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October 22, 2003

The Honorable John D. Dingell
Member of Congress
2328 Rayburn House Office Building
Washington, DC 20515-2215

Reference: White Paper on Tying Violations and the Impact on **Small Businesses**

Dear Sir,

I am writing in further support of your efforts to bring BHC Anti-Tying violations to the attention of Regulatory Agencies and other interested parties. There have been several papers, published recently, on the topic of Tying. These papers address issues concerning Tying, mostly, if not solely, related to tying between the extension of credit and investment banking activities. Further, these papers address tying as it affects mostly large corporations.

I am enclosing a White Paper, which I have written, based upon my actual experience, on the affects of Tying, which more specifically focuses on the impact of Tying on small and medium businesses. However, the discussion is also applicable to large businesses.

I believe that my Paper complements other papers on the topic because it is based upon actual experience and touches upon areas affected by Tying, which are not addressed in any existing research on the subject. I believe, from a small business perspective, that the focus should be shifted from the concern that "*illegal tying is hard to prove*" to finding solutions to make "*illegal tying hard to impose*." Small businesses simply do not have the resources to litigate with a bank, to prove illegal tying, even if it is easy to prove in the particular case. For example, in the WebSci/Tare case, the violation of the Anti-Tying statute involved imposition of conditions which violated other Federal Regulations, most notably Regulation U. The Bank also fraudulently did not file Form FR-U-1 to conceal the true purpose of extending credit. Any tying that breaks the law cannot be deemed to be Permissible Tying. Yet, the complaint was filed in July 2002 and due to Fleet's deep-pocketed tactics, has not moved much. Most of the work on it had to be done by me, on a *Pro Se* basis. This example amplifies the disadvantages faced by small businesses in pursuing tying violations.

The retaliation from large banks when regulatory violations are involved can also be overwhelming, as my White Paper amply illustrates. I have been personally reduced from the owner of a $30 Million business to a virtually homeless person. WebSci was valued, by Fleet, at the time the Tying Conditions were imposed, at $30 Million. I am the sole shareholder of WebSci.

As I was about to send this document, I came across your observation quoting Comptroller Hawke (emphasis added) "*…Are we to believe that big, sophisticated borrowers are being coerced?*" My White Paper is particularly relevant in view of this comment, because for reasons unknown, the focus continues to be on "big," "large" and "sophisticated" borrowers as if small businesses do not need credit. If anything, small businesses are most vulnerable to the abuses of tying.

The disparity noted in the GAO's report "*between frequent allegations and few, if any, formal complaints*" widens further with small businesses. In fact, with small businesses, tying issues may not even rise to the level of an "allegation," let alone a "formal complaint," because small businesses may recognize tying as merely an unbelievably-restrictive and abusive contract, rather than an illegal one -- absent the awareness of the statute.

As my White Paper shows, it has been a hard and uphill battle for me to survive a large bank's numerous retaliatory actions, as my pursuit of Tying Claims against it led to discovery of even more serious regulatory violations. In the final analysis, it has become clear to me that small businesses can seek remedy against a bank, for violation of the Anti-Tying statute, only through litigation-time support from regulatory agencies. I now understand that the OCC has a policy of not intervening in an ongoing litigation. That policy, I believe, deprives small businesses of the possibility of prevailing in any Tying-Violation litigation against a bank. However, having said that, I must also add that attorneys/staff at the OCC have always been helpful in providing non-litigation guidance and directions to resources, whenever I have contacted them.

I have provided Part II of my White Paper, detailing the events, during the litigation against Fleet. Statements I have made, may sound hyperbolic. Therefore, all statements I have made are Under Penalty of Perjury and I have evidence to back them, which I will be sending shortly to the OCC as requested by it.

Also, I have forwarded the White Paper along with this letter to those on the attached list and others who have indicated an interest in this area.

I respectfully thank you for your efforts in addressing the issue of Tying, which is so important to all businesses, small and large.

Respectfully,

/s/ Ramkrishna S. Tare

The letter to The Hon. John J. Dingell and the enclosed White Paper was forwarded on or around Oct. 22, 2003 to the following, and other interested persons:

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Ranking Member
House Committee on Energy and Commerce
2328 Rayburn House Office Building
Washington, DC 20515-2215

The Honorable Richard Shelby
United States Senate
110 Hart Senate Office Building
Washington, DC 20510

Hon. W. J. Tauzin, Chairman
Committee on Energy and Commerce
2183 Rayburn House Office Building
Washington, DC 20515

Hon. Michael G. Oxley, Chairman
Committee on Financial Services
2308 Rayburn House Office Building
Washington, DC 20515
202-225-2676

Hon. Barney Frank
Committee on Financial Services
2252 Rayburn H.O.B.
Washington, DC 20515

Hon. William H. Donaldson
Chairman
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Hon. Alan Greenspan
Chairman
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Twentieth Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Barry C. Melancon, CPA
President and CEO
American Institute of CPAs
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New York, NY 10036-8775

Hon. John D. Hawke, Jr.
Comptroller of the Currency
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Washington, DC 20219-0001

Hon. David M. Walker
Comptroller General
U. S. General Accounting Office
441 G. Street, N.W.
Washington, D.C. 20548

Hon. Hector V. Barreto
Administrator
United States Small Business Administration
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Washington, DC 20416

Donald G. Ogilvie
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American Bankers Association
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Washington, DC 20036

James A. Kaitz, President and CEO
Association for Financial Professionals
7315 Wisconsin Avenue, Suite 600 West
Bethesda, MD 20814

Jennifer J. Johnson
Secretary of the Board
Board of Governors of the Federal Reserve System
20th Street and constitution Avenue, NW
Washington, D.C. 20551

Dr. Donald J. Mullineaux
Director, School of Management
DuPont Chair in Banking and Financial Serv.
Gatton College of Business and Economics
University of Kentucky
Lexington, Kentucky

Relationship Banking *or* Impermissible Tying?

The Impact on Small and Medium Businesses

Ramkrishna S. Tare

October 2003

A Practical Analysis of the impact of Tying on Small Businesses
With Case Example of the very litigation referenced in The Honorable John D. Dingell's letter involving FleetBoston Financial Corporation

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"A creditor is worse than a master; for a master owns only your person, a creditor owns your dignity, and can belabor that."

Victor Hugo, *Les Miserable* as quoted by Mary L. Azcuenaga, Former Commissioner, Federal Trade Commission, while commenting on The Fair Debt Collection Practices Act.

Introduction

There has been a surge in interest regarding violations of the bank anti-tying statute codified at 12 U.S.C. § 1972 et seq. and defining what constitutes a violation of this statute. The interest in this topic has come from both regulatory agencies as well as the media. However, this interest has focused primarily on tying as it affects large business customers. As a result, published studies have focused on the tying of the extension of credit to investment banking services, such as the underwriting of equity offerings and/or debt underwriting. These studies have not addressed the problems faced by small and medium businesses (hereinafter referred to as "small businesses") when tying of traditional banking product occurs with non-traditional or traditional banking products, from the bank or its affiliate.

This paper is presented in two parts. **Part I** addresses generic issues, which need to be considered, when determining if a violation of the anti-tying statute has occurred and the impact of tying on small businesses. It concludes with some suggestions to prevent banks from imposing impermissible tying conditions. **Part II** presents a "real world" example of how a bank morphed "Relationship Banking" to the imposition of impermissible tying conditions and the subsequent devastating impact on the business, its owner (even his daughter), employees and suppliers from the inception of the tying condition to an attempted liquidation of the entire business by the bank.

In this paper, "Fleet" refers to the Bank Holding Company FleetBoston Financial Corp. and its subsidiaries and/or affiliates. "Summit" refers to Summit Bancorp and/or associated affiliates and subsidiaries. Fleet is the successor by merger to Summit.

This paper makes references, among others, to the following documents:

- The Board of Governor's Proposed Interpretation and Supervisory Guidance on Tying (referred hereinafter as the "*Board's Proposed Interpretation and Guidance*").
- The OCC's White Paper titled "Today's Credit Markets: Relationship Banking, and Tying" released in September 2003 (referred hereinafter as the "*OCC Paper*")
- Dr. Donald J. Mullineaux's paper titled "Tying and Subsidized Loans: A Doubtful Problem" sponsored by the ABA and the ABA Securities Association (referred hereinafter as the "*Mullineaux-ABA Paper*").

Acknowledgment

Attorneys at the OCC and at the Federal Reserve provided valuable general (non-litigation) guidance, whenever they were contacted. Isidor Farash and Atal Bansal reviewed the draft and provided useful suggestions. The author also wishes to thank Steven Cunningham, Esq. who filed the Anti-Tying claims against Fleet and provided legal services, for a substantial period, on a contingency basis even after Fleet attempted to sabotage the litigation. The author's personal Anti-Tying and other legal claims against Fleet have been preserved, thus far, as a result of the exemplary efforts of Bankruptcy Trustee Robert Wasserman, Esq., despite intense pressure from Fleet to extinguish them.

The Hon. John Dingell's belief, and rightly so, that Impermissible Tying exists in the industry has kept the debate alive, providing relief and hope for businesses, and specifically small businesses, that preventive measures will be taken to eliminate or minimize this practice.

Part I: The Impact of Relationship Banking *or* Tying on Small Businesses

The Importance of the Impact of Tying on Small Businesses

To understand the importance of the impact of tying on small business, the following statistics from the SBA web site should suffice. Small businesses:

- Provide approximately 75 percent of the net new jobs added to the economy.
- Employ 50.1 percent of the private work force.
- Provide 40.9 percent of private sales in the country.
- Account for 39.1 percent of jobs in high technology sectors in 2001.
- Account for 52 percent of private sector output in 1999.
- Represent 97 percent of all U.S. exporters.
- Represent 99.7 percent of all employers.

Small businesses do not have the litigation resources to seek damage compensation from banks as a result of banks violating the Anti-Tying or any other statute. Therefore, prevention of such violations in the first place, is more important to a small business than the availability of any post-violation remedy.

The Start of "Relationship Banking"

"Relationship Banking" usually starts with a marketing call from a Bank, intended to discuss the credit needs of the business. This extension of credit is usually the Tying Product. The naïve customer is unaware of what may follow or the circumstances motivating the initial call by the bank. A customer may be satisfied with his current banking relationship and may have no reason to shop around for another bank. In fact, most successful small businesses are preoccupied with their core business and changes in banking relationships occur mostly as a result of a new bank making a sales call.

The initial sales call is made to analyze the existing banking relationship. Subsequent sales calls usually are made based upon this analysis to highlight how the new bank can improve upon those areas that the customer is currently dissatisfied with. It need not be a price issue. There is nothing onerous about such an approach as it is a standard sales technique: Identify the flaws of the competitor. Once the new bank has convinced the customer that it can rectify the problems that the customer is facing, however minor they may be, with the existing relationship, a confidence-building period begins. During this time the customer is bombarded with a series of calls and visits from different officers to convince the customer that there is enough manpower and management personnel dedicated to service the customer. The customer is convinced that the new bank "cares" and moves towards the transition from the existing relationship to the new one.

This transition could involve a series of irreversible steps or at least irreversible to the extent that reversing them would require substantial cost, time and efforts, something that a small business can ill-afford. Other steps in the transition involves actions and inaction which have a material impact on the existing relationship but may not involve any signing of documents. For example, the customer may provide more time and information to the new banker given the impending transition. Or the customer may ignore his existing relationship, or miss a deadline to submit financial reports, because he has received a verbal commitment and an assurance from the new bank and has no reason to believe that the new bank will revoke or modify this commitment. In a litigation, these irreversible steps may be difficult to prove, and this works in favor of the new bank.

The dynamism of transferring a credit relationship, from one commercial lender to another, cannot be done overnight. It involves a transition period during which there are steps such as calculating the precise payout to be made to the existing lender and then actually paying it out as part of the new credit agreement. The duration of the transition period can be easily controlled by the new lender. This provides a "window of opportunity" for lenders to introduce new tying conditions during this transition period.

The Evolution of Tying from "Relationship Banking"

Having started the transition to the new bank, based upon the representations made by the new bank, the customer is, unbeknown to himself, in a very precarious situation. He has initiated the transition based upon the assurances and representations made by the new Loan Officer. Based upon his prior experience with other banks, he has no reason to believe that terms and conditions could change from those represented during verbal negotiations and discussions.

The new Loan Officer, however, has other ideas. He brings along a sales person from another affiliate of the bank. This could be, for example, an insurance agent or a securities broker. Initially, the visit is a casual sales call in which the loan officer introduces his affiliate's officer. The customer, most likely, has an existing insurance policy or a brokerage account with a non-affiliate in place. The Loan Officer now insists that these products be moved to an affiliate of the bank. The customer is convinced by the new bank/affiliate that he could save substantially in brokerage commissions and insurance costs. The customer agrees to do so, foreseeing no adverse change in quality or price, in the services offered by the affiliate, compared to the services offered by his existing vendor. He also sees that he has no choice as he has already started the transition of his existing credit line. The Tying has already started. Typically, the Bank Officer knows about Tying Laws while the customer is unaware of such laws. No paper trail is left behind by the bank or its affiliate for the customer to be able to prove that the purchase of the Tied Product was not a voluntary choice of the customer.

The Transition from Voluntary Tying to Coercive Tying

The actual credit transaction has not yet been signed and yet the customer has already purchased two or more products from the bank's affiliates, even though they were never part of any Bundle Package that was offered to him when the commitment was made.

The Bank now sends the customer its loan agreement package. It consists of numerous documents. The Loan Officer assures the customer that it is a "standard agreement" and that most of his customers do not need legal counsel for such a transaction. The naïve customer believes that the credit contract presented to him is a standard boilerplate agreement that the bank has. The customer also believes that any representations made to him verbally would be accurately reflected in the contract. The loan officer usually focuses on core credit terms: Issues such as interest rate, amount of credit and availability or renewal criterion. The customer tends to focus on these issues, and ignores the tying issues, which are usually hidden in other parts of the document or even camouflaged as a collateral item. Legal counseling would cost the customer at least $20,000.00[1] given the volume of the documents presented. He has no reason to believe that a large bank would cheat or misrepresent material information to him. He or she has been in business for more than a decade and had banking relationships with other bank(s). Transitions have always been smooth in the past. The Loan Officer reviews the loan documents with him. All "standard" clauses are explained but no mention is made of the Tying Arrangements.

Later he finds that he now has additional restrictions: He cannot move the Tied Product out of the bank's affiliate to a competitor. There are other conditions which appear confusing in

[1] Even if legal counsel recommends that the transaction is overly burdensome and restrictive, the customer normally finds that it is too late to reverse his steps, at this stage, having initiated the termination of his relationship with his old lender.

the loan document and not as represented to him during verbal or e-mail discussions. He calls the loan officer who assures him that these are standard terms and that he need not be concerned. Faced with the impractical situation of reversing his transaction, which would now involve contacting the old bank and requesting re-establishing of the credit and also reversing other steps, he continues the contract on the assurance and assumption that the Tied Product would have no quality issues associated with it.

Because the Tying Products are purchased by the customer before the signing of the credit agreement, the Bank is able to maintain a position that there was no tying, as the customer had already purchased the other products prior to the extension of credit. What is not obvious from the credit transaction document is that the Bank had implicitly coerced the customer to purchase these additional products as a condition to the extension of credit. The bank had done so while the customer was transitioning from his existing credit line. All of the customer's choices by the time the credit transaction document are presented to him are virtually controlled by the new Bank. Going back to status quo, as it existed before, is a virtual impossibility at this stage for the small business.

Inverted-Tying: Evading 12 U.S.C. § 1972

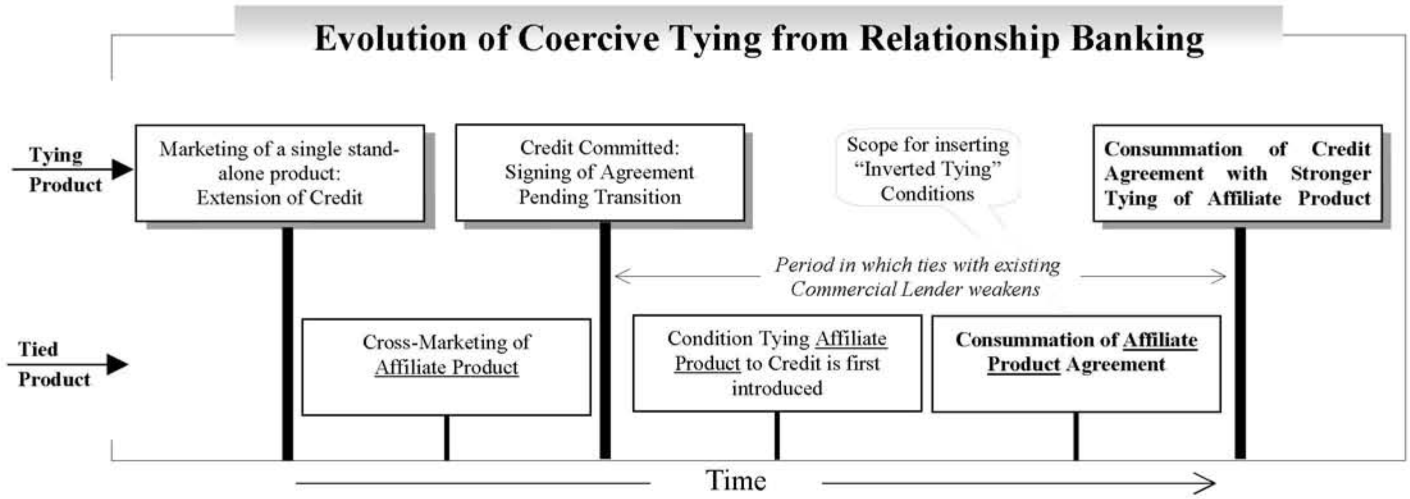
Banks often use their affiliates to evade the Anti-tying statutes. These statutes are applicable only to banks and not their non-banking affiliates. The *Board's Proposed Interpretation and Guidance* specifically states (pp. 25) that:

> "…section 106 generally does not apply to tying arrangements imposed by an affiliate of a bank. However, a bank may not participate in a transaction in which an affiliate has nominally imposed a condition on a customer that the bank is prohibited from directly imposing under section 106 if the affiliate was acting on behalf of, as agent for, or in conjunction with the bank."

However, in practice, it is possible for shrewd loan officers, in collusion with their counterparts in the bank's affiliate, to avoid the inclusion of the tying condition in loan agreements but instead "invert" them and have them included in the affiliate's Tied Product agreement. Most small businesses will never be able to understand the significance of such "inversion" as they may tend to look at the entire BHC as one organization and all contracts from the BHC, or any of its subsidiaries, as one big integrated contract. Indeed, <u>cross-marketing and cross-selling ("Relationship Banking") often blurs the distinction between loan officers of banks and salespersons from the bank's affiliates</u>.

To add to the confusion, business-cards of affiliates' salespersons often tend to confuse the customer. Sometimes, they carry the name of the Holding Company, which is often the dominating name. At other times they share a proper noun followed by other qualifiers. For example, "Summit Bank," "Summit Bancorp," "Summit Financial," "Summit Investments," or "Summit Insurance" would generally be understood by a small businessman as different <u>departments</u> of the same "Summit" corporation, rather than distinctly separate corporations, if indeed they are separate entities in the first place. Once this perception is in place, a combination of different agreements can be presented to the customer. Included in these agreements can be those from non-banking affiliates imposing tying conditions, which would otherwise not be permitted through the bank. The presentation of these agreements to the customer can be spaced temporally, and sequenced appropriately, by the bank/affiliate to eliminate any litigation-time allegation of collusive and/or coercive tying.

The following diagram illustrates an example of the evolution of Coercive Tying from "Relationship Banking":

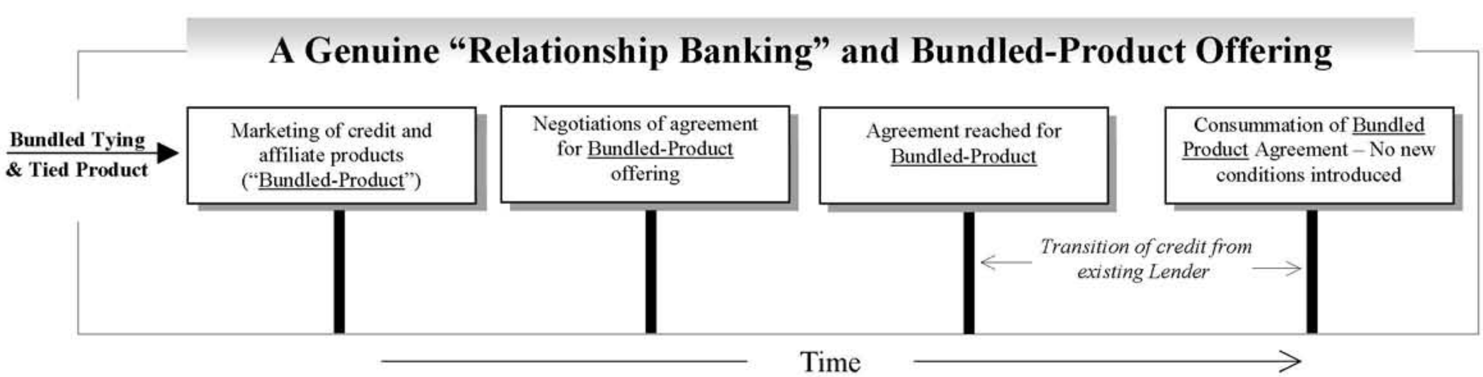


In this respect, credit must be given to the *Board's Proposed Interpretation and Guidance* in which it emphasizes the importance of "Factual Inquiry" and specifically clarifies that:

> "the timing and sequence of the offers, purchases or other transactions between the customer and the bank or its affiliates that form the basis of the alleged tying arrangement, and the nature of the condition or requirement itself, also may be particularly relevant in determining whether the customer was required to obtain (or provide) the tied product in order to obtain the desired product."[2]

Tying Restrictions Need not Affect Genuine Relationship Banking

Relationship banking can provide a camouflage for evolving into coercive and impermissible tying. However, that need not always be the case. Genuine "Relationship Banking" can be offered, even though it is the author's belief that it cannot be beneficial to a small business in the long run. What is comforting, however, is that an ethics-driven "Relationship Banking" can eliminate the coercion factor by introducing, concurrently to the customer, all products as a bundled offering. In addition, subsequent negotiations and the actual consummation of all agreements in the "bundled offering" should also take place concurrently as shown below:



[2] See Proposed Interpretations on Anti-Tying Restrictions of Section 106 of the BHCA Amendments of 1970. Docket No. OP-1158, pp 15-16.

The Ultimate Violation: Tying the Entire Credit for the purchase of the Tied Product

The ultimate violation by a bank of the Anti-Tying statute is carried out by extending credit for one purpose but then tying it for use, in its entirety, towards a Tied Product. For example, a bank extends credit for Working Capital and then imposes a tying condition, to have it used and remain tied, in its entirety, towards an inferior Tied Product such as securities investment in its brokerage affiliate.

At first glance, this appears to be only a theoretical possibility. However, Part II of this document provides a "real world" example of how a bank and its affiliate coordinated their activities to make this possibility a reality and almost got away with it, with impunity.

Preliminary Conclusions

From the foregoing scenario, the following should be clear:

- Cross-Marketing/Cross-Selling can evolve into Illegal Tying
  Cross-marketing and Cross-Selling provides a back-door entry which moves towards Impermissible Tying. A Tied Product is rarely offered synchronously or concurrently with the extension of credit. Typically, small business customers are totally unaware of Anti-Tying laws, let alone know the difference between voluntary and coercive tying. Such a customer will fail to understand the bank/affiliate's intentions, in sequencing the consummation of transactions, in the order in which they are carried out. This makes the imposition of Tying Conditions easy for a bank to impose.

- Banks have a "Window of Opportunity" to Introduce new Tying Conditions
  The dynamism of the credit business provides bank a transition period, the duration of which they can control, to introduce new tying conditions.

- Coercive Tying may be imposed in a way that is difficult to prove during litigation
  Banks inherently have an advantage over small businesses in that they have a better understanding of Anti-Trust, Banking and Tying Laws and a virtually unlimited litigation budget. In introducing Tied Products, the bank can ensure that there is no paper trail left to prove that the tying was coercive. The efforts required, to prove the bank's intention behind the sequencing of events such as the signing of Tied Products vis-à-vis the Tying Product, increases the cost of litigation further. Additionally, proving the irreversibility of steps such as moving away from an old credit relationship in view of a new one, based upon a commitment from the bank, require retention of emails, phone records or even tape recordings of phone conversations. Such records are rarely maintained by small businesses, who rarely foresee, let alone plan for a litigation involving gross violations of Federal Banking statutes.

- Banks can introduce Inverted-Tying Condition in Affiliate Products
  Banks can maneuver around 12 U.S.C. § 1972 et seq. and insert tying conditions in the Affiliate Product. Though the interpretation does not make this legal, the "Factual Inquiry" required to prove that it is impermissible tying, increases the litigation costs further, often beyond what a small business can afford.

- Banks possess inherent Convincing Power as well as Marketing Power
  Interestingly, the OCC states in its latest white paper, the *OCC Paper*[3] that "there is little evidence that banks have market power in the commercial loan market, especially for larger credits." The qualification of "especially larger credits" is telling. Banks possess market power and they can wield this power very easily with smaller businesses, which

[3] Today's Credit Markets, Relationship Banking and Tying, September 2003, pp 7.

often rely on only one major commercial bank for their credit needs. In conjunction with the conventional belief of small businesses that banks, and particularly national banks, would not lie or do anything illegal, the market power of the bank is enhanced significantly, resulting in Convincing Power that small businesses can easily fall prey to. Tying provides an easy mechanism for banks to leverage their marketing power in conjunction with their convincing prowess. It also allows them to set up systems to dominate and unduly control the assets of their customers.

Benefits beyond Pricing to the Bank Holding Company

Most studies on Tying violations, including the *Board's Proposed Interpretation and Guidance,* the *OCC Paper,* and the *Mullineaux-ABA Paper* have focused on the benefits of Tying to the bank or its affiliate in terms of direct benefits only, such as direct profits from the additional business.

However, there are numerous other tangible and intangible benefits that banks and their affiliates get out of illegal tying arrangements. For example, just before seeking an acquisition, a Bank Holding Company can seek additional business for all of its subsidiaries even if it is not profitable in the short term or involves impermissible tying. The assumption could be that the liability will flow to the acquiring Bank Holding Company or could be extinguished or dealt with later. The motive could solely be to dramatically increase the loan, brokerage and other portfolios to boost the size factor that could affect the stock-exchange ratio in an acquisition. Tying provides an easy mechanism to recycle credit within a BHC to boost the size factor, which is critical for evaluating the value of a BHC prior to a merger (Refer to Part II which provides an actual case involving the use by a parent company of recycled credit).

There are other motivational factors which influence violation of Anti-Tying laws. For example, bank officers are driven by their own commissions and often cross-market and cross-sell products generating "cross-commissions" which encourage impermissible tying. A bank's loan officer, who stands to personally gain substantial commissions for generating brokerage business for the bank's affiliate, may not hesitate to indulge in sales tactics which may result in coercive tying. Commission structures are, upon information and belief, not guided by anti-tying laws. In fact, cross-marketing and cross-selling is encouraged in the form of "Relationship Banking" as the *OCC Paper* states.

Traditional and Non-Traditional Banking Products

The statutory and regulatory exceptions makes tying permissible, under certain conditions, when the Tied Product is a traditional banking product. The *Board's Proposed Interpretation and Guidance* provides a non-exclusive list of what constitutes a traditional banking product. Unfortunately, the statutory and regulatory exceptions exasperate the situation for the small business even further -- not as much due to the exception itself but because of the loopholes this exception leaves for banks and their loan officers, that can easily be abused.

The *Board's Proposed Interpretation and Guidance* assumes the offering as a concurrently-offered integrated bundled package tying traditional banking products. In practice, the tying can occur asynchronously between traditional banking products beyond an integrated offering. For example, a loan officer can impose a restriction that the customer purchase *payroll services*[4] from the bank's affiliate but this restriction may not be made at the time the credit is offered. The bank may impose such a tying arrangement during the period leading towards the signing of the loan but after the customer has started the transition from his existing bank. The bank may also impose a tying arrangement at the time of the renewal of the credit. At such

[4] Listed as a traditional banking product under the Board's Proposed Interpretation

inopportune moments, the bank can easily leverage its negotiating power resulting in an anti-competitive sale of what could easily be an inferior Tied Product, even though the Tied Product is a traditional banking product.

The Bundled-Product agreement signed with the bank provides no indication of the sequence in which the Tying and the Tied Products were offered and thus makes it difficult to determine if coercion was involved and if so, to what extent.

Problem Not Addressed: Quality vis-a-vis Cost of Tied Product

An important problem associated with Tying is the quality of the Tied Product. The *OCC Paper* states:

> "Relationship Banking Can Result in Cost Savings for Both Banks and Their Customers"

Indeed, a properly structured, and concurrently bundled offering of products through "Relationship Banking" can provide initial cost savings. However, the much heralded "Cost Savings," as the only factor, cannot be sufficient to justify "Relationship Banking," absent sustained Quality of Service (QOS), associated with the bundled products. Also, the *OCC Paper* has addressed tying problems with respect to large customers only. As an example, the *OCC Paper* offers the following argument for a customer with underwriting and loan needs:

> "Potential borrowers also incur expenses in selecting a financial intermediary and transmitting to that firm the required, and possibly proprietary, information. Since this information can often be reliable and useful for a significant period of time, repeat dealings in the same product (e.g., loans) or in multiple related products (e.g. loans and securities underwriting) can generate savings for financial intermediaries and their customers."

First, even for large customers, there is a conflict issue associated with the purchase of such services (loans and securities underwriting) from the same BHC. A potential investor may apply a discount factor to offset the risk, arising out of such a conflict. This discount factor may offset any cost advantages associated with "Relationship Banking." Apart from the conflict issue, a single Commercial Lender may be likely to compromise the quality of the securities underwriting process, knowing that it controls the very credit -- without which the customer cannot survive.

For any business, large or small, seeking any product from a competing vendor has additional advantages. For example, the ability to use the information relied upon by one firm, and have it audited by a competing firm before it agrees to offer what could have been a Tied Product, can benefit both the customer as well as the product providers. It also makes it easier for the customer to shop for yet a third product or the same supplementary product (additional credit, for example) from yet another vendor. This is facilitated now because two competing financial institutions have already audited and approved the financial information of the customer, inspiring confidence in the customer's financial stability. In addition to enhancing competition, it results in safe and sound lending practices. Such benefits, associated with purchasing products from multiple vendors, become more evident as the number of products sought by the customer increases.

Fundamental to discouraging tying is the need to foster a quality and cost-driven competitive environment. Tying of both traditional and non-traditional banking products, discourages competition. From a small business perspective, tying camouflaged under the name of "Relationship Banking" can actually result in increased costs to the customer. Small businesses are significantly disadvantaged when they are enticed (and subsequently tied) into purchasing services such as payroll, brokerage or cash management from banks/affiliates, only to find out that these services are of an inferior quality compared to those they had come to rely upon from specialized vendors, at a more affordable pricing.

Exit Restrictions Tilt Unfairly in Favor of the Bank/Affiliate

Tying can be exacerbated further by the imposition of conditions which restrict the customer from any "meaningful freedom" to move the Tied Product or service to a competitor if the Quality of Service (QOS) is found to be inferior or deteriorates subsequent to the consummation of the Bundled Product offering. A bank[5] may argue that it has to meet a certain profitability hurdle rate, on a continued basis, in bundling products to offset what it may conceive to be a narrow spread on the extension of credit alone.

When such products are bundled through the concept of "Relationship Banking," the bank retains the right to put the loan in default if the customer does not maintain the "quality" of the financial health of his company. Reciprocally, the customer, however, is now allowed to terminate the use of the Tied Product, if the quality of the Tied Product is inferior or deteriorates for reasons beyond the control of the customer.

A bank uses some criterion to evaluate its return on capital loaned, such as Risk-Adjusted Return on Capital (RAROC) to compute the profitability hurdle rate, over the period of the extension of credit. However, the customer loses or never has control over the continued returns from his investment in the Tied Product. His control ceases as soon as the credit transaction is consummated.

As an example, a bank can illegally tie the requirement that the customer use brokerage services of its affiliate when extending credit (or legally tie the requirement that the customer use Payroll Services offered by an affiliate). This situation is further exasperated when the customer is coerced into <u>continued use</u> of the services of the affiliate even with a deteriorating QOS. For example, the brokerage affiliate may be unable to resolve securities discrepancies or the Payroll Service may lack a good leave/vacation management subsystem.

To make matters worse, the affiliate can impose additional restrictions later, which were beyond those used to compute the initial profitability hurdle rate. Furthermore, a misguided salesperson at the affiliate may, knowing that the customer is "stuck" with the Tied Product, manipulate the relationship to benefit his own commission, with no consideration to the bank's profitability hurdle rate or the requirement of a "safe and sound" banking practice.

While a bank can easily afford to exit an entire "bundled product" relationship, the customer's choices, especially those of a small business, in abruptly transitioning a range of services, including credit, <u>at one time</u>, may be limited. This transition can be imposed on the customer by the bank's initiative or even by the bank's threat unless the customer is willing to agree to additional tying arrangements. Even if the customer wants to initiate a transition, it becomes overly burdensome to do a simultaneous transition of multiple products and services. This is yet another drawback of Tying. The inconvenience in such a transition, however, is alleviated substantially, if the customer is allowed, <u>at any time</u>, to make an objective decision, to continue, <u>separately and independently</u>, any of the Tied Products. Tying, permissible or impermissible, seriously restricts such choices because the bank will allow only bulk transition with its "either keep all products or find another bank" approach.

Therefore, there should be <u>mandatory provisions</u> in Tying Arrangement Agreements allowing customers to exit the use of Tied Products. To offset the "cost savings" and the "profitability hurdle" that a bank claims to have associated with bundled products, a pre-negotiated penalty can be imposed with such partial withdrawals initiated by the customer.

[5] Or the parent if the bundled products are from a bank and an affiliate since the profitability is now based upon the combination of two products from two different subsidiaries of the BHC.

The effect of Mergers on the Board's Proposed Interpretation and Guidance

The *Board's Proposed Interpretation and Guidance* should further clarify the definition of a "bank" and its "affiliate," when the purported parent of a set of entities, which are loosely tied together, is acquired by a Bank Holding Company. For example, the Summit Bancorp acquisition by FleetBoston Financial Corporation involved a hierarchical structure (Fleet) acquiring a complex "Enron-style" corporate structure of Summit Bancorp. Here is an example of Summit Bancorp's corporate structure,[6] as it existed at one time, in a dynamically shifting structure of its loosely coupled entities:

> Summit Financial Services Group, LP (the Company) is a full service broker/dealer. During 2000, Summit Financial Services Group, Inc. merged into Summit Financial Services Group, LP. The Company is 99% owned by Summit Bank, PA (the Parent), which is a wholly-owned subsidiary of First Valley Corporation, which is a wholly-owned subsidiary of Summit Bancorp (Summit), and 1% owned by Bethlehem Holdings, LLC, which is a wholly-owned subsidiary of Summit Bank, PA.

When a tying claim is brought by a plaintiff against the successor of this complex structure, the tying claim can be brought against the Bank Holding Company. But how is one to distinguish the "bank" and its "affiliate" after a merger of such a complex structure?

Market Power is not required to engage in Anti-Competitive Tying

Courts have consistently held that under the BHCA, "even if evidence of market power and the effect of interstate commerce are insufficient to state a cause of action under the Sherman Act, a litigant can still recover under Section 1972 of the BHCA." See JST Properties, 710 F. Supp. At 1449 (quoting Naegle, The Antitying Provision: Its Potential is Still There, 100 Banking Law Journal 138, 143 (1983)).

Therefore, it appears that the issue is moot, whether market power exists or not, when a bank violates the Anti-Tying statute.

Litigation Power is a Bank's Primary Weapon against Anti-Tying Violations

What a bank possesses in its defense against a small business is Financial Power, which gets translated into Litigation Power. This is a particularly significant factor when a claim is brought, based upon the violation of the Anti-Tying statute because the violation of this statute imposes high civil penalties in addition to treble damages, which the customer may seek.

A misguided bank's ability to, possibly improperly, influence the litigation of a small business is amplified in Part II. The very nature of a credit transaction, when it goes sour, provides a bank immediate access to the finances of the small business, thus choking its ability to litigate against the bank and encouraging a judgment in favor of the bank, either through default or by leveraging constraints on the small business's ability to retain paid attorneys.

This problem is particularly serious for small businesses and their owners who often invest their entire life's savings in their business and are personal guarantors to any credit extended to their business. When an illegal tying claim is brought, the bank can immediately call in a loan default, even if such a default is caused by the illegal tying itself. Once a loan is put into default, the bank can quickly overwhelm a first-time litigant with legal maneuvers. The business and the business owner are left at the mercy of the bank, as their very ability to litigate any claims under the Anti-Tying Statutes can be scuttled by the bank.

[6] As defined in one of the reports produced by Fleet during litigation-driven discovery.

Even if the bank does not manage to get control of the customer's collateral and finances, a bank can prolong the litigation to extend it beyond the financial ability of the customer.

In view of these facts, no practical solution exists for the small business, if the bank violates the anti-tying statute. Most small businesses would not be aware of the violation in the first place. Banks benefit from the fact that banking law is a specialized field, which is both expensive to litigate and nearly impossible to handle on a *Pro Se* basis. Therefore, the solution lies in putting appropriate preventive measures in place rather than seeking a cure after the violation has occurred. The OCC's enforcement attorneys should be proactively involved in resolving violations brought to their notice and should intervene, or at the minimum, investigate, such claims <u>even if litigation has commenced</u>. In the absence of any litigation-time intervention from the OCC in investigation or intervention, banks will tend to prevail in any litigation, against small businesses, by virtue of their financial/litigation power, leaving the impression that Impermissible Tying simply does not exist.

Banks, such as Fleet, use the non-intervention policies of regulatory agencies, to their advantage. They can represent to the Court that a customer does not have a right of private action when regulations are violated and then represent to the regulatory agencies that the matter is in litigation and that therefore they should not intervene. While the Anti-Tying Statute itself provides a right of private action, often such claims are associated with other regulatory violations, such as violation of Regulation U, for which there may not be a right of private action. Banks can easily dodge both private and regulatory actions, unless the regulatory agencies are willing to intervene in an ongoing litigation or at the minimum, investigate the regulatory violations.

Relationship Banking and Bankruptcy

The very concept of "Relationship Banking" for a small business translates into anti-competitiveness because unlike a large corporation, small businesses have a credit relationship with one and often only one commercial lender. Purchasing other bundled products from the same lender puts the small business at the mercy of the lender, during financially difficult times. This situation is particularly exasperated when the small business seeks bankruptcy protection. Here's why:

With Tying encouraged, under Title 11, a creditor's committee, if one is formed, is dominated by one creditor, the one that has offered multiple products under the camouflage of "Relationship Banking."

Other creditors, who most likely will have relatively small claims in the proceedings, often do not participate in bankruptcy proceedings because the cost of participation, including the retention of attorneys to pursue the claim does not provide a business justification to pursue the claim.

The Bankruptcy Proceedings are dominated by this one commercial lender leaving the business at the total mercy of the lender in sharp contrast to the provisions of Title 11, which exists to provide protection from creditor<u>s</u> so that the business can be reorganized.

This single dominating creditor can move to have a trustee imposed and can improperly influence the selection of the trustee, even going so far as to have a trustee imposed who represents the creditor in credit transactions. This is not a far-fetched scenario. It actually happened in the WebSci bankruptcy as described in Part II. Additionally, this single creditor can control the entire cash collateral of the Bankruptcy estate and impose unreasonable conditions. Included in these conditions could be the refusal to allow the Bankruptcy Estate to retain attorneys to pursue the Anti-Tying or other such claims.

As a result of "Relationship Banking," even if it is allowed through permissible tying, the protection under Title 11 is rendered impotent for a small business and actually provides complete control of the business to the one and only one Commercial Lender. This situation can be easily avoided if multiple competing financial institutions participate in the bankruptcy proceeding of the small business. This results in the formation of a balanced creditors committee, one that can work towards a true reorganization of the business and pursue Anti-Tying or other claims against the creditor.

Tying vis-à-vis Financial Privacy

Tying is closely inter-twined with a parallel debate that is raging on the issue of Financial Privacy and Consumer Protection. By its very definition, a Commercial or Consumer lender has a right to seek, and invariably gets detail financial information when lending credit. The restriction to not disseminate this information, to non-affiliated parties, albeit a rational and logical one, provides an unbeatable but unfair advantage to the bank's affiliate over competitors when tying a product. This results in an undeniably anti-competitive offering of products.

As an example, a bank can loan $5 Million to a customer and despite knowing that it will need the monies for Working Capital in the immediate or very near future, ask its affiliate to make a sales call to sell other products, including non-traditional bank products, using the very monies purportedly loaned for Working Capital. This information is not available to non-affiliate parties and thereby provides an anti-competitive advantage. Beyond the illegality of initiating such a sales call, it is access to the credit and cash availability information, without any added cost, and not "Relationship Banking" that provides the anti-competitive advantage to the affiliate. Tying does not foster competition. It suppresses it.

The conflict between Tying and Restriction on the dissemination of Financial Privacy information should be resolved not by loosening the dissemination of Financial Privacy but by tightening Anti-Tying laws.

Also, from a small business perspective, the finances of shareholders of the corporation are closely scrutinized as they often are personal guarantors to the commercial credit offered to their business. This could blur the line between commercial and consumer credit, at least from the application of any restrictions under Financial Privacy regulations. Therefore, any interpretations of the Anti-Tying statute, at least from a small business perspective, should also include a discussion on the impact vis-à-vis the Financial Privacy and Consumer Protection regulations.

Influence of Tying Violations: Beyond the Customer

When a bank violates the anti-tying statute, the results are far reaching. At a minimum, the small business can be shut down, if the tying involves a substantial sum. Most credit transactions, between a bank and a small business, usually involve the use of almost all, if not all, of the assets of the business as a collateral and the business owner as the guarantor.

When the tying violation results in a collapse of a business, jobs are lost. Suppliers are affected. In turn, their employees and their suppliers are affected. In short, the damage multiplies several times as it ripples through employees and other suppliers, leaving behind a trail of broken families and bankrupt businesses.

The anti-tying statute allows any person who is injured in his business or property to sue. Specifically, 12 U.S.C. § 1975 states:

> Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the

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defendant resides or is found or has an agent, without regard to
the amount in controversy, and shall be entitled to recover three
times the amount of the damages sustained by him, and the cost of
suit, including a reasonable attorney's fee.
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There appears to be no case law on the definition of what or who constitutes "Any person." However, the plain language of the statute appears to allow any party to sue and seek compensation. While this is somewhat consoling to those affected, the unfortunate reality is that neither the small business nor its employees or suppliers are aware of Anti-Tying laws or have the resources to litigate against a bank. Therefore, the well-intentioned statute is virtually ineffective for those associated with a small business-borrower. Again, it is prevention that should be the focus of the regulatory agencies rather than the remedy available to those injured.[7]

Comments on the *Mullineaux-ABA Paper*

The author respectfully disagrees, from a small business perspective, with some of the views on Tying provided in the Mullineaux-ABA Paper. (By Dr. Donald J. Mullineaux from the University of Kentucky, in his paper titled "Tying and Subsidized Loans: A Doubtful Problem." The paper was supported by the American Bankers Association and the ABA Securities Association.)

Dr. Mullineaux finds it "difficult to rationalize why banks or BHCs would use loans as part of a tying scheme, since the strategy is more likely to destroy than enhance BHC value." On the contrary, a BHC, through its subsidiaries, can easily leverage the tremendous power that comes with the extension of credit, to tie the customer with non-credit products, of a lower quality, but higher profitability to the BHC or its non-banking subsidiaries. That is sufficient to enhance the BHC value.

Dr. Mullineaux restricts his discussion of the Tied Product to the underwriting market. Even there, in a single-tied-product scenario, tying is beneficial to the BHC. Dr. Mullineaux does not address the impact of tying multiple diverse products to the extension of credit. As more products are tied, the benefit to the BHC increases exponentially as it retains more control over the finances of the customer.

Dr. Mullineaux assumes that products are presented concurrently when offered as a bundled package through "Relationship Banking." He assumes that a BHC will not sequence the offering and tying of products, to suit itself, and to put it in a leveraged position to negotiate with a customer. There is no evidence offered, and indeed there is no business rationale for a BHC to do otherwise. Part II of this paper shows how a bank and its affiliate used sequencing of transactions to impose an impermissible tying arrangement.

Dr. Mullineaux offers an informative look at the different computational methods employed by banks to measure the profitability hurdle rate. In simple terms, he argues that a bank should be allowed to offset the risk of extending credit by generating fees in less riskier offerings, such as cash management. This may work well in a paper formula for reducing the RAROC ("risk-adjusted return on capital"). However, the exposure to a bank if the loan defaults is significantly higher and cannot be offset by any fees through other products. For example, a misguided salesperson from an affiliate may use this formula to justify offering multiple products

7 It is instructive to note that the inherent advantage, which economically powerful entities have in court, usually results, from their conducting litigation, driven by the financial limitations of the adversary — which in turn motivates them to prolong the litigation. Banks have an even bigger advantage. The fact that Banks make use of depositors' cash to finance such litigations, should not be overlooked.

to the customer. However, as more of these products are offered, sometimes even when they are not needed, or on more ominous and inflexible terms, the customer's probability of defaulting on the loan itself, as a result of purchasing these products, may actually increase. This could easily offset the advantages offered by some short-term generation of low-risk fees for the BHC.

As an example, a bank may like to generate fees for its brokerage affiliate to increase its overall RAROC. However, if the conditions imposed are so ominous that the entire credit extended is required to be tied in the brokerage account, then the advantage of an increased RAROC can soon be offset by the dramatically increased risk by the customer defaulting on the loan, as a direct result of the tying conditions. In such a scenario, the RAROC computation may enable the bank to overcome the profit hurdle rate. However, it would result in unsound and unsafe banking practice, which can be fatal to the small business.

Also, Dr. Mullineaux's study is not targeted for the small business and accordingly its scope should be restricted to the customer category it addresses: Customers of commercial lenders who also have a need for debt/equity underwriting.

Proposed Suggestions to Protect Small Businesses from Tying Violations

The solution to alleviate the affect of the violation of the Anti-Tying statute on a small business is prevention in the first place and this is perhaps the most important issue that the author seeks to emphasize. A post-violation remedy is less meaningful, absent the resources to seek it in the first place. From a small business perspective, certain measures and internal controls at a bank can be enforced with relative ease. The *Board's Proposed Interpretation and Guidance* also specifies basic supervisory guidance for Banks to ensure compliance with the anti-tying prohibitions.

This guidance could be augmented to include the following measures and Internal Controls at a bank:

- Banks should have a well-documented "Safety and Soundness" consideration policy when tying traditional and non-traditional products to small businesses.
- There should be strict guidelines, as part of a bank's internal control mechanism, to ensure that bundled products are offered concurrently and not sequenced to result in involuntary or coercive purchase of a Tied Product.
- The amount invested or associated with a Tied Product should never be allowed to exceed a certain percentage of the extension of credit.
- The documented purpose of extending credit by a bank should be strictly adhered to. A bank's and/or a BHC's internal controls should be well documented to prevent the use of credit towards a Tied Product, if it is different than the documented purpose of extending the credit.
- Cross-selling commissions to loan officers should have built-in controls to discourage impermissible tying.
- <u>Banks should be required to provide a small informative booklet to customers on anti-tying laws</u> whenever a bank offers a bundled product or services, traditional or otherwise, to the small business. This booklet should provide contact information of the OCC or other enforcement agencies.
- The <u>Profitability Hurdle</u> argument of banks in imposing Tying, camouflaged as "Relationship Banking," can be addressed by requiring banks to have a <u>mandatory</u> clause for customers to discontinue Tied Products at any time. This clause could include a pre-negotiated penalty payment for the customer to terminate the use of the Tied Product. This compromise can significantly mitigate abuses associated with Tying. In most cases,

the customer's loss will be limited to the payment of the penalty. This will also allow banks to reduce their liability under the Anti-Tying statute.

- A lender's <u>internal documents</u> for evaluating credit should be available for forwarding to non-affiliates, upon the request of the customer. This will eliminate the duplication of costs of evaluating the financial strengths and weaknesses of a customer by a non-affiliate and thereby fostering competitiveness.
- Small Businesses should be considered "individuals" to the extent that any enhanced restrictions on banks for imposition of tying arrangements on individuals should be applicable to their business. At the minimum, such enhanced restrictions [8]should be applicable if the credit is personally guaranteed by the shareholders of the small business.[9]
- There should be a default imposition of a minimum liability on the bank to be compensated to the small business customer and/or a minimum civil penalty if the bank fails to put the required controls in place with respect to anti-tying laws, when offering credit.
- <u>Strict</u> sanctions should be imposed for retaliatory actions by the bank, or its officer, when an informed customer reports a violation to a regulatory agency, the bank's executive management or members of its Board of Directors.

Conclusion

While tying has been misunderstood or over-simplified in theoretical studies, this paper focuses on <u>practical issues</u> based upon <u>real experience</u>. Tying can start with a simple credit offering and initially evolve into a bi-product Tying Arrangement. Thereafter, the creditor can tie more products or make the existing tying conditions more restrictive, in favor of the creditor.

The impact of Tying should be analyzed throughout the duration of the relationship, not just on the basis of the credit agreement. This should include an analysis of factors, which influenced the borrower during the initial offering of credit, which was subsequently morphed into impermissible tying camouflaged as voluntary tying. Changes in credit agreements at the time of the renewal of credit should also be analyzed.

The impact of Tying on the customer during bankruptcy is also important. A single large creditor can easily control bankruptcy proceedings, and thereby even extinguish tying claims against the creditor. Tying facilitates such situations.

Tying of even traditional banking products, from a bank or its affiliate, though allowed under the *Board's Proposed Interpretations and Guidance*, can also be detrimental to the customer. Improper and/or Impermissible Tying can benefit the BHC only in the short term, and could be a result of misguided loan officers and salespersons. A BHC's Internal Controls, therefore, play a critical role.

There can, however, be advantages associated with the offering of bundled products through genuine Relationship Banking. To ensure that Relationship Banking does not morph into Improper Tying, proper procedures and controls should exist at all levels. These procedures and controls should be administered through Statutory, Regulatory and Internal Bank Controls. **Such Relationship Banking can lead to WIN-WIN agreements beneficial to all parties**.

[8] "Furthermore, because individuals typically have less bargaining power and may be less financially sophisticated, individuals may be more susceptible to subtle pressure by a bank that encourages the customer to purchase a non-traditional product from the bank or an affiliate." *Board's Proposed Interpretation and Guidance* at pp. 29.

In the interest of brevity, the author has addressed only the proverbial tip of the iceberg of the affect of illegal tying but what has been addressed should suffice to provide a glimpse into the seriousness of this issue. Impermissible tying exists and is practiced by banks. Studies fail to admit that most small businesses which have failed as a result of tying may have never known that they were victims of an illegal practice. Even if they know of the violation of the anti-tying statute, after the damage has occurred, financial constraints make it virtually impossible for them to litigate such claims against a big financial institution.

Defining and providing specific guidance to banks can go a long way in eliminating the abuses of tying. Banks should ensure that there are strict internal controls, that detailed records of relationship-banking are maintained, and that procedures and policies are well-defined to monitor any inadvertent or intentional tying violations. However, no matter how strong and detailed the guidance is, ultimately it is the emphasis on actual compliance with this guidance by the bank and its employees that will play the dominant role in reducing impermissible tying practices.

Part II provides a solid example of a tying violation, the extent to which a bank will go to extinguish such claims, and the devastating affect it can have on a small business and others associated with the business.

About the Author

The author is the founder and sole principal of WebSci Technologies, Inc. He received his B.Tech. in Electrical Engineering from the Indian Institute of Technology and his Masters in Computer Science from the New Jersey Institute of Technology. Before starting WebSci, he worked at AT&T Bell Laboratories (now Lucent Technologies) in Murray Hill, New Jersey. During that time, he published numerous technical papers and two books for the McGraw-Hill Company.

WebSci, prior to its relationship with Summit/Fleet, employed more than 250 employees worldwide, through its offices in the U.S., Russia, Romania and India.

The author speaks numerous Indian languages fluently, can communicate well in Russian, and has studied French for many years.

[9] See Swerdloff v. Miami Nat. Bank, 584 F.2d 54 (5th Cir. 1978) in which the Court observed that the Swerdloffs as 100% shareholders of the borrowing company and as guarantors were as much customers of the bank as their company.

Part II: Violation of the Anti-Tying[10] Statute - A "Real World" Example

In this paper, "Fleet" refers to the Bank Holding Company FleetBoston Financial Corp. and its subsidiaries and/or affiliates. "Summit" refers to Summit Bancorp and/or associated affiliates and subsidiaries. Fleet is the successor by merger to Summit.

Year 1999: WebSci Technologies Continues its Decade-long Success

In the year 1999 WebSci had a credit line with the Bank of New York (referred herein also as "BONY"). The relationship was stable and WebSci continued to be a profitable company. WebSci's continued growth over a decade was driven by consulting services and software projects and not by the dot-com boom. On or around May 25, 1999, Summit made an offer of a line of credit of $2,500,000 to WebSci. WebSci declined the offer. However, Summit Bank continued to call on WebSci to solicit business. In the year 1999, WebSci had gross annual sales exceeding $13 Million. The corporation had also initiated a global expansion plan, to make use of low cost software development overseas, and had opened offices in Russia, India and Romania. It had also ventured on an ambitious R&D effort, budgeting and investing millions, in the development of an innovative software. In short, the company was poised for a quantum leap forward.

Year 2000: Summit Approaches WebSci Again

In the first quarter of 2000, Summit Bank once again approached WebSci and began communication with the principal to solicit credit business. Summit offered WebSci a $5 Million line of credit. During the one year, since the $2.5 Million credit offer was made by Summit, WebSci's revenues had increased but definitely not doubled.

WebSci found the offer attractive because it was double the existing credit line it had and it was also double the credit line that Summit itself had offered only a year earlier. It also appeared to provide the additional Working Capital WebSci needed for its ambitious growth plans. At this time, when the commitment was made, there were no impermissible tying conditions imposed, no cross-marketing or cross-selling efforts involved. It was a single product with no bundled offerings of any kind, traditional or non-traditional. This situation was short-lived and started changing gradually.

Summit starts Cross-Marketing Efforts

Soon after WebSci was offered a $5 Million extension of credit and had initiated the termination, through action and inaction, with its existing credit line at BONY, Summit also initiated a major sales drive, targeted at WebSci, from its brokerage and investment affiliates/subsidiaries. Many brokerage salespersons, portfolio managers and brokers visited WebSci and did so on a continuous basis even providing a list of recommended stocks to purchase.

Cross-Marketing Evolves into Cross-Selling and ultimately into Impermissible Tying

Summit gradually introduced new requirements into the offering of the credit line. First it made it a requirement that WebSci move its brokerage account to Summit. WebSci obliged as it could not have anticipated any problems, subsequent to the move, in maintaining its brokerage account with Summit. Besides, WebSci thought that if the brokerage service at Summit was not going to be satisfactory, WebSci could move the brokerage account to any other brokerage firm.

[10] …and other regulatory violations by FleetBoston Financial Corp. and its subsidiaries and/or affiliates.

WebSci was not informed of any restrictions on the Summit brokerage account at the time Summit made a commitment to extend credit.

After WebSci was given a commitment from Summit for the credit line, it did not continue to strengthen its existing relationship with Bank of New York, as this relationship was going to be of no consequence. With this background, new tying conditions were gradually introduced by Summit. The following email provides an example of how the Impermissible Tying Conditions were slowly imposed.

============================== ***Start of Email*** ==============================

Subject: Questions and Terms and conditions
Date: Fri, 14 Jul 2000 12:25:49 -0400
From: relias@SummitBank.com
To: anant@websci.com
CC: tare@websci.com

At this time, WebSci has no idea of who or what the OCC is. But the email sent to WebSci is clearly intended to give the impression that the bank is concerned about regulations and regulatory compliance and specifically about the OCC.

In order to complete our credit underwriting, could you please provide answers to the following questions. I apologize if they seem insignificant, but, I have auditors and the OCC looking at our credit files. Life in a regulated industry!!

1) Income Statement - in 1999, direct costs and G&A increased primarily due to increased consultant salaries and administrative salaries. Why did this occur?

2) Sale of Voice Response System - why was this sold, i.e. did it not fit strategically or was it losing $$$? Who was the former employee it was sold to? What impact will it have on 2000 revenues and profit?

3) Building Plans - in Note 2 of the financials, it mentions $61M of engineering fees relating to the possible construction of another building. What is the status? And could Summit assist?

4) 1999 Revenue - Besides the $11.5MM in revenue to AT&T, who comprised the balance of the $3MM in revenue? Any other major clients or is it spread out amongst a few?

5) Tax Bill - could you please provide a recent tax bill showing the block and lot for the Princeton location?
6) Foreign Sales - what % of sales in 1999 came from abroad?

Fleet later claimed that the loan was in default as of January, 2001.

The following is a summary of the terms of the Facility:
Amount: $5,000,000 Revolving Credit Facility, available from Dec-Feb, decreases to $4,000,000 other times of the year. NO annual clean-up provision.
Maturity Date: August 31, 2001

Security: Blanket lien on all assets of WebSci, including Retail Brokerage Account. Minimum of $2MM to be kept in brokerage account at all times.

Rate: Choice of LIBOR plus 1.5% or Prime minus 1/2%

Guarantor: R.S. Tare

Procedure for Borrowing: NO monthly borrowing base required. Just provide an aging quarterly. Daily advances and paydowns allowed.

Fees: Documentation will be done by Summit, no outside attorney will be used. Legal bill will be approximately $1,000.

Please provide answers to the above questions at your earliest convenience. Also, I still need a recent receivable aging.
If the above terms are acceptable, I can have Summit counsel start working on the documents right away and we could close within a week or so. Please let me know.

============================== ***End of Email*** ==============================

The impermissible tying became even stronger through another email from the loan officer stating that:

> "In order to close the credit facility, my [loan officer] credit area is requiring that the $2MM be placed in a managed account at Summit"

There were also representations made in emails by the loan officer stating:

> "After closing (and paying off BONY), amounts could be borrowed and invested at your desire."

However, when the loan documents were finally provided, after the cross-marketing and cross-selling had occurred, they included several impermissible, and very tight, tying conditions which were never discussed before. The conditions imposed in the credit agreement, which was signed around September 15, 2000 now included (emphasis added):

> **3.4** The market value of securities in Securities Account No. 77028395 shall at no time be less than $2,000,000.00.

and

> **3.5** "Borrower will not withdraw any money or property from any securities investment account, nor sell nor offer to sell nor otherwise transfer any portion of the Collateral. <u>If no Event of Default has occurred, Borrower may make trades in such account but in no event may the proceeds of any such trades be removed from such account</u>, and Borrower may exercise any voting or consensual rights with respect to such Collateral."

The Impermissible Tying Conditions

<u>The new conditions, stated in the preceding paragraph, imposed in the credit contract were hidden among numerous documents presented during the signing of the contract</u>.

By Fleet's estimate, there was more than $4 Million in the <u>brokerage account</u> at the time the conditions were imposed. At that time WebSci was offered, for <u>Working Capital,</u> an initial credit line of $4 Million (to be increased to $5 Million later). So, on the one hand, Fleet represented to WebSci, in the loan documents that it had prepared, that the loan was for Working Capital and in the same contract it put a condition that more than $4 Million, at the minimum, were to be <u>tied</u> in its brokerage account and that the value of this portfolio could never fall below $2 Million**.** To understand the intensity and impact of this tying arrangement, one has only to know that WebSci's annual sales at that time were about $13 Million.

The tying condition was a two-edged sword. On the one hand, WebSci was forced to maintain a brokerage account <u>at the affiliate</u> having a "market value" of $2 Million. On the other hand the brokerage account already had a value of more than $4 Million and could neither be liquidated nor moved out of the brokerage account for use as Working Capital, a condition that was not obvious and definitely not discussed <u>ever before</u> or at the time the "standard" contract was consummated. All WebSci could do was to trade in the account. The more than $4 Million tied in brokerage was a significant percentage of the credit extended. The more than $4 Million tied in brokerage was also a significant percentage of WebSci's gross annual sales of $13 Million. WebSci wanted to use it, shortly afterwards, as Working Capital for the growth of its business. The more than $4 Million invested also included several investments based upon securities recommended by Summit, even though the trading was done by WebSci.

While these conditions appear to be monstrous in scope, they were enforced and <u>enforced even beyond the conditions actually in the contract</u>.

The "Factual Inquiry" Requirement

Perhaps the most important lesson to be learned here is that a credit agreement by itself cannot provide evidence if impermissible tying has occurred. As the *Board's Proposed Interpretation and Guidance* rightly states: "Factual Inquiry [is] Required"[11] and explains:

> "As the foregoing illustrates, the specific facts and circumstances surrounding the bank customer relationship often will be critical in determining whether a prohibited condition or requirement existed and whether the condition or requirement was imposed or forced on the customer by the bank or was volunteered or sought by the customer."

It further goes on to add

> "The timing and sequence of the offers, purchases or other transactions between the customer and the bank or its affiliates that form the basis of the alleged tying arrangement, and the nature of the condition or requirement itself, also may be particularly relevant in determining whether the customer was required to obtain (or provide) the tied product in order to obtain the desired product."

One could not have said it better than the Board. The factual inquiry, in this litigation, clearly provides evidence that Fleet violated the provisions under the Anti-Tying statutes.

Impermissible Tying: Breaking the Law Further to conceal it from Regulators

WebSci had made it clear to Summit in an email dated on or around July 31, 2000 that investing in securities was not its main business and that it did not want to buy securities from borrowed monies. Pertinent segment of the email sent to Summit is reproduced below (emphasis added):

> From: r_tare@att.net
> To: relias@SummitBank.com
>
> …Also, investing in securities is not our main business. I would like to purchase some additional securities as the market dips, average them out and then sell some at a reasonable juncture, shortly, so we have only amounts that were paid for in cash in our securities account. I would prefer not to carry any margin or borrowed monies into our securities account.[12]

After the credit was extended, Summit was required by law to file Form FR-U-1 "when a bank extends credit in excess of $100,000.00 secured directly or indirectly, in whole or in part, by any margin stock." This form also requires the bank to provide the following information and abide by Federal laws (copied verbatim from the form):

> "List the margin stock securing this credit; do not include debt securities convertible into margin stock. The maximum loan value of margin stock is 50 per cent of its current market value under the current Supplement of Regulation U."

Summit failed to do so and Fleet later admitted, during litigation, to this failure, calling it a "minor regulatory violation." What Fleet references as a "minor regulatory violation" is a serious violation of the law and form FR-U-1 itself states (emphasis added):

> This report is required by law (15 U.S.C. §§ 78g and 78w; 12 CFR 221)

[11] See ¶ 3 "Factual Inquiry Required" at pp 15.

[12] Capital Temporaris, Inc. v. Olsten Corporation, 506 F.2d 1211 "Person aggrieved has to establish that he has been required to purchase something which he does not want to take." Further indication that this was not a voluntary tie-in.

Further, 12 C.F.R. 221.106(e) puts the burden on the bank of not accepting a customer's statement in good faith. Therefore even if Form FR-U-1 was presented to WebSci, which it never was, and even if WebSci had indicated that the loan was for Working Capital, Fleet knew that the impermissible tying conditions imposed by it on the extension of credit coerced WebSci into a different purpose for the loan, or at least a large portion of the loan. Specifically, 12 C.F.R. 221.106(e) states (emphasis added):

> (e) The interpretation set forth in Sec. 221.101 contains an example of the application of the ``good faith'' test. There it was stated that ``if the loan is to be made to a customer who is not a broker or dealer in securities, but such a broker or dealer is to deliver margin stock to secure the loan or is to receive the proceeds of the loan, the bank would be put on notice that the loan would probably be subject to this part. It could not accept in good faith a statement to the contrary without obtaining a reliable and satisfactory explanation of the situation''.

Fleet was fully aware of the "situation" at the time the credit was extended. In fact, Fleet paid a significant portion of the alleged credit line to its own brokerage affiliate upon signing of the credit agreement. As a technology company, WebSci, at that time, had no knowledge of such laws or guidelines. WebSci relied solely upon Fleet's representations. Fleet knew that WebSci would rely upon Fleet's representations. Fleet evaded presenting form FR-U-1 both to WebSci and the Federal Reserve System, both of whom were to be presented this form in accordance with the law. Fleet did so to conceal the violation of the Tying Arrangement, a violation which was intended to have WebSci use the credit for a different purpose than what Fleet and WebSci had agreed upon.

Fleet's concealed intention, at the time of extending credit, was further confirmed during litigation. WebSci was provided, probably accidentally, by Fleet, an email dated April 23, 2001, in which an officer of Fleet (Gina Hamilton) had written to several other officers (James Noonan, Gary Tyrell, Robert Turnipseed and others), referring to the WebSci loan (emphasis added):

> "We loaned the money essentially to fund this portfolio. Historically the company had invested cash short-term and then liquidated the investments to pay the line down. We had increased the company's line from \$2.5MM (with BONY) to \$5.0MM so that the extra cash could remain invested."[13]

The collusion between the bank and the brokerage affiliate in offering a non-traditional banking product as the Tied Product is undeniable. Fleet had offered the Tied Product so that the cash from the credit could remain invested in the Tied Product. This intention of the bank to extend credit so "the extra cash could remain invested" was not made known during the "Relationship Banking" activities of the bank and its affiliates and it is the most flagrant form of violation of the Anti-Tying statute.

How the Bank Trivialized the Tying Conditions

Summit knew that WebSci was a small business with focus on technology and consulting services. The representations Summit made to trivialize the credit transaction with impermissible tying arrangements included statements, made in emails sent by the loan officer, in guiding WebSci, that there was really no need for legal representation for signing the credit documents:

[13] Areeda, Phillip, *Antitrust Law* at ¶ 1752 (1991) "There is no tie for any antitrust purpose unless the defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one" (emphasis added).
Referenced from the *Board's Proposed Interpretation and Guidance* document.

> "Many of my clients do not utilize outside counsel especially when standard bank documents are used and the transaction is simple."
>
> "Fees: Documentation will be done by Summit, no outside attorney will be used. Legal bill will be approximately $1000"

If indeed the contract was standard, then Summit has probably imposed such impermissible tying arrangements on many other customers. If not, it was a fraudulent misrepresentation. Either way, representations made to WebSci were that these documents were "standard bank documents." This instilled confidence in WebSci that indeed there was no need to seek outside counsel.

Tied Product Dominates the Tying Product

Fleet offered $5 Million in credit to WebSci for Working Capital. But as a result of the impermissible tying violation, WebSci involuntarily had to keeping invested (what Fleet erroneously claimed to be) $6.8 Million in securities. The Tied Product had overtaken the Tying Product. The Tying Product, the extension of credit, was a traditional banking product offered by the bank. The Tied Product, brokerage services, was a non-traditional product with an affiliate.

The $6.8 Million amount, claimed by Fleet, to have been monies invested by WebSci in securities, was an erroneous computation, resulting from Fleet's failure to resolve discrepancies due to system-wide problems in its brokerage system and compounded with the auto-swap tying with WebSci's other accounts, and problems in Fleet's Internet-driven trade entry system. While each of this problem was itself sufficient to render any computation incorrect, the combined effect resulted in outrageous computations. The destruction of brokerage complaint records by Fleet was no coincidence.

The Tightening of Involuntary Tying

As time passed, the tying conditions tightened even more and the situation only deteriorated further.

- When WebSci wanted to liquidate its portfolio in a falling market, the brokerage affiliate refused to do so.
  If it was indeed a collateral, then the bank had an obligation to protect its value. Ultimately, after a significant amount of pleading and after informing the brokerage affiliate that WebSci would report to the SEC, the brokerage affiliate and the loan officer allowed WebSci to liquidate $2 Million of the portfolio. By this time, the Loan Officer was himself not sure if his employment with the bank would be terminated as a result of the Fleet merger. Significant number of securities discrepancies still remained unresolved and WebSci was forced to liquidate $2 Million in securities, unsure of the correctness of the portfolio.
- When WebSci realized that the quality of the brokerage services was deteriorating rapidly, WebSci wanted to move the brokerage account to another brokerage firm.
  Summit refused to allow WebSci to do so, even though WebSci was willing to sign any document that Summit needed to ensure that the collateral requirement, if any, were maintained. The quality of the brokerage service was deteriorating sharply as brokers were terminated in view of the pending merger and during the merger. In fact, by the time the merger was consummated, most, if not all of the brokers were terminated.
- Throughout the relationship, it became obvious that Summit wanted to ensure that WebSci invested the entire monies in Summit's portfolio, even as WebSci reminded Summit brokers and the bank that the monies were loaned for Working Capital.

- The involuntary tying situation was exasperated further because the tying involved an auto-swap arrangement. Therefore, the brokerage affiliate could swap funds easily from WebSci's account at the bank. This situation was further exasperated because WebSci, at the time, relied upon Summit/Fleet's representations of financial statements made, especially as the principal of the company was overseas for a substantial period during this time.

- Summit's brokerage statements showed that WebSci had invested $6.8 Million, at one time, in the Tied Product even as WebSci was questioning the fundamentals of such a possibility given WebSci's financial status at the time. The core problem was that Summit had an auto-swap arrangement between the Tied Product and the Tying Product, giving it control that would not have been possible otherwise. <u>Prior to the year 2000, WebSci had invested not more than $200,000.00 in securities at any time</u>.

The Inferior and Deteriorating Quality of the Tied Product

The quality of the Tied Product, the brokerage service at Summit's affiliate, was inferior and began deteriorating further shortly after the credit agreement was signed. This is evident from the following:

- Inability to resolve discrepancies
  Summit was unable to resolve trade execution discrepancies. Subsequently, during the State Court litigation, a certified broker, Ms. Heather Brown, examined the evidence presented by Summit and found[14] that Summit had system-wide problems in their trade execution system, which could have affected a large number of customers who could be unaware of it.

- The Freezing of the Portfolio
  Summit subsequently froze WebSci's portfolio because of the problems encountered in the system. Later in the litigation, Fleet took a different position asserting that the brokerage account was frozen because WebSci had defaulted on the loan.

- The total failure to retain records in accordance with SEC Regulations and NASD Rules 17a-3 and 17a-4.
  Summit and later Fleet failed to maintain brokerage records and specifically brokerage complaint records, in accordance with SEC regulations and NASD rules 17a-3 and 17a-4. In fact, complaint records, which should have been present, as evidenced from brokerage tape recordings presented by Fleet itself during litigation, were destroyed. Even the brokerage tape recordings produced by Fleet were faulty and often redacted.

- The lack of manpower
  On multiple occasions, brokers who were asked to resolve brokerage discrepancies, complained about lack of manpower as Fleet continued to terminate Summit brokers and other employees.

- "Chaos and Turmoil" during the merger with Fleet.
  Later during State Court litigation, at least two officers of Fleet, including the supervisors of WebSci's loan officer, confirmed that there was chaos and/or turmoil during the merger.

[14] Immediately after she provided the certification, Fleet's attorneys retaliated by making threatening calls at her place of work, making statements intended to give her the impression that they could jeopardize her employment.

- The uninformed transition to Fleet's brokerage: Quick & Reilly
  When the brokerage account was transferred to Fleet's brokerage subsidiary, Quick & Reilly, no information was presented to WebSci. Much later, Fleet started forwarding statements of the frozen account to WebSci.
- The "pretty face" Accounts Executive in charge of the WebSci brokerage Account.
  The brokerage Accounts Executive assigned to the WebSci account was Stephan Murphy. Fleet never refuted this information and in fact this was confirmed from several documents presented by Fleet in which his name was listed as the brokerage Account Executive for WebSci. Yet, he was never available for resolution of brokerage complaints. Later when deposed, he asserted that he was "only a pretty face" for the account.

Refraining WebSci's "Meaningful Freedom of Choice"

In addition to violation of other provisions of the Anti-Tying statute, Fleet also violated 12 U.S.C. § 1972(1)(E) by <u>further implicitly</u> refraining WebSci from obtaining another product from a competitor of the bank or of an affiliate in order to obtain credit. While WebSci could open another brokerage account with a competitor, it was a materially moot option because Fleet had ensured that WebSci had a substantial amount of credit tied in Fleet's brokerage affiliate which it could not move out. Therefore, Fleet had <u>materially refrained</u> WebSci from obtaining brokerage services ("another product") from a competitor of its brokerage affiliate. By tying a substantial amount of the credit in Fleet's affiliate, WebSci did not "have a 'meaningful freedom of choice' in deciding whether or not to purchase the allegedly tied product from the seller."[15]

The "Collateral Argument" Offered by Fleet

Fleet's argument that the brokerage account was used as collateral is rendered moot, for many reasons, including the following:

- Fleet intentionally concealed that the brokerage account it asked WebSci to open at Fleet had a <u>purpose significantly different than its use as a mere collateral</u>. The failure to present Form FR-U-1 to WebSci or file it with the Federal Reserve, and the subsequent revelation of the internal email provides incontrovertible evidence to prove this.
- Fleet fails to admit that "Factual Inquiry" revealed that the timing of the opening of the brokerage account at Fleet's subsidiary, and <u>the imposition of subsequent tying conditions referencing this very account, were undeniably and inextricably tied to the extension of credit</u>.
- If *arguendo* the brokerage account was to be used merely as a collateral, it was Fleet's responsibility to protect its value through "safe and sound" banking practice. Fleet's tying conditions did not meet this requirement. Additionally, after Fleet froze the account and took control of it, it had an added responsibility to protect the collateral. Again it failed.
- The tying conditions imposed by Fleet jeopardized <u>all the other collateral</u> also because almost all the funds, and according to Fleet even more than the credit extended, that were to be used for Working Capital, were <u>tied</u> and had to "remain invested" in the brokerage account, stifling WebSci's growth.

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[15] <u>Tic-X-Press, Inc. v. Omni Promotions Co.,</u> 815 F.2d 1407, 1416-17 (11th Cir. 1987)

Tying vis-a-vis Violation of Other Federal Regulations

The Tying Condition imposed by Fleet resulted and/or included the flagrant violation, by Fleet, of other Federal Regulations.

- Fleet violated Regulation U[16], as confirmed by a certified broker. Fleet claimed that there was about $6.8 Million invested in Fleet's brokerage account at one time, even as Fleet asserts that it had loaned WebSci $5 Million in credit. Other brokerage statements would further confirm that Regulation U was violated on numerous occasions, by Fleet.
- Fleet also violated Federal Law by not presenting to the customer or filing with the Federal Reserve, Form FR-U-1 to concealing its true intention for extending credit.
- In imposing the tying conditions as part of a requirement for the extension of credit, Fleet also violated 12 U.S.C. § 371c and/or 12 U.S.C. § 1972, yet again, by not offering "comparable terms" to WebSci as it had offered to one of its affiliate ($25 Million non-collateralized loan to its affiliate. The original transaction document, not the copy, was marked for destruction).

The violation of several Federal Laws/Regulations, in the imposition of Tying Conditions, cannot, as a matter of law, make any Tying Permissible.

The Small Business Disadvantage in Litigation with Fleet

Fleet had retained the services of the law firm of Buchanan Ingersoll in the State Court litigation. Fleet, through their attorneys, used abusive and intimidating tactics, intended to obstruct justice, during the litigation with WebSci. These tactics, which were particularly effective on WebSci, because WebSci is a small company, included the following:

- **Fleet destroyed evidence.**
  Fleet destroyed evidence and did so intentionally. This is discussed later in more detail.
- **Fleet withheld evidence during litigation.**
  Fleet, and/or their attorneys, withheld evidence, and did so intentionally. Later Fleet sought Summary Judgment based upon evidence withheld and destroyed. Proof of spoliation of evidence surfaced after the granting of partial Summary Judgment.
- **Fleet tampered with a witness.**
  Heather Brown, a certified broker, provided a certification through WebSci's attorneys stating that the brokerage system at Summit was faulty and that it could and should have affected other customers who may not be aware of it. Within hours of receipt of this certification, Fleet's attorneys contacted her at her work and, according to her account, intimidated her with irrelevant questions such as issues about her employment contract with her employer. Fleet contacted her directly, even though her certification was authenticated and presented by WebSci's attorney. Subsequently she provided a certification confirming the intimidation by Fleet's attorneys.
- **Fleet's attorneys resorted to intimidation and made a mockery of the justice system.**
  One of the attorneys for Fleet, Mr. Louis T. DeLucia, for example, forged the signature of Supreme Court Justice Scalia, on a document of material importance, later stating that he did so in jest. On yet another occasion, Fleet's attorneys reminding an employee of his ethnic background, threatened to call the F.B.I. when he had gone to deliver some

[16] In litigation, Fleet asserted that WebSci did not have a right to Private Action but, upon information and belief, failed to inform Regulatory Authorities of the violation or take follow-up actions.

documents. The attorneys demanded that the employee open box(es) full of documents in front of the attorneys. There was no genuine reason to do so as the attorneys knew that the documents were expected from WebSci and had reasons to believe that the person was from WebSci. If indeed there was a genuine doubt, they could have easily called WebSci to confirm rather than intimidating one of its employees. Clearly this was one of Fleet's pattern of abusive and harassing strategy to intimidate a small business.

Later when WebSci brought these incidents to the attention of Fleet's Senior Counsel, Gary Michael, Esq. in New Jersey, there was no response offered to WebSci.

- **Fleet flagrantly violated conflict of interest ethics.**
  Fleet concealed that the first attorney that was retained by WebSci, maintained a conflict of interest vis-à-vis Fleet. This attorney withdrew representation of WebSci, less than a week before an important motion (Order to Show Cause) was entered by Fleet, admitting a conflict of interest with Fleet. Fleet abused the situation even further by leveraging WebSci's undefended position, by having an *Ex Parte* Order entered that finally resulted in the imposition of a Fiscal Agent on WebSci. WebSci was denied due process of law as a result of Fleet's unethical and abusive tactics. From thereon Fleet controlled WebSci's finances.

  This conflict-of-interest abuse was later repeated in bankruptcy and, upon information and belief, has been Fleet's strategy with other litigants. Also, the author has evidence of this practice by Fleet with other litigants, especially in New Jersey.

- **Fleet Illegally "Back-dated" at least one Contract**
  When Fleet found that one of the contracts involved in the Tying Arrangement was not signed by Fleet but its date had material importance, Fleet's loan officer signed it during litigation and back-dated it to a date that suited Fleet and did so without WebSci's permission or without informing WebSci. This was admitted during the deposition of one of Fleet's officers, who was a witness to this incident, and who, upon information and belief, was subsequently either terminated or resigned.

Fleet's Motivation: Beyond the Profitability Hurdle

What started as a litigation involving lender liability claims and violation of the Anti-Tying statute soon revealed evidence of Summit's and later Fleet's numerous illegal activities, some with criminal penalties. It also provided the likely motivation that Summit had in violating the Anti-Tying statute. Discovery and research revealed the following:

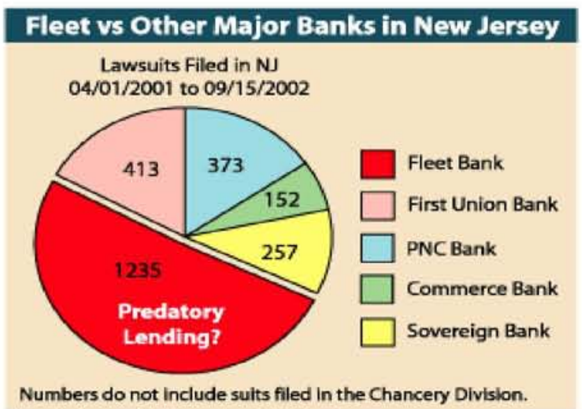
- **Pre-merger goals of Summit**
  Summit, prior to its merger with Fleet, had issued numerous loans, consumer and commercial, with the intent to boost its loan portfolio prior to the merger. The goal was to seek a better stock-exchange ratio by virtue of the size of its loan portfolio. That explained why Summit would double the credit offered to WebSci over a period of 12 months with no material change in WebSci's finances to justify this doubling of credit.
  The intention to offer credit to a customer, and then recycle it to an affiliate, served multiple purposes. In addition to the conventional benefits to the bank and the affiliate by virtue of getting more business, it also helped Summit to increase its loan, as well as its brokerage portfolio.

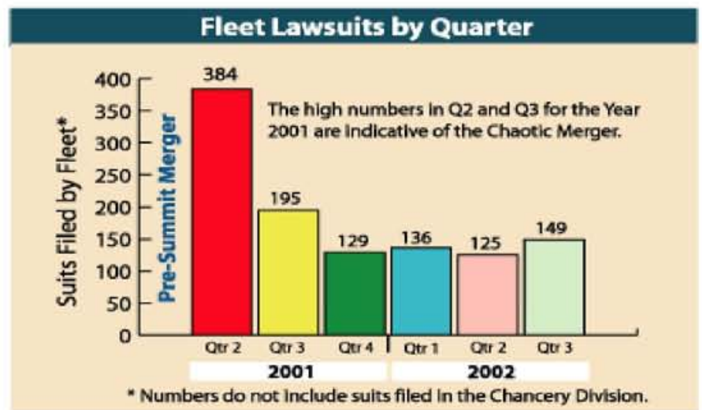
  While a $5 Million loan alone may not be adequate to have an affect on the stock-exchange ratio of a multi-billion dollar transaction, when this practice is repeated with hundreds of customers (in fact, there were, upon information[17] and belief, more than a thousand lawsuits filed by Fleet in connection with transactions arising out of pre-merger loans issued by Summit), the amount quickly multiplies. And that is precisely what Summit did: Issue hundreds of loans quickly with the sole intent of boosting its loan portfolio.

- **Post-merger actions by Fleet**

  After the merger, having benefited from these loans, the same senior management of Summit, who now worked under Fleet and were part of the strategy, upon information and belief, started indiscriminately putting these loans into default. This would normally not have been detected but for WebSci's suspicion, based upon what appeared to be an unusual practice for a bank to extend credit for Working Capital and have the amount tied, against the will of the customer, in brokerage services, at virtually all times.

  WebSci got data on Fleet/Summit's litigation from the New Jersey Automated Court Management System (ACMS) and analyzed it. Basic analysis yielded the following result:





* Data from an independent third party source.
Fleet also leads by a BIG MARGIN in average number of lawsuits per branch in NJ.

In the quarter prior to the merger, Summit initiated very few lawsuits. However, in the quarter immediately after the merger, there was almost an **eight fold increase** in the lawsuits and about a **300%** percent increase in lawsuits filed in subsequent quarters, compared to the average number of lawsuits in the two quarters prior to the merger. This data did not include lawsuits filed in the Chancery Division, which if included, would make the statistics significantly worse.

Further, Fleet had the largest number of lawsuits filed by and/or against it, both on an absolute basis, as well as on a per branch basis, among all banks in New Jersey.

WebSci's principal then started to communicate with other victims of Fleet and was appalled by the abusive misconduct of Fleet's officers with small businesses, who could not afford to litigate against Fleet, even though the evidence tilted heavily in favor of the customer. Among them were businesses who complained how Fleet held their payroll hostage so that they would release Fleet from all claims, doctors whose medical practice and real estate associated with it was foreclosed on, based upon frivolous technicalities, senior citizens who were made homeless even as Fleet refused to provide them the loan

[17] Information based upon data from the ACMS (Automated Court Management System) of New Jersey Courts.

documents that Fleet was alleging that they had signed. Upon information and belief, Fleet had destroyed them.[18]

WebSci also found other litigants who had claimed violations of the anti-tying statute by Fleet. The evidence provided by WebSci helped other litigants in their claims against Fleet.

- **Overseas Losses and Foreclosures in the U.S.**

  It is no secret that Fleet suffered debilitating losses in its overseas operations[19]. A BHC's branches and overseas operations, are unlike those of industrial companies. Industrial companies usually set up local subsidiaries that are separated from the parent company by a legal firewall. Branches of BHCs do not have a separate legal personality nor their own assets and liabilities. Rather, the branch is legally a part of its American parent, and its officers are officers of the parent bank.[20] Therefore, Fleet's losses in South America[21], which ran into Billions, had a direct impact on its operations in the U.S. Also, compounded to these losses, was Fleet's exposure to corporate failures such as Enron and Worldcom and the closure of Robertson Stephens, which it could not give away, despite paying $800 Million for it in 1998.

  The total losses suffered by Fleet, as a result of its overseas investment (including additional potential exposure), and other investments in failed corporations and ventures in the domestic market, in the past three years alone, could exceed $8 Billion.

  A look at Fleet's 10-K filings for the past four years shows a dramatic increase in cash and cash equivalent from $5.7 Billion in the beginning of 1999 to $11.6 Billion at the end of 2002. <u>Upon information and belief, foreclosures of businesses and homes, from the Summit acquisition contributed largely to this increase in "cash and cash equivalent reserves" to offset losses overseas</u>. The author has spoken to many businesses in litigation with Fleet and the unified theme is that Fleet is intent on foreclosing their business even when the business is <u>not</u> insolvent, presumably to boost its cash reserves.

Obstruction of Justice: Creating Impediments to Pursue the Anti-Tying Claim

As WebSci's problems, driven by Fleet's control over its finances, increased, WebSci was driven into bankruptcy by Fleet's actions. The WebSci bankruptcy is a textbook style example of how a large bank can exert improper influence over a small business to prevent it from bringing its Anti-Tying and other claims to trial.

The anti-tying claims were filed in the last week of July 2002.

In the early stages of bankruptcy, WebSci's attorneys, Steven Cunningham and Raymond Wong,[22] after realizing that the trustee, Gary N. Marks, had a conflict moved to have the trustee dismissed.[23] Shortly thereafter, WebSci's attorneys, who were paid pre-bankruptcy to file the anti-tying claims, were disqualified from representing WebSci in bankruptcy, because of the payment that they had received pre-petition. However, convinced by the merits of the anti-tying

[18] Edward Andrewscavage and Sherry Balance, two other former customers of Summit/Fleet, for example, even provided written certifications to the author confirming that their documents too were destroyed by Fleet. And there are other litigants who have also provided this information of document destruction by Fleet.

[19] Publicly available data shows that Fleet is among the top three financial institutions in the U.S. in terms of foreign investments.

[20] Robinson, Stuart W., Jr. 1972. *Multinational Banking*. Leiden: A.W. Sijthoff

[21] Fleet was also involved in at least one bribery scandal in Argentina/Brazil.

[22] The law firm of Raymond Wong, P.C., New York/New Jersey.

[23] The bankruptcy court termed the conflict *de minimus* and an appeal followed and is pending in the 3d. Cir. docketed as 03-1887.

violation claims, they wanted to pursue them on a contingency basis but the trustee continuously discouraged them from doing so.

The trustee assigned to the WebSci bankruptcy has a conflict of interest vis-a-vis Fleet. Specifically, the disclosure statements filed by his law firm confirmed the following conflicts:

- His law firm represents Fleet in credit transactions.
- His law firm has an "approximately" $1 Million line of credit with Fleet.
- One of his partners in the law firm and Fleet are substantial investors in an Investment Banking firm, which is managed by the partner.

Additionally, the trustee later admitted that his law firm's trust accounts are managed by Fleet.

This trustee, whose law firm[24] has a questionable record on fraud and fraudulent conveyances, then moved to voluntarily dismiss WebSci's claims against Fleet including the violation of the Anti-Tying statute! After a delay of several months, a hearing was finally held and the Bankruptcy Court denied the trustee's motion to voluntarily dismiss the claims against Fleet. After further delay, the trustee moved to have the claims against Fleet abandoned so that WebSci would have no funds to pursue these claims. WebSci had to look for attorneys who could pursue the claims, only on a contingency basis, even though there was more than $1 Million in cash and cash equivalent, apart from millions more in real estate and other assets, available to the WebSci trustee. Fleet leveraged its influence over the trustee to the maximum. The only defense that was available to WebSci was through contingency attorneys and through the *Pro Se* efforts of WebSci's principal. In bankruptcy, WebSci, as a corporate debtor, was virtually undefended.

Such a situation, involving a single creditor controlling the bankruptcy proceedings, is a direct effect of tying. The more the products offered and tied to a single creditor, the less are the creditors in bankruptcy proceedings and the more is the control that the single creditor wields.

Fleet[25] also took other steps, through its influence over the trustee, intended to obstruct justice:

- Fleet brought down the website www.fleetclass.com, which helped litigants who were confronted with Fleet's destruction of documents, download evidence that could help them in their litigation.
- Fleet illegally, through its influence over the trustee, took possession of litigation evidence, including soft copies of pleadings, and other evidence that would be detrimental to Fleet by providing one hour notice to all occupants of WebSci in a sudden move to shut the company down.
- Fleet encouraged the trustee to perjure himself, to avoid litigating the anti-tying claims, using funds available in the WebSci bankruptcy estate, by making false representations that the trustee's accountant had given him advise that the WebSci litigation against Fleet, involving the anti-tying violations, would not yield more than $5.9 Million. The accountant then confirmed, in writing, that he had provided no such opinion nor was asked to do so.

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[24] The trustee's law firm, Norris McLaughlin Marcus, was found recently by the Third Circuit to be involved in aiding and participating in fraud and fraudulent conveyances of its client (See Morganroths v. Norris McLaughlin Marcus 331 F.3d 406 (3d Cir. 2003)). With a trustee with this less-than-disinterested and other questionable background, WebSci was further affected under Fleet's influence. Fleet's association with such law firms is further proof of its unethical practices.

[25] Through its influence over the WebSci trustee.

- Fleet had the trustee tamper or take possession of other evidence on WebSci's premises of Fleet's activities of destruction of documents, including additional photographs, video tape recordings, etc.

Flagrant Negligence of Regulatory and Compliance Issues

Anti-Tying and other regulatory violations can be controlled by a bank if there is a general awareness and emphasis on regulatory compliance among the employees of the bank and its affiliates. The importance of compliance should start with the bank's legal department, which is normally responsible for formulating it and then propagate down to those who are responsible for implementing these policies.

Fleet has a shocking lack of such internal controls and a laissez-faire attitude towards regulatory compliance. This is obvious from the shocking statements made, during his deposition, by Gary Michael, Esq. the Senior Vice President and General Counsel of Fleet in New Jersey. He stated, with no hesitation or remorse, that he was not aware of details about the compliance department within Fleet, even as he claimed to be in charge of Fleet's litigation in New Jersey. Here is a section from the transcript of his deposition:

Question: Is there anyone within the legal group that deals with mergers or are or has dealt with mergers of the company as opposed to you who deal with the management assets?
Answer: I'm certain there is. I do not know who that person would be.
…
Question: Is there a group called the compliance group with the legal department?
Answer: I don't know if there is a group, a compliance group within the context of the legal department. I have no personal knowledge that there was a compliance department at FleetBoston Financial. There would have to be a compliance department. As a general matter in the context of my general knowledge, every financial institution has a compliance area.
Question: Is there a compliance area of Fleet National Bank?
Answer: I don't know.

With such an attitude towards compliance, it is inconceivable that Fleet can implement adequate controls to prevent the violation of Anti-Tying statutes, or do so under the current legal management it has, at least in New Jersey. Such lack of importance to compliance results in Fleet's officers and managers violating statutes such as the Anti-Tying statute, with impunity. The negligence comes out of a confidence among officers and counsel of Fleet that it has the litigation machinery and the financial strength to extinguish any regulatory violations brought into litigation, especially by small businesses.

Retaliation by Fleet for Pursuing Anti-Tying and Civil RICO Claims

Fleet was infuriated that WebSci's principal, in his *Pro Se* capacity, despite Fleet's intense efforts to prevent him from bringing forth his anti-tying claims, was able to preserve these claims. Later WebSci's principal using Title 18 statutes, filed a Civil RICO claim and even submitted a RICO case statement, under which, if ruled against Fleet, its officers and attorneys could be held criminally liable for destruction of documents and other illegal activities, including the potential for bribery indictment[26].

[26] The author has evidence that not only did Fleet concealed a conflict-of-interest with a bankruptcy trustee, but also provided business to him, while he was a trustee of a bankruptcy estate which was in litigation

WebSci's principal also quantified the civil penalties that Fleet may have to pay, if found to be in violation of the Anti-Tying claims. This resulted in the intensification of Fleet's retaliatory actions, in collusion with the trustee, for which ample evidence exists. The trustee, whose law firm represented Fleet in credit transactions, asked WebSci's principal, on multiple occasions, to settle WebSci's anti-tying and other claims against Fleet but without compensation for the damages suffered by WebSci. When that did not work, he resorted to other tactics. His retaliatory actions included:

- **Child Support Abuse**

  The trustee deducted child support monies from the principal's pay check but maliciously did not distribute the same to the mother for a period of about six months. The Family Court even demanded to know from the trustee why he should not be held in contempt of the Court for violating the existing child support order by not distributing child support monies -- even as he continued to deduct them from the father's paycheck. He had violated the provisions under the Uniform Interstate Family Support Act (UIFSA) as well as New Jersey Statute N.J. 2A:4-30.98(c) which requires (emphasis added) that:

  > "the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order."

  The trustee did the withholding but maliciously did not distribute the funds even after his accountant reminded him, in writing, that he was holding several months of child support monies.

- **Reducing Salary by more than 50%**

  In addition, Fleet, first directly and then through the trustee, withheld/reduced the salary of WebSci's principal, and only of WebSci's principal, even as the principal continued to run WebSci, despite numerous budgetary constraints imposed by Fleet. The salary was reduced by more than 50%. As a result, the principal was getting paid, a net pay check less than $15.00 per month because of child support deductions which were deducted from the pay check but not distributed to the mother. In short, Fleet ensured that the child did not get any monies for her support for six months, from the father or the mother, in an effort to pressure WebSci into surrendering its Anti-Tying and other claims and/or risking a default judgment.

- **Destruction of the Bankruptcy Estate**

  Software R&D: Fleet, through the trustee, also destroyed the R&D investments made by WebSci because the trustee and Fleet knew that WebSci and its employees had emotional and sentimental attachments to the software product that they were developing. In fact, at first the trustee refused to acknowledge the acceptance of the software that WebSci was developing. During this time, other employees, including the author, contributed from their own funds to continue the R&D efforts. When that was exhausted, the R&D efforts, involving millions in investment fell by the way-side.

  Sale of the AT&T Contract**:** Fleet, through the trustee, also sold a major contract that WebSci had with AT&T that generated Millions in revenues for WebSci. This was done for a paltry sum of $135,000.00[27] on grounds that Fleet refused to allow WebSci to use the cash collateral.

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with Fleet involving Anti-Tying claims. His position was vacated and Fleet continued to give his firm more business later.

[27] The whereabouts of the funds received are at this time not known. They are shown in the Operating Reports filed by the trustee as receivables even though the trustee claimed, on the record, that he had received the proceeds from the sale.

- **Retaliation against Suppliers of WebSci**

  Fleet, through the trustee, in an effort to shut WebSci down, also retaliated against WebSci's suppliers and contractors, intentionally failing to pay them for services rendered post-petition with the intent to discourage them from providing continued services so that WebSci can be liquidated, making it difficult to pursue the pending claims.

- **Personal Bankruptcy**

  WebSci's principal was also forced into personal bankruptcy. The circumstances surrounding this could not have been more abusive. On the day that WebSci filed for bankruptcy, Fleet's attorney threatened that if the principal did not also file for bankruptcy, then Fleet would proceed with the State Court litigation and seek a default against him. At that time, WebSci's principal had very limited knowledge of banking, bankruptcy or other relevant laws. He would have been unable to defend himself, without the presence of WebSci's attorneys, against at least four Fleet's attorneys, who were involved at the time in the litigation.

  Fleet had an ulterior motive for forcing the principal into bankruptcy. It sought to control the Anti-Tying claims using provisions under Title 11 rather than confronting them on the merits. <u>The trustee[28] assigned to the principal's bankruptcy estate was awarded legal representation business by Fleet, even as he represented the estate and was expected to further the Anti-Tying claims against Fleet itself</u>. This trustee tried every possible effort to sabotage the anti-tying claims. Finally, after WebSci's principal complained to the U. S. Trustee's office, his position was vacated and a truly disinterested trustee with no conflict of interest, Mr. Robert Wasserman, was assigned. <u>Mr. Wasserman, despite intense pressure from Fleet, strived to preserve the legal claims and his administration of the bankruptcy estate has been exemplary</u>.

Possible Reasons for Retaliation by Fleet

Fleet has retaliated for multiple reasons but always with the intent to pressure WebSci and associated parties to surrender their claims against Fleet, and conceal regulatory violations including destruction of banking and brokerage records. <u>**Fleet and affiliated parties could face huge civil and criminal penalties for reasons listed below**</u>:

- **Potential Civil Penalties for Fleet from Anti-Tying Violation**

  In accordance with the statute, the potential "Third Tier" civil penalties for Fleet under 12 U.S.C. § 1972 could be as high as $1,000,000.00 on a daily basis. Since the violation started sometimes in the year 2000, this could easily, at least in theory, exceed $1 Billion. The minimum, "First Tier" penalties, will be at least $5 Million.

- **Potential Civil Penalties for Members of the Fleet Board of Directors from Anti-Tying Violation**

  Members of the Board were informed about the violation but failed to respond. They were subsequently made defendants under the Anti-Tying statute. In addition to the bank itself, they can be separately held liable, in accordance with the "Statutory and Regulatory" liabilities that Directors have under 12 U.S.C. § 1972 and as more specifically defined by the OCC in the "The Director's Book: The Role of a National Bank Director."[29]

[28] Steven Kartzman of the law firm of *Mellinger Sanders and Kartzman*

[29] Issued in March 1997. See Chapter 5.

- **Potential Compensation to Summit's Brokerage Customers**
  WebSci found during its analysis of the Summit Brokerage system, in an attempt to prove the numerous discrepancies in the brokerage account, that the problem Summit had in its brokerage system must have affected other customers also. For example, there were flagrant violations of trade executions involving limit orders. A certified broker confirmed that this flaw in the system, or fraud, must have affected many unwary customers. Fleet admitted that the errors pointed out by the broker were genuine and only questioned the magnitude of the error, though the certified broker had examined only a small sample of trades. Even if the error is small for a single share, and therefore undetectable by most customers, it quickly multiplies when thousands of shares are traded. In some cases, the trade execution was erroneous by a significant amount, but always in favor of Fleet.
  As a matter of law, Fleet as successor to Summit, will be required to disclose to all its former brokerage customers, of the system-wide problem. Furthermore, Fleet will have to compensate them for any losses, including consequential and/or punitive damages.

- **Potential Civil and Criminal Liability for Spoliation of Evidence**
  During litigation discovery, WebSci demanded access to WebSci's brokerage complaint records, including those whose existence was confirmed in the brokerage tape recordings provided. Fleet was unable to provide them and finally sent WebSci to a document destruction facility to rummage through boxes with original documents marked for destruction. It is here that WebSci uncovered that Fleet was systematically destroying original loan documents and customer brokerage complaint records and took photographs of this shocking revelation, which are included later in this paper.

  Under the spoliation inference doctrine and/or NJ concealment of evidence tort, where a litigant is made aware of the destruction or concealment of evidence during or after the underlying litigation, courts have followed the rule "*omnia praesumuntur contra spoliatorem*," which means "*all things are presumed against the destroyer*" and permits the fact finder to draw an unfavorable inference against the party who has destroyed evidence.

  In addition, after WebSci brought proof of spoliation of evidence to Fleet's attention, Fleet had a:

  > "Duty to preserve evidence, independent from court order to preserve evidence, arises where there is pending or probable litigation involving defendants, knowledge by plaintiff of existence or likelihood of litigation, foreseeability of harm to defendants, or in other words, discarding evidence would be prejudicial to defendants, and evidence relevant to litigation." [30]

  Upon information and belief, Fleet flagrantly ignored this duty.

  The spoliation inference doctrine allows a jury or a Court to assume that the spoiled evidence is unfavorable to the destroyer. Even if Fleet takes the position that the spoliation was not intentional but out of negligence, which it cannot, Fleet is liable under N.J. Tort of Negligence because Fleet owed a duty to retain these documents under OCC, SEC, NASD (For example, Rules 17a-3, 17a-4) and other laws which it breached, resulting in injury to WebSci, WebSci's principal and hundreds of other litigants.

  As a matter of law, Fleet has to inform all litigants who had a judgment against them and who were affected by the mass scale destruction of records by Fleet during the Summit merger. Furthermore, any judgment in favor of Fleet, as a matter of law, under Federal

[30] See Hirsch v. General Motors Corp., 628 A.2d 1108, 266 N.J. Super 222.

Rule of Civ. Proc., Rule 60 or corresponding State Law, will have to be vacated. This could result in hundreds of Millions in liability to Fleet.

Also, in addition to a huge monetary penalty, under 18 U.S.C. § 152(8), 18 U.S.C. § 1519, or N.J.S.A. 2C:28-6(1), Fleet and its officers and attorneys could also be held criminally liable for conspiring to destroy evidence which subsequently appears to have resulted in the illegal foreclosure of hundreds of businesses and houses in the post-Summit-merger period. Specifically, Fleet's Vice President Richard Napierkowski and Senior Vice President in charge of legal affairs in New Jersey Gary Michael, Esq. have been aware, at all material times, of Fleet's regulatory violations, but have failed to address them. They could, and should, be held liable in accordance with the enhanced provisions of the Sarbanes-Oxley Act.

The author is confident that any investigation by a Regulatory Agency, involving an audit of the organization and retention of brokerage/banking records, brokerage recordings and specifically brokerage complaint records by Summit's brokerage affiliate (and subsequently Fleet), during and after the merger would result in revelation of mass scale regulatory violations. However, Fleet may have tampered with the records in the recent past and therefore testimony of brokers/loan officers who were terminated and/or who worked specifically at the document destruction facilities, at material times, may be required.

- **Illegal Inter-affiliate Transaction**
  WebSci also encountered, at least one document of an illegal inter-affiliate transaction involving $25 Million non-collateralized loan involving Summit entities. The original loan document was marked for destruction. The loan transaction itself is illegal under Banking Rules and Statutes, specifically under 12 U.S.C. § 371c. It is also a violation under 12 U.S.C. § 1972 et seq. as Summit had extended credit to an affiliated entity which was not in compliance with the requirement under 12 U.S.C. § 1972 that it be:

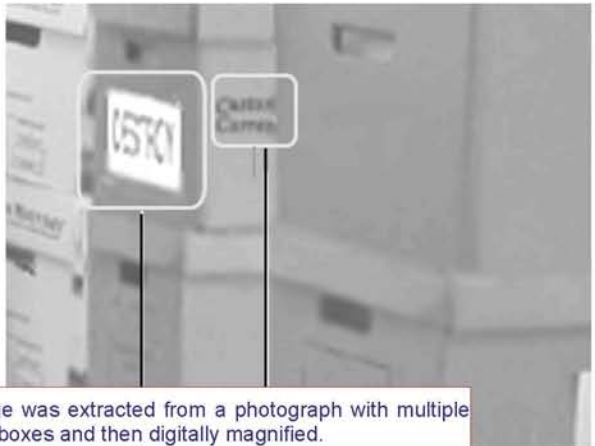
  > "on substantially the same terms, including interest rates and collateral as those prevailing at the time for comparable transactions with other persons and does not involve more than the normal risk of repayment or present other unfavorable features."

  In litigation, Fleet's attorneys did not question the illegality of the inter-affiliate transaction presented but stated that Members of the Board of Summit Bank be held liable for this violation and not Fleet.

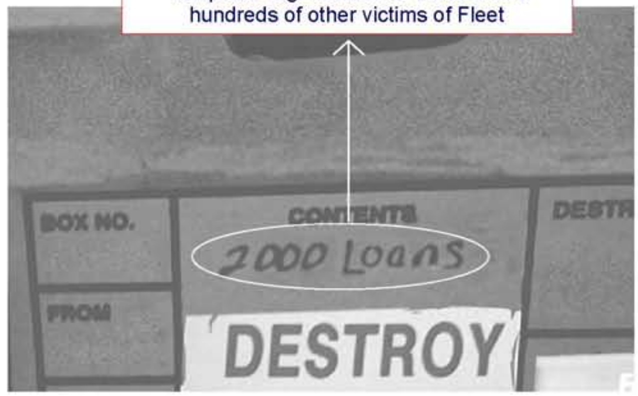
- **Special Purpose Entities (SPEs) at Summit**
  WebSci discovered that Summit Bancorp existed as an "Enron-like" structure, unlike any Bank Holding Company, with a complex set of entities, including many Special Purpose Entities. These numerous entities were inter-twined among themselves in an untraditional and non-hierarchical way. Therefore the merger between such a non-hierarchical "parent" into FleetBoston Financial Corp., a hierarchically organized Bank Holding Company, was difficult to comprehend. Fleet refused to divulge any details of the merger transaction vis-à-vis the Summit Bancorp internal structure. An examination of form 10-K and 10-Q filed by Fleet itself shows the use of many SPEs for accounting purposes.

Inferior Quality of Tied Product (Brokerage Services) and Tying Product (Loan). For example, Fleet failed to maintain records in accordance with OCC, SEC regulations and NASD rules 17a-3 and 17a-4.

Temporal Significance to WebSci and hundreds of other victims of Fleet

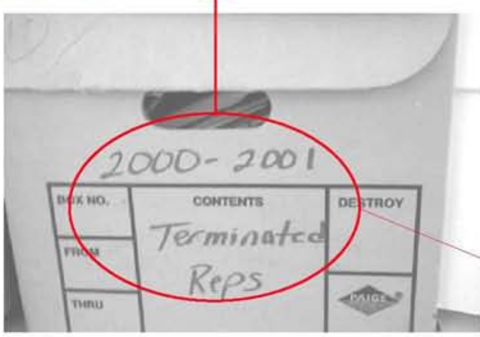


This image was extracted from a photograph with multiple stacks of boxes and then digitally magnified.



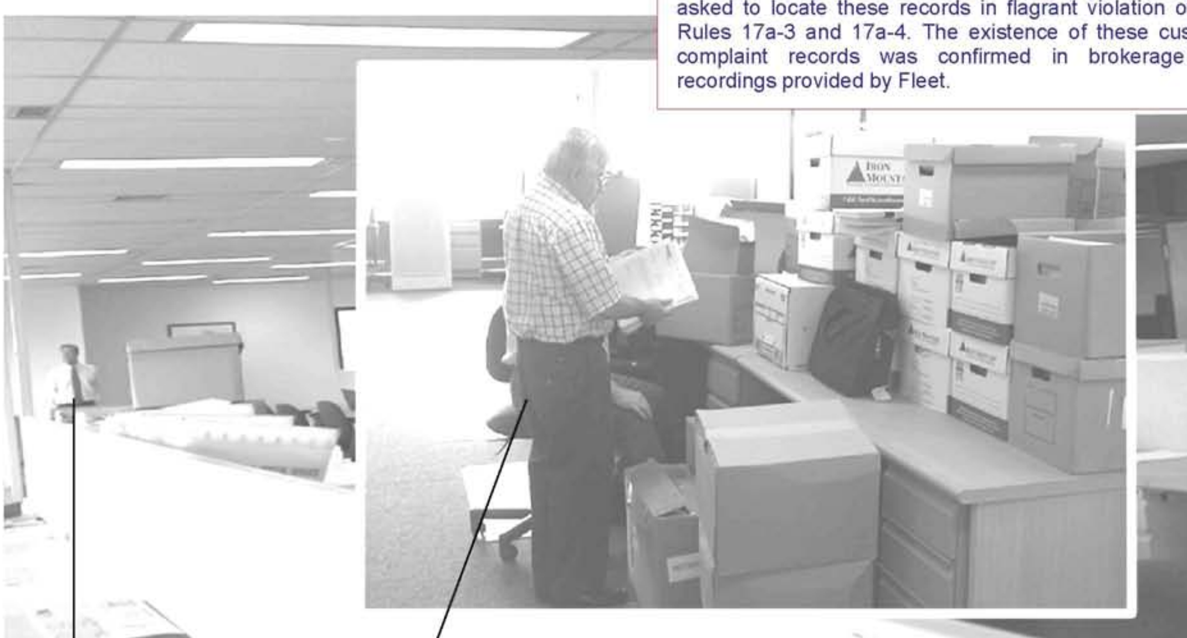
Customer Correspondence

DESTROY



The very box in which an illegal inter-affiliate transaction was found. Fleet admitted to its illegality and said that Members of the Board of Summit Bank should be held liable and not Fleet.

Brokerage correspondence of terminated reps. All reps were terminated. Most of the correspondence was already destroyed. Note the temporal significance. WebSci could not locate the documents and customer complaint records **at Fleet's document destruction facility**, where it was asked to locate these records in flagrant violation of SEC Rules 17a-3 and 17a-4. The existence of these customer complaint records was confirmed in brokerage tape recordings provided by Fleet.



<u>Witnesses</u>: Fleet's attorney and WebSci's attorney

Conclusion

The violation of the anti-tying statute and associated and/or related tortious acts of Fleet and affiliated parties have had a devastating affect on WebSci, its principal, employees, contractors and others. The affects of Tying on WebSci were long lasting and reverberated much after the consummation of the transaction. Any cost advantage to WebSci, as a result of the tying arrangement, if any, was negligible compared to the devastation and havoc wrecked by Fleet on WebSci and all those associated with WebSci, as suppliers, employees or shareholders.

Fleet's leveraging power was significantly enhanced in bankruptcy proceedings as a result of the tying conditions, which allowed Fleet to represent itself as the only "secured creditor" representative on both the credit as well as the brokerage controversies.

Fleet was able to influence the selection or at least the continued retention of a bankruptcy trustee whose firm had a solid conflict of interest vis-à-vis Fleet. This was possible because tying eliminated the participation, in bankruptcy proceedings, of multiple financial institutions with competing interests but comparable size and power.

As a result of violations of the Anti-Tying statute, Fleet asserted rights to all of WebSci's cash, and controlled its use as it deemed fit, often to the detriment of the estate, and thereby controlled the very funds WebSci needed to litigate against Fleet.

As a result of the tying arrangement, it was in Fleet's interest to plan and ultimately seek the liquidation of WebSci in its entirety. As a result, gradually, about 250 employees lost their jobs globally since the inception of the controversy, more than 150 in the United States alone.

Beyond WebSci, Fleet's overall litigation statistics and foreclosures of businesses has had a socio-economic impact that is shocking to the conscience when discussed with the victims of the predatory lending practices of Fleet. Tying violations by Fleet have provided a platform to address these issues also.

The author states under Penalty of Perjury that if any of the information presented here is knowingly false, he is subject to punishment. The author has, in the past, requested Fleet to provide a rebuttal, if any, under Penalty of Perjury, from Fleet officers aware of the proceedings. Fleet has failed to do so. The author has numerous Exhibits/evidence to substantiate the statements made herein. The author can be contacted, by email, at `r_tare@att.net`.

Signed
/s/ Ramkrishna S. Tare
October 21, 2003