IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON, STATE OF MICHIGAN

Scott and Janet Brannam Plaintiffs v. The Huntington Mortgage Co. Defendant.	)	Case No. 00-40439-CH Honorable Timothy G. Hicks

BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY IN SUPPORT OF DEFENDANT HUNTINGTON MORTGAGE COMPANY.

Interest of Amicus Curiae

The Office of the Comptroller of the Currency ("OCC") respectfully submits this brief *amicus curiae* in support of defendant Huntington Mortgage Co., which at all relevant times was an operating subsidiary of Huntington National Bank, a national bank. As the federal agency responsible for interpreting the National Bank Act and administering the national bank charter, including determining the scope of permissible national bank activities, the OCC has a particular interest and expertise in the issues raised by the litigation.

Huntington National Bank engages in mortgage lending through its subsidiary, Huntington Mortgage Co. ("Huntington"). *See* 12 C.F.R. § 5.34.[1] Pursuant to this

[1] The OCC regulation authorizing national banks to establish operating subsidiaries provides:

> (e)(1) *Authorized activities.* A national bank may conduct in an operating subsidiary activities that are permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking as determined by the OCC, or otherwise under statutory authority * * *.

authority, Huntington made a loan to Plaintiffs ("the Brannams") to refinance their home. The Brannams allege that Huntington's $250 fee for "preparing documents directly related to the transfer of title, specifically, the Note and the Mortgage," was "grossly excessive," and therefore violated MCL § 445.903(z) of the Michigan Consumer Protection Act. First Amended Complaint ¶¶ 1 and 7.

Here, the question presented is whether, under recognized preemption standards, the authority of a national bank under federal law to document its own loan transactions and to charge a fee for that service preempts a state law that the Brannams seek to apply to prevent Huntington from receiving that fee.

Making loans is at the heart of the business of banking authorized for national banks under federal law. Inherent and essential to that business is the authority of national banks to prepare documentation necessary for their own loan transactions. Also fundamental is that national banks are authorized under federal law to charge customers for the products and services they provide. State laws cannot compel national banks to provide banking products and services for free.

The OCC has repeatedly endorsed the fundamental and unremarkable principle that national banks are authorized, as a matter of federal law, to charge fees for the banking services that federal law authorizes them to provide. This principle, which reflects universal practice among American financial institutions, is codified in OCC's regulations and reflected

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* * *

(3) An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. * * *

12 C.F.R. § 5.34(e). Courts have consistently treated the operating subsidiary and the national bank as equivalents, unless federal law requires otherwise, in considering whether a particular activity is permissible for a national bank. *Wells Fargo Bank, N.A. v. Boutris*, 265 F. Supp. 2d 1162, 1169 (E.D. Cal. 2003); *National City Bank of Indiana v. Boutris,* 2003 WL 21277203 (E.D. Cal. 2003).

in numerous published OCC Interpretive Letters. To the extent that Michigan law blocks the exercise of national bank powers authorized by federal law, the Supremacy Clause of the U.S. Constitution renders the state statute null and void.

Accordingly, the OCC submits this brief *amicus curiae* to present the federal interest at issue, which here coincides with the merits position taken by defendant Huntington, that federal law authorizes national banks to charge a fee for preparing loan documents related to their real estate lending activities. The OCC notes that at least one federal appellate court has accorded deference to OCC's *amicus* briefs on this subject. *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 563 & n. 7 (9th Cir. 2002) (rejecting view that OCC's *amicus* brief is not entitled to deference).

ARGUMENT

THE NATIONAL BANK ACT AUTHORIZES NATIONAL BANKS TO CHARGE FEES FOR DOCUMENT PREPARATION SERVICES AND PREEMPTS CONTRARY STATE LAW

I. The National Bank Act Authorizes National Banks To Charge Document Preparation Fees in Connection with their Lending Activities

The statutory authority for national banks to conduct business comes from the National Bank Act, enacted in 1864. 12 U.S.C. § 1 *et seq*. In addition to setting forth the framework for the creation, regulation, and operation of national banks, the National Bank Act governs the scope of "banking powers" -- *i.e.,* statutorily-authorized banking-related activities. Those powers include the authority: "To exercise * * * all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills

of exchange, and other evidences of debt * * *; by loaning money on personal security." 12 U.S.C. § 24 (Seventh).

Federal law also explicitly empowers national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to * * * such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371. Moreover, the OCC has specifically recognized that national banks may exercise their lending powers through operating subsidiaries. 12 C.F.R. § 5.34(e)(5)(v)(C) (making loans and other extensions of credit). Accordingly, the power of the national bank to engage in the business of making real estate loans through an operating subsidiary is textually explicit.

It is also beyond debate that national banks have authority to prepare the documents necessary to effect their own transactions. Recording and documenting deposits received, loans made, and other banking transactions are easily understood as a central element of the business of banking. A national bank's failure to properly document its transactions would be severely criticized by the OCC as an unsafe or unsound banking practice. *See* 12 C.F.R. Part 30, Appendix A, at ¶¶ II.C & D.

It is a fundamental principle that the authority conferred by federal banking law to provide a banking service carries with it the authority to charge for that service. National banks are private, for-profit enterprises, and not public utilities or common carriers, which must justify service charges to regulators. National banks are charged in 12 U.S.C. 24 (Seventh) with the authority to engage in the "**business** of banking" (emphasis added), which cannot be separated from the authority to seek a business return from those activities. Any contrary rule would render national bank powers meaningless.

The Supreme Court has long recognized that national banks are private enterprises that are entitled to exercise National Bank Act powers inherent in the operation of the business of banking. In holding that the National Bank Act preempts a state restriction on national bank advertising, the Court stated: "Modern competition for business finds advertising one of the most usual and useful of weapons. * * * It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-78 (1954); *see Bank One, Utah v. Guttau,* 190 F.3d 844, 850 (8th Cir. 1999), *cert. denied sub nom. Foster v. Bank One, Utah,* 529 U.S. 1087 (2000). It would be even more difficult to justify an interpretation that would permit national banks to engage in an activity but require them to do it for free.

In a rulemaking in 2001, the OCC specifically addressed the authority of national banks to charge fees for the services they provide. 66 Fed. Reg. 34,791 (July 2, 2001) (OCC regulation on national bank charges, codified at 12 C.F.R. § 7.4002). The OCC's regulation provides that "[a] national bank may charge its customers non-interest charges and fees, including deposit account service charges." 12 C.F.R. § 7.4002(a) (2002). The regulation goes on to state that "[t]he establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles." 12 C.F.R. § 7.4002(b)(2). The regulation also identifies safety and soundness factors bearing upon a bank's decision to establish a fee, including the cost to the bank of providing the service and deterring misuse of banking services. *Id.*

In this case, Huntington, making real estate loans as an authorized operating subsidiary of a national bank, charged a fee for preparing the note and mortgage that documented the agreed upon terms of its loan to the Brannams and the security interests received in those transactions. Given that a national bank has the legal power to make real estate loans, and to do so through an operating subsidiary, it follows that a fee may be charged for discrete services rendered in the process of making those loans: here, for preparing the documents needed to close the loan. The U.S. Court of Appeals for the Ninth Circuit recently confirmed that 12 U.S.C. § 24 (Seventh) and 12 C.F.R. § 7.4002 authorize a national bank to charge ATM fees to non-depositor customers of the bank, *Bank of America v. City and County of San Francisco*, 309 F.3d at 562-563 (9th Cir. 2002), and the same authority supports Huntington's fees for preparing documents in connection with its own loans.

II. Any State Law Prohibiting Fees Authorized By The National Bank Act Is Preempted By Federal Law.

Under the Constitution's Supremacy Clause, when the federal government acts within the sphere of its authority, federal law is paramount over, and preempts, inconsistent state law. *See, e.g., M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). The nature and degree of disharmony between state and federal law that will trigger preemption has been expressed in a variety of formulations, but has been usefully summarized as a question whether, under the circumstances of a particular case, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996), *quoting Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); "interfere with, or impair [national banks'] efficiency" in performing authorized activities, *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1870); or

"condition the exercise" of federally conferred powers, *Franklin Nat'l Bank*, 347 U.S. at 378, *Barnett Bank*, 517 U.S. at 34-35. Those principles have repeatedly been applied to invalidate state authority that would obstruct the exercise of national bank powers. *Barnett Bank*, 347 U.S. at 32-33. The Supreme Court has observed that the history of Supremacy Clause litigation of national bank authority is "one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank*, 517 U.S. at 32.

These principles are equally applicable in the context of state laws that would prohibit a national bank from charging fees it is authorized to charge under federal law. Courts have repeatedly invalidated state and municipal efforts to prevent national banks from charging for the products and services they are authorized to provide under federal law. *See, e.g., Wells Fargo Bank Texas, N.A. v. James*, 321 F.3d 488 (5th Cir. 2003) (Texas par value statute prohibiting fee for paying a check preempted by 12 C.F.R. § 7.4002); *Bank of America v. City and County of San Francisco*, 309 F.3d at 561-564 (9th Cir. 2002) (municipal ordinances banning ATM access fees preempted by National Bank Act and permanently enjoined); *Metrobank, N.A. v. Foster*, 193 F. Supp. 2d 1156, 1162 (S.D. Iowa 2002) (permanent injunction against state prohibitions on ATM access fees). *Wenzel v. Citicorp Mortgage, Inc.,* No. 01 CH 18067 (Cook Cty Cir. Ct., Ill., Aug. 27, 2002) (Illinois law banning unauthorized practice of law cannot prevent a national bank from charging document preparation fees allowed by federal law) (copy attached). The result here can be no different.

III. CONCLUSION

Federal banking law, including 12 C.F.R. § 7.4002, authorizes the document preparation fees charged by Huntington, and state law cannot limit this authority. Accordingly, MCL § 445.903(z) is preempted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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