countries, leaving her stranded overseas without funds, according to a federal lawsuit.

Gueye v. People's United Bank et al., No. 18-cv-5961, complaint filed, 2018 WL 5624120 (E.D.N.Y. Oct. 24, 2018).

Sokhna Gueye, who is black, says Glendale-based People's United Bank discriminated against her when it closed her accounts even though she had given the institution notice of her travel plans and need for funds while overseas.

She claims in a complaint filed in the U.S. District Court for the Eastern District of New York that bank manager Patricia Hoffman refused to reopen the accounts because of Gueye's travel to the Muslim nations.

Gueye, a Bronx, New York, resident, says People's United and Hoffman violated 42 U.S.C.A. § 1981, which prohibits racial discrimination in the making and enforcement of contracts.

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William L. Anderson of Jimerson & Cobb discusses a newly effective Florida law affecting foreclosure actions where the borrower has obtained a bankruptcy discharge and will surrender the property.

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Avoid probate court: Head to your bank instead

By David B. West, Esq.
Dykema Gossett PLLC

There has been a growing trend among individuals and even estate planners to avoid having to go to the probate court. Even for those people who need wills, a large percentage of their assets will be transferred pursuant to beneficiary designations in account agreements at banks and credit unions, in IRA's and other qualified retirement plans, and through life insurance policies. Add a trust, and an even wider range of assets can be transferred outside the probate courts.

What this non-probate disposition of assets means, of course, is that financial institutions are called upon to help a customer determine what type of account to use and, after death of the customer, review legal documents and carry out the transfer instructions.

In addition, more people are using simplified probate tools to avoid a formal probate. In Texas, small estates affidavit can be used when a person dies without a will and has $75,000 or less in personal assets, not including the homestead.

If there is a will and there are no unpaid debts or a need for administration, the will can be admitted to probate under a unique Texas proceeding known as a "muniment of title."

Under these procedures, no representative of the estate is appointed. Banks may be presented with a court certified copy of an affidavit for small estates or an order admitting a will to probate as a muniment of title. The financial institution may be called upon to review the documents and pay the funds in an account. These procedures are currently authorized by statute, but may become more widely used.

A task force formed by the Supreme Court of Texas is considering promulgating forms for use by non-lawyers to make it easier for them to take advantage of these simplified procedures.

Even before the death of a customer, financial institutions may be involved with estate issues of their customers. With people living longer, there is a growing need to address how assets will be managed in the event of incapacity.

> More people are using simplified probate tools to avoid a formal probate.

Most families prefer having a family member act as trustee of a parent's estate, to the expensive and burdensome process of a court supervised guardianship in which the judge determines where a parent will live and approves payment of expenses, legal fees and court fees.

A power of attorney ("POA") is often used as an estate planning tool to avoid guardianships. The form of the POA may vary from state to state, but many statutes are modeled after the Uniform Power of Attorney Act of 2006. They promote the acceptance of POA's — and discourage their rejection by banks.

A bank may refuse a POA only on the grounds listed in the statute and only within strict time limits. There may be penalties if a financial institution fails to comply with the new guidelines, including law suits and liability for attorney's fees.

Texas adopted a new POA statute in September of 2017. Under the new Texas statute, POAs executed in another state now must be accepted if their execution complies with the law of the state in which it was signed — a legal determination that must be made by financial institutions.

In addition, the powers of an agent under a POA may be significantly expanded. If specifically authorized in the POA, an agent in Texas may create, amend, revoke or terminate an inter vivos trust; make a gift; change the rights of survivorship; or change a beneficiary designation of an account. These "hot powers" allow an agent to completely alter the customer's testamentary intent as set out in the account agreements.

Against these new powers, a financial institution must weigh the potential for elder abuse. A family member may try to improperly influence the testamentary decisions of a parent or other relative. Persons without children or heirs may become the targets of fraud schemes.

Texas law requires a person (including an employee of a financial institution) having cause to believe that an elderly person is in the state of abuse, neglect or exploitation (including financial fraud) to report the information to the proper authorities.

These legal changes come within the context of widely available documents on the internet. Forms for the preparation of wills, trusts (especially the popular "living trust") and POA's are readily available.

Articles and purveyors of legal documents encourage their use. The use of these and other forms can be a huge benefit to persons who need estate planning but cannot afford legal counsel.

At the same time, there are risks. Mistakes in the execution of documents may thwart the legal intent and raise new legal issues. On-line documents may not address the

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requirements of a particular state. Forms may be obsolete as legislatures change requirements. Individuals may not know that they are required to transfer title to an asset in order to achieve an intended disposition.

Employees of financial institutions increasingly are asked to decide difficult questions with limited information and in a short time frame. They are asked to fill the role of an advisor in setting up accounts. They may be asked to determine the validity of legal documents.

In the event of a dispute involving ownership of assets, they also may be asked to make decisions regarding who has the authority to access or transfer funds, enter safe deposit boxes or distribute funds in an IRA. Examples include the following:

- If a financial institution reports suspected elder abuse, can it place a hold on the customer's account while an investigation is ongoing? If it is presented with a check signed by the suspected individual, can it return the item without risk of liability for wrongful dishonor of the check?
- An elderly person wants to prevent her spendthrift children from inheriting her estate by naming her minor grandchildren as POD beneficiaries of her account. After she dies, can the bank write checks to each of her minor grandchildren, the youngest of which is two?
- A daughter calls her mother's bank to warn that her brother has obtained a POA from their minimally competent mother, who is in a nursing home. She wants the bank to place a hold on the accounts. Can it do so without risk of a claim that is in breach of the account agreement?
- A husband opens an IRA solely in his name using profit sharing distributions from his wholly owned business. The wife files for divorce and demands that the bank transfer her community interest in the IRA to another bank. Should the bank follow her instructions?
- A wife wants to use her husband's POA to continue operating a family owned corporation and a limited liability corporation (LLC). The husband is the majority shareholder and an officer of the corporation. He is also the sole member of the LLC. Can she use the statutory POA to make herself an officer of the family businesses?
- Husband and wife set-up a bank account in their names while living in Texas. They retire in Florida and set-up a revocable trust for their benefit under Florida law. The trust states that all personal bank accounts are held in trust. After the death of the last to die, a Florida trustee faxes a letter instructing the Texas bank to pay the funds from the Texas account to her. Does she have authority of assets in Texas?
- A court in Nevada issues an order instructing the bank, as trustee, to reimburse the state of Nevada for the funds it has expended in caring for the trust beneficiary, an incapacitated adult who lives in Nevada. Can this order be enforced against a trust in Texas?

These are all legal issues that must be addressed by financial institutions as part non-probate transfers of assets. Some of these issues used to be addressed in the courts. Customers of financial institutions now want to avoid them. Financial institutions should try to do the same! How can this be done?

> Employees of financial institutions should not attempt to provide legal advice and should not take on the role of counseling customers on how to do their estate planning.

First, financial institutions need to recognize that they are being given expanded responsibilities by these legislative and social changes. They may need to become more knowledgeable about statutory changes and new estate planning options, especially self-help tools, that are available to customers.

They should train personnel on how to set-up accounts and how to respond to customer requests; develop appropriate policies and procedures to provide a backstop against unreasonable requests from customers (and sometimes attorneys); and develop internal mechanisms to funnel questions to the right people who are familiar with these issues.

Second, it is important to stay within the limits of being a bank, and not become an advisor. Employees of financial institutions should not attempt to provide legal advice and should not take on the role of counseling customers on how to do their estate planning.

Otherwise, the employee and the financial institution may be vulnerable to a claim that they are acting as fiduciaries for the customer. Case law states that banks do not have a formal fiduciary relationship with their customers.

Customers may view the relationship differently, however. When there is a problem, they may allege there was a "special relationship" with the bank and that they depended on the bank for advice and counsel for many years.

They may also argue that because the bank had possession of the assets and determined who could access to them, it was the controlling party, giving rise to a higher duty of care.

Whether or not these allegations have merit, they may be sufficient to raise a fact question, prevent a court from entering a summary judgment and allow the customer to go to the jury.

Third, even with vigilance on the part of the financial institution, their customers, family members of customers, and third parties will find new and creative ways to use estate planning techniques. When all else fails, call your lawyer. WJ

New Florida statute provides lenders with a remedy in a foreclosure proceeding against borrowers who declare bankruptcy

By William L. Anderson, Esq.
Jimerson & Cobb

Effective October 2018, lenders have a new remedy in a foreclosure proceeding to expedite the final resolution of the proceeding. Section 702.12, Florida Statutes, Fla. Stat. § 702.12, creates a presumption in favor of the lender that the borrower waived any defense to a foreclosure proceeding when the borrower's debt was discharged in a bankruptcy proceeding.

Additionally, Section 702.12 allows a lender to use the borrower's filings when they declare bankruptcy as an admission by the borrower in the foreclosure proceeding.

BORROWERS TAKE THEIR TIME WHEN FACED WITH A FORECLOSURE PROCEEDING

For years lenders have experienced the following scenario when a mortgage loan becomes delinquent: The borrower falls behind on the payment and attempts an unsuccessful loss mitigation option such as a loan modification or short-sale. During this time the borrower retains the property without paying their loan.

The lender then begins foreclosure proceedings and the borrower files affirmative defenses or potentially a counterclaim for a perceived loan servicing error.

After months or years of litigation, almost inevitably on the eve of trial the borrower files a chapter 7 or chapter 13 bankruptcy, thus receiving the benefit of the protections of the bankruptcy code's automatic stay.

With the stay in place the lender is forced to the sideline and unable to proceed further. All the while, the borrower has been able to retain the property.

BORROWERS WHO DECLARE BANKRUPTCY ARE FORCED TO MAKE DECISIONS

When the borrower files their bankruptcy petition and declares the mortgage loan debt as part of the bankruptcy estate, the borrower must declare their intention to either surrender or retain the mortgage property. This intention may be listed in the bankruptcy plan or in voluntary petition.

If the borrower declared that they would surrender the property and received a bankruptcy discharge, the borrower is no longer liable for the mortgage debt, absent a reaffirmation of the debt.

With the bankruptcy proceedings concluded, the stay lifts and the state foreclosure can now proceed.

HAVING THEIR CAKE AND EATING IT TOO

Some borrowers (and their attorneys) continue to defend against the foreclosure even though they received the full benefits of bankruptcy protection.

Now, after living (or, in some cases, renting) the mortgaged property without paying the loan for over a year, and being protected from a deficiency judgment, the borrower continues to try and prevent the lender from securing the property with a foreclosure judgment.

The Courts have recognized that under such circumstances the borrower has received an enormous windfall that is unfair to the lender.

SECTION 702.12 PROVIDES THE TRIAL COURT WITH A CLEAR ROADMAP

Trial courts in Florida have been free to preclude a borrower from asserting affirmative defenses or counterclaims, when the borrower has received a bankruptcy discharge, by application of the principle of judicial estoppel.

Several District Courts of Appeal have held that when a borrower declares their intention to surrender their interest in mortgaged real property, the borrower is precluded from taking overt action to defend against the foreclosure. *See Clay County Land Trust v. HSBC Bank USA, N.A. for FBT Securitization Trust 2005-3*, 219 So. 3d 1015 (Fla. 1st DCA 2017); *Rivera v. Bank of America, N.A. ex rel. BAC Home Loans Servicing, L.P.*, 190 So. 3d 267 (Mem.) (Fla. 5th DCA 2016).

Prior to the implementation of Section 702.12, counsel for the lender could request that the trial court take judicial notice of the bankruptcy filings, and request that the court find as a matter of law that the borrower was precluded from raising defenses or counterclaims.

This approach conferred a great deal of discretion with the trial court and disadvantaged the lender, as the courts could employ standards favorable to the borrower.

The other route available to the lender, both presently and prior to the implementation of Section 702.12, is for the lender to seek relief from the bankruptcy court.

The federal bankruptcy courts have consistently held that borrowers who

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have received bankruptcy protection by announcing their intention to "surrender" their mortgage property have forfeited their right to contest the foreclosure. *See In re Failla*, 838 F. 3d 1170 (11th Cir. 2016) ("We also agree with the bankruptcy court and the district court that 'surrender' requires debtors to drop their opposition to a foreclosure action").

Bankruptcy courts are willing to sanction borrowers who attempt to "have their cake and it too" when they contest the state court foreclosure proceedings. *See In re Elowitz*, 550 B.R. 603 (Bankr. S.D. Fla. 2016).

proof as to why they should be able to defend against the foreclosure.

This removal of discretion and clear mandate on how the trial court is to proceed when faced with the circumstances outlined herein should expedite foreclosure proceedings and provide a predictable set results for lenders.

PROCEED WITH CAUTION

Even if a borrower has announced their intention to surrender the mortgaged property and obtained a discharge, the lender must still go through the necessary steps to obtain a foreclosure judgment.

> Section 702.12 creates a presumption in favor of the lender that the borrower waived any defense to a foreclosure proceeding when the borrower's debt was discharged in a bankruptcy proceeding.

However, this approach can protract the timeline for the foreclosure's resolution, since the lender will need to petition the bankruptcy court for an order and wait for the requested relief.

Then, after obtaining a successful order from the bankruptcy court, the lender will need to go back to the state court with the bankruptcy court's order.

Section 702.12 provides a clear roadmap for the trial court when the borrower has declared their intention to surrender the property and obtained a discharge.

Once the lender moves the trial court to judicially notice the bankruptcy proceedings, the trial court must take note of the same. Then, the ball is the borrower's court and the borrower must present some argument or

Likewise, the borrower should be aware that even though the bankruptcy has discharged their debt, they will be a named party in a foreclosure action, as the lender must obtain judicial relief from the state court to foreclose the mortgage and take possession of the property.

At a Motion for Summary Judgment, or trial, the lender must still provide sufficient evidence to prove that they have standing to foreclose, that the loan is in default, and that the lender has complied with mortgage's conditions precedent to filing suit in order to obtain a foreclosure judgment.

A borrower objecting to the lender's evidence at trial or making legal arguments that the lender failed to prove the requisite elements of foreclosure is likely not judicially estopped from doing the same. Even if the trial court utilizes Section 702.12, a lender should be prepared for objections to evidence at trial.

Further, if a lender is seeking to have the affirmative defenses or counterclaims struck by operation of Section 702.12, the lender will be tasked with notifying the trial court as to which documents conclusively show the borrower's surrender of the property. *See Fischer v. HSBC Bank USA, N.A. for Deutsche Alt-A Securities Inc., Mortgage Loan Trust, Series 2006-AR1,* 2D16-5307, 2018 WL 3320860 (Fla. 2d DCA July 6, 2018) (holding that trial court improperly precluded borrower from raising defense of standing when lender did not introduce the bankruptcy documents showing that the borrower surrendered the property that was the subject of foreclosure).

Generally, it should be sufficient to introduce the bankruptcy plan or petition, the order of discharge, and the bankruptcy court's docket. Lenders would be prudent and outline for the trial court how the bankruptcy documents clearly demonstrate that the borrower is prevented from raising a defense.

CONCLUSION ON THIS REMEDY IN A FORECLOSURE

Section 702.12 should provide lenders, borrowers, and state courts will clear guidance as to how they should proceed when a borrower has obtained a bankruptcy discharge and announced an intention to surrender the property.

Lenders should expect more consistent favorable results under these circumstances, but must still take steps to ensure they obtain a successful foreclosure judgment. Ultimately, Section 702.12 should prove a valuable tool to expedite foreclosure litigation. WJ

Feds: Woman accused of $600,000 credit card fraud plot

A Georgia woman has been accused of conspiring to defraud a bank out of more than $600,000 by using fraudulent credit cards she acquired using stolen identities.

United States v. Adekanmi, No. 18-mj-8207, defendant arrested (D.N.J. Oct. 25, 2018).

Funmilola Adekanmi, who was arrested Oct. 25, has been charged with one count each of bank fraud conspiracy and aggravated identity theft, U.S. Attorney Craig Carpenito of the District of New Jersey said in a statement.

> The plaintiff, who appeared on store surveillance footage while using some of the credit cards, received a portion of the scheme's profits, according to the criminal complaint.

FRAUDULENT ACCOUNTS

The defendant worked with co-conspirator Akintunde Adeyemi and others between July 2016 and May 2017 to obtain credit cards using stolen personal identifying information from victims, some of whom were in New Jersey.

Adeyemi created the fake credit card accounts at the victim banks using the stolen personal information, according to the criminal complaint.

Once the accounts were created, Adeyemi contacted the bank and changed the addresses so the credit cards would be mailed to locations in New Jersey and Georgia, where he and other conspiracy members had access, Carpenito said.

Adeyemi also made fake identification cards with his co-conspirators' photos, and used the names and addresses of the identity theft victims when merchants asked for identification in conjunction with a credit card purchase, prosecutors said.

The conspirators used the cards to buy merchandise and gift cards, according to the charges. They sold some of the gift cards and other purchased items to third parties and kept the rest, causing the bank more than $600,000 in losses, Carpenito said.

Adekanmi, who appeared on store surveillance footage while using some of the credit cards, received a portion of the scheme's profits, according to the criminal complaint.

If convicted, she faces up to 30 years in prison and a maximum fine of $1 million on the bank fraud conspiracy charge. The charge of aggravated identity theft carries a mandatory two-year prison sentence that runs consecutive to any other prison term, prosecutors said.

Adeyemi is currently a fugitive, according to Carpenito. WJ

NATIONAL BANK ACT

Borrower fights BofA cert petition over escrow account interest

By Meg Gerrity

A California man who convinced the 9th U.S. Circuit Court of Appeals that federal law does not preempt a state statute requiring banks to pay interest on mortgage escrow accounts says the U.S. Supreme Court should let the ruling stand.

Bank of America NA v. Lusnak, No. 18-212, opposition brief filed, 2018 WL 5078025 (U.S. Oct. 17, 2018).

Donald M. Lusnak argues in a brief opposing Bank of America's certiorari petition that Congress limited the preemptive reach of federal banking law when it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C.A. § 53.

Lusnak filed a class-action complaint against BofA in 2014 in the U.S. District Court for the Central District of California, alleging the bank had violated California's unfair competition law, Cal. Bus. & Prof. Code § 17200, by not paying interest on funds held in mortgage escrow accounts.

Banks collect money from borrowers to hold in such accounts for the payment of taxes and insurance premiums on the encumbered property.

Lusnak said a state statute, Cal. Civil Code § 2954.8(a), required the bank to pay 2 percent interest on mortgage escrow accounts.

BofA successfully sought dismissal of the suit by convincing the District Court that the state law is preempted by the National Bank Act, 12 U.S.C.A. § 38, which does not require national banks to pay interest on escrow accounts.

But a 9th Circuit appeals panel reversed and reinstated the suit. *Lusnak v. Bank of Am. NA*, 883 F.3d 1185 (9th Cir. 2018).

WESTLAW JOURNAL/Donna Higgins

The panel said the preemption question must be viewed in light of Dodd-Frank, which Congress passed to prevent the recurrence of the banking practices that led to the 2008 financial crisis. According to the panel, Dodd-Frank indicates that federal law does not preempt state laws such as Section 2954.8(a).

BofA then filed its cert petition, which is supported by the Bank Policy Institute, American Bankers Association, Consumer Bankers Association, Chamber of Commerce of the United States and Mortgage Bankers Association as amici curiae.

BOFA, AMICI SAY DECISION WILL DISRUPT INDUSTRY

BofA says in its petition that the high court should review the 9th Circuit's decision because the question of whether state and local governments can regulate national banks' mortgage lending activity is one of "exceptional importance" to the banking industry.

It also says the appeals panel got it wrong.

The decision will cause disruption in the industry and divergent regulation — problems the National Bank Act was designed to prevent — and it conflicts with prior Supreme Court decisions as well as regulations issued by the Office of the Comptroller of the Currency, the petition says.

The high court has long held that grants of authority to national banks preempt contrary state laws that regulate core banking activities such as mortgage lending, BofA says, citing *Barnett Bank of Marion County NA v. Nelson*, 517 U.S. 25 (1996).

BofA says Dodd-Frank, 12 U.S.C.A. § 25b(b)(1)(B), codified *Barnett*'s ruling that federal law preempts any state consumer financial law that "prevents or significantly interferes with the exercise" of a national bank's powers.

The industry amici agree with BofA and add that the 9th Circuit's decision would allow states to regulate the prices of a national bank's products and services, because mortgage escrow accounts are "products" that lenders require borrowers to buy "for the vast majority of new home mortgages."

DODD-FRANK CHANGED THE GAME, BORROWER SAYS

In his opposition brief, Lusnak says BofA is ignoring explicit Dodd-Frank provisions that limit the National Bank Act's preemptive reach, set a limited level of deference owed to OCC regulations and "expressly" invite state regulators to assist in national bank oversight.

The borrower agrees that Dodd-Frank codified the *Barnett* preemption standard but says the 9th Circuit correctly ruled that a state law requiring banks to pay interest on mortgage escrow accounts does not "prevent or significantly interfere" with a national bank's exercise of its powers.

Moreover, Dodd-Frank limits or invalidates the OCC regulations BofA and the amici rely on, according to Lusnak.

He further argues that Supreme Court review would be premature at this early stage of the proceedings before a factual record has been developed and that there is no circuit conflict or substantial question of law for the court to resolve. WJ

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Respondent: Michael Sobol and Roger N. Heller, Lieff Cabraser Heimann & Bernstein, San Francisco, CA

Related Filings:
Opposition brief: 2018 WL 5078025
Amici curiae brief: 2018 WL 4464737
Certiorari petition: 2018 WL 3993381
9th Circuit opinion: 883 F.3d 1185

See Document Section B (P. 23) for the opposition brief.

No standing in $1.92 billion MBS suits, New York appeals court says

By Peter H. Hamner, Esq.

A New York appeals court won't revive four lawsuits alleging that several investment banks and affiliates fraudulently sold a combined $1.92 billion worth of risky mortgage-backed securities to a Belgian bank that in turn transferred them to an investment vehicle.

Royal Park Investments SA/NV v. Morgan Stanley et al., Nos. 7257, 7258, 7259 and 7260, 2018 WL 4866980 (N.Y. App. Div., 1st Dep't Oct. 9, 2018).

In a short opinion, a panel of the New York Supreme Court Appellate Division, 1st Department, affirmed a trial judge's decision to toss the suits because the investment vehicle, Royal Park Investments SA/NV, lacked standing to sue Credit Suisse, Deutsche Bank, Morgan Stanley and UBS for fraud and negligent misrepresentation.

Last year, Justice C.E. Ramos of the New York County Supreme Court ruled that a 2009 contract transferring the securities from Brussels-based Fortis Bank, known now as BNP Paribas Fortis, to Royal Park did not expressly transfer the right to bring non-contractual claims. *Royal Park Invs. SA/NV v. Morgan Stanley*, 57 N.Y.S.3d 677 (N.Y. Sup. Ct., N.Y. Cty. 2017).

NEW YORK LAW APPLIES

Justice Ramos said that because the disputes were in New York, the state's law that noncontractual claims are not automatically transferred applies.

Royal Park appealed the decision, claiming Belgian law should have applied to the question of standing.

The appellate panel disagreed, finding that Justice Ramos properly tossed the complaints despite a choice-of-law provision designating Belgian law as the law to be applied to the securities transfer agreement.

Choice-of-law clauses apply to substantive matters, but for procedural issues like standing, the forum state's law applies, the panel said.

THE INVESTMENT VEHICLE

According to Justice Ramos' order, Royal Park was created in 2008 in the midst of the subprime financial crisis by the Belgian government, Netherlands insurance company Ageas and French bank BNP Paribas before BNP Paribas acquired then-failing Fortis.

Fortis in May 2009 sold Royal Park about 150 mortgage-backed securities that Fortis had originally bought from the defendants between 2005 and 2007. The securities allegedly were worth much less than their original value. Royal Park sued the banks and their affiliates in four separate actions alleging fraud and negligent misrepresentation.

Mortgage-backed securities are linked to pools of mortgage loans. MBS investors get distributions of principal and interest from the underlying loans with varying maturity dates, cash flows and default risks.

NO STANDING

The banks moved to dismiss, and Justice Ramos grouped the motions together, deciding them in one order.

Although Royal Park had been assigned "all of the seller's right, title and interest in and to" the securities, Fortis had not assigned noncontractual claims, the judge said.

The purchase agreement limited the assignment of rights to contractual rights and it did not explicitly transfer non-contractual claims, such as fraud and negligent misrepresentation, Justice Ramos said.

Royal Park proffered an April 2013 letter from BNP Paribas to Royal Park that said Fortis had transferred the noncontractual

REUTERS/Arnd Wiegmann

REUTERS/Mike Blake

Credit Suisse and Morgan Stanley are two of the defendant banks sued for fraud and negligent misrepresentation.

claim rights, but Justice Ramos said the letter is inadmissible because the purchase agreement is not ambiguous.

Under New York law, extrinsic evidence can be admitted only if an agreement is ambiguous, he said.

"As sophisticated parties represented by counsel that are routinely involved in complex financial transactions, the court can presume that if they intended to assign noncontractual claims, they would have done so through express language," Justice Ramos said. WJ

Related Filings:
Opinion: 2018 WL 4866980

See Document Section C (P. 34) for the opinion.

MORTGAGE-BACKED SECURITIES

Wilmington Trust fights bid to revive $168 million MBS suit

By Peter H. Hamner, Esq.

Wilmington Trust Co. says in recently filed federal appeals court papers that a trial judge properly dismissed a lawsuit accusing the company of breaching its agreements to oversee several mortgage-backed securities trusts worth a combined $168 million.

IKB International SA et al. v. Wilmington Trust Co. et al., No. 18-2312, appellees' brief filed, 2018 WL 4782926 (3d Cir. Oct. 3, 2018).

In a brief filed Oct. 3 with the 3rd U.S. Circuit Court of Appeals, Wilmington Trust says the agreements do not impose a duty on the trustee to "protect" the trusts, as MBS purchasers IKB Deutsche Industriebank AG and IKB International SA argue.

The IKB companies sued Wilmington Trust in 2017, claiming it failed to hold mortgage lenders accountable for loading the trusts with securities backed by bad loans.

U.S. District Judge John E. Jones III of the District of Delaware granted Wilmington Trust's motion to dismiss the suit in May. *IKB Int'l v. Wilmington Trust Co.*, No. 17-cv-1351, 2018 WL 2210564 (D. Del. May 14, 2018).

THE TRUSTS

The case stems from the IKB companies' purchase of mortgage-backed securities issued by 15 Delaware statutory trusts for which Wilmington Trust acted as the "owner trustee."

According to the banks' complaint, the loans that lenders sold to the trusts purportedly met certain agreed-upon guidelines and quality standards, and mortgage servicers subsequently handled collecting payments from borrowers and pursuing foreclosure actions.

As owner trustee, Wilmington Trust oversaw the trusts' nonparty indenture trustees, which were responsible for taking physical possession of the complete mortgage files, enforcing the lenders' and servicers' obligations, and providing notice if loans were found to violate the guidelines, the suit said.

The indenture trustees allegedly failed to act on claims that the loans did not meet promised standards and that the loan servicers failed to properly foreclose on properties.

As a result, most of the loans underlying the securities defaulted in 2008, making the securities "almost worthless," the suit said.

The plaintiffs alleged Wilmington Trust failed to protect investor interests because it did not prudently oversee the indenture trustees.

'PLAIN READING'

Judge Jones first dismissed the claims relating to four securities purchased by IKB International, saying it lacked standing to sue because it had sold the securities to third parties and had not retained its litigation rights.

The judge next turned to IKB AG's claims and found that Wilmington Trust had not breached its obligations under the trust agreements.

The plaintiff failed to point to any specific provisions in the agreements that made Wilmington Trust responsible for the indenture trustees' alleged failure to monitor and hold lenders and servicers accountable for noncompliance with loan guidelines, the judge said.

"A plain reading of the unambiguous terms of the agreements fails to support IKB AG's allegations," he said.

The complaint also mistakenly conflated Wilmington Trust's contractual authority with its contractual duties, Judge Jones said.

'ACCOMMODATION PARTY'

The IKB companies have appealed the decision, arguing Judge Jones' reading of the agreements leads to an "absurd result."

The trust documents explicitly require Wilmington Trust to ensure that the trusts perform their duties, the banks say.

"This is a necessary and essential element of the governing agreements, because the 'trusts' or 'issuers' are legal fictions that have no capacity to act other than by contracting with others to act on their behalf," their appellants' brief says.

Wilmington Trust counters by arguing in its brief that the plaintiffs missed the opportunity to go after the indenture trustees and are now trying to blame the owner trustee for "failing to take the very action appellants themselves failed to take."

The trustee is an "accommodation party" that ensures the trust complies with the Section 3807 of the Delaware Statutory Trust Act, 12 Del. Code Ann. § 3807, and is not responsible for the indenture trustees or for the origination or servicing of the underlying loans, the brief says. WJ

Related Filings:
Appellees' brief: 2018 WL 4782926
Appellants' brief: 2018 WL 4078402

Deutsche Bank seeks review of class certification in subprime suit

By Peter H. Hamner, Esq.

Deutsche Bank AG is asking a federal appeals court to review a trial judge's order certifying two classes of preferred securities holders in a 2009 lawsuit alleging the German bank misrepresented its exposure to the housing market that collapsed in 2008.

In re Deutsche Bank AG Securities Litigation, No. 18-3036, petition for permission to appeal filed, 2018 WL 5076510 (2d Cir. Oct. 16, 2018).

In an Oct. 16 petition for permission to appeal, Deutsche Bank and its underwriters say U.S. District Judge Deborah A. Batts of the Southern District of New York was wrong to certify the classes because the named plaintiffs had profited from their investments. *In re Deutsche Bank AG Sec. Litig.*, 2018 WL 4771525 (S.D.N.Y. Oct. 2, 2018).

The 2nd U.S. Circuit Court of Appeals should review the decision because it involves an important and recurring issue in securities class actions, the petition says.

The underwriters are Banc of America Securities LLC, Citigroup Global Markets Inc., Merrill Lynch Pierce Fenner & Smith, Morgan Stanley & Co. LLC, UBS Securities LLC and Wachovia Capital Markets LLC.

THE SECURITIES

According to the plaintiffs' suit, Deutsche Bank sold $5.4 billion worth of preferred securities in five offerings between May 2006 and May 2008.

The offerings' marketing materials, however, did not fully disclose the bank's mortgage-backed securities and collateralized debt obligations holdings tied to the subprime housing market bubble, the suit said.

In late 2008, Deutsche Bank's investments in the products went sour, forcing it to write down billions of dollars in losses, the complaint said.

The suit, filed by Deutsche Bank shareholders Belmont Holdings Corp., Norbert G. Kaess and others, accused the bank of failing to inform investors about its true housing market exposure in financial statements and stock-offering materials.

REUTERS/Kai Pfaffenbach

OMNICARE RESURRECTS SUIT

Judge Batts dismissed the suit in 2012, saying it failed to allege that Deutsche Bank did not believe its "opinions" about market risk and subprime exposure at the time it expressed them. *In re Deutsche Bank Sec. Litig.*, No. 09-cv-1714, 2012 WL 3297730 (S.D.N.Y. Aug. 10, 2012).

A 2nd Circuit panel upheld the decision and Belmont asked the Supreme Court for review, saying the case presented questions similar to those then pending before the court in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015). *Kaess v. Deutsche Bank AG*, 572 F. App'x 58 (2d Cir. 2014).

In *Omnicare*, the top court said a company's opinions that allegedly omit certain facts are actionable if the omitted information would have been "material to a reasonable investor."

The Supreme Court remanded the Deutsche Bank case to the panel, which then sent the case back to Judge Batts. *Belmont Holdings Corp. v. Deutsche Bank AG.*, 135 S. Ct. 2805 (2015).

The plaintiffs filed a third amended complaint and the judge dismissed claims relating to three of the five offerings for lack of standing, leaving allegations regarding offerings in November 2007 and February 2008. *In re Deutsche Bank AG Sec. Litig.*, 2016 WL 4083429 (S.D.N.Y. July 25, 2016).

CLASS CERTIFICATION

After plaintiff Belmont was dismissed from the suit for lack of standing, Kaess and shareholder Maria Farruggio moved for certification of a class of investors for November 2007 offering.

Judge Batts certified the class, finding that issues of law and fact are common to the class members. She also allowed the pair to step in as class representatives for investors in the February 2008 offering under the "class standing" doctrine from *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012).

In *NECA*, the 2nd Circuit allowed a plaintiff who bought Goldman securities to represent the interests of other investors who had "the same set of concerns" despite their not having bought securities in the same offering.

APPEAL PETITION

In their petition for permission to appeal Judge Batt's decision, Deutsche Bank and the underwriters say that Kaess and Farruggio profited from their trading of the November 2007 securities, despite the judge's finding they had a "minimal loss," and that they should not have been permitted to represent the February 2008 class.

"A plaintiff who makes multiple purchases of the issued securities within the class period — profiting on some, losing on others, yet profiting overall — should not be certified as a class representative," the petition says.

As to the February 2008 class, the bank and underwriters say the plaintiffs clearly profited on that offering and that the *NECA* class standing doctrine should not be expanded to circumvent the loss requirement for standing. WJ

Related Filings:
Petition: 2018 WL 5076510
Third amended complaint: 2015 WL 12861370

See Document Section D (P. 38) for the petition.

SECURITIES

CPI Card Group $11 million investor settlement gets nod

By Nicole Banas

A Manhattan federal judge has preliminarily approved an $11 million settlement in a consolidated shareholder lawsuit alleging payment card maker CPI Card Group Inc.'s 2015 initial public offering documents failed to disclose declining demand for "chip" cards.

In re CPI Card Group Inc. Securities Litigation, No. 16-cv-4531, order entered (S.D.N.Y. Oct. 22, 2018).

U.S. District Judge Lewis A. Kaplan of the Southern District of New York certified for settlement purposes a class of investors who lost money on CPI shares purchased in or traceable to the Oct. 9, 2015, IPO.

Judge Kaplan authorized lead plaintiff Alex Stewart to notify class members and set a final hearing for Feb. 5, 2019.

The judge denied Stewart's first proposed notice without prejudice Oct. 1 because it did not disclose the parties' positions on the total damages payable in the suit if Stewart had successfully established liability.

A revised notice filed Oct. 15 said Stewart's damages expert estimated $95 million in maximum aggregate damages.

The defendants' expert, however, calculated total possible damages of about $8 million, the notice said.

Stewart's counsel at Labaton Sucharow LLP plans to request fees of up to 30 percent of the settlement amount, or $3.3 million, plus reimbursement of litigation expenses not to exceed $200,000, according to the notice.

If approved, the proposed settlement will resolve all claims against Colorado-based CPI, Chairman Bradley Seaman, ex-CEO Steven Montross and other current and former officers and directors.

The agreement also covers claims against the IPO's underwriters, private equity firm Tricor Pacific Capital Inc., which is CPI's majority shareholder, and three affiliated investment funds.

'MASSIVE' CARD INVENTORY

The consolidated complaint, filed in October 2016, says CPI's offering materials touted "astounding growth" in chip card revenues as U.S. merchants transitioned away from using magnetic stripe cards.

The registration statement for the IPO allegedly failed to disclose that the company's largest customers had millions of unissued chip cards on hand and were unlikely to continue purchasing at the same rate.

The offering materials also omitted increased pricing pressure on chip cards and slower migration by small and mid-sized card issuers, according to the suit.

The IPO raised more than $172 million in gross proceeds, of which the company and the Tricor defendants received $142 million and $18 million, respectively, the suit says.

CPI's share price fell 60 percent in the months after the IPO, closing around $4 per share May 12, 2016, after it reduced its 2016 financial guidance and revealed that its largest customers had a "massive glut" of inventory, the suit says.

Judge Kaplan denied the defendants' motion to dismiss the suit last year, saying the consolidated complaint adequately pleaded a violation of Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C.A. §§ 77k and 77o. *In re CPI Card Group Inc. Sec. Litig.*, No. 16-cv-4531, 2017 WL 4941597 (Oct. 30, 2017).

Stewart's motion for class certification was pending when the parties reached an agreement in principle to settle the suit for $11 million in late July.

Judge Kaplan denied the certification motion without prejudice Sept. 4. WJ

Attorneys:
Plaintiff: Jonathan Gardner, Michael P. Canty, Alfred L. Fatale, Ross M. Kamhi and Nicole M. Zeiss, Labaton Sucharow LLP, New York, NY

Defendants: James P. Smith III and Matthew L. DiRisio, Winston & Strawn, New York, NY; Adam S. Hakki, Daniel H.R. Laguardia and Agnes Dunogue, Shearman & Sterling, New York, NY

Related Filings:
Memo supporting preliminary settlement approval: 2018 WL 4558514

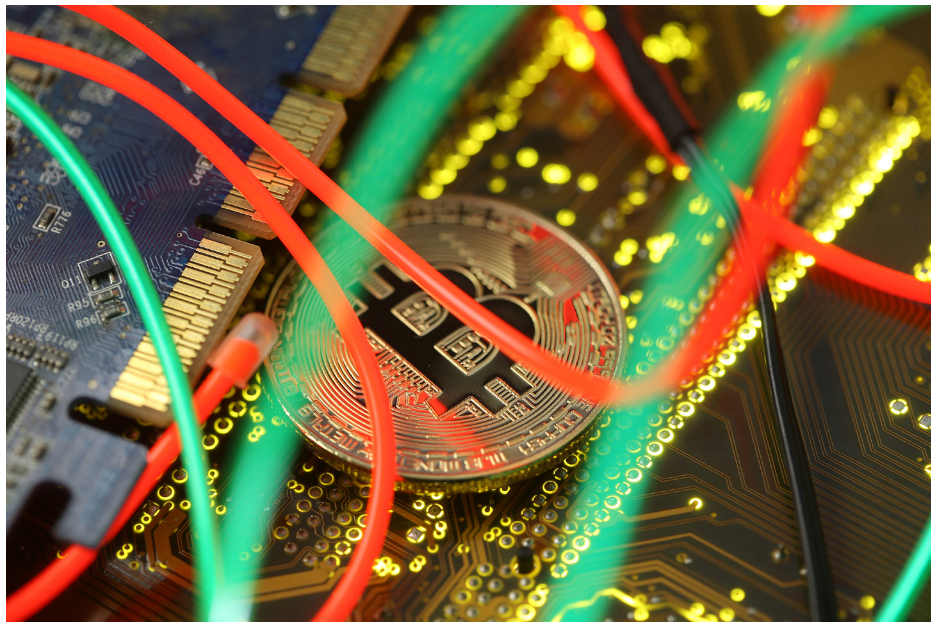
CFTC, SEC sue to shut down online bitcoin futures trading platform

By Daniel Rice

The Commodity Futures Trading Commission and the Securities and Exchange Commission have brought parallel lawsuits seeking to shut down the operations of an online platform for conducting securities-based swaps using bitcoin digital currency.

Commodity Futures Trading Commission v. 1pool Ltd. et al., No. 18-cv-2243, complaint filed, 2018 WL 4628334 (D.D.C. Sept. 27, 2018).

Securities and Exchange Commission v. 1pool Ltd. et al., No. 18-cv-2244, complaint filed, 2018 WL 4658195 (D.D.C. Sept. 27, 2018).



REUTERS/Dado Ruvic

In separate complaints filed Sept. 27 in the U.S. District Court for the District of Columbia, the agencies seek injunctions against 1pool Ltd., also known as 1Broker, and its owner, Austria resident Patrick Brunner.

The suits allege Brunner, 26, and 1Broker illegally operated the website 1broker.com for securities-based swaps using bitcoin without registering with the regulatory agencies or complying with other federal laws governing the investment offerings.

Securities-based swaps allow investors to participate in price movements of a security, such as stock of a publicly traded company, without owning the underlying asset. An investor can buy a long position and make a profit if the price of the security increases over a defined period or a buy a short position and profit if the price of security goes down.

Thousands of 1Broker account holders engaged in millions of dollars' worth of bitcoin transactions since 2012, according to the SEC's lawsuit.

The SEC and CFTC also seek disgorgement of illegal gains or a return of all investor funds.

CFTC ALLEGATIONS

The CFTC alleges Brunner and 1Broker violated the Commodity Exchange Act, 7 U.S.C.A. § 1, and commission regulations by failing to register as a futures exchange merchant.

According to the suit, the securities-based swaps offered through the 1Broker online platform qualified as retail commodity transactions, triggering a duty to register with the CFTC.

Brunner and 1Broker also failed to implement required anti-money laundering protocols and other supervisory procedures to ensure they knew the true identities of their customers, the CFTC says.

The 1Broker website allowed anyone who provided a username and an email address to place orders, according to the suit.

SEC ALLEGATIONS

The SEC alleges Brunner and 1Broker violated federal securities laws, which generally require the registration of securities-based swap offerings with the commission and the execution of the transactions on a national exchange.

Brunner also illegally failed to register 1Broker as a broker-dealer with the SEC, according to the suit.

The suit asserts claims under the Securities Act of 1933 and the Securities Exchange Act of 1934.

The SEC says the defendants failed to ensure that account holders met certain discretionary trading thresholds, noting that an FBI special agent working undercover was able to purchase securities-based swaps in the stock of publicly traded companies on the 1Broker site by providing just an email and password. WJ

Related Filings:
CFTC complaint: 2018 WL 4628334
SEC complaint: 2018 WL 4658195

Discrimination

CONTINUED FROM PAGE 1

The suit also alleges the defendants violated Section 296(2) of New York state's Executive Law, which prohibits owners and employees of places of public accommodation from denying equal advantages, facilities or privileges because of race, religion and national origin.

OVERSEAS TRAVEL

Gueye had four accounts at People's United, including one for a charitable foundation that sponsors schools in Africa. Before leaving on a charitable-work trip to Bahrain, Dubai, Kuwait, Morocco and Senegal in July 2016, she told the bank of her travel plans so as to avoid problems accessing her money, the complaint says.

While overseas she was unable to access her accounts, leaving her and her disabled child stranded with insufficient funds to return to the United States, according to the suit.

THE OVERDRAFT

When she did return, Gueye found a letter waiting from the bank stating that her accounts would be closed unless she resolved a $30 overdraft on the charity account, the complaint says.

> The defendant's refusal to reopen the accounts "establishes a clear discriminatory bias," the plaintiff says.

Gueye alleges the bank knew she would not receive the notice until her return and claims the institution intentionally closed all four accounts due to the single overdraft. She also says the bank notified credit reporting agencies about the account closures.

People's United later admitted it had improperly assessed a monthly maintenance fee to the charity account. It did not, however, reopen Gueye's accounts, the suit claims.

TRAVEL BLAMED?

Gueye says Hoffman later told her the accounts would not be reopened because of the countries she had visited.

The suit says the bank's refusal to reopen the accounts "establishes a clear discriminatory bias."

The bank also delayed removing the false derogatory information from Gueye's credit file for 10 months and she could not open a new account during this period, the suit says.

Gueye has suffered emotional distress and humiliation due to the defendants' actions, as well as damaged credit, the complaint says.

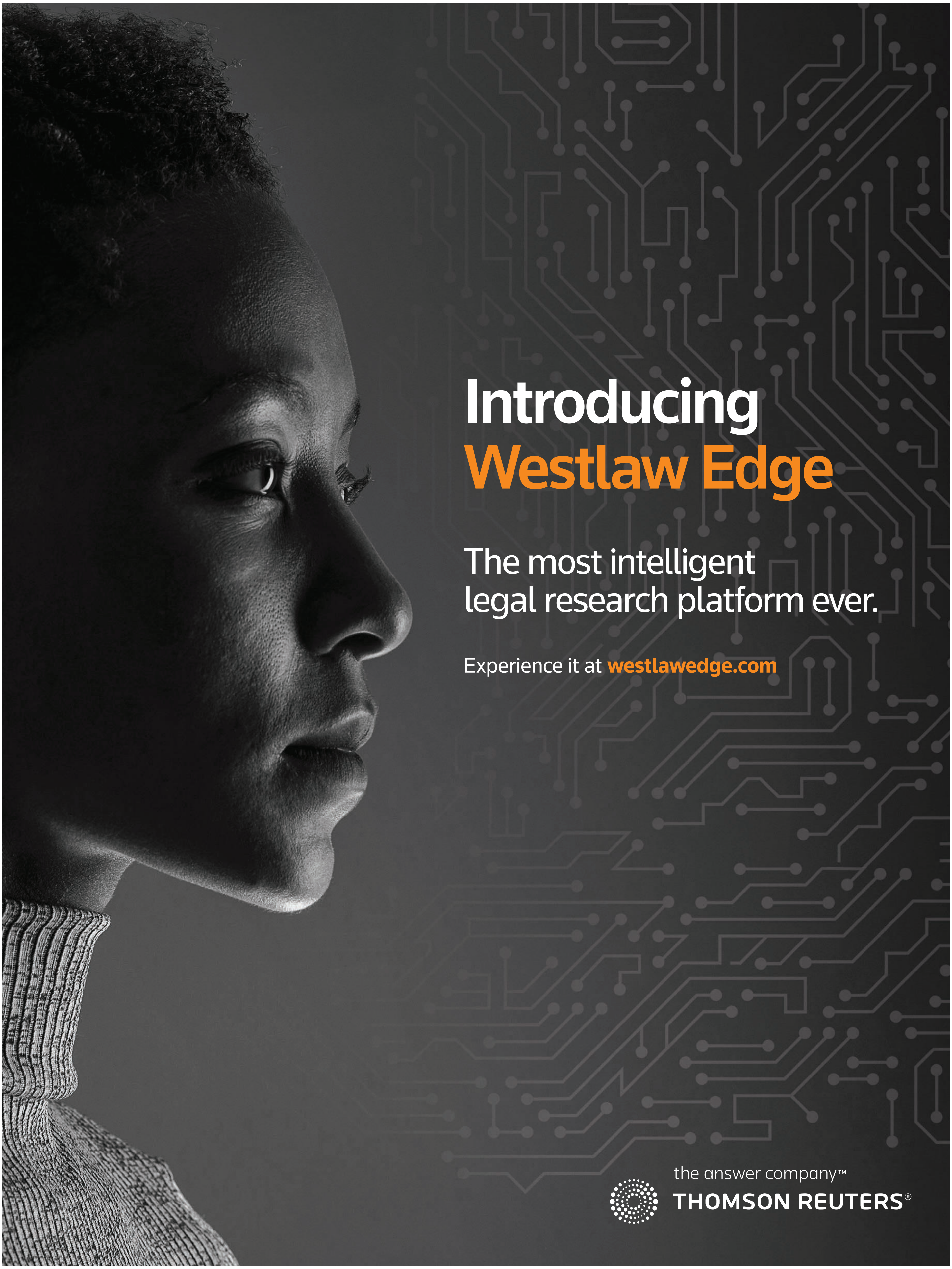
She is seeking an award of unspecified compensatory and punitive damages, attorney fees, costs and interest. WJ

Attorneys:
Plaintiff: Johnmack Cohen, Derek Smith Law Group PLLC, New York, NY

Related Filings:
Complaint: 2018 WL 5624120

See Document Section A (P. 17) for the complaint.

CASE AND DOCUMENT INDEX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GUEYE

2018 WL 5624120 (E.D.N.Y.) (Trial Pleading)
United States District Court, E.D. New York.

Sokhna GUEYE, Plaintiff,
v.
PEOPLE'S UNITED BANK, NATIONAL ASSOCIATION, and Patricia Hoffman, individually, Defendants.

No. 1:18-cv-05961-ENV-JO.
October 24, 2018.

Complaint

Johnmack Cohen, Esq., Derek Smith Law Group, PLLC., One Penn Plaza Suite 4905, New York, New York 10119, (212) 587 0760, for plaintiff.

Plaintiff demands a trial Jury

Plaintiff SOKHNA GUEYE (hereinafter referred to as "Plaintiff GUEYE" or "Plaintiff"), by and through her attorneys, the DEREK SMITH LAW GROUP, PLLC, hereby complains of PEOPLE'S UNITED BANK, NATIONAL ASSOCIATION, and PATRICIA HOFFMAN, individually (hereinafter collectively referred to as "Defendants"), as follows:

NATURE OF THE CLAIMS

1. This action is brought to remedy the unlawful discriminatory conduct of Defendants. Through their unlawful and discriminatory conduct, Defendants violated *inter alia*, 42 U.S.C. § 1981, New York State Human Rights Law, New York Executive Law, § 290, et seq. ("NYSHRL"); New York City Human Rights Law, the Administrative Code of the City of New York 8-107 et seq. ("NYCHRL"); and any and all other causes of action which are alleged and/or can be inferred from the facts set forth herein.

2. Plaintiff seeks declaratory relief with respect to each Claim, as well as, monetary relief, including but not limited to: compensatory and punitive damages; attorney's fees and the costs associated with this action; together with any and all other appropriate legal and equitable relief pursuant to applicable state and city laws.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 in that the action involves federal questions, because the causes of action asserted herein arise in part under 42 U.S.C. § 1981 ("1981"), to remedy violations of the laws of the State of New York and City of New York based upon Federal Questions and the supplemental jurisdiction of this Court pursuant to *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966) and 28 U.S.C. § 1367, seeking declaratory and injunctive relief and damages to redress the injuries Plaintiff suffered as a result of being discriminated against by Defendants on the basis of her race and/or color, national origin, and religion.

4. 28 U.S.C. § 1331 states that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

5. Plaintiff filed a verified complaint with the New York State Division of Human Rights on or about February 10, 2017. The New York State Division of Human Rights conducted an investigation and found that "probable cause exists to believe that the Defendant[s] engaged in or [are] engaging in the unlawful discriminatory practice complained of."

6. On or about June 28, 2018, upon request of Plaintiff's attorney, The New York State Division of Human Rights dismissed Plaintiff's complaint and annulled her election of remedies to hereby pursue the current action.

7. Venue is proper in this District based upon the fact that the events or omissions which gave rise to the claims asserted herein occurred within the Eastern District of New York.

PARTIES

8. At all times relevant to this Complaint, Plaintiff was and is an individual, black Muslim female from Senegal.

9. At all times relevant to this Complaint, the Defendant PEOPLE'S UNITED BANK, NATIONAL ASSOCIATION (hereinafter referred to as "PEOPLE'S UNITED BANK") was and is a national association owning and operating a store located at 8989 Union Turnpike Glendale, New York 11385.

10. At all times relevant to this Complaint, Defendant, PATRICIA HOFFMAN (hereinafter referred to as "HOFFMAN") was and is Growth Manager for Defendant PEOPLE'S UNITED BANK.

11. At all times relevant to this Complaint, SHAMECCA ANDREWS (hereinafter referred to as "ANDREWS") was and is a personal banker for Defendant PEOPLE'S UNITED BANK working at the store located at 8989 Union Turnpike, Glendale, New York 11385.

MATERIAL FACTS

12. This case involves public accommodation discrimination on the basis of religion, race, and national origin all of which were directed at Plaintiff GUEYE by Defendants.

13. Plaintiff GUEYE is the chairwoman for the Mumin Foundation Charitable Corp. (hereinafter referred to as "Mumin"), a charitable organization that sponsors education programs and schools in Africa.

14. Plaintiff has banked with Defendants since 2010.

15. Plaintiff had four (4) separate bank accounts with Defendants. Plaintiff had her personal checking account, her personal savings account, her son's college savings account, and an account for Mumin.

16. Plaintiff opened an account for Mumin in 2015, which held funds for the charity.

17. Plaintiff always complied with Defendants' policies regarding each of her accounts.

18. In or around July of 2016, Plaintiff notified Defendants that she would need access to her bank funds while traveling overseas to the Muslim countries of Senegal, Morocco, Dubai, Kuwait, and Bahrain. Plaintiff responsibly provided dates of her planned trips to Defendants so there would be no issues when she needed to withdraw funds from her accounts.

19. In or around the end of July of 2016 to the beginning of August of 2016, Plaintiff traveled to several Muslim countries (Senegal, Morocco, Dubai, Kuwait, and Bahrain) for her work with Mumin.

20. Plaintiff tried to withdraw funds from her accounts at Defendant PEOPLE'S UNITED BANK while traveling in these countries but was denied access to all four (4) of her accounts.

21. Plaintiff was stranded with her disabled minor child in foreign lands with little money. This caused Plaintiff and her minor child extreme stress and anxiety, not knowing if they would be able to make it home.

22. Defendants intentionally froze, and ultimately closed, all four (4) of Plaintiff's accounts while she was traveling internationally on the basis that Plaintiff's Mumin account was overdrawn by a mere $30.60. Defendants closed all four (4) of Plaintiff's accounts, even though her other three (3) accounts had positive balances. Additionally, Defendants reported her to Chex Systems, Inc.[1] (hereinafter referred to as "ChexSystems), which restricted her from opening another bank account in the United States.

23. Defendants admit that Plaintiff had absolutely no fault in causing the overdraft of her Mumin account. Defendants acknowledge that it was their fault entirely and that they incorrectly had overdrawn funds from Plaintiff's Mumin account.

24. Defendants had sent correspondence to Plaintiff's home address in Bronx, New York notifying her of the overdraft and warning her that her bank accounts would be closed if she does not address the matter. However, Defendants sent this correspondence during the time Plaintiff was traveling overseas for her charity. Defendants had full knowledge that Plaintiff would not receive this correspondence until a much later date as Defendants were informed as to when and where Plaintiff was traveling prior to her trip.

25. Defendants' employee, ANDREWS who opened Plaintiff's Mumin account, admits that she incorrectly categorized the Mumin account as a "nonprofit business checking account" rather than a "nonprofit advantage checking account."

26. Plaintiff's Mumin account became overdrawn because a nonprofit business checking account incurs monthly fees. ANDREWS stated that Plaintiff's Mumin account should never have incurred monthly fees.

27. In or around September of 2016, Plaintiff went in-person to Defendants' Queens branch in an attempt to have her bank accounts reopened. Plaintiff directly asked ANDREWS why her accounts were closed even after Defendants discovered that Plaintiff's overdrawn Mumin account was based on Defendants' own error. Andrews stated that she did not know.

28. Defendants shockingly prevented Plaintiff from reopening her accounts even after Defendants uncovered and acknowledged their own error as the reason for Plaintiff's accounts being closed in the first place.

29. ANDREWS escalated the matter to Defendants' Growth Manager, HOFFMAN. Defendant HOFFMAN informed ANDREWS that the Plaintiff's accounts could not be reopened because of the countries that Plaintiff traveled to.

30. Defendants were aware of Plaintiff's Muslim charity and her recent travel to several Muslim countries on behalf of that foundation. Defendants' unreasonable refusal to reopen Plaintiff's bank accounts because she traveled to Muslim countries establishes a clear discriminatory bias on the basis of Plaintiff's religion, race and national origin.

31. Moreover, Defendants substantially delayed notifying ChexSystem that Plaintiff should not be on the ChexSystem record. Plaintiff was not taken off of the ChexSystem record for approximately ten (10) months. This prevented Plaintiff from opening bank accounts during this period, which caused significant personal and business-related difficulties for her. Additionally, Plaintiff had significant issues booking flights and hotels for traveling, which impacted her greatly as she frequently needed to travel for her work with the charity.

32. Defendants' discriminatory actions negatively impacted Plaintiff GUEYE'S credit and finances, causing her severe emotional distress.

33. The above are just some examples of the unlawful discrimination to which Defendants subjected Plaintiff GUEYE.

34. As a result of Defendants' actions, Plaintiff felt extremely humiliated, degraded, victimized, embarrassed, and emotionally distressed.

35. As a result of this discrimination, Plaintiff suffered and continues to suffer from anxiety, depression, and emotional distress.

36. As Defendants' conduct has been willful, wanton, reckless, and/or in conscious disregard or so reckless as to amount to such disregard of Plaintiff's rights, Plaintiff GUEYE respectfully seeks all available damages including but not limited to emotional distress, statutory damages, attorney's fees, costs, interest and punitive damages from all Defendants jointly and severally.

37. Defendant HOFFMAN clearly abused her managerial authority with the conduct described herein.

38. Defendants' actions and conduct were intentional and intended to harm Plaintiff.

CAUSES OF ACTION: THE FIRST CAUSE OF ACTION FOR DISCRIMINATION UNDER 42 U.S. CODE § 1981 (Against All Defendants)

39. Plaintiff repeats and re-alleges each and every allegation contained in the above paragraphs of this Complaint.

40. 42 U.S. Code § 1981 - Equal rights under the law states provides:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

41. Defendants violated 42 U.S.C. § 1981 as set forth herein.

42. As a result of Defendants' discrimination in violation of Section 1981, Plaintiff has been denied the enjoyment of all benefits, privileges, terms, and conditions of her contractual relationship which provided substantial benefits, thereby entitling her to injunctive and equitable monetary relief; and having suffered such anguish, humiliation, distress, inconvenience and loss of enjoyment of life because of Defendants' actions, thereby entitling Plaintiff to compensatory damages.

43. As alleged above, Defendants acted with malice or reckless indifference to the rights of the Plaintiff, thereby entitling Plaintiff to an award of punitive damages.

44. Defendants violated the above and Plaintiff suffered numerous damages as a result.

45. Plaintiff makes a claim against Defendants under all of the applicable paragraphs of 42 U.S. Code § 1981.

THE SECOND CAUSE OF ACTION: Public Accommodation Violation of the New York Executive Law (Against All Defendants)

46. Plaintiff repeats, reiterates, and re-alleges each and every allegation contained in the above paragraphs of this Complaint, with the same force and effect as if fully set forth herein.

47. New York State Executive Law § 296(2) provides that it shall be an unlawful discriminatory practice: "For any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement, because of the race, creed, color, national origin, sexual orientation, military status, sex or disability or marital status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, including the extension of credit, or, directly or indirectly, publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed, color, national origin, sexual orientation, military status, sex, or disability or marital status, or that the patronage or custom thereat of any person of or purporting to be of any particular race, creed, color, national origin, sexual orientation, military status, sex or marital status, or having a disability is unwelcome, objectionable or not acceptable, desired or solicited."

48. Defendants violated all applicable sections of the NYSHRL § 296(2) by withholding and/or denying equal advantages, facilities or privileges on the basis of Plaintiff's race, religion, and national origin.

THE THIRD CAUSE OF ACTION: Aiding and Abetting in Violation of New York Executive Law (Against All Defendants)

49. Plaintiff repeats, reiterates, and re-alleges each and every allegation contained in the above paragraphs of this Complaint, with the same force and effect as if fully set forth herein.

50. New York State Executive Law § 296(6) provides that it shall be an unlawful discriminatory practice: "For any person to aid, abet, incite, compel or coerce the doing of any acts forbidden under this article, or attempt to do so."

51. Defendants violated Executive Law § 296(6) by aiding, abetting, inciting, compelling and coercing acts, or attempted to do so, the above discriminatory and unlawful conduct set forth herein.

THE FOURTH CAUSE OF ACTION: Public Accommodation Discrimination under New York City Law (Against All Defendants)

52. Plaintiff repeats, reiterates, and re-alleges each and every allegation contained in the above paragraphs of this Complaint, with the same force and effect as if fully set forth herein.

53. The New York City Administrative Code Title 8, § 8-107(4)(a) provides:

"It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation, because of the actual or perceived race, creed, color, national origin … of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof, or directly or indirectly, to make any declaration, publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages, facilities and privileges of any such place or provider shall be refused, withheld from or denied to any person on account of … gender …"

54. Section 8-107(13) entitled Employer Liability For Discriminatory Conduct By Employee, Agent or Independent Contractor provides:

An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section only where: (1) the employee or agent exercised managerial or supervisory responsibility; or (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or (3) the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

55. Defendants engaged in an unlawful discriminatory practice in violation of New York Administrative Code Title 8, § 8-107(4)(a), by withholding and denying equal advantages, facilities, or privileges to Plaintiff on the basis of her race, religion, and national origin.

56. Defendant PEOPLE'S UNITED BANK, is additionally strictly liable for the discriminatory acts of Defendant HOFFMAN under all of the applicable paragraphs of New York City Administrative Code, Section 8-107(13).

THE FIFTH CAUSE OF ACTION: Aiding and Abetting Under New York City Law (Against All Defendants)

57. Plaintiff repeats, reiterates, and re-alleges each and every allegation contained in the above paragraphs of this Complaint, with the same force and effect as if fully set forth herein.

58. New York City Administrative Code Title 8, § 8-107(6) provides that it shall be an unlawful discriminatory practice: "For any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so."

59. Defendants violated New York City Administrative Code § 8-107(6) by aiding, abetting, inciting, compelling and coercing, or attempted to do so, the above discriminatory, harassing, and unlawful conduct.

60. Furthermore, Defendant PEOPLE'S UNITED BANK is strictly liable for the retaliatory acts of Defendant HOFFMAN under New York City Administrative Code Title 8, § 8-107(13).

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment for damages including, but not limited to compensatory damages, punitive damages, statutory damages, attorney's fees, costs, interest and all other damages as are just and proper to remedy Defendants' unlawful conduct.

JURY REQUEST

Plaintiff requests a jury trial on all issues to be tried.

Date: New York, New York
October 24, 2018

Respectfully Submitted,

DEREK SMITH LAW GROUP, PLLC.
Attorneys for Plaintiff

BY: */s/ Johnmack Cohen, Esq.*

Johnmack Cohen, Esq.
One Penn Plaza Suite 4905
New York, New York 10119
(212) 587 0760

Footnotes

1 According to their website, "ChexSystems is a nationwide specialty consumer reporting agency under the federal Fair Credit Reporting Act (FCRA).... ChexSystems provides services to financial institutions and other types of companies that have a permissible purpose under the FCRA. ChexSystems' services primarily assist its clients in assessing the risk of opening new accounts."

End of Document

BANK OF AMERICA

2018 WL 5078025 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

BANK OF AMERICA, N.A., Petitioner,
v.
Donald M. LUSNAK, Respondent.

No. 18-212.
October 17, 2018.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition

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***i QUESTIONS PRESENTED**

Do regulations of the Office of Controller of the Currency ("OCC") that preexist the financial collapse of 2008 override new congressional mandates under the Dodd-Frank Wall Street Reform and Consumer Protection Act?

Did the Court of Appeals correctly conclude that the OCC lacks the power to field preempt state bank regulations that "condition" the activities of national banks when this Court established a standard preempting only state regulations that "significantly interfere" with national banks' operations and Congress then expressly codified that standard?

Did the Court of Appeals correctly conclude that the OCC is entitled to at most *Skidmore* deference to its preemption determinations?

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*1 INTRODUCTION

Like a production of Hamlet without the Prince, there is a telling void at the heart of the Petition. In this case of statutory interpretation, Petitioner and its Amici studiously avoid engaging with the controlling statutory framework. Missing in the Petition's account of a well-settled pattern of regulatory autonomy on the part of the Office of Controller of the Currency ("the OCC") over issues of preemption is any attempt to address seriously what Congress did to redress the cataclysmic events of 2008 that rocked this country's economic foundations down to the studs.

In response to the financial meltdown, Congress passed a new statutory framework, known colloquially as Dodd-Frank,[1] that expressly cabined the preemptive reach of the National Bank Act, expressly codified the limited level of deference owed to the OCC, and expressly invited state regulation as an integral part of bank oversight. Most critically, Congress stated that any action taken by the OCC to thwart state regulation required express administrative findings justifying preemption and that those findings were subject to non-deferential judicial review.

In turn, and on the very date Dodd-Frank took effect, the OCC decided to override Congress by reaffirming, on a wholesale basis, its entire pre-2008 regulatory regime. It did so in defiance of Congress's mandate that all decisions purporting to preempt state laws be subject to evidentiary proof and justification. Such administrative arrogation of power violates the legislative supremacy at the inviolate core of ***2** administrative law. The Petition does not purport to identify a contemporary Circuit conflict or any other legal support for the unsustainable proposition that Congress's post-2008 regulatory interventions could be ignored in favor of business as usual at the OCC. Instead, the Petition asks this Court to override Congress and restore the OCC regulations from 2004 that Congress thoroughly overhauled.

It is hard to imagine a more unattractive case for the proposition that the OCC could invoke its past practices to override Congress. At issue in this case is a consumer mortgage originally issued in 2008 by Countrywide, the poster child for the mortgage securitization catastrophe. That mortgage then passed over to Bank of America when Countrywide collapsed in the opening salvo of the 2008 bank meltdown. Now Bank of America has the audacity to claim that the regulatory environment controlling Countrywide's practices prior to 2008 should continue to control unabated, despite Congress's determination in Dodd-Frank to rein in such financial irresponsibility.

There has been no trial here, no evidence presented, just a barely disguised claim that regulatory fiat trumps express statutory language. No court has ever endorsed this view, there is no Circuit conflict, and the Ninth Circuit's decision rejecting it is manifestly correct. There is no basis for certiorari review of the denial of a motion to dismiss.

***3 STATEMENT OF THE CASE**

A. Bank of America Issues the Mortgage but Refuses to Comply with State Law.

In July 2008, Countrywide Financial sold Lusnak a Veterans Administration-guaranteed mortgage for his home in Palmdale, California. RA 14a.[2] That same month, shortly before the crest of the financial crisis hit, Countrywide's mortgage empire collapsed and Bank of America purchased Countrywide and with it acquired Lusnak's mortgage. RA 14a; App. 5a.[3] Subsequently, Lusnak and Bank of America agreed to refinance and then entered into a loan modification agreement in January 2011. RA 15a; App. 5a.

These contracts required Lusnak - like many of Bank of America's borrowers - to pay funds each month ($250 per month in Lusnak's case) into an escrow account maintained by Bank of America and used to pay for property taxes and insurance for the property. RA 12a, 15a. These escrow accounts routinely have significant positive balances (e.g., when the monthly payments into the account build up for several months before annual or semi-annual property tax payments, or otherwise exceed the expenditures from the account). RA12a. Bank of America has access to these excess balances and earns interest on those amounts. RA 12a, 15a.

The contracts state that Bank of America will pay interest on these escrow funds only if applicable law requires it, and that it "shall be governed by federal law and the law of the jurisdiction in which the ***4** Property is located." RA 13a. Bank of America agrees with Lusnak that the contract obligates it to pay interest on escrow funds if required by federal or nonpreempted state law. App. 6a.

California law requires financial institutions to pay borrowers at least two percent interest per year on mortgage escrow accounts. Cal. Civ. Code § 2954.8(a); RA 6a-7a. There is no dispute that Bank of America does not pay Lusnak or other California borrowers interest on their mortgage escrow accounts, despite the requirement of state law. RA 12a, 14a; App. 6a. Bank of America also concedes that Wells Fargo, its chief competitor and the largest mortgage bank in the nation, abides by California's mortgage escrow interest law. App. 6a; *see also* RA 12a-13a (quoting Wells Fargo). Like Bank of America, Wells Fargo is a nationally chartered bank operating under the National Bank Act, 12 U.S.C. § 38, *et seq.*

B. Dismissal in the District Court.

In March 2014, Lusnak sued Bank of America on behalf of himself and other California Bank of America borrowers with escrow accounts, alleging that the bank's failure to pay interest on mortgage escrow accounts was unlawful under Cal. Civ. Code § 2954.8(a) and that compliance with state law was also required under the provision of Dodd-Frank obligating national banks to follow state law mandates on the payment of interest. The statute provides:

If prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as ***5** prescribed by that applicable State or Federal law.

15 U.S.C. § 1639d(g)(3); RA 6a. The complaint alleged a violation of California's unfair competition law and a breach of the parties' contract. App 6a.

Bank of America moved to dismiss, arguing that Cal. Civ. Code § 2954.8 is preempted by the National Bank Act. In the procedural posture of the motion to dismiss, Bank of America could seek relief only as a matter of law. There was no factual showing at this stage of the litigation that the California escrow requirement interfered with the ability of a national bank to do business in California, let alone that the California mortgage escrow rule would "significantly interfere," as this Court defined the applicable preemption standard in *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 33 (1996). App. 25a, 27a.

The district court granted the motion to dismiss, concluding that the National Bank Act preempted California's mortgage escrow interest law. App. 39a. The district court purported to apply the preemption standard in *Barnett Bank* - which the court concluded was unaffected by Dodd-Frank - and held as a matter of law that California's mortgage escrow interest requirement significantly interfered with the bank's lending power, notwithstanding the fact that Wells Fargo, another nationally chartered bank, was operating in California in compliance with state law. App. 39a. The district court reached this conclusion without a hearing, without taking any evidence from the parties, and without permitting any discovery. App. 23a.

***6 C. The Decision Below.**

The Court of Appeals reversed. State consumer protection laws are "a field traditionally regulated by the states," the court ruled, which meant that Bank of America bore "the burden of proving its preemption defense" with "compelling evidence." App. 9a (internal citations omitted). *Id.* Under this Court's controlling precedent in *Barnett Bank,* states may regulate national banks so long as "doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers." App. 10a (quoting *Barnett Bank,* 517 U.S. at 33). Dodd-Frank codified this "prevent or significantly interfere" requirement with explicit citation to *Barnett Bank,* such that the basic preemption standard remained the same before and after Dodd-Frank. App. 13a (citing 12 U.S.C. § 25b(b)(1)(B)); RA 1a.

There was no factual showing (or even proffer) below by Bank of America that California's escrow interest law significantly interfered with the bank's powers, given the procedural posture of the case as an appeal from a motion to dismiss. Consequently, the Court of Appeals considered whether the bank had shown that the state escrow requirement was preempted as a matter of law. App. 14a-15a n.6. Thus the court considered whether legal authority demonstrated Congress's intent that state laws requiring interest payments on mortgage escrow accounts significantly interfered with the bank's operations on an across-the-board basis with no need for factual proof. App. 18a.

Rather than seeking to foreclose all state regulation of national banks, Congress expressly mandated that "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any ... escrow account...." 15 U.S.C. § 1639d(g)(3), RA 6a. According to the Court of Appeals, ***7** this language "expresses Congress's view that such laws would not necessarily prevent or significantly interfere with a national bank's operations."[4] App. 15a.

The court below rejected Bank of America's argument that the word "applicable" in § 1639d(g)(3) rendered the provision nugatory by somehow precluding all state regulation as inapplicable. Instead the Ninth Circuit concluded that the word "applicable" simply acknowledged that different states have differing (or no) laws requiring interest on mortgage escrow accounts. App. 16a-17a. A House Report provided further evidence that Congress intended this provision to address problems in mortgage servicing of escrow accounts that had led to the subprime mortgage crisis. App. 17a-18a. By specifically allowing state regulation of escrow payment, the court held, Congress had by the direct language of Dodd-Frank expressly invited state regulations that would require interest payments on escrow accounts. *Id.*

Alternatively, Bank of America had argued below that it was entitled to judgment as a matter of law based on the OCC's broad preemption determinations. App. 18a. According to both Bank of America and the OCC appearing as an amicus on a petition for rehearing en banc, the OCC's decrees of complete field preemption were entitled to deference from reviewing courts. The Court of Appeals concluded that the OCC's preemption interpretations, both before and after Dodd-Frank, were "entitled to little, if any, deference" for several reasons. App. 12a-13a. First, both the ***8** OCC's 2004 rule essentially claiming field preemption, and its post-Dodd-Frank 2011 rule sweepingly reaffirming the 2004 determinations, were merely the "OCC's articulation of its legal analysis," without a "review of specific potential conflicts on the ground." App. 12a. The Court of Appeals relied upon this Court's ruling that, absent specific authorization, agencies' legal conclusions about preemption are owed no deference. App. 11a-12a (citing *Wyeth v. Levine,* 555 U.S. 555, 576 (2009)). Even if the OCC had conducted empirical conflict analysis, such analysis is owed deference only to the extent it is persuasive (i.e., no more than *Skidmore* deference). App. 11a-12a (citing *Wyeth,* 555 U.S. at 577, and *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)). Indeed, in Dodd-Frank, Congress specifically reaffirmed that the OCC's preemption determinations are entitled to only *Skidmore* deference. App. 10a, 13a (citing 12 U.S.C. § 25b(b)(5)(A)); *see also* RA 2a-3a.

Second, the court concluded that the OCC's 2004 articulation of the *Barnett Bank* preemption standard and its 2011 reaffirmation were "inaccurate[.]" App. 12a. Where *Barnett Bank* held (and Dodd-Frank codified) that preemption was limited to laws that "***prevent or significantly interfere***" with bank powers - a fact-based conflict preemption standard - the OCC effectively rewrote this standard as field preemption, covering "state laws that ***obstruct, impair, or condition***" bank powers. App. 10a-11a (quoting 12 C.F.R. § 34.4(a)) (emphasis added); RA 7a. This interpretation conflicted with *Barnett Bank* and Dodd-Frank by removing the requirement of "significantly" and substituting "condition," a term consistent with field preemption rather than fact-specific conflict preemption. App. 11a n.4. These rejections of the standard from both *Barnett Bank* and the language of Dodd-Frank ***9** lessened the persuasiveness of, and thus the deference owed to, the OCC's determinations. *See* App. 12a.

In sum, the Court of Appeals concluded that the OCC's ungrounded say-so, especially in light of Dodd-Frank, was insufficient evidence that Congress intended to preempt state mortgage escrow interest laws. Therefore, at this pre-discovery stage of the case, Bank of America failed to show that as a matter of law the National Bank Act preempted Cal. Civ. Code § 2954.8. The court acknowledged that certain facts *could* prove that an escrow interest law significantly interfered with a bank's powers, such as evidence of a punitively high interest rate. App. 17a n.7. The Court of Appeals accordingly remanded the case to the district court for further proceedings, rejecting only the motion to dismiss at this stage. App. 22a.

REASONS TO DENY THE WRIT

I. Under Dodd-Frank, the Question of Preemption Cannot Be Decided on a Motion to Dismiss.

This case is unripe and inappropriate for this Court's review for two reasons: the decision below was only an interlocutory appeal that has been remanded for further factual development, and the preemption analysis required depends on a factual record that does not yet exist.

A. This Interlocutory Appeal Is Not Ripe for Supreme Court Review.

This Court has long emphasized that it "must limit its review of interlocutory orders." *Goldstein v. Cox,* 396 U.S. 471, 478 (1970). "[E]xcept in extraordinary cases, the writ is not issued until final decree." ***10** *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916) (citing, *inter alia, Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co.,* 148 U.S. 372, 378, 384 (1893) ("[A] writ of error ... to this court ... does not lie until after final judgment ....")). In *Hamilton-Brown,* the mere fact that the judgment below was not final "itself alone furnished sufficient ground for the denial of the application." *Id.*[5]

Here, Bank of America seeks review of a reversal of a grant of a motion to dismiss. The district court dismissed the case without discovery, evidence, or a hearing. There is no factual record, there have been no findings of fact, and there has been no determination of liability. The Court of Appeals reversed and remanded the case for further proceedings. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.,* 389 U.S. 327, 328 (1967) (per curium) (denying certiorari); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* 285 (10th ed. 2013). ("[I]n the absence of some such unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

The decision below has not produced any immediate consequences for Bank of America or any other parties in a way that might under extraordinary circumstances invite interlocutory intervention by this Court. The case is stayed pending appeal, and following ***11** remand would return to the district court at an early, pre-discovery phase. Meanwhile, Bank of America continues to not pay interest on borrowers' escrow accounts pending further litigation in this case.

B. Review Is Inappropriate Here Without a Factual Record.

Interlocutory review by this Court without a factual record is especially inappropriate in this case. National Bank Act preemption analysis turns on a factual determination about whether the state law at issue "prevent[s] or substantially interfere[s] with" a bank's exercise of its powers. 12 U.S.C. § 25b(b)(1)(B); RA 1a; *Barnett Bank,* 517 U.S. at 33. This is a factual question regarding the real-world impact of the state law in question and the ability of the bank to exercise its powers while abiding by the law. Review prior to the parties creating a factual record on these questions at summary judgment or trial would be premature.[6]

Preemption analysis is ultimately governed by congressional intent, and in Dodd-Frank Congress made its intent crystal clear that preemption of state consumer financial protection laws depends on a factual record. In addition to codifying *Barnett Bank,* Congress expressly required the OCC to justify any preemption determinations with "substantial evidence, made on the record of the proceeding" that "supports the specific finding" "in accordance with" the fact-dependent standard of *Barnett Bank.* 12 U.S.C. § 25b(c); RA 3a. Congress instructed that "any preemption determination ... by a court, or by regulation or order of the [OCC]" must ***12** be made "on a case-by-case basis," defined as "a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law," again requiring fact-based analysis. 12 U.S.C. §§ 25b(b)(1)(B), (b)(3)(A); RA 1a, 2a. Congress could not have been more explicit about wanting these preemption determinations to be based on specific, case-by-case analysis of facts.[7]

By presenting its defense as a motion to dismiss, Bank of America necessarily failed to provide the courts below with any factual support for its preemption argument. Bank of America then compounded its legal error by claiming that the OCC preemption rules merited court deference,[8] even though those rules were also issued without factual support - and no factual support was provided even after Congress specifically required it.

***13** The controlling fact is that the OCC issued its original 2004 rule preempting state mortgage escrow laws as part of a blanket field preemption determination without any factual evidence or discussion regarding mortgage escrow laws. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1907-08, 1917 (Jan. 13, 2004); RA 7a; Catherine M. Sharkey, *Inside Agency Preemption,* 110 Mich. L. Rev. 521, 581 (2012) (citing 2004 OCC rules as having "no factual findings ... explaining why preemption was necessary in the specific case or what conflicts between state authorities and federal banks justified preemption").

But the offense to the legislation only gets worse. Incredibly, in 2011, on the very same day Dodd-Frank's preemption provisions became effective, the OCC reaffirmed its 2004 conclusion that state "escrow standards ... would meaningfully interfere"[9] with bank's powers and were accordingly preempted based on the 2004 regulations. *See* Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43549, 43557 (July 21, 2011); RA 8a. The OCC made no effort to provide any (let alone "substantial") evidence on the record regarding the impact of escrow interest laws, as required by Dodd-Frank.[10] *Id.* at ***14** 43554-57. In other words, this case lacks either a court record or an administrative record providing the facts required - both by this Court's *Barnett Bank* standard and by Congress's explicit statutory command - to properly assess preemption.

II. There Is No Circuit Conflict or Substantial Question of Law to Resolve.

The heart of the Petition is the claim that the Court of Appeals has introduced uncertainty by "rejecting settled case law and regulations ...." Pet. 19. This purportedly creates a conflict with the Second Circuit's 2005 interpretation of the 2004 OCC regulation, which an OCC amicus brief to the Ninth Circuit insisted must control. Pet. 18-19 (citing *Wachovia Bank, N.A. v. Burke,* 414 F.3d 305 (2d Cir. 2005)).[11] *See also* Amicus Br. 8, 10 (citing 2004 OCC regulations as controlling and claiming preemptive authority under the 1864 National Banking Act, with no mention of Dodd-Frank).

At bottom, the claim is that Congress did nothing in 2010 and that Petitioner should be entitled to continue with business as usual. The simplest answer is ***15** that Congress, with the 2010 passage of Dodd-Frank, changed the controlling statutory scheme, directly discredited the OCC's previous preemption determinations, and instructed courts to apply only *Skidmore* deference, rendering the Second Circuit's 2005 analysis irrelevant in the new statutory environment. *See* 12 U.S.C. § 25b(b)(5)(A); RA 2a-3a; Shapiro et al., *Supreme Court Practice, supra,* at 248 (purported conflict based on "discredited" or "stale" authority "will not be an adequate basis for granting certiorari").

The Second Circuit's decision in *Wachovia* is stale as it predates Dodd-Frank, the controlling statute. *Wachovia* creates no conflict because its conclusion that the OCC's 2004 rule preempted state law was based on *Chevron* deference. 414 F.3d at 315 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council,* 467 U.S. 837 (1984)). Congress has since confirmed that *Chevron* deference does not apply to OCC preemption determinations, erasing any uncertainty. 12 U.S.C. § 25b(b)(5)(A); RA 2a-3a. Petitioner cites no circuit that has defied Congress on this point since it was codified as part of Dodd-Frank, and thus fails to point the Court to any circuit split under today's law.

Second, Petitioner ignores that since the Second Circuit applied the OCC's 2004 preemption rule, Congress undid them. The Senate Report for Dodd-Frank made Congress's intentions unmistakably clear: the "standard for preempting State consumer financial law would *return to what it had been for decades,* those recognized by the Supreme Court in *Barnett Bank* ... ***undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004.*** " S. Rep. No. 111-176, at 175 (2010), https://www.congress.gov/111/crpt/srpt176/CRPT-111srpt176.pdf (emphasis added). Understanding how Congress ***16** rejected the OCC's field preemption is not just a question of reading the legislative history alone.[12] This rejection, and the intent to restore this Court's previously articulated standard, is reflected in the statute's express codification of *Barnett Bank*'s "significantly interfere" language.

Third, unlike for the state laws at issue in *Wachovia,* here Congress *specifically allowed states to require payment of interest on escrow accounts.* 15 U.S.C. § 1639d(g)(3); RA 6a. This distinction is especially pertinent given that Congress instructed that OCC preemption determinations must be made on a case-by-case basis. 12 U.S.C. § 25b(b)(3); RA 2a.

The remaining cases Petitioner cites for purported conflicts all fail to evidence circuit conflicts for the same reasons as *Wachovia:* they pre-date Dodd-Frank, applied *Chevron* deference, and/or considered preemption of state laws unrelated to mortgage escrow interest requirements. *See* Pet. 14-16 (citing cases).

There are also no other cases interpreting 15 U.S.C. § 1639d(g)(3), Dodd-Frank's section requiring banks to "pay interest" on escrow funds of "prescribed by that applicable State ... law." Therefore there is also no ***17** circuit conflict regarding Petitioner's strained statutory argument that the word "applicable" in that section renders it a nullity and allows for field preemption of all state law. Pet. 22-23. Bank of America reasons that because some state regulations may indeed be preempted, the word "applicable" is a congressional invitation to the complete removal of state law from the regulatory oversight of banking. Pet. 23. As the Court of Appeals correctly held, the fact that some state laws may be preempted does nothing to relieve Petitioner of the burden of establishing the affirmative defense that *this* state law "significantly interfere [s]" with the operation of a national bank, the applicable standard under *Barnett Bank* both before and after Dodd-Frank. App. 9a.

Not surprisingly, Petitioner can point to no authority for its tortured statutory construction under which the word "applicable" removes state regulation as a matter of law. There is no circuit conflict because the decision below is the first appellate decision to address the application of 15 U.S.C. § 1639d(g)(3) to the question of state laws on mortgage escrows, and fully conforms to Dodd-Frank's instruction that state law applies absent substantial factual findings to the contrary.

A cursory review of the statute, in the sections excised from Petitioner's Appendix and unmentioned by Amici, reveals the absurdity of claiming the field preemptive force of the OCC regulations from 2004:

12 U.S.C. §25b(b)(3). This section requires that any determination by the OCC concerning the adverse impact of a State consumer financial law on a national bank must be made on a "case-by-case" basis. RA 2a. Further, subsection (3)(B) requires that in making any such case-by-case determination the OCC "shall first ***18** consult with the Bureau of Financial Protection and shall take the views of the Bureau into account ...." *Id.* Contrary to the statutory requirements for preemption, the OCC conducted no case-specific fact-finding and there was no consultation with the CFBB when it reaffirmed its 2004 rules (which also were not based on any case-specific findings). App. 10a (Dodd-Frank "required the OCC to follow specific procedures in making the preemption determination."); *cf. Sacco v. Bank of Am., N.A.,* No. 5:12-CV-00006-RLV, 2012 WL 6566681, at *8 n.7 (W.D.N.C. Dec. 17, 2012) (the OCC's "blanket regulatory stance would appear to violate" the section of Dodd-Frank requiring case-by-case analysis).

12 U.S.C. § 25b(b)(5)(A) and § 25b(c). These sections make clear that, consistent with *Barnett Bank,* OCC preemption decisions are not entitled to *Chevron* deference and that any claim of preemption must be made on the basis of "substantial evidence, made on the record of the proceeding [that] supports the specific finding regarding the preemption ...." RA 2a-3a; *see also* Kent Barnett, *Codifying Chevmore,* 90 N.Y.U. L. Rev. 1, 26-29 (2015) (providing legislative history of congressional determination to codify only *Skidmore* deference for OCC preemption claims).[13] ***19** There are no findings by the OCC invoked by Petitioner or Amici. Although subsections (b) and (c) are not included in the Petitioner's Appendix, they were properly identified below as supporting the need for exacting judicial scrutiny. App. 14a.

12 U.S.C. § 25b(d). This section requires a review, through notice and comment, of any preemption determination within a five-year period after promulgation. RA 3a-4a. There is no grandfathering of pre-Dodd-Frank regulations, and even if the 2004 regulations were deemed in place at the time Dodd-Frank was enacted in 2010, the five-year period for administrative review would have passed before this litigation began. Moreover, subsection (2) requires the OCC to report to Congress on any preemption determinations "and the reasons therefor." RA 4a. No such reporting has ever been made for the escrow preemption claim.

12 U.S.C. §25b(g). This section requires publication and quarterly updating of all preemption determinations by the OCC. RA 4a. No such publication of the claimed preemption at issue has been made.

In sum, the reason for the absence of any circuit conflict is clear. The OCC has failed to discharge its statutory obligations and has acted contrary to preemption standards that applied both pre- and post-Dodd-Frank. No court has indulged this malfeasance.

***20 III. The Decision Below Correctly Applies the Preemption Standard this Court Set and Dodd-Frank Codified.**

The court below properly began its analysis with the statutory commands of Dodd-Frank. App. 8a ("[T]he purpose of Congress is the ultimate touchstone in every pre-emption case" (quoting *Wyeth,* 555 U.S. at 565)). Dodd-Frank was Congress's response to the 2008 financial crisis, and one of its primary goals was to prevent another mortgage crisis. App. 4a. Congress recognized that "a major cause of the most calamitous worldwide recession since the Great Depression was the simple failure of federal regulators to stop abusive lending, particularly unsustainable home mortgage lending." S. Rep. No. 111-176, at 15; RA8a-9a.

Ultimately the Petition is an effort to obtain by improper judicial means a reversal of the congressional determination that, in the aftermath of 2008, the bank regulatory framework in the U.S. had to change. There is no secret that the major banks, often acting through the institutional amici present in this case,[14] sought to derail the Dodd-Frank reforms. Nor is it a secret that, as the court below wrote, "Dodd-Frank brought about a 'sea change' in the law, affecting every corner of the nation's financial markets." App. 4a.

As previously noted, the Senate Report for Dodd-Frank specifically stated that the act would "return ***21** [the preemption standard] to ... *Barnett Bank* ... undoing broader standards adopted by rules, orders, and interpretations issued by the OCC in 2004." S. Rep. No. 111-176, at 175. In turn, *Barnett Bank* stands in direct opposition to the 2004 OCC regulations. Under *Barnett Bank,* state regulatory authority was preserved so long as it "does not ***prevent or significantly interfere*** with the national bank's exercise of its powers." 517 U.S. at 33 (emphasis added); App. 10a. That is the preemption standard that Congress expressly codified, and which applied even before Dodd-Frank.

By contrast, the OCC regulations invoked by Petitioner, Amici, and the OCC itself as amici below, would preempt state laws if they "obstruct, impair, ***or condition*** a national bank's ability to fully exercise the powers authorized to it under Federal law." 12 C.F.R. § 34.4 (emphasis added). This is clearly the language of field preemption and is irreconcilable with the "significantly interfere" holding of this Court and its subsequent endorsement by Congress.

In rejecting the 2004 OCC claims of broad preemptive authority, Congress set out to restore regulatory balance between the states and federal agencies. For example, in the section consolidating the OCC and the Office of Thrift Supervision, Congress stated that one of its purposes was "to preserve and protect the dual system of Federal and State-chartered depository institutions." 12 U.S.C. § 5401(2); RA 5a. Similarly, in the section establishing the Consumer Financial Protection Bureau, an entire subsection titled "Preservation of State Law" clarifies that Dodd-Frank sets a regulatory floor that state law may exceed if it affords greater protection to consumers. 12 U.S.C. § 5551; RA5a.

***22** The OCC is acting beyond its statutory authority in claiming deference and in claiming the right to make a preemption decision not authorized by statute. The Court of Appeals correctly reviewed agency claims to preemption under the standard that this Court upheld in *Barnett Bank,* and correctly applied only *Skidmore* deference to the OCC on preemption, both of which Congress reaffirmed in the express statutory language of Dodd-Frank. 12 U.S.C. §§ 25b(b)(1)(B), (b)(5)(A); RA 1a, 2a-3a. The claim that the 2004 OCC regulations should control as if nothing had changed in the financial crisis of 2008 and the congressional response in Dodd-Frank has absolutely no legal foundation.[15] To argue in the face of Dodd-Frank that the same rules governing Countrywide mortgage practices at the height of the crisis are vigilant today is, in one word, "amazing."[16]

***23** Accordingly, the Petition fails to identify any issue meriting this Court's review.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

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Footnotes

1 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 53, *et seq.*) ("Dodd-Frank").

2 "RA __a" refers to pages in Respondent's Appendix.

3 "App. __a" refers to pages in Petitioner's Appendix.

4 Although Respondent's individual loan agreement pre-dated the effective date of § 1639d(g)(3), the court below found this provision of Dodd-Frank inviting applicable state law to be pertinent for purposes of *Barnett Bank*'s preemption analysis. App. 20a-21a.

5 *See also Mount Soledad Mem'l Ass'n v. Trunk,* 567 U.S. 944 (2012) (Alito, J.) (statement on denial of certiorari) (denial appropriate "[b]ecause no final judgment has been rendered"); *Virginia Military Inst. v. United States,* 508 U.S. 946 (1993) (Scalia, J.) (statement on denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.").

6 One key fact conceded by Bank of America strongly suggests there is no significant interference here: Bank of America asks this Court to exempt it from a state law with which its primary competitor, Wells Fargo, readily complies. RA 13a.

7 Bank of America faces an insurmountable hurdle reconciling its defense of a district court motion to dismiss with the express statutory language mandating a fact-based inquiry as a precondition for any claim of preemption. The express statutory requirements of fact-finding are apparently of no moment for Petitioner. Far easier to simply disregard what Congress mandated. In a manner similar to air-brushing disfavored characters out of historical photos, Petitioner invites this Court to ignore the statutory text altogether. To this end, Bank of America has even gone to the length of omitting these statutory sections from its Appendix. *See* App. 48a-49a. The appropriate statutory text is found in the Respondent's Appendix. *See* RA 1a-4a.

8 The OCC's preemption rules do not merit deference not only because the agency issued them without factual support, but also because (*inter alia*) Congress expressly instructed that courts owed them no more deference than their persuasiveness (i.e., *Skidmore* deference), and without factual support they lack such persuasiveness. *See* 12 U.S.C. § 25b(b)(5)(A); RA 2a.

9 Even in 2011 the OCC resisted using *Barnett Bank* and Dodd-Frank's prescribed language of "significantly interfere."

10 Not only did the OCC's 2011 rule not abide by Dodd-Frank's requirement of case-by-case analysis based on substantial evidence, but based on Respondent's research the OCC also failed to follow Dodd-Frank's requirements to: (1) consult with the Consumer Financial Protection Bureau; (2) review its preemption rulings through notice and comment within five years; (3) submit reports of such reviews to Congress; or (4) publish a quarterly list of preemption determinations. *See* 12 U.S.C. §§ 25b(b)(1)(B), (b)(3), (c), (d), (g); RA 1a-4a. Petitioner omitted these statutory sections from its appendix and presented no evidence to the courts below of the OCC's compliance with these statutory prerequisites for preemption.

[11] Petitioner further argues that not recognizing the OCC's pre-2008 rules on preemption would run counter to *Geier v. American Honda Motor Co.,* 529 U.S. 861 (2000). Pet. 18. To the contrary, compelling the OCC to follow Dodd-Frank's statutory requirements in making preemption determinations is perfectly consistent with *Geier:* "Requiring the Secretary to put his pre-emptive position through formal notice-and-comment rulemaking ... respects both the federalism and nondelegation principles that underlie the presumption against pre-emption in the regulatory context ...." 529 U.S. at 912.

[12] The Treasury Department also immediately criticized the OCC's 2011 blanket preemption reauthorization as inconsistent with Dodd-Frank. Letter from George W. Madison, General Counsel, Dep't of the Treasury, to the Hon. John Walsh, Acting Comptroller of the Currency, Office of the Comptroller of the Currency, June 27, 2011 (stating that the OCC's rule was "inconsistent with the plain language of [Dodd-Frank] and its legislative history" and ran afoul of "basic canons of statutory construction"), *quoted in* Jay B. Sykes, Cong. Research Serv., R45081, *Banking Law: An Overview of Federal Preemption in the Dual Banking System* 21 (Jan. 23, 2018), https://fas.org/sgp/ crs/misc/R45081.pdf.

[13] *See also id.* at 39 ("Congress stripped the OCC's preemption decisions of *Chevron* deference after years of questionable rulings during which the banking industry had captured the agency and the agency conceded its conflict of interest. The legislative history referred to this troubling behavior as grounds for the preemption provisions."). Even before Dodd-Frank, the OCC's penchant for unmoored preemption claims had been the target of criticism. *See* Sharkey, *supra,* at 581 (citing 2004 OCC rules as having "no factual findings ... explaining why preemption was necessary in the specific case"); Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection,* 23 Ann. Rev. Banking & Fin. L. 225, 232 (2004) (with well over 90 percent of its revenue coming from regulated banks, the OCC "has an obvious self-interest in pursuing a preemption agenda").

[14] *See, e.g.,* Letter from American Bankers Association et al. to Members of Congress, June 28, 2010 ("writing to express strong opposition to ... Dodd-Frank" and urging all Senators and House members to "vote against"), https://www.aba.com/archive/ Letters_Congress_Archive/ Letters%20to%C20Congress%20Archive/ CongressJointStatesMemoreRegulatoryRestr.

[15] The OCC's 2011 re-authorization of its 2004 preemption rules do not save them, as the 2011 re-authorization failed to abide by Dodd-Frank's procedural requirements even though it was issued the day those requirements became effective. The OCC's 2011 blanket determination that its 2004 rules were consistent with *Barnett Bank* and thus Dodd-Frank is simply uncredible, including because the 2004 rules were issued under the broader "obstruct, impair, or condition" interpretation that was rejected in *Barnett Bank* and by Congress in Dodd-Frank. *See, e.g., Sacco,* No. 5:12-CV-00006-RLV, 2012 WL 6566681, at *8 (The OCC's preemption position "substitute[s] the *Barnett Bank* directive with a more wide-ranging preemption standard.").

[16] "[W]hen the Executive Branch chooses a weak (but defensible) interpretation of a statute, and when the courts defer, we have a situation where every relevant actor may agree that the agency's legal interpretation is not the best, yet that interpretation carries the force of law. Amazing." Brett M. Kavanaugh, *Fixing Statutory Interpretation,* 129 Harv. L. Rev. 2118, 2151 (2016).

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ROYAL PARK

2018 WL 4866980
Supreme Court, Appellate Division, First Department, New York.

ROYAL PARK INVESTMENTS SA/NV, Plaintiff–Appellant,
v.
Morgan STANLEY et al., Defendants–Respondents.
Royal Park Investments SA/NV, Plaintiff–Appellant,
v.
Credit Suisse AG et al., Defendants–Respondents.
Royal Park Investments SA/NV, Plaintiff–Appellant,
v.
Deutsche Bank AG et al., Defendants–Respondents.
Royal Park Investments SA/NV, Plaintiff–Appellant,
v.
UBS AG et al., Defendants–Respondents.

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ENTERED: OCTOBER 9, 2018

Synopsis
Background: Purchaser of residential mortgage-backed securities pursuant to portfolio transfer agreement with financial institution and its subsidiaries brought action against banks from which institution and subsidiaries had acquired the securities, asserting claims for fraud, fraudulent inducement, aiding and abetting fraud, negligent misrepresentation, and rescission. The Supreme Court, New York County, Charles E. Ramos, J., 2017 WL 1379447, granted defendants' motion to dismiss. Purchaser appealed.

Holdings: The Supreme Court, Appellate Division, held that:
[1] trial court properly applied New York law, rather than Belgian law, in considering purchaser's standing, and
[2] purchaser lacked standing to assert the claims.

Affirmed.

West Headnotes (8)

[1] **Contracts**

Courts will generally enforce choice-of-law clauses.

Cases that cite this headnote

[2] **Contracts**

When parties include a choice-of-law provision in a contract, they intend application of only that state's substantive law.

Cases that cite this headnote

[3] **Contracts**

Choice-of-law provisions typically apply to only substantive issues.

Cases that cite this headnote

[4] **Action**

Unlike substantive law, matters of procedure are governed by the law of the forum state.

Cases that cite this headnote

[5] **Action**

The question of whether a plaintiff has standing is a procedural matter, as relevant to determining the governing law.

Cases that cite this headnote

[6] **Contracts**

Trial court properly applied New York law, rather than Belgian law as provided in portfolio transfer agreement, to determine whether purchaser of residential mortgage-backed securities had standing to assert claims for fraud, fraudulent inducement, aiding and abetting fraud, negligent misrepresentation, and rescission against banks from which a non-party financial institution and its subsidiaries had acquired the securities before selling them to purchaser pursuant to the agreement, where the banks made no concession that Belgian law governed.

Cases that cite this headnote

[7] **Fraud**

Purchaser of residential mortgage-backed securities lacked standing to assert claims for fraud, fraudulent inducement, aiding and abetting fraud, negligent misrepresentation, and rescission against banks from which a non-party financial institution and its subsidiaries had acquired the securities before selling them to purchaser pursuant to the agreement, where the agreement contained no language assigning any fraud or tort claims the institution or subsidiaries might have had against banks.

Cases that cite this headnote

[8] **Assignments**

Where an assignment of fraud or other tort claims is intended in conjunction with the conveyance of a contract or note, there must be some language that evinces that intent and effectuates the transfer of such rights.

Cases that cite this headnote

Attorneys and Law Firms

Robbins Geller Rudman & Dowd LLP, San Diego, CA (Lucas Olts of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for respondents.

Renwick, J.P., Manzanet–Daniels, Mazzarelli, Webber, Singh, JJ.

Opinion

***1** Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about April 12, 2017, April 14, 2017, and April 17, 2017, which granted defendants' motions to dismiss the amended complaints with prejudice, unanimously affirmed, with costs.

In these cases, which have been consolidated by this Court for purposes of this appeal, plaintiff alleges that defendants committed fraud in connection with the sale of residential mortgage-backed securities (RMBS). The threshold issue is whether plaintiff's standing is governed by New York or Belgian law.

Between 2005 and 2007, nonparties Fortis Bank, Fortis Bank SA/NV, Cayman Islands Branch (Fortis Cayman), and Scaldis bought RMBS from defendants. Nonparty Fortis Proprietary Investment (Ireland) Limited (Fortis Ireland) bought RMBS from the Credit Suisse defendants. On October 9, 2008, the Belgian State (which owned 49.93% of Fortis Bank), BNP Paribas, and various Fortis entities agreed to "set up a special purpose vehicle" to acquire Fortis' structured credit portfolio. Plaintiff was this special purpose vehicle.

On May 12, 2009, plaintiff, Fortis Bank, Fortis Ireland, and other companies not parties to this appeal entered into the Portfolio Transfer Agreement (PTA), pursuant to which plaintiff bought "all of the Sellers'[1] right, title and interest in and to the Portfolio Property". The PTA states, "This Agreement and the legal relations among the parties shall be governed by and construed in accordance with Belgian law". Plaintiff is incorporated under the laws of Belgium and has its principal place of business in Brussels.

Between August and November 2013, plaintiff commenced four actions against different defendants alleging fraud, fraudulent inducement, aiding and abetting fraud, and negligent misrepresentation. Plaintiff also sued the Deutsche Bank defendants for rescission.

Supreme Court dismissed the amended complaints with prejudice on the ground that plaintiff lacked standing or capacity to sue.

[1] [2] [3]We affirm. "[C]ourts will generally enforce choice-of-law clauses" (*Ministers & Missionaries Benefit Bd. v. Snow,* 26 N.Y.3d 466, 470, 25 N.Y.S.3d 21, 45 N.E.3d 917 [2015]). However, "when parties include a choice-of-law provision in a contract, they intend application of only that state's substantive law" (*Id.* at 474, 25 N.Y.S.3d 21, 45 N.E.3d 917 [internal quotation marks omitted]). In other words, "[c]hoice of law provisions typically apply to only substantive issues" (*Portfolio Recovery Assoc., LLC v. King,* 14 N.Y.3d 410, 416, 901 N.Y.S.2d 575, 927 N.E.2d 1059 [2010]).

[4] [5]Unlike substantive law, "matters of procedure are governed by the law of the forum state" (*FIA Leveraged Fund Ltd. v. Grant Thornton LLP,* 150 A.D.3d 492, 496, 56 N.Y.S.3d 12 [1st Dept. 2017]). The question of whether a plaintiff has standing "is a procedural matter" (*O'Neill v. Warburg, Pincus & Co.,* 39 A.D.3d 281, 833 N.Y.S.2d 461 [1st Dept. 2007]; *see also Mertz v. Mertz,* 271 N.Y. 466, 473, 3 N.E.2d 597 [1936] ["The law of the forum determines ... the capacity of parties to sue or to be sued"]).

[6]Plaintiff contends that pursuant to *Sealink Funding Ltd. v. Morgan Stanley,* 2014 N.Y. Slip Op. 31031(U) at *7, 2014 WL 1511156 [Sup. Ct. N.Y. County 2014], *affd* 133 A.D.3d 458, 19 N.Y.S.3d 282 [1st Dept. 2015], whether claim rights were transferred under a contract is a substantive question and not a procedural matter. Plaintiff's reliance on *Sealink Funding* is misplaced as there the parties agreed that English law governed the transfers under the applicable agreements (*id.* at *7). Here, the defendants make no such concession as to the governing law. Accordingly, the motion court properly applied New York law to determine whether plaintiff had standing.

***2 [7] [8]**Under New York law, "where an assignment of fraud or other tort claims is intended in conjunction with the conveyance of a contract or note, there must be some language ... that evinces that intent and effectuates the transfer of such rights" (*Commonwealth of Pennsylvania Pub. Sch. Employees' Retirement Sys. v. Morgan Stanley & Co., Inc.,* 25 N.Y.3d 543, 550, 14 N.Y.S.3d 313, 35 N.E.3d 481 [2015]). Plaintiff does not claim that the PTA contains such language, and thus, the motion court properly found that plaintiff lacked standing to bring the claims it asserts in the instant actions.

In view of the foregoing, it is unnecessary to reach the parties' other arguments.

All Citations

--- N.Y.S.3d ----, 2018 WL 4866980, 2018 N.Y. Slip Op. 06695

Footnotes

1 The Sellers were the parties to the PTA other than plaintiff.

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IN RE DEUTSCHE BANK

2018 WL 5076510 (C.A.2) (Appellate Petition, Motion and Filing)
United States Court of Appeals, Second Circuit.

In Re DEUTSCHE BANK AG SECURITIES LITIGATION.

No. 18-3036.
October 16, 2018.

From an Order Granting Certification of Class Entered on October 2, 2018 by the United States District Court for the Southern District of New York
The Honorable Deborah A. Batts

Petition for Permission to Appeal Class Certification Decision Pursuant to Federal Rule of Civil Procedure 23(f)

Charles A. Gilman, Susan Buckley, David G. Januszewski, Brent L. Andrus, Cahill Gordon & Reindel LLP, 80 Pine Street, New York, New York 10005, Tel: (212) 701-3000, cgilman@cahill.com, sbuckley@cahill.com, djanuszewski @cahill.com, bandrus @cahill.com, for the Deutsche Bank defendants-petitioners and the Individual defendants-petitioners.

Jay B. Kasner, Scott D. Musoff, Jessica A. Barcus, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, New York 10036, Tel: (212) 735-3000, Jay.kasner@skadden.com, Scott.musoff@skadden.com, Jessica.barcus @skadden.com, for the Underwriter defendants-petitioners.

FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners[1] state the following:

1. *The Deutsche Bank Entities*. Deutsche Bank Capital Funding Trust VIII, Deutsche Bank Capital Funding LLC VIII, Deutsche Bank Contingent Capital Trust II, Deutsche Bank Contingent Capital LLC II, Deutsche Bank Capital Funding Trust IX, Deutsche Bank Capital Funding LLC IX, Deutsche Bank Capital Funding Trust X, Deutsche Bank Capital Funding LLC X, Deutsche Bank Contingent Capital Trust V, and Deutsche Bank Contingent Capital LLC V are all wholly-owned subsidiaries of Deutsche Bank AG. Deutsche Bank Securities Inc. is a wholly-owned subsidiary of DB U.S. Financial Markets Holding Corporation, which in turn is a wholly-owned subsidiary of DB USA Corporation, which in turn ***ii** is a wholly-owned subsidiary of Deutsche Bank AG. Deutsche Bank AG is a publicly traded corporation. Deutsche Bank AG has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

2. *Banc of America Securities LLC*. On November 1, 2010, Banc of America Securities LLC ("BAS") was merged into Merrill Lynch, Pierce, Fenner & Smith Incorporated ("MLPF&S"), at which time all of the issued and outstanding membership interests of BAS were cancelled. MLPF&S is a wholly-owned subsidiary of NB Holdings Corporation. NB Holdings Corporation is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of NB Holdings Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the New York Stock Exchange. Bank of America Corporation has no parent company and no publicly held corporation owns more than 10% of Bank of America Corporation's shares.

3. *Citigroup Global Markets Incorporated*. Citigroup Global Markets Inc. is a wholly-owned subsidiary of Citigroup Financial Products Inc., which, in turn, is a wholly-owned subsidiary of Citigroup Global Markets Holdings Inc., which, in turn, is a wholly-owned subsidiary of Citigroup Inc., a publicly held company. Citigroup Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

***iii** 4. *Merrill Lynch, Pierce, Fenner & Smith Incorporated*. Merrill Lynch, Pierce, Fenner & Smith Inc. is a wholly-owned subsidiary of NB Holdings Corporation. NB Holdings Corporation is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of NB Holdings Corporation. Bank of America Corporation is a publicly held company whose shares are traded on the New

York Stock Exchange. Bank of America Corporation has no parent company and no publicly held corporation owns more than 10% of Bank of America Corporation's shares.

5. *Morgan Stanley & Co. LLC*. Morgan Stanley & Co. LLC (f/k/a Morgan Stanley & Co. Inc.) is a limited liability company whose sole member is Morgan Stanley Domestic Holdings, Inc., a corporation wholly owned by Morgan Stanley Capital Management, LLC, a limited liability company whose sole member is Morgan Stanley. Morgan Stanley is a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, Mitsubishi UFJ Financial Group, Inc., 7-1 Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330, beneficially owns greater than 10% of Morgan Stanley's outstanding common stock.

6. *UBS Securities LLC*. UBS Securities LLC's corporate parents are UBS Americas Holding LLC and UBS Americas Inc., the latter of which is wholly-owned by UBS Americas Holding LLC. UBS Americas Holding LLC is wholly ***iv** owned by UBS AG, which is wholly owned by UBS Group AG, a publicly traded corporation. No publicly held corporation holds 10% or more of UBS Group AG stock.

7. *Wachovia Capital Markets, LLC*. On July 1, 2009, Wells Fargo Securities, LLC merged with and into Wachovia Capital Markets, LLC. On July 3, 2009, Wachovia Capital Markets, LLC changed its name to Wells Fargo Securities, LLC. Wells Fargo Securities, LLC is an indirect subsidiary of Wells Fargo & Company, a publicly held company. Wells Fargo & Company has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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Defendants (*see* note 1, *supra*) petition this Court pursuant to Fed. R. Civ. P. 23(f) and Fed. R. App. P. 5 for permission to appeal the Memorandum and Order of the United States District Court for the Southern District of New York (Batts, J.) entered on October 2, 2018 (ECF 224; attached hereto), which, excluding defendants and their affiliates, certified the following plaintiff class in this action:

> All persons or entities who purchased or otherwise acquired the 7.35% Noncumulative Trust Preferred Securities of Deutsche Bank Capital Funding Trust X ('7.35% Preferred Securities'), and/or the 7.60% Trust Preferred Securities of Deutsche Bank Contingent Capital Trust III ('7.60% Preferred Securities'), pursuant or traceable to the public offerings that commenced on or about November 6, 2007 and February 14, 2008.

STATEMENT OF THE QUESTIONS PRESENTED

The class certified by the district court has no temporal period. Membership is based on a purchase being "pursuant or traceable to" either of two offerings (one in November 2007 and the other in February 2008), regardless of date of purchase.

1. ***With respect to the November 2007 Offering*:** By virtue of Plaintiffs' Rule 36 admissions, it is "conclusively established" that:

(i) prior to filing suit, Plaintiffs purchased 13,400 trust preferred shares issued in the November 2007 Offering for a total investment of $232,792;

(ii) Plaintiffs sold those 13,400 shares for total proceeds of $332,990; and

(iii) while they owned those shares, Plaintiffs received over $88,000 in interest and dividends.

That is a *profit* of over $188,000. Having profited, Plaintiffs are not members of the class they seek to represent. However, Plaintiffs fractionated their purchase to ***2** fabricate what the district court referred to as a "minimal loss" (ECF 151) – claiming a $0.25 per share loss on 7,000 shares while ignoring a $15.82 per share gain on the other 6,400 shares. The district court allowed Plaintiffs to proceed, reserving to summary judgment whether they have any actual damages. (ECF 151)

The first question presented is whether the Court should review the district court's erroneous determination that Plaintiffs who made multiple purchases of the securities at issue prior to filing suit, and who sue under Sections 11 and 12 of the Securities Act of 1933, can ignore all of their profitable trades and aggregate trading profit in claiming a minimal loss on a subset of trades for purposes of establishing standing to sue and in seeking to represent a class.

2. ***With respect to the February 2008 Offering*: **In their Complaint, Plaintiffs do not allege any claims in connection with the securities issued in the February 2008 Offering. But discovery established that they in fact purchased and *profited* on the securities issued in the February 2008 Offering. Nonetheless, the district court found Plaintiffs appropriate to represent purchasers of the February 2008 Offering under the "class standing" doctrine articulated in *NECA-IBEW Health & Welfare Fund* v. *Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012).

The second issue presented is whether the Court should review the district court's erroneous application of the "class standing" doctrine where the Plaintiffs purchased and profited in the securities at issue and thus have no standing to sue.

*3 *THE RELEVANT FACTS*

Plaintiffs sued under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 relating to six public offerings by Deutsche Bank between October 2006 and May 2008 (ECF 34). The district court dismissed all claims. *In re Deutsche Bank AG Sec. Litig.*, 2011 WL 3664407 (S.D.N.Y. Aug. 19, 2011) (Batts, J.) and 2012 WL 3297730 (S.D.N.Y. Aug. 10, 2012) (Batts, J.). This Court unanimously affirmed. *Kaess* v. *Deutsche Bank AG*, 572 F. App'x 58, 59 (2d Cir. 2014).

While Plaintiffs' petition for a writ of certiorari was pending, the Supreme Court rendered its decision in *Omnicare, Inc.* v. *Laborers District Counsel Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), and remanded this action for further consideration in light thereof.

On remand, the district court permitted Plaintiffs to file a Third Consolidated Amended Complaint (ECF 98). Defendants moved to dismiss (ECF 103). The district court dismissed all claims as to the October 2006, May 2007, July 2007 and May 2008 Offerings. *In re Deutsche Bank AG Sec. Litig.*, 2016 WL 4083429, at *4 n.3, *21-*26, *36 (S.D.N.Y. July 25, 2016) (Batts, J.). As to the November 2007 and February 2008 Offerings, the district court dismissed all claims other than those alleging omissions in violation of Item 303 (known trends and uncertainties) and Item 503 (most significant risk factors) of Regulation S-K. *Id*. at *18-*19, *27-*28.

***4** Both the November 2007 and the February 2008 Offerings have since been fully redeemed at their original offering prices. From issuance to redemption, the trust preferred securities paid all interest and dividends on time and in full. Anyone who bought in the offerings and held through redemption has no injury.

The district court initially appointed Norbert Kaess and Maria Farruggio, a married couple, as Lead Plaintiffs for the November 2007 Offering, and Belmont Holdings Corp. as Lead Plaintiff for the February 2008 Offering (ECF 27). When it was later revealed that Belmont lacked standing to sue, its claims were dismissed (ECF 139), leaving the February 2008 Offering without any named plaintiff.

Kaess and Farruggio then moved for class certification, but only with respect to the November 2007 Offering (ECF 126). Thereafter, Plaintiffs' counsel filed an amended motion for class certification seeking to add a new Plaintiff (Sylvia Laiti) with respect to the February 2008 Offering (ECF 133). The district court disqualified Laiti and struck the amended motion for class certification (ECF 163). Even though they had asserted no claims with respect to the February 2008 Offering, Kaess and Farruggio then argued that they should be permitted to step in as class representatives for that offering under the doctrine of "class standing" articulated in *NECA-IBEW Health & Welfare Fund* v. *Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012). The district court permitted them to do so (ECF 163), and set a schedule leading to consideration of class certification (ECF 164).

***5** With respect to the securities issued in the November 2007 Offering, the relevant facts are undisputed. Prior to filing their lawsuit, on November 7, 2007 Plaintiffs bought 7,000 trust preferred shares issued in the November 2007 offering at $25.00 per share and on February 19, 2009, Plaintiffs bought an additional 6,400 of the same trust preferred shares at $9.03 per share. Plaintiffs filed this lawsuit on February 24, 2009. Plaintiffs sold all 13,400 shares on February 8, 2012 at $24.85 per share. Plaintiffs thus invested $232,792 and received back $332,990, for an aggregate *profit* of $100,198. While they owned these trust preferred shares, Plaintiffs also received over $88,000 in interest and dividends. These facts are admitted by Plaintiffs pursuant to Rule 36, and are thus "conclusively established" for this action. Fed. R. Civ. P. 36(b). *See* Gilman Decl. (ECF 172) at ¶ 11.

Under the applicable statutory damage formula, Plaintiffs have no compensable loss. *See* 15 U.S.C. § 77k(e) (crediting "the price at which such security shall have been disposed of after suit but before judgment"). However, the district court permitted Plaintiffs to fractionate their pre-suit purchase and fabricate a "minimal loss" by cherry-picking among their transactions, claiming a $0.25 per share loss on their first purchase of 7,000 shares while ignoring a $15.82 per share gain on their second pre-suit purchase of an additional 6,400 shares, stating: "Defendants' arguments [that Plaintiffs have no loss and thus lack standing] can be addressed at the Summary Judgment stage." (ECF 151).

***6** With respect to the securities issued in the February 2008 Offering, discovery established that Plaintiffs in fact bought those trust preferred shares and also made a *profit*. *See* Kaess Dep. Tr. at 207:24-208:20 ("I got more than I paid."). With only one purchase and one sale transaction, Plaintiffs could not fabricate even a minimal loss and conceded they "have not asserted any individual claims as to the February 2008 Offering." (ECF 176 at 25) But the district court permitted Plaintiffs to invoke the "class standing" doctrine articulated in *NECA*, and allowed them to seek to represent those who suffered losses in the purchases of securities issued in the February 2008 Offering. (ECF 151).

Following completion of discovery on class certification issues, Defendants moved to deny class certification. Plaintiffs cross-moved for class certification.

On October 2, 2018, the district court certified the above-defined plaintiff class as to both the November 2007 and the February 2008 Offerings, reiterating its preliminary ruling that Plaintiffs had a "minimal loss" on the securities issued in the November 2007 Offering, and that they could continue the action with respect to the February 2008 Offering under the doctrine of class standing. *In re Deutsche Bank AG Sec. Litig.*, 2018 WL 4771525 (S.D.N.Y. Oct. 2, 2018) (ECF 224).

REVIEW PURSUANT TO RULE 23(F) IS WARRANTED

Class representatives must be members of the class that they seek to represent. *See* ***7** *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 660 F.2d 9, 17 (2d Cir. 1981) (Friendly, J.) ("The named plaintiffs in a class action 'cannot represent a class of whom they are not a part.'") (quoting *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962)). Plaintiffs violate this bedrock principle twice over. Nevertheless, the district court certified them as appropriate class action representatives. Review at this time is warranted under Rule 23(f).

I. *THE STANDARD OF REVIEW UNDER RULE 23(f)*

Rule 23(f) of the Federal Rules of Civil Procedure provides:

> A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

"[P]etitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable; or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001). "[T]he Rule 23(f) standard is a flexible one that should not be reduced to any bright-line rules." *Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 76 n.4 (2d Cir. 2004). The Court "is given unfettered discretion whether to permit the appeal...." Adv. Comm. Note to Rule 23(f).

***8** The Supreme Court has spoken of the hydraulic pressure on defendants to settle that is imposed by the certification of plaintiff classes in securities litigation.[2]

Purported class actions alleging securities laws violations are commenced in this district with frequency. And with frequency, class certification is granted. The certified action proceeds along a relatively predictable path of expensive litigation, significant potential loss allegations, and most often, an eventual settlement. Certification of the class is, therefore, a crucial inflection point in such a case. Given the enormous ramifications of certifying a class - turning potential losses from relatively small amounts into potentially massive exposure - careful analysis of the factors under Rule 23 is required. This rigorous analysis is further required by Supreme Court precedent as well as by a judiciary calibrated to be fair and just.

George v. *China Automotive Systems, Inc.*, 2013 WL 3357170, at *1 (S.D.N.Y. July 3, 2013) (footnote omitted). Recognizing that "very few securities class actions are litigated to conclusion," *Hevesi*, 366 F.3d at 80, this Court has permitted Rule 23(f) appeals in a number of large securities class actions.[3]

This case presents a clear and clean opportunity for the Court to address two important and recurring issues in securities class actions: (i) whether plaintiffs who ***9** profited from their transactions may sue as class representatives; and (ii) whether *NECA* should be extended to permit plaintiffs who profited from their transactions and disavowed any claims concerning those transactions to represent those who suffered a loss. The relevant facts are either "conclusively established" pursuant to Plaintiffs' Rule 36 admissions, or are undisputed. Each question "is of fundamental importance to the development of the law of [securities] class actions and is likely to escape effective review ...." *In re Sumitomo*, 262 F.3d at 140.

II. *THE DISTRICT COURT'S ORDER IS QUESTIONABLE AND IMPLICATES FUNDAMENTAL LEGAL ISSUES AS TO WHICH THERE IS A COMPELLING NEED FOR RESOLUTION*

A. The Court should review the district court's erroneous determination that Plaintiffs who, prior to suit, made multiple purchases of the securities at issue and who sue under Sections 11 and 12 of the Securities Act of 1933 can ignore their profitable trades and overall trading profit in seeking to represent a class.

All of Plaintiffs' purchases of the securities issued in the November 2007 Offering were made prior to their filing suit. Looking at all of those purchases, Plaintiffs made a *profit* of over $188,000. It is only by counting some trades and ignoring all others that Plaintiffs fashion what the district court preliminarily referred to as a "minimal loss" (ECF 151; ECF 224 at 8, 19, 22-23).[4]

***10** But, because all of Plaintiffs' purchases are prior to their filing suit and within the certified class definition, the district court erred in permitting Plaintiffs to cherry-pick among them in order to fabricate a minimal loss. *See In re Vivendi Universal, S.A. Sec. Litig.*, 284 F.R.D. 144, 159 (S.D.N.Y. 2012) ("gains resulting from transactions occurring between the first materialization date and the end of the Class Period will be used to offset losses incurred during that very same period"); *Ross* v. *Warner*, 1980 WL 1474, at *10 (S.D.N.Y. Dec. 11, 1980) ("[T]he Court doubts whether plaintiffs who are challenging the adequacy of a registration statement are entitled to keep investing in the defendant's stock while enjoying a baseline price, locked in by the original complaint, as a guaranty against losses.").[5]

A plaintiff who makes multiple purchases of the issued securities within the class period – profiting on some, losing on others, yet profiting overall –should not be certified as a class representative. *See Gordon* v. *Sonar Capital Mgmt. LLC*, 92 F. Supp. 3d 193, 205 (S.D.N.Y. 2015) (denying class certification because, netting gains and losses, "the Court finds that [plaintiff] is subject to the potentially meritorious defense that he suffered no economic loss attributable to defendants' alleged wrongdoing.... The Court need not resolve this question here, however, ***11** as the inquiry at this stage is whether [plaintiff] is 'subject to unique defenses which threaten to become the focus of this litigation.'"); *Makor Issues & Rights, Ltd.* v. *Tellabs, Inc.*, 256 F.R.D. 586, 600 (N.D. Ill. 2009) (disqualifying class representative because plaintiff's gains "may far and away offset his loss," resulting in a defense that was "non-frivolous and unique to [the plaintiff]").

The Court has not had the opportunity to address the issue here presented, and the district courts in this Circuit need clear guidance. Whether Plaintiffs with an aggregate profit have standing to represent a class of those who lost "is of fundamental importance to the development of the law of [securities] class actions and is likely to escape effective review ...." *In re Sumitomo*, 262 F.3d at 140. Because the relevant facts are all conclusively admitted pursuant to Rule 36, this case presents a unique and appropriate vehicle for the Court to address this issue.

B. The Court should review the district court's erroneous extension of the "class standing" doctrine articulated in *NECA-IBEW Health & Welfare Fund* v. *Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012).

"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, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996).

***12** In *NECA*, the Court held that "in a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he 'personally has suffered some actual ... injury as a result of the putatively illegal conduct of the defendant,' and (2) that such conduct implicates 'the same set of concerns' as the conduct alleged to have caused injury to other members of the putative class by the same defendants." 693 F.3d at 162. It is submitted that *NECA* does not stand for the sweeping proposition articulated by the district court in this case. It should be read narrowly and specifically so as not to abrogate the constitutionally-mandated doctrine of standing, just as it has by other district judges in this Circuit:

> The Court has found that *NECA-IBEW* is frequently misread, usually, as here, in an attempt to create standing where standing does not exist. It does not stand for the sweeping proposition that an individual may represent absent class members with regard to claims as to which he or she has no individual standing, although that is how it is now sometimes cited.

Stadnick v. *Vivint Solar, Inc.*, 2015 WL 8492757, at *17 (S.D.N.Y. Dec. 10, 2015) (Forrest, J.), *aff'd,* 861 F.3d 31 (2d Cir. 2017). *See also Yi Xiang* v. *Inovalon Holdings, Inc.*, 2018 WL 4445114, at *7-*8 (S.D.N.Y. Sept. 18, 2018) (Marrero, J.) (quoting and following *Stadnick*).

In *NECA*, a "class standing" analysis was required because the plaintiff did not purchase certain certificates and lacked standing to assert claims on its own behalf with respect to them. *NECA*, 693 F.3d at 158. But here Plaintiffs did in fact purchase securities issued in the February 2008 Offering, and they realized a *profit* ***13** thereon. Because Plaintiffs profited in their purchase of the February 2008 securities, they lack standing to sue on those securities, and concede they "have not asserted any individual claims as to the February 2008 Offering." (ECF 176 at 25).

The requirements of the class standing doctrine are "distinct from the criteria that govern whether a named plaintiff is an adequate class representative under Rule 23(a)." *Retirement Board of the Policemen's Annuity & Ben. Fund of the City of Chicago* v. *Bank of New York Mellon*, 775 F.3d 154, 161 (2d Cir. 2014), *cert. den*., 136 S. Ct. 796 (2016).[6] The facts here are very different than the situation giving rise to the class standing doctrine in *NECA*. Because Plaintiffs actually purchased and profited and lack standing to sue on the February 2008 Offering, Plaintiffs should not be certified to represent those who may have lost.

We know of no decision applying the *NECA* class standing doctrine to persons who actually traded, and who realized a profit from trading, in the securities at issue. With respect to the February 2008 Offering, class certification should have been denied on that basis. The undisputed facts of this case and district court confusion over the parameters of class action standing under *NECA* make it an appropriate vehicle for the Court's immediate review.[7]

14 *CONCLUSION

The two legal issues presented herein are of fundamental importance in the litigation of class actions under the federal securities laws. The Court's ability to review these issues is all too infrequent given the customary travel of such actions. The facts here relevant to a determination of these issues are either conclusively admitted pursuant to Fed. R. Civ. P. 36 or are undisputed. This case therefore presents an appropriate vehicle for the Court's immediate review pursuant to Fed. R. Civ. P. 23(f). Defendants' Petition should be granted.

October 16, 2018

Respectfully submitted,

s/ Charles A. Gilman

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Footnotes

1 Petitioners are comprised of three groups: (i) the Deutsche Bank Defendants; (ii) the Individual Defendants; and (iii) the Underwriter Defendants. The Deutsche Bank Defendants are: Deutsche Bank AG, Deutsche Bank Capital Funding Trust VIII, Deutsche Bank Capital Funding LLC VIII, Deutsche Bank Capital Funding Trust IX, Deutsche Bank Capital Funding LLC IX, Deutsche Bank Capital Funding Trust X, Deutsche Bank Capital Funding LLC X, Deutsche Bank Contingent Capital Trust II, Deutsche Bank Contingent Capital LLC II, Deutsche Bank Contingent Capital Trust III, Deutsche Bank Contingent Capital LLC III, Deutsche Bank Contingent Capital Trust V, Deutsche Bank Contingent Capital LLC V and Deutsche Bank Securities Inc. The Individual Defendants are: Josef Ackermann, Hugo Banziger, Jonathan Blake, Anthony Di Iorio, Martin Edelmann, Hermann-Josef Lamberti, Rainer Rauleder, Peter Sturzinger and Marco Zimmermann. The Underwriter Defendants are Banc of America Securities LLC (n/k/a Merrill Lynch, Pierce, Fenner & Smith Incorporated), Citigroup Global Markets Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. Inc. (n/k/a Morgan Stanley & Co. LLC), UBS Securities LLC and Wachovia Capital Markets, LLC (n/k/a Wells Fargo Securities, LLC).

2 *See Dura Pharm. Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (recognizing that securities class actions can allow for an "*in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence"); *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 163 (2008) ("extensive discovery and the potential for uncertainty and disruption in [securities class actions] allow plaintiffs with weak claims to extort settlements from innocent companies"); *Amgen Inc.* v. *Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 474 (2013) ("[securities] class actions can entail a "risk of 'in terrorem' settlements").

3 *See, e.g., Arkansas Teachers Retirement System* v. *Goldman Sachs Group, Inc.*, 879 F.3d 474, 482 (2d Cir. 2018); *Waggoner* v. *Barclays PLC*, 875 F.3d 79, 92 (2d Cir. 2017), *cert. den*., 138 S. Ct. 1702 (2018); *In re Petrobras Securities Litigation*, 862 F.3d 250, 260 (2d Cir. 2017); *New Jersey Carpenters Health Fund* v. *Rali Series 2006-Q01 Trust*, 477 F. App'x 809, 811 (2d Cir. 2012); *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 27, 31 (2d Cir. 2006).

4 The district court's order characterizing Plaintiffs as having a "minimal loss" stated: "Defendants' arguments [concerning Plaintiffs' profits] can be addressed at the Summary Judgment stage." (ECF 151).

5 *See also Carlisle Ventures, Inc.* v. *Banco Espanol de Credito, S.A.*, 176 F.3d 601, 607 (2d Cir. 1999) ("Carlisle did not suffer compensable damages because it recouped its entire investment as well as a small profit, when it resold the Banesto shares."); *Commercial Union Assur. Co. plc* v. *Milken,* 17 F.3d 608, 615 (2d Cir.) ("The net result of these computations is that [plaintiffs] have not suffered compensable damages under § 12(2)."), *cert. den*., 513 U.S. 873 (1994).

6 Since *NECA*, the Court has refused opportunities to expand its reach and read *NECA* narrowly, cognizant of "the murky line between traditional Article III standing and so-called 'class standing.'" *Retirement Board*, 775 F.3d at 160; *see DiMuro* v. *Clinique Labs., LLC*, 572 F. App'x 27, 29 (2d Cir. 2014).

7 Even if Plaintiffs' trading in the February 2008 securities was ignored and a *NECA* class standing analysis were applied, Plaintiffs fail the first prong of the *NECA* standard because, as demonstrated above, Plaintiffs made a substantial *profit* from their pre-suit purchases of the November 2007 securities and have not suffered any actual damages.

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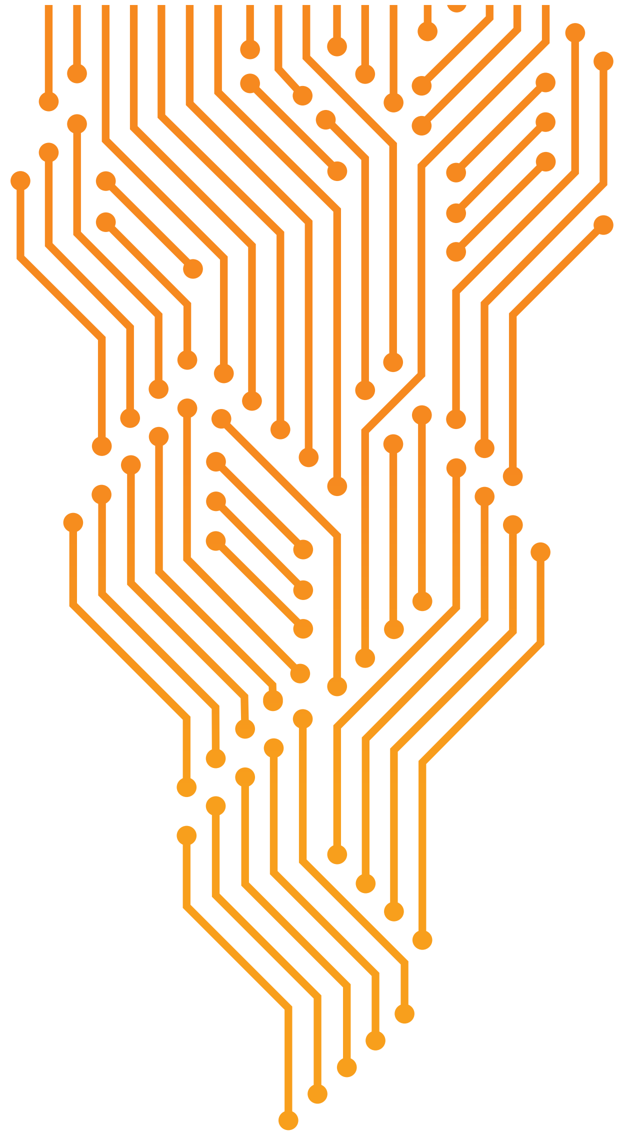

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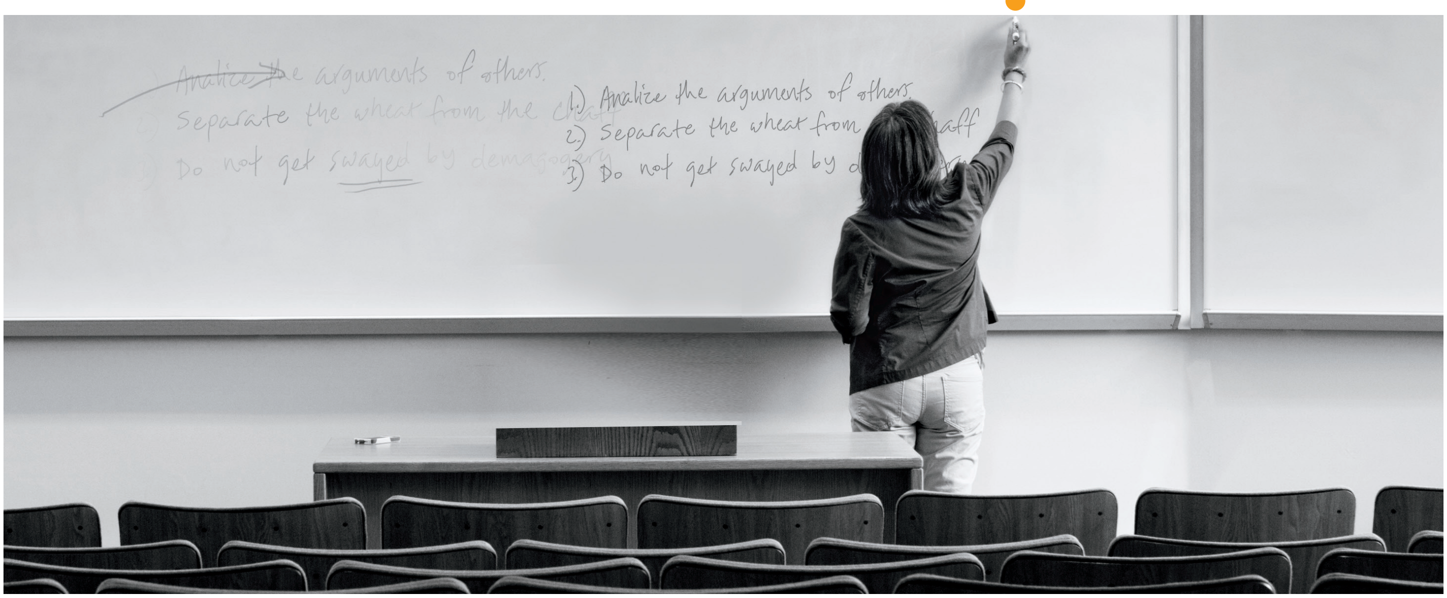

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