No. 15-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE HUNTINGTON NATIONAL BANK,

Defendant-Petitioner,

v.

JEREMY POWELL and TINA POWELL,

Plaintiffs-Respondents.

Petition for Permission to Appeal From
The United States District Court For The Southern District Of West Virginia
Hon. Thomas E. Johnston, District Judge

THE HUNTINGTON NATIONAL BANK'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

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May 8, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 4th Cir. R. 26.1, counsel for Petitioner hereby certifies as follows:

1. Petitioner The Huntington National Bank ("Huntington") is wholly owned by its parent company Huntington Bancshares, Inc., a publicly traded company (NASDAQ: HBAN).

2. Huntington Bancshares, Inc. has no parent corporation. No publicly held corporation, and no publicly held or traded master limited partnership, real estate investment trust, or other legal entity, owns 10 percent or more of Huntington Bancshares, Inc.'s stock.

3. Besides Huntington Bancshares, Inc., Huntington is not aware of any publicly held corporation that has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

4. Two trade associations filed in the district court a motion seeking leave for permission to file a memorandum as *amici curiae* in support of Huntington's effort to certify an interlocutory appeal.

a. The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. The ABA's members include financial institutions of all sizes and

types, and they hold a majority of the domestic assets of the U.S. banking industry. As far as Huntington is aware, the ABA has no parent company, and no publicly held corporation, and no publicly held or traded master limited partnership, real estate investment trust, or other legal entity, owns 10 percent or more of the ABA's stock.

b. The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions. As far as Huntington is aware, the CBA has no parent company, and no publicly held corporation, and no publicly held or traded master limited partnership, real estate investment trust, or other legal entity, owns 10 percent or more of the CBA's stock.

Respectfully Submitted,

s/ Andrew Soukup

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INTRODUCTION

The Huntington National Bank ("Huntington") seeks permission under 28 U.S.C. § 1292(b) to appeal an order denying Huntington's motion for judgment on the pleadings. The ruling at issue held that the National Bank Act provisions codified at 12 U.S.C. § 85 and § 86 do not preempt West Virginia law restricting the circumstances in which a national bank may charge late fees. The district court reached this result even though Plaintiffs do not dispute that those fees are permitted by 12 U.S.C. § 85 and even though numerous other courts—including this Court—have recognized that similar state-law claims are preempted by federal banking law.

Recognizing the importance of the issue upon which district courts have disagreed, the district court certified the issue for interlocutory review. As two trade associations representing more than 1,000 national banks and depository institutions pointed out in an amicus brief submitted to the district court, the district court's ruling has created considerable confusion about the scope of a national bank's federal right to impose interest charges permitted by the law of its home state. This Court should therefore grant this Petition.

JURISDICTION

The district court has jurisdiction over this case under 28 U.S.C. § 1332(d). *See* A-22-23. Huntington seeks permission to file an interlocutory appeal under 28

U.S.C. § 1292(b). On May 1, 2015, the district court certified that the Order met the requirements of Section 1292(b). *See* A-2-10. This Petition was filed within 10 days of the entry of that certification.

BACKGROUND

A. National Banks' Right To Charge A Uniform Rate Of Interest.

When it enacted the National Bank Act more than 150 years ago, Congress "intended to facilitate … a national banking system." *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978) (internal quotation marks omitted). Because interstate loans were deemed an important component of this "national banking system," *id.* at 314-16, the National Bank Act specifies that a national bank may charge "interest at the rate allowed by the laws of the State … where the bank is located," 12 U.S.C. § 85. Section 85 thus gives national banks a federal right to "export" their home state's laws regarding the permissibility of interest charges into other states. *See, e.g.*, *Marquette*, 439 U.S. at 308. 12 U.S.C. § 86 complements Section 85 by establishing the "exclusive cause of action" for a claim that a bank has charged interest not permitted by the laws of its home state. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003). "If … the interest that the bank charged … did not violate § 85 limits, the statute unquestionably pre-empts any common-law or [state] statutory rule that would treat those rates as usurious." *Id.* at 9.

There is no dispute that late fees are considered "interest" under the National Bank Act, and therefore the laws of a national bank's home state that relate to late fees may therefore be exported. "[L]ate fees" are expressly included in the regulation construing Section 85's definition of interest. 12 C.F.R. § 7.4001(a). The Supreme Court upheld this regulation in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), holding that the National Bank Act preempted state laws that limited a national bank's right to charge late fees. *See id.* at 738 n.1, 740-44.

B. The Allegations In The Complaint.

This is a case about two $15 late fees Plaintiffs were charged in the fall of 2012. In September 2012, Plaintiffs missed their monthly mortgage payment, and they were charged a $15 late fee. *See* Def.'s Memo. In Supp. of Its Mot. to Certify, Doc. 65, at 2. In October 2012, Plaintiffs made a mortgage payment, which Huntington treated as the overdue September 2012 payment. Because Plaintiffs remained behind on their mortgage repayment obligations, they were assessed another $15 late fee. *See id.* at 2-3 & n.1. Similarly, when Plaintiffs made a mortgage payment in November 2012, Huntington treated that payment as the overdue October 2012 payment, and assessed a $15 late fee because Plaintiffs still remained behind on their mortgage repayment obligations. *See id.* at 3 & n.2.

Plaintiffs claim that the imposition of these fees—which they have not disputed are permitted by the law of Ohio (where Huntington is located) and

Section 85— nevertheless violates West Virginia law. In October 2013, they filed this lawsuit against Huntington, alleging that the late fees that Plaintiffs were charged in October and November 2012 violated the West Virginia Consumer Credit and Protection Act ("WVCCPA"). *See generally* A-41-47. Count I of the Complaint accused Huntington of violating W.V. Code § 46A-3-112, which Plaintiffs allege prohibit Huntington from charging a late fee in a month when a borrower makes a timely mortgage payment even if the borrower remains behind on their mortgage repayment obligations. Count II of the Complaint is derivative of Count I: it accuses Huntington of misrepresenting the amount of the Plaintiff's debt, in violation of W.V. Code § 46A-2-127, by collecting late fees that West Virginia law prohibited Huntington from collecting.

C. The District Court's Order Denying Huntington's Motion For Judgment On The Pleadings.

After the Complaint was filed in state court, Huntington removed this action to federal court, answered the Complaint, and moved for judgment on the pleadings. Huntington argued that Plaintiffs' assertion that Huntington charged too many late fees is a challenge to the amount of the interest charged and therefore is preempted by the National Bank Act provisions codified at 12 U.S.C. § 85 and § 86.

The district court disagreed. *See* A-18. The district court noted that Plaintiffs did not expressly assert a claim under West Virginia's usury statute. *See*

id. The district court also attempted to distinguish this case from the Supreme Court's decision in *Smiley*, claiming that *Smiley* involved "a challenge to the *amounts* of the late fees" whereas this case involved a claim that "no late fee should be charged in the first place." A-20-21. According to the district court, such claims were not preempted by Sections 85 and 86. *See id.*

D. The District Court Certifies The Order For Interlocutory Appeal.

Huntington subsequently asked the district court to certify the Order for interlocutory appeal. Two trade associations that collectively represent more than 1,000 national banks and depository institutions supported Huntington's motion as *amici curiae*, arguing that the Order conflicted with decisions from other courts (including this Court) and created confusion about the scope of a national bank's federal right to impose interest charges permitted by the law of its home state.[1] *See generally* A-24-40. The district court found that the requirements of 28 U.S.C. § 1292(b) had been satisfied, certified the Order for interlocutory review, and stayed the litigation pending the outcome of this appeal. *See* A-9-10.

QUESTION PRESENTED

The district court certified the following question for interlocutory review:

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[1] After it certified the Order for interlocutory appeal, the district court denied the trade associations' motion for leave to file an amicus brief as moot. *See* Doc. 97 at 9. The amicus brief submitted to the district court is included in the appendix to this Petition.

> Whether Plaintiffs' state-law claims are preempted by the National Bank Act, 12 U.S.C. §§ 85 and 86.

A-9-10.

RELIEF REQUESTED

Huntington asks that this Court grant permission for Huntington to appeal the Order. In its appeal, Huntington will ask this Court to reverse the Order and remand this case with instructions to enter judgment in Huntington's favor.

REASONS WHY THE APPEAL SHOULD BE ALLOWED AND IS AUTHORIZED BY STATUTE

I. THE REQUIREMENTS OF 28 U.S.C. § 1292(b) ARE MET.

28 U.S.C. § 1292(b) gives this Court jurisdiction over any interlocutory order that "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The district court correctly concluded that each of these requirements had been met.

A. The Order Involves A Controlling Question Of Law.

As the district court correctly noted, "Plaintiffs do not contest" that the Order involves a controlling question of law. A-6. The Order raises the issue of whether W. Va. Code § 46A-3-112 is preempted by the National Bank Act provisions that permit Huntington to charge any late fees permitted by Ohio law. This question is precisely the kind of "pure, controlling question of law" that does not require "delv[ing] beyond the surface of the record in order to determine the

facts" and therefore may be certified for interlocutory appeal. *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004).

B. Interlocutory Appeal From The Order Will Materially Advance The Ultimate Termination Of The Litigation.

As the district court also properly observed, "Plaintiffs do not contest" that an interlocutory appeal will materially advance the ultimate termination of the litigation. A-6. The only claims in the Complaint rest on Plaintiffs' assertions that the late fees Huntington imposed in October and November 2012 violate the WVCCPA. If this Court concludes that the National Bank Act preempts W. Va. Code § 46A-3-112 and reverses the Order, judgment will be entered in Huntington's favor—saving the parties and the district court the need for additional discovery, class certification, summary judgment, and trial proceedings. Even if the Court affirms the Order, the prospects of an early settlement increase.

C. There Are Substantial Grounds Upon Which To Disagree With The Order.

Finally, as the district court correctly observed, "there is a substantial ground for difference of opinion as to the controlling issue of law—whether Plaintiffs' claims are preempted by the [National Bank Act]—as addressed in the [Order]." A-9.

The crux of the Plaintiffs' case "is that Defendant assessed late fees when no late fees should have been assessed." A-18. However, there is no dispute in this

case that Ohio law—where Huntington is located for purposes of Section 85—permits Huntington to impose late fees in months where a borrower remains behind on their mortgage repayment obligations, even if the borrower makes a payment on that mortgage. *See, e.g.*, *Begala v. PNC Bank, Ohio, N.A.*, 214 F.3d 776, 782 (6th Cir. 2000); Ohio R.C. §§ 1109.20, 1151.21, 1161.28. As a result, Section 85 permits Huntington to charge those fees as well. *See Smiley*, 517 U.S. 740-44; *Marquette Nat'l Bank*, 439 U.S. at 308; OCC Interp. Ltr. 744, 1996 WL 685467, at *3 (Aug. 21, 1996) (observing that if a fee is "permissible for [a] lender[ ] to impose under the laws of the state where a bank is located, they may be charged and 'exported.'"). Plaintiffs also have abandoned any claim that Plaintiffs' mortgage agreements prohibit Huntington from imposing late fees in this manner.[2] Thus, the only reason why Plaintiffs claim that "no late fees should have been assessed"—even though the fee is permitted by their mortgage agreements, the law of the *national bank's* home state, and Section 85—is because the law of the *borrower's* home state supposedly prohibits such a charge.

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[2] Although the Order observed that Plaintiffs claimed that the October and November 2012 late fees "violated the terms of the loan contract," A-18, the Complaint did not assert a breach-of-contract claim, and Plaintiffs later clarified that they abandoned any claim that the imposition of those fees violated the terms of their mortgage agreements. *See* Pls.' Resp. to Def.'s Mot. to Certify, Doc. 74, at 8, 9-10.

In concluding that such a claim is not preempted by the National Bank, the Order departs from abundant authority. As explained below, it has long been understood that "federal law permits [national banks] to charge [interest] to all of their customers as long as the fees are legal in the [banks'] home states." *In re Late Fee and Over-Limit Fee Litig.*, 741 F.3d 1022, 1025 (9th Cir. 2014). In such cases, all other state laws in the borrower's home state that would prohibit a bank from assessing such charges are preempted.

1. The National Bank Act Preempts Any State Law Limiting A National Bank's Right To Charge Interest, Not Just Usury Laws.

As the Supreme Court has recognized, Sections 85 and 86 "form a system of regulations" that "cover the entire subject" of a national bank's right to charge interest. *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 32 (1875). The Supreme Court has long recognized that those provisions were intended to create "uniform rules limiting the liability of national banks" and to prevent states from imposing "substantive limits on the rates of interest that national banks may charge." *Beneficial Nat'l Bank*, 539 U.S. at 9, 10. For this reason, Sections 85 and 86 protect national banks not merely from claims arising under usury statutes, but from *any* "possible unfriendly State legislation" that seeks to limit a national bank's interest charges. *Id.* at 10 (quotation marks omitted).

Although the Order focused on whether "the word 'usury' appears … on the face of the Complaint" and whether "Plaintiffs ground their claims in West Virginia's usury statute," A-18, other Supreme Court decisions confirm that Sections 85 and 86 preempt *all* state laws purporting to limit a national bank's interest charges, not just usury laws. *See Smiley*, 517 U.S. at 738 n.1, 747 (holding that 12 U.S.C. § 85 preempted unjust enrichment and unfair practices claims); *Dearing*, 91 U.S. at 35 ("In any view that can be taken of [the provision that became Sections 85 and 86], the power to supplement it by State legislation is conferred neither expressly nor by implication."); *Tiffany v. Nat'l Bank of Missouri*, 85 U.S. 409, 412 (1873) (Section 86 was deemed "indispensable" to protect national banks "against possible unfriendly State legislation").

Numerous decisions from other courts of appeals and district courts have likewise confirmed that the National Bank Act preempts any claim "challenging the lawfulness of the interest charged by a national bank." *Phipps v. Fed. Deposit Ins. Corp.*, 417 F.3d 1006, 1011 (8th Cir. 2005). Courts have therefore found claims challenging a national banks' interest charges preempted even when the complaint "never makes use of the term 'usury,'" *Austin v. Provident Bank*, 2005 WL 1785285, at *5 (N.D. Miss. July 26, 2005), and even when a plaintiff "expressly disclaim[s] any usury or federal claims," *Budnik v. Bank of Am. Mortgage*, 2003 WL 22964372, at *1 (N.D. Ill. Dec. 16, 2003). *See also Phipps*,

417 F.3d at 1010-13 (Missouri consumer protection claims preempted); *Santos v. Household Int'l, Inc.*, 2003 WL 25911112, at *3 (N.D. Cal. Oct. 24, 2003) (California unlawful business practices claims preempted); *Hill v. Chem. Bank*, 799 F. Supp. 948, 951-54 (D. Minn. 1992) (Minnesota deceptive practices claim preempted); *Nelson v. Citibank (S.D.) N.A.*, 799 F. Supp. 312, 314 (D. Minn. 1992) (same).

2. The Order Improperly Elevates Form Over Substance.

To avoid this result, Plaintiffs persuaded the district court to focus narrowly on only one component of the bank's interest charges: those that relate to late fees. According to Plaintiffs, so long as they challenge the propriety of that *entire* interest charge, and not the *amount* of that specific interest charge, their claim is not preempted by Sections 85 and 86. *See* A-18. However, Plaintiffs' position that their Complaint does not challenge the "amount" of interest—a position the Order embraced—is both legally and factually flawed.

As a legal matter, Plaintiffs' characterization of their claim improperly elevates form over substance. If states were free to *ban* national banks from including certain charges in the total amount of interest assessed so long as they refrained from *capping the amount* of those individual component charges, the Congressional goal of protecting national banks from state-law limits on their interest charges would lie in ruins, and the purposes of Sections 85 and 86 would

be thwarted. The cases make clear that Sections 85 and 86 are not so easily evaded. *See, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004) ("Distinguishing between pre-empted and non-preempted claims based on the particular label affixed to them would elevate form over substance and allow parties to evade the pre-emptive scope" of federal law (quotation marks omitted)); *Davis v. Bell Atlantic-West Virginia, Inc.*, 110 F.3d 245, 247 (4th Cir. 1997) ("Form is not to triumph over substance" in the preemption analysis).

As a factual matter, the Complaint does challenge the amount of Huntington's interest charges. Properly understood, the Complaint alleges that the law of the borrower's home state prohibits Huntington from charging the *entire* amount of interest permitted by the law of the bank's home state and Section 85. Two examples—drawn from the facts of Plaintiffs' own case—illustrate how the Complaint challenges the amount of Huntington's interest charges.

First, Huntington's home state's laws—and therefore Section 85—permitted Huntington to impose $563.53 in interest charges in October 2012: $548.53 of which is normal periodic interest, and $15 of which is a late fee. However, Plaintiffs argue that West Virginia law prohibits the bank from charging that $15 late fee. According to Plaintiffs, even though it may be lawful under Huntington's home state's law—and therefore Section 85—to charge $563.53 in interest in

October 2012, West Virginia law permits that national bank to only charge $548.53 in interest that month.

Second, Huntington's home state's laws—and therefore Section 85—permitted Huntington to impose interest charges each month Plaintiffs remained delinquent on their mortgage repayment obligations. Here, however, Plaintiffs seek to use West Virginia law to cap the total amount of interest a consumer may be charged when they have fallen behind on their repayment obligations. According to Plaintiffs, even though it may be lawful under Huntington's home state's law—and therefore Section 85—to charge $45 in interest if the consumer remained behind on their repayment obligations for three months, West Virginia law caps the maximum amount of such interest charges during that time period at $15.

The Order nevertheless embraces these outcomes. As a result, the Order calls into question what has long been a settled principle of banking law: national banks have an unchallenged right to export interest charges pursuant to Section 85 if they are lawful under their home state, even if the borrower's state has contrary rules on the interest charges. *See, e.g.*, *Marquette Nat'l Bank*, 439 U.S. at 310-18. The effect of the Order is to disrupt the "uniform rules" applicable to a national bank's interest charges that have been deemed "indispensable" to the national banking system enacted by Congress. *Beneficial Nat'l Bank*, 539 U.S. at 9, 10;

Tiffany, 85 U.S. at 412. The Order allows state-law challenges to the propriety of certain interest charges by attacking the legality of the entire fee, even though Congress intended that Section 86 provide the "exclusive cause of action" for such challenges. *Beneficial Nat'l Bank*, 539 U.S. at 10-11.

3. Other Courts Have Held That Federal Law Preempts State Law Restrictions On Banks' Interest Charges.

Decisions from other courts further illustrate the extent to which there are substantial grounds to disagree with the Order. *See, e.g.*, *Lynn v. Monarch Recovery Mgmt., Inc.*, 953 F. Supp. 2d 612, 624 (D. Md. 2013) ("An issue presents a substantial ground for difference of opinion if courts, as opposed to parties, disagree on a controlling legal issue." (internal quotation marks omitted)).

For example, at least one court has reached a contrary result when presented with the exact same question at issue in the Order. In *Akopyan v. Wells Fargo Home Mortgage*, the court held that a claim that late fees were imposed in months when timely mortgage payments were made was preempted by the National Bank Act. *See* 155 Cal. Rptr. 3d 245, 271-72 (Cal. App. Ct. 2013). The *Akopyan* court held that a claim like the one asserted in the Complaint was preempted when it rested on a claim that a plaintiff was "improperly assessed late fees for one additional month" because such a claim "arguably gives rise to a claim of usury." *Id.* at 269. *Akopyan* is both procedurally and factually indistinguishable from this case, and therefore establishes substantial grounds for a difference of opinion.

Similarly, the Order conflicts with another district court decision in this Circuit that, like this case, addressed the extent to which W.V. Code § 46A-3-112 was preempted by federal banking law. In *Bishop v. Ocwen Loan Servicing, LLC*, 2010 WL 4115463, at *6-7 (S.D. W. Va. Oct. 19, 2010), the court held that a claim that "use[s] the WVCCPA to independently attack the imposition of late fees as a matter of policy is an attempt to apply the applicable provisions in a manner which directly regulates conduct that is sanctioned by federal law" and is therefore preempted. *Id.* at *7. Although *Bishop* involved the Home Owners' Loan Act, not the National Bank Act, Congress noted four months before *Bishop* was decided that the preemption standards applicable to the HOLA are the same as the standards applicable to the National Bank Act. *See* 12 U.S.C. § 1465(a).

Akopyan and *Bishop* are consistent with numerous other court decisions holding that a challenge to the lawfulness of a late fee is a challenge to the amount of interest and is preempted by Section 85. *See, e.g.*, *Smiley*, 517 U.S. at 743-47*;* *Krispin v. May Dept. Stores Co.*, 218 F.3d 919, 923-24 (8th Cir. 2000).[3] Outside the context of late fees, courts have concluded that challenges seeking to prohibit a national bank from imposing other fees that are "interest" are preempted. *See, e.g.*,

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[3] *Accord Taylor v. Wells Fargo Home Mortg.*, 2004 WL 856673, at *3 (E.D. La. Apr. 20, 2004); *Tikkanen v. Citibank (SD), N.A.*, 801 F. Supp. 270 (D. Minn. 1992); *Hill*, 799 F. Supp. 948; *Nelson*, 794 F. Supp. at 318; *cf. Forness v. Cross Country Bank, Inc.*, 2006 WL 240535, at *3-5 (S.D. Ill. Jan. 13, 2006) (different federal banking law preempts challenge to late fees).

Beneficial Nat'l Bank, 539 U.S. at 11 (numerical periodic interest); *Phipps*, 417 F.3d at 1013 (loan origination, discount, underwriting, and application fees).[4]

With the exception of the Order, the only cases Huntington is aware of that hold that the National Bank Act does not preempt the lawfulness of a national bank's interest charges involved claims of alleged affirmative misrepresentations, fraud, or breach of contract. While the district court cited some of those cases, the Complaint here does not include the same types of allegations and claims present in the cases cited in the Order.[5] For example, this Complaint does not include a claim for breach of contract. *See supra* 5 n.2. Similarly, Plaintiffs do not allege that Huntington affirmatively misrepresented how it would impose interest charges. Instead, the *only* reason why Huntington allegedly acted deceptively in this case was because it imposed an interest charge permitted by its home state

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[4] *Accord Taft v. Wells Fargo Bank, N.A.*, 828 F. Supp. 2d 1031, 1037-38 (D. Minn. 2011) (mortgage insurance, origination fees, and servicing fees); *Lewis v. Wells Fargo Bank, N.A.*, 2011 WL 5374575, at *4-5 (D. Minn. Nov. 4, 2011) (same); *Austin*, 2005 WL 1785285, at *5-6 (broker fees); *Santos*, 2003 WL 25911112, at *3 (overlimit fees); *Budnik*, 2003 WL 22964372, at *2-3 (periodic interest).

[5] *See* A-21 (citing *Hood ex rel. Miss. v. JPMorgan Chase & Co.*, 737 F.3d 78, 93 (5th Cir. 2013) (challenge to banks' practice marketing and disclosure practices that allegedly caused "improperly enrolling [of] certain unqualified customers in the Plans"); *West Virginia ex rel. McGraw v. Capital One Bank (USA), N.A.*, 2010 WL 2901801, at *3 (S.D. W. Va. July 22, 2010) (challenge to "practices and methods used to entice, deceive, or dupe cardholders into accruing interest"); *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006, 1021 (S.D. Iowa 2009) (challenge to automated process of imposing late fees in a manner prohibited by the contract); *Cross-Country Bank v. Klussman*, 2004 WL 966289, at *6 (N.D. Cal. Apr. 30, 2004) (challenge that "Defendants misrepresented the nature and cost of their services")).

(and therefore Section 85) but not permitted by the borrower's state. Such claims are textbook examples of claims preempted by the National Bank Act.

4. The Order Conflicts With This Court's Ruling That Federal Banking Law Preempts State Law Restrictions On Banks' Interest Charges.

In concluding that Plaintiffs' claims were not preempted by the National Bank Act, the Order conflicts with this Court's decision in *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007). In *Vaden*, this Court held that federal banking law preempted claims that "fees and interest rates" were charged "in violation of Maryland laws regulating finance charges, late fees, and compounding of interest." *Id.* at 606. Because these charges "fall squarely" within the definition of permissible "interest" charges, this Court held that Maryland law prohibiting the imposition of these charges must yield to federal law permitting the bank to impose charges authorized by the bank's home state law of Delaware. *Id.* at 606-07.

To be sure, *Vaden* involved the Federal Deposit Insurance Act (the "FDIA"), which applies to a state-chartered bank.[6] But, as this Court observed, 12 U.S.C. § 1831d(a) is in "virtual identity" with 12 U.S.C. § 85. *Id.* at 606. *Compare* 12 U.S.C. § 1831d(a) (state-chartered bank "may … take, receive, reserve, and charge on any loan or discount made … interest … at the rate allowed by the laws of the

[6] Other decisions refer to this law as the Depository Institutions Deregulation and Monetary Control Act, or "DIDA." *See, e.g., Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 822 (1st Cir. 1992).

State … where the bank is located), *with* 12 U.S.C. § 85 (national bank "may take, receive, reserve, and charge on any loan or discount made … interest at the rate allowed by the laws of the State … where the bank is located").

Vaden also relied on a First Circuit decision comparing the National Bank Act to the FDIA. Like this case, *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), involved a question of whether "a bank may continue to use the favorable interest laws of its home state in certain transactions with out-of-state borrowers" to impose late fees prohibited by the borrower's state laws. *Id.* at 827. The First Circuit answered this question in the affirmative because Section 1831d(a) "should be interpreted *in para materia* with its direct lineal ancestor, [12 U.S.C. § 85]," and national banks had long been permitted to export their home state's laws regarding late fees. *Id.* at 829-31. As a result, the First Circuit held that Section 1831d(a) preempted state laws prohibiting the imposition of late fees.

There is no difference between the law at issue in *Vaden* and the West Virginia statute at issue here. *Compare* Md. Code Comm. Law § 12-506(a)(6)(ii), (g) *with* W.V. Code § 46A-3-112. As a result, there is no reason to believe this Court would reach a different preemption decision in this case simply because the National Bank Act is involved.[7]

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[7] Although the Supreme Court reversed *Vaden*'s separate jurisdictional holding that the fact that a challenge to the amount of "interest" was raised in a (continued…)

II. THIS COURT SHOULD ACCEPT THE APPEAL BECAUSE IT PRESENTS AN ISSUE OF NATIONAL IMPORTANCE.

Because the criteria for an interlocutory appeal under 28 U.S.C. § 1292(b) have been met, this Court should grant this Petition. *See Ahrenholz v. Board of Trustees of University of Illinois*, 219 F.3d 674, 677 (7th Cir. 2000) ("emphasiz[ing] the duty of … our court … to allow an immediate appeal to be taken when the statutory criteria are met"). Here, there are especially strong reasons to permit an interlocutory appeal.

The preemption issues presented by this case are especially well-suited for interlocutory review. For example, this Court routinely permits interlocutory appeals in cases presenting preemption issues. *See Sonoco Prods Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 368 (4th Cir. 2003); *Warren v. Blue Cross & Blue Shield*, No. 97-1374, 1997 U.S. App. LEXIS 31793, at *3 (4th Cir. 1997); *Madonia v. Blue Cross & Blue Shield*, 11 F.3d 444, 446 (4th Cir. 1993). Similarly, other circuits have recently permitted interlocutory appeals in cases involving the preemptive scope of Sections 85 and 86. *See, e.g., Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027 (9th Cir. 2014); *Hood v. JPMorgan Chase*, 737 F.3d at 82.

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counterclaim did not give federal jurisdiction over a petition to compel arbitration, *Vaden v. Discover Bank*, 556 U.S. 49, 53-54 (2009), the Supreme Court did not disturb *Vaden*'s holding that federal banking law preempted an attempt to limit a bank's interest charges, and that holding remains good law, s*ee id.* at 56 n.4.

In addition, trade associations that collectively represent approximately 1,000 national banks and other depository institutions submitted an amicus brief urging interlocutory review of the Order to clarify the preemptive scope of Sections 85 and 86. *See generally* A-24-40. Those trade associations have asserted that "in light of how other courts have interpreted the preemptive scope of the National Bank Act," the district court's ruling "has the potential to create confusion about the federal right of a national bank to impose interest charges permitted by the law of its home state." A-27.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of Fed. R. App. P. 5(c) because this brief is 20 pages, excluding the parts or the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I, Andrew Soukup, certify that on May 8, 2015, I caused The Huntington National Bank's Petition For Permission To Appeal Pursuant To 28 U.S.C. § 1292(b) (including the Appendix) to be filed with the Clerk of Court for the U.S. Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system.

I further certify that on May 8, 2015, pursuant to 4th Cir. Rule 31(d)(1), I caused eight papers copies of the foregoing document (including the Appendix) to be delivered to the Clerk of Court at the Lewis F. Powell Jr. Courthouse, 1100 East Main Street, Suite 501, Richmond, VA 23219 via Federal Express, next-business-day service.

I further certify that on May 8, 2015, I caused a copy of the foregoing document (including the Appendix) to be served via email and Federal Express, next-business-day service, upon the following:

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

JEREMY A. POWELL, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 2:13-cv-32179

THE HUNTINGTON NATIONAL BANK,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending before the Court are Defendant's Motion to Certify the Court's September 26, 2014 Order for Interlocutory Review (the "Motion to Certify"), (ECF 64), Defendant's Motion to Expedite Briefing Schedule (the "Motion to Expedite"), (ECF 66), Defendant's Request for a Hearing, (ECF 90), and the Motion by American Bankers Association and Consumer Bankers Association for Leave to File a Memorandum as *Amici Curiae* in Support of Defendant's Motion to Certify an Interlocutory Appeal (the "Motion to File Memorandum as *Amici Curiae*"), (ECF 70). For the reasons discussed herein, the Court **GRANTS IN PART** and **DENIES IN PART** the Motion to Certify and **DENIES AS MOOT** the Motion to Expedite, the Request for a Hearing, and the Motion to File Memorandum as *Amici Curiae*.

I. Background

Plaintiffs filed the Complaint in the Circuit Court of Kanawha County, West Virginia, on October 15, 2013. (ECF 1-1.) The Complaint alleges that Plaintiffs "bring this action on his [sic] own behalf and on behalf of a class of West Virginia consumers who have had unlawful late fees

charged to their home loan accounts." (*Id.* ¶ 1; *see also id.* ¶¶ 12–16 (alleging that this matter is a class action brought pursuant to West Virginia Rule of Civil Procedure 23).) The Complaint includes two claims for relief. Count I alleges that Defendant illegally assessed late fees in violation of the terms of Plaintiffs' mortgage loan contract and West Virginia Consumer Credit and Protection Act ("WVCCPA"), Section 46A-3-112. (*Id.* ¶¶ 17–22.) Count II is a misrepresentation claim under Section 46A-2-127 of the WVCCPA. (*Id.* ¶¶ 23–24.)

On December 13, 2013, Defendant timely removed the state case to this Court. (*See* ECF 1.) In the notice of removal, Defendant argued this Court has diversity jurisdiction over this matter under the Class Action Fairness Act of 2005 and based on federal-question jurisdiction. (*Id.*) As to the latter, Defendant argued that the Complaint includes only usury claims that are completely preempted by the National Bank Act ("NBA"), 12 U.S.C. §§ 85 and 86. (*Id.* ¶¶ 11–28.) Defendant then moved for judgment on the pleadings. (ECF 6.)

In its Memorandum Opinion and Order, dated September 26, 2014 (the "Opinion"), the Court found that "Plaintiffs' claims are not pre-empted by the NBA" and, "[c]onsequently, Defendant improperly removed this case from state court on the basis of federal question jurisdiction." (ECF 57 at 12.) However, the Court found that it does have diversity jurisdiction over this matter under 28 U.S.C. § 1332(d). (*Id.* at 12–13.)

On October 7, 2014, Defendant filed the Motion to Certify,[1] (ECF 64), and the Motion to Expedite, (ECF 66). On October 9, 2014, the American Bankers Association and the Consumer

[1] In the Motion to Certify, Defendant requests that the Court certify the following question:

> Whether the National Bank Act provisions codified at 12 U.S.C. §§ 85-86, and federal law interpreting the NBA, which permit Huntington Bank to export Ohio's laws governing the amount and manner of assessing late fees and other interest charges, preempt Plaintiffs' claims that W.Va. Code § 46A-3-112 prohibits Huntington Bank from charging late fees that are permissible under Ohio law.

Bankers Association filed the Motion to File Memorandum as *Amici Curiae*. (ECF 70.) Plaintiffs subsequently filed their response to the Motion to Certify, the Motion to Expedite, and the Motion to File Memorandum as *Amici Curiae* on October 21, 2014, (ECF 74), and Defendant filed its reply in support of the Motion to Certify on October 28, 2014,[2] (ECF 78).

II. Discussion

"In general, appellate review is reserved for final judgments." *Ohio Valley Envtl. Coal., Inc. v. Fola Coal Co.*, Civil Action No. 2:13–5006, 2015 WL 1599638, at *2 (S.D. W. Va. Apr. 8, 2015) (citations omitted). "[F]inality is an important component of the judicial structure, for, as a general matter, it prevents the entanglement of the district and appellate courts in each other's adjudications in an unruly and ultimately inefficient way." *Evergreen Int'l (USA) Corp. v. Standard Warehouse*, 33 F.3d 420, 423 (4th Cir. 1994); *see also United States v. Nixon*, 418 U.S. 683, 690 (1974) ("The finality requirement of 28 U.S.C. [§] 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." (citing *Cobbledick v. United States*, 309 U.S. 323, 324–26 (1940))); *Millville Quarry, Inc. v. Liberty Mut. Fire Ins. Co.*, 217 F.3d 839, at *3 (4th Cir. 2000) (stating that piecemeal review of ongoing district court proceedings "would not only delay the ultimate resolution of disputes by spawning multiple appeals, it would also 'undermine the independence of the district judge' in conducting court proceedings" (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981))).

(ECF 65 at 1.)

[2] Defendant later filed the Request for a Hearing on December 10, 2014. (ECF 90.)

28 U.S.C. § 1292(a) provides an exception to this finality rule and states, in relevant part, that "the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States." Section 1292 further provides the following:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b). "Section 1292(b) is best suited for use in a dispute that involves 'a narrow question of pure law whose resolution will be completely dispositive . . . .'" *Stewart v. W. Va. Emp'rs Mut. Ins. Co.*, Civil Action Nos. 2:09-126, 2:09-127, 2010 WL 1286623, at *1 (S.D. W. Va. Mar. 29, 2010) (quoting *Difelice v. U.S. Airways, Inc.*, 404 F. Supp. 2d 907, 908 (E.D. Va. 2005)).

"Although courts have discretion to certify an issue for interlocutory appeal, interlocutory appeals are rarely allowed . . . [and] the movant bears the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of final judgment." *Nat'l Cmty. Reinvestment Coal. v. Accredited Home Lenders Holding Co.*, 597 F. Supp. 2d 120, 122 (D.D.C. 2009) (internal quotation marks and citation omitted). Ultimately, "§ 1292(b) should be used sparingly and . . . its requirements must be strictly construed." *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989) (citation omitted).

Defendant argues—and Plaintiffs do not contest—that the Opinion involves a controlling question of law and that immediate appeal from the Opinion may materially advance the termination of this litigation. (ECF 65 at 5–6, 10–12; *see* ECF 74 at 2 (constituting Plaintiff's opposition to the Motion to Certify and stating that "[t]he first and third conditions" of an interlocutory appeal "are arguably met here, as with the majority of pre-discovery dispositive motions, because the legal question presented is inherently controlling, and the litigation will be delayed or advanced by the appeal depending on whether the appeal courts [sic] affirms or reverses").) As such, the parties only dispute whether there is "substantial ground for difference of opinion" as to the controlling legal question. (*See* ECF 74 at 2–6; ECF 78 ("Plaintiffs first concede that two of the three prerequisites to an interlocutory appeal have been met." (citing ECF 74 at 2–3)).

"The question of whether there is 'substantial ground for difference of opinion' must be considered not from the perspective of the parties, but from that of the courts." *Ohio Valley Envtl. Coal. v. Elk Run Coal Co.*, Civil Action No. 3:12–0785, 2014 WL 4660782, at *3 (S.D. W. Va. Sept. 17, 2014) (citing *Lynn v. Monarch Recovery Mgmt., Inc.*, 953 F. Supp. 2d 612, 624 (D. Md. 2013)). "Mere disagreement, even if vehement, with a court's ruling does not establish a substantial ground for difference of opinion sufficient to satisfy the statutory requirements for an interlocutory appeal." *Nat'l Cmty. Reinvestment Coal.*, 597 F. Supp. 2d at 122 (quoting *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 233 F. Supp. 2d 16, 20 (D.D.C. 2002)); *see also Lynn*, 953 F. Supp. 2d at 626 ("[F]or purposes of § 1292(b), the litigants' positions are irrelevant—otherwise, every contested decision would be appropriate for immediate interlocutory appeal."). Additionally, "[t]hat a controlling issue of law may be an issue of first impression does

not necessarily translate into there also being substantial ground for difference of opinion." *Elk Run Coal Co.*, 2014 WL 4660782, at *3 (citing *Lynn*, 953 F. Supp. 2d at 624). "Furthermore, that a question of law is complex or difficult does not justify immediate appeal pursuant to 28 U.S.C. § 1292(b)." *Id.* (citing *In re S. African Apartheid Litig.*, 624 F. Supp. 2d 336, 339 (S.D.N.Y. 2009)); *see also Lynn*, 953 F. Supp. 2d at 623 ("Interlocutory appeal should not be sought 'to provide early review of difficult rulings in hard cases.'" (quoting *Abortion Rights Mobilization, Inc. v. Regan*, 552 F. Supp. 364, 366 (S.D.N.Y. 1982))).

Defendant argues there is "substantial ground for difference of opinion" as to whether Sections 85 and 86 of the NBA preempt Plaintiffs' claims regarding Defendant's assessment of late fees during months Plaintiffs allege they were current on payments. (ECF 65 at 6–10; ECF 78 at 3–7.) As the Court noted in the Opinion, it is "not a novel interpretation" to find—as the Court did—that a claim regarding the practice of charging a "late fee when no late fee should be charged in the first place" is different than a claim asserting that a fee is excessive or usurious. (ECF 57 at 11); *see, e.g., Hood ex rel. Miss. v. JP Morgan Chase & Co.*, 737 F.3d 78, 92–94 (5th Cir. 2013) (finding that "[n]one of the State's claims can be fairly construed as allegations that [the defendants] violated the NBA" where "[t]he [plaintiff] never alleges that [the defendants] charge an interest rate greater than allowed by § 85"); *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006, 1021 (S.D. Iowa 2009) ("[T]he basis of the alleged excessiveness is that Wells Fargo charged fees when they should not, a wholly different claim from a claim that Wells Fargo applied an illegal interest rate. As such, [the plaintiffs'] claims are not usury claims and are not subject to complete preemption by § 86 of the NBA."); *Cross-Cnty. Bank v. Klussman*, No. C–01–4190–SC, 2004 WL 966289, at *6 (N.D. Cal. Apr. 30, 2004) ("[The plaintiff] does not challenge the legality of the *rate*

of interest charged by [the defendants]. Rather, [the plaintiff] claims that various interest fees were not disclosed, were unwarranted, were based on charges that were themselves improper, and in short, should never have been charged at all."). However, the Court recognizes that the definition of "interest" under the NBA presents "legal issues that are neither easy to decide nor well-settled," *Haw. ex rel. Louie v. JP Morgan Chase & Co.*, 921 F. Supp. 2d 1059, 1067 (D. Haw. 2013), and the proper application of the definition of "interest"—and particularly whether "interest" includes various fees—is an issue that has garnered different interpretations in courts throughout the country. *See, e.g.*, *New Mexico v. Capital One Bank (USA) N.A.*, 980 F. Supp. 2d 1314, 1328–29 (D.N.M. 2013) (discussing a division between courts relating to whether claims relating to fees are usury claims). *Compare W. Va. ex rel. McGraw v. JPMorgan Chase & Co.*, 842 F. Supp. 2d 984, 992 (S.D. W. Va. 2012) (determining that fees associated with the defendants' payment protection plans "are not interest under the NBA"), *and W. Va. ex rel. McGraw v. Capital One Bank USA N.A.*, Civil Action No. 3:10–0211, 2010 WL 2901801, at *3–4 (S.D. W. Va. July 22, 2010) (finding that the plaintiff's state-law claims were not preempted by Sections 85 or 86 of the NBA because the claims challenged the imposition of over-the-limit fees, not the amount of those fees), *with Hood v. JPMorgan Chase & Co.*, 958 F. Supp. 2d 681, 703–04 (S.D. Miss.) (specifically disagreeing with the holding in *W. Va. ex rel. McGraw*, 842 F. Supp. 2d 984, and finding that fees associated with the defendants' payment protection plans "constitute interest under the NBA"), *rev'd Hood ex rel. Miss.*, 737 F.3d 78 (2013), *and Akopyan v. Wells Fargo Home Mortg., Inc.*, 155 Cal. Rptr. 3d 245, 269 (Cal. Ct. App. 2013) (noting that the case did not involve an allegation of fraudulent activity and stating that "the allegations that the [plaintiffs] were improperly assessed late fees for one additional month at the rate of six percent arguably gives rise to a claim of usury").

Given the complexity of this issue and the divergent interpretations of courts regarding whether various fees are "interest" for purposes of the NBA, the Court finds there is a substantial ground for difference of opinion as to the controlling issue of law—whether Plaintiffs' claims are preempted by the NBA—as addressed in the Opinion. *See, e.g.*, *Elk Run Coal Co.*, 2014 WL 4660782, at *3 (discussing the standard relating to "substantial ground for difference of opinion"). The Court therefore finds that the three requirements for interlocutory appeal are met in this case and that certification for interlocutory appeal is appropriate.[3] *See* 28 U.S.C. § 1292(b). (*See generally* ECF 74 at 2 (providing Plaintiff's opposition to the Motion to Certify and noting that "[t]he first and third conditions" of an interlocutory appeal "are arguably met here").)

Nonetheless, the Court declines to certify Defendant's proposed controlling question of law. (*See* ECF 64.) The discussion and findings in the Opinion regarding whether Plaintiffs' state-law claims are preempted by the NBA are sufficient to provide the Fourth Circuit with the specific controlling question of law presently at issue. (*See* ECF 57.)

III. Conclusion

For the reasons discussed above, the Court **GRANTS** the Motion to Certify, insofar as it requests amendment of the Opinion to include certification for interlocutory appeal and a stay in the proceedings pending appeal. (ECF 64.) However, the Court **DENIES** the Motion to Certify, insofar as it requests that the Court certify Defendant's proffered controlling question of law. (*Id.*) The Court further **DENIES AS MOOT** the Motion to Expedite Briefing Schedule, (ECF 66),

[3] The Court also notes that some courts granted motions for interlocutory review when the challenged legal issue was whether certain fees are "interest" for purposes of the preemption analysis under the NBA. *See Haw. ex rel. Louie*, 921 F. Supp. 2d at 1068 (granting a motion for certification for interlocutory appeal on the issue of whether claims related to fees associated with the defendants' payment protection plans are preempted by the NBA); *Hood ex rel. Miss.*, 737 F.3d at 82 & 84 n.2 (noting that the district court certified for interlocutory appeal the question of whether fees associated with the defendants' payment protection plans constituted "interest" under the NBA).

Defendant's Request for Hearing, (ECF 90), and the Motion to File Memorandum as *Amici Curiae*, (ECF 70).

The Court **ORDERS** that its September 26, 2014 Memorandum Opinion and Order is hereby amended to include the following additional paragraph:

> The Court certifies, pursuant to 28 U.S.C. § 1292(b), that it is of the opinion that the finding of this Memorandum Opinion and Order that Plaintiffs' state-law claims are not preempted by the National Bank Act, 12 U.S.C. §§ 85 and 86, involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Memorandum Opinion and Order may materially advance the ultimate termination of the litigation.

The Court **STAYS** these proceedings pending the determination of the Fourth Circuit as to this interlocutory appeal. The Court **DIRECTS** the Clerk to remove this case from the Court's active docket.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: May 1, 2015

THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

JEREMY A. POWELL, et al.,

Plaintiffs,

v. CIVIL ACTION NO. 2:13-cv-32179

THE HUNTINGTON NATIONAL BANK,

Defendant.

MEMORDANDUM OPINION AND ORDER

Pending before the Court is Defendant The Huntington National Bank's motion for judgment on the pleadings [ECF 6]. Also pending is Plaintiffs' motion for leave to file a surreply [ECF 20]. For the reasons set forth herein, the Court **DENIES** both motions.

I. BACKGROUND

Plaintiffs Jeremy A. Powell and Tina M. Powell filed a Complaint in the Circuit Court of Kanawha County, West Virginia on October 15, 2013 (ECF 1–1). The Complaint alleges that Plaintiffs "bring this action on his [sic] own behalf and on behalf of a class of West Virginia consumers who have had unlawful late fees charged to their home loan accounts." (*Id.*) Plaintiffs allege two claims for relief. Count I alleges that Defendant illegally assessed late fees in violation of the terms of Plaintiffs' mortgage loan contract and in violation of the West Virginia Consumer Credit and Protection Act ("WVCCPA") (W. Va. Code § 46A–3–112).[1] Count II

[1] Section 46A–3–112 provides in pertinent part:

* * * * *

> (2) A delinquency charge under [this section] may be collected only once on an installment however long it remains in default. No delinquency charge may be collected with respect to a deferred installment unless the installment is not paid in full within ten days after its deferred due date. A delinquency charge may be collected at the time it accrues or at any time thereafter.

alleges a misrepresentation claim under Section 46A–2–127 of the WVCCPA.[2] The Complaint alleges that the action is a class action brought pursuant to West Virginia Rule of Civil Procedure 23. (*Id.* at 5–6.)

On December 13, 2013, Defendant timely removed the state case to this Court (ECF 1). Defendant then moved for judgment on the pleadings (ECF 6). Plaintiffs responded in opposition (ECF 12), Defendant replied (ECF 19), and Plaintiffs filed a motion for leave to file a surreply (ECF 20). This matter is ripe for adjudication.

II. LEGAL STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure succinctly provides: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." *Williams v. Basic Contracting Servs., Inc.*, Civil Action No. 5:09-cv-00049, 2009 WL 3756943 (S.D. W. Va. Nov. 9, 2009) (citing *Burbach Broad. Co. v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir. 2002)). When considering a motion for judgment on the pleadings under Rule 12(c), the Court applies the same standard as when considering a motion to dismiss pursuant to Rule 12(b)(6). *Id.* (citing *Burbach.*, 278 F.3d at 405–06 (4th Cir. 2002)). A court

> (3) No delinquency charge may be collected on an installment which is paid in full within ten days after its scheduled or deferred installment due date, even though an earlier maturing installment or a delinquency or deferral charge on an earlier installment may not have been paid in full. For purposes of this subsection, payments shall be applied first to current installments, then to delinquent installments and then to delinquency and other charges.

[2] Section 46A-2-127 provides in pertinent part:

> No debt collector shall use any fraudulent, deceptive or misleading representation or means to collect or attempt to collect claims or to obtain information concerning consumers. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:
>
> * * * * *
>
> (d) Any false representation or implication of the character, extent or amount of a claim against a consumer, or of its status in any legal proceeding.

must accept all well-pleaded allegations in the plaintiff's complaint as true and draw all reasonable factual inferences from those facts in the plaintiff's favor. *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility requires that the factual allegations "be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true." *Twombly*, 550 U.S. at 555. A court decides whether this standard is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer that "the defendant is liable for the misconduct alleged." *Id.* If evidence outside the pleadings is tendered to and accepted by the court, the motion for judgment on the pleadings is converted into a motion for summary judgment under Rule 56. *Id.* (citing *A.S. Abell Co. v. Baltimore Typographical Union*, 338 F.2d 190, 193 (4th Cir. 1964); Fed. R. Civ. P. 12(d). The motion is not converted into a summary judgment motion if the court considers documents and facts of which it may take judicial notice. *Id.* (citing *R.G. Fin. Corp. v. Vergara–Nunez*, 446 F.3d 178, 182 (1st Cir. 2006); *Armbruster Prods. v. Wilson*, No. 93–2427, 1994 U.S. App. LEXIS 24796, at *5, 1994 WL 489983 (4th Cir. Sept. 12, 1994) (unpublished)). The court may take judicial notice of certain facts which are not subject to reasonable dispute, Federal Rule of Evidence 201, and of the existence and contents of various types of official documents and

records. *Id.* (citing *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1018 (5th Cir. 1996) (documents filed with government agencies); *Anderson v. FDIC*, 918 F.2d 1139, 1141 n. 1 (4th Cir. 1990) (records of bankruptcy court); *Bratcher v. Pharm. Prod. Dev., Inc.*, 545 F. Supp. 2d 533, 538 n.3 (W.D.N.C. 2008) (EEOC Complaints and right-to-sue notices)). A court may also consider documents attached to the Complaint, *see* Federal Rule of Civil Procedure 10(c), as well as those attached to the motion to dismiss, so long as they are integral to the Complaint and authentic. *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (citing *Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006)).

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a Complaint; "importantly, [a Rule 12(b)(6) motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards*, 178 F.3d at 243–44 (citing *Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)).

III. DISCUSSION

On December 13, 2013, Defendant timely removed the state case to this Court (ECF 1). The tendered bases for this Court's jurisdiction are federal question jurisdiction under 28 U.S.C. §§ 1331 and diversity jurisdiction under the class action provisions contained in 28 U.S.C. § 1332(d).

In support of its motion for judgment on the pleadings, Defendant argues that Plaintiffs' claims are completely preempted by the National Bank Act ("NBA"), 12 U.S.C. §§ 85 and 86. Defendant reasons that, because Plaintiffs' Complaint has not alleged a violation of the NBA or a predicate state law claim that is authorized by the NBA, it is entitled to judgment as a matter of law because Plaintiffs' Complaint fails to state a viable claim for relief. (ECF 7 at 1.)

For the reasons set forth below, the Court finds that the NBA does not preempt the claims alleged in Plaintiffs' Complaint. Consequently, Defendant may not rely on this Court's federal question jurisdiction. The Court does have jurisdiction over this case, however, based on its diversity jurisdiction under 28 U.S.C. §§ 1332(d) and 1453. The Court will address each of these jurisdictional issues in turn.

A. Plaintiffs' state law claims are not preempted by the National Bank Act

In its notice of removal, Defendant purports to invoke this Court's federal question. A civil action filed in a state court may be removed to federal court if the claim is one "arising under" federal law. 28 U.S.C. § 1441(b). To determine whether the claim arises under federal law, a court must examine the "well pleaded" allegations of the Complaint and ignore potential defenses: *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) A defense that relies on the preemptive effect of a federal statute will not provide a basis for removal. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 13 (1983). As a general rule, absent diversity jurisdiction, a case will not be removable if the Complaint does not affirmatively allege a federal claim. *Beneficial*, 539 U.S. at 6. Two exceptions to this general rule are: (1) a state claim may be removed to federal court -when Congress expressly so provides; and (2) when a federal statute wholly displaces the state-law cause of action through complete pre-emption.[3] *Id.* at 8. As explained by the Supreme Court in *Beneficial*:

> When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under

[3] Although not pertinent here, a state claim can also be removed through the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(a), as long as there is another removable claim.

> 28 U.S.C. § 1441(b), which authorizes any claim that "arises under" federal law to be removed to federal court.

Id.

The NBA, 12 U.S.C. §§ 21–216d, authorizes a national bank "to charge interest at the rate allowed by the laws of the state in which the bank is located." In *Beneficial*, the Court held that in actions against national banks for usury, §§ 85 and 86 of the National Bank Act provide the exclusive cause of action for such claims and there is "no such thing as a state-law claim of usury against a national bank." *Id.* at 11.

Thus, in determining whether the NBA pre-empts Plaintiffs' claims, the Court must examine the character of the claims. If they assert usury claims, such claims would be pre-empted by §§ 85 and 86 of the NBA and this Court would have federal question jurisdiction over this case. If Plaintiffs' Complaint does not assert usury claims but purely state consumer protection claims that do not challenge the rate of interest charged, federal question jurisdiction is lacking and, absent diversity jurisdiction, remand to state court would be required.

Plaintiffs' Complaint states the case "arises out of the systematic abusive loan-servicing practices of the Defendant" and "concerns the assessment by Huntington of illegal and multiple late fees to its West Virginia consumers who have their home loans serviced by Huntington." (ECF 1–1 at 4.) The Complaint states that Defendant "regularly and systematically charges late fees to consumers who have made a timely payment of the current month's installment" in violation of state law prohibiting the "pyramiding" of late fees. *Id.* With respect to the individual defendants, the Complaint alleges that Defendant's imposition of late fees also violated the terms of Plaintiffs' loan note. *Id.* at 5.

Count I is styled "Illegal Assessment of Late Fees (Class and individual claim)." *Id.* at 6. This Count, which incorporates all preceding paragraphs, states:

> 18. Plaintiffs' Note prohibits the assessment of late fees for payments made within the contractual period and prohibits the assessment of more than one late fee for each late payment.
>
> 19. Pursuant to West Virginia Code, § 46A–3–112, Huntington must first credit payments, for purposes of assessing late fees, to current installments. Moreover, Huntington may only charge a late fee once, no matter how long an installment remains in default.
>
> 20. Nevertheless, Huntington regularly and systematically assessed Plaintiffs late fees for months in which they made timely monthly payments.
>
> 21. As a result, Defendant assessed Plaintiffs and the putative class members late fees in violation of the terms of their contracts and West Virginia Code § 46A–3–112.
>
> 22. By assessing Plaintiffs and the putative class members these unlawful late fees, Huntington caused Plaintiffs and the putative class members to suffer damages.

Id. at 6–7.

Count II is styled "False Representation of Amount of Claim (Class and individual claim)." *Id.* at 7. This claim incorporates the preceding paragraphs and states: "By assessing or collecting late fees that it had no right to assess, Huntington misrepresented the amount of a claim in violation of West Virginia Code § 46A–2–127." *Id.*

The Complaint seeks a declaration that Defendant's conduct is unlawful, actual and compensatory damages, statutory civil penalties and attorneys' fees, and interest. *Id.* at 7–8.

In its motion for judgment on the pleadings, Defendant reasons that, under *Beneficial*, Plaintiffs' claims are completely preempted by §§ 85 and 86 of the NBA. (ECF 7 at 5–10.) Defendant contends this is so because under 12 C.F.R. § 7.4001 late fees fall within the legal

definition of "interest." *Id.* at 6. Defendant, citing *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 745 (1996), asserts the following proposition: "A challenge to the amount of interest charged is a usury claim. Plaintiffs' claim, therefore, that a national bank violated state law by assessing late fees that were excessive or improper is legally a claim for a usury violation, regardless of how that claim is denominated." *Id.* at 7.

In response, Plaintiffs do not dispute that §§ 85 and 86 of the NBA pre-empt all state law claims that challenge as usurious rates of interest charged by a national banks. (ECF 12 at 5.) Plaintiffs contend, however, that their claims do not assert that the amount of the $15 late fee at issue is usurious. Rather, Plaintiffs' claims are based on the distinct theory that Defendant's regular and systematic assessment of late fees when a consumer has made a timely payment of the current month's installment violates the terms of the consumer's loan contract and violates §§ 46A–3–112 and 46A–2–127 of the WVCCPA . Plaintiffs stress that their theory of liability is that Defendant assessed late fees when no late fees should have been assessed.

The Court agrees with Plaintiffs that they do not assert claims that challenge as usurious the rate of interest (that is, the *amount* of the $15 late fees) charged by Defendant. Indeed, the word "usury" appears nowhere on the face of the Complaint. Nor do Plaintiffs ground their claims in West Virginia's usury statute, West Virginia Code § 47–6–6. Here it is clear that Plaintiffs' claims do not assert that the $15 late fee is excessive. If they did, such a claim would assert a theory of usury. Rather, Plaintiff's theory is that Defendant's practice of assessing a late fee in a month where Plaintiffs made a timely payment violated the terms of the loan contract and also violated West Virginia Code §§ 46A–3–112 and 46A–2–127. Because this theory does not

challenge the rate of interest charged by Defendant, Plaintiffs' claims are not usury claims and are not pre-empted by §§ 85 and 86 of the NBA.

The Court's determination is not in conflict with the Supreme Court's holding in *Smiley*. In that case, the Supreme Court examined the question whether § 85 of the NBA authorized a national bank to charge late fees that were lawful in the bank's home state but unlawful in the state where the credit card holders resided. 517 U.S. at 737. Smiley contended that the late fees were unconscionable under California law. *Id.* at 738. The national bank, Citibank, was located in South Dakota. *Id.* at 737–38. Smiley had two credit cards with Citibank. *Id.* The agreement for one card provided that Smiley would be charged a $15 late fee for each monthly period in which she failed to make the minimum monthly payment within twenty-five days of the due date. *Id.* Under the other card agreement, Citibank would impose a late fee of $6 in the minimum payment was not received within fifteen days of its due date. *Id.* at 738. Also, an additional charge of $15 or 0.65% of the card's outstanding balance, whichever was greater, would be assessed if the minimum payment was not received by the next minimum monthly payment due date . *Id.*. The state court dismissed Smiley's complaint on the grounds that her challenge to the late fees was pre-empted by § 85 of the NBA and the state appellate courts affirmed the dismissal. *Id.* at 738-39.

The issue before the Supreme Court in *Smiley* was whether the statutory term "interest" included late fees. *Id.* At the time Smiley filed her complaint, the federal regulation [12 C.F.R. § 7.4001(a)] which expressly states that "interest" under § 85 includes "late fees", had not yet been promulgated. *Id.* 739. This regulation, however, was adopted, however, in the course of Smiley's appeal. *Id.* The Court found that, although use of the term "interest" in § 85 was

ambiguous, deference should be given to the Comptroller of Currency's judgment as to the meaning of "interest" as set forth in § 7.4001(a). *Id.* at 740–743. The Court then held that inclusion of "late fees" in the definition of "interest" under § 7.4001(a) was a reasonable interpretation of the term "interest" in § 85. *Id.* at 745–47. In making this determination, the Court rejected, among other contentions, Smiley's argument that late fees should not be deemed interest because such fees are flat charges and not percentage charges. The Court stated that "the Comptroller's refusal to give the word 'rate' the narrow meaning [Smiley] demands" was not unreasonable. The Court noted that at the time the NBA was enacted the word "rate" was commonly understood to mean "the price or amount stated or fixed on any thing." *Id.* at 746.

Contrary to Defendant's assertion, *Smiley* does not stand for the broad proposition that "state law claims governing the charging of late fees" are preempted by §§ 85 and 86 of the NBA. (ECF 7 at 2.) Rather, *Smiley* simply held that the Comptroller of Currency's inclusion of "late fees" within the definition of "interest" was a reasonable agency judgment. It is true that the Court then affirmed, without further discussion, the state appellate courts' affirmance of the dismissal of Smiley's complaint on pre-emption grounds. But it appears that Smiley's claims included a challenge to the *amounts* of the late fees, which is a challenge to the rate of "interest" and is a challenge pre-empted by § 85 of the NBA. Because the Court did not examine this specific question, however, *Smiley* simply stands for the point of law that the Comptroller's inclusion of "late fees" within the regulatory definition of "interest" is lawful. *Smiley* does not broadly hold that § 85 pre-empts all challenges to the lawfulness of a national bank's assessment of late fees. Nor does *Smiley* stand for a rule that § 85 pre-empts state law claims that do not challenge a late fee as excessive or usurious.

The Court finds that Plaintiffs' claims do not challenge the rate of interest charged by Defendant, but rather challenge Defendant's practice of charging an otherwise non-usurious late fee when no late fee should be charged in the first place. The Court's view on this matter is not a novel interpretation. In *W. Va. ex rel. McGraw v. Capital One Bank (USA) N.A.*, Civil Action No. 3:10-cv-0211, 2010 WL 2901801 (July 22, 2010) (Chambers, J.), this Court applied similar reasoning in the context of a national bank's practice of imposing over-the-limit fees in certain circumstances and the bank's failure to report its imposition of certain fees until issuance of the consumer's second credit card statement. Judge Chambers reasoned that the plaintiff's challenges were claims that the bank engaged in deceptive practices and not claims that the amount of the fees charged was excessive. *Id.* at *3–4. *See also Hood ex rel. Miss. v. JP Morgan Chase & Co.*, 737 F.3d 78, 90–92 (5th Cir. 2013) (per curiam) (stating that, assuming the bank's payment protection fees were within the definition of "interest" under § 85, none of the plaintiff's claims could be fairly construed as allegations that the bank violated the NBA because plaintiff did not claim that the rate of interest the bank charged was excessive, but rather challenged the bank's practice of improperly enrolling certain unqualified customers in the payment protection plans); *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006, 1021 (S.D. Iowa 2009) ("Hence, the basis of the alleged excessiveness is that Wells Fargo charged fees when they should not, a wholly different claim from a claim that Wells Fargo applied an illegal interest rate."); *Cross–Cnty. Bank v. Klussman*, No. C–01–4190–SC, 2004 WL 966289 at *6 (N.D. Cal. Apr. 30, 2004) ("Plaintiff does not challenge the legality of the rate of interest charged by Defendants. Rather, Plaintiff claims that various interest fees were not disclosed, were unwarranted, were based on charges that were themselves improper, and in short, should never have been charged at all.").

In sum, the Court finds that Plaintiffs' claims are not pre-empted by the NBA. Consequently, Defendant improperly removed this case from state court on the basis of federal question jurisdiction. The Court now turns to Defendant's alternative ground for jurisdiction—diversity jurisdiction.

B. Diversity jurisdiction under the Class Action Fairness Act

As an alternative basis for this Court's jurisdiction, Defendant invokes the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). CAFA grants district courts original jurisdiction over "a class action" if the class has more than 100 members, the amount in controversy is greater than $5,000,000, and the parties are minimally diverse. 28 U.S.C. § 1332(d)(2), (5)(B). To "determine whether the matter in controversy" exceeds $5,000,000, "the claims of the individual class members shall be aggregated." *Id.* § 1332(d)(6). The minimal diversity requirement is satisfied when "any member of a class of plaintiffs is a citizen of a State different from any defendant." *Id.* § 1332(d)(2)(A). A "class action" is "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *Id*. § 1332(d)(1)(B).

The Court notes at the outset that Plaintiffs did not seek remand of this case following removal. Nor have they challenged the accuracy of Defendant's diversity jurisdiction averments. The Court is otherwise satisfied that it has diversity jurisdiction over this case based on the allegations set forth in Defendant's notice of removal. Defendant plausibly alleges that the putative class exceeds 100 members and that the amount in controversy exceeds $5,000,000. (ECF 1 at 12–16.) Defendant is a federally chartered bank with a principal place of business in

Columbus, Ohio and the individual Plaintiffs and putative class members are all West Virginia residents. Thus, the minimal diversity requirement is satisfied. Plaintiff's Complaint states that it brings this putative class action pursuant to West Virginia Rule of Civil Procedure 23, the state counterpart of Federal Rule of Civil Procedure 23. Accordingly, the Court has diversity jurisdiction in this case.

IV. CONCLUSION

For the reasons stated herein, the Court **DENIES** Defendant's motion for judgment on the pleadings [ECF 6] and **DENIES** Plaintiffs' motion for leave to file a surreply [ECF 20].

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: September 26, 2014

THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

JEREMY A. POWELL, et al. **Plaintiffs,** **v.** **THE HUNTINGTON NATIONAL BANK** **Defendant.**	**Civ. No. 2:13-cv-32179**

MEMORANDUM OF *AMICI CURIAE*
AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION
IN SUPPORT OF DEFENDANT'S MOTION
TO CERTIFY AN INTERLOCUTORY APPEAL

TABLE OF CONTENTS

INTRODUCTION

The Supreme Court has repeatedly recognized that the National Bank Act provisions codified at 12 U.S.C. §§ 85 and 86 were intended to create "uniform rules limiting the liability of national banks" and to prevent states from imposing "substantive limits on the rates of interest that national banks may charge." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9, 10 (2003). For this reason, it has long been understood that "federal law permits [national banks] to charge [interest] to all their customers as long as the fees are legal in the [banks'] home states." *In re Late Fee and Over-Limit Fee Litig.*, 741 F.3d 1022, 1025 (9th Cir. 2014).

This Court's Order (ECF No. 57, referred to as the "Order") threatens to disrupt these settled principles of law. As a result of the Order, national banks are no longer certain that they may charge a single uniform rate of interest nationwide. Instead, the Order could be interpreted to permit states to ban national banks from imposing some interest charges, even if those charges are permitted by the law of the banks' home state. However, the National Bank Act was enacted precisely to prevent this result.

Amici are trade associations that collectively represent approximately 1,000 national banks and other depository institutions that rely on the exportation of their home state's interest rates pursuant to federal law. They submit this amicus brief to explain the potential impact of the Court's ruling, and to urge this Court to certify the Order for immediate interlocutory review to clarify the preemptive scope of Sections 85 and 86. Part I of this amicus brief explains how *amici* and their members have long understood the preemptive force of Sections 85 and 86: if the law of a national bank's home state permits the bank to impose an interest charge, the national bank may impose those interest charges nationwide, and any other state laws that would prevent the imposition of those charges are preempted. Part II of this amicus brief compares how this Court has resolved this issue with the approach taken by other courts, including the Fourth Circuit.

THE INTERESTS OF THE AMICI CURIAE

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. ABA's members, located in fifty states, the District of Columbia, and Puerto Rico, include financial institutions of all sizes and types, and they hold a majority of the domestic assets of the U.S. banking industry. ABA frequently submits *amicus curiae* briefs in matters that significantly affect its members and the business of banking.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

Amici submit this memorandum because, in light of how other courts have interpreted the preemptive scope of the National Bank Act, the Court's ruling has the potential to create confusion about the federal right of a national bank to impose interest charges permitted by the law of its home state. For the reasons explained below, there is a "substantial ground for difference of opinion" as to whether the National Bank Act preempts claims like those asserted in the Complaint. *Amici* respectfully request that this Court certify its Order for interlocutory appeal to permit the Fourth Circuit to clarify the preemptive scope of 12 U.S.C. § 85 and § 86.

ARGUMENT

I. IF AN INTEREST CHARGE IS PERMITTED BY A NATIONAL BANK'S HOME STATE, THE NATIONAL BANK ACT PERMITS THE NATIONAL BANK TO IMPOSE THAT INTEREST CHARGE NATIONWIDE.

As explained below, if the law of a national bank's home state permits a lender to impose certain interest charges, courts and *amici* have long understood the National Bank Act to gives national banks the right to charge that amount of interest across the nation. Once a national bank is

permitted to "export" the interest laws of its home state to out-of-state borrowers, the National Bank Act preempts all other state laws in the borrower's home state that would prohibit a bank from assessing such interest charges.

A. The National Bank Act Permits National Banks To "Export" Interest Charges Permitted by the State Where A National Bank Is Located.

When it enacted the National Bank Act more than 150 years ago, Congress "intended to facilitate … a 'national banking system.'" *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978). Interstate state loans were deemed an important component of this "national banking system." *Id.* at 314-16. For this reason, the National Bank Act specifies what interest national banks may charge on interstate loans. *See* 12 U.S.C. § 85.

Under Section 85, a national bank may charge "interest at the rate allowed by the laws of the State … where the bank is located." In other words, national banks have the right to "export" their home states' laws regarding the permissibility of interest charges into other states. *See, e.g.*, *Marquette*, 439 U.S. at 308. This right "was designed by Congress to place national banks on a plane of at least competitive equality with other lenders in the respective states, and, indeed, to give to national banks a possible advantage over state banks in the field of interest rates." *Fisher v. First Nat'l Bank of Omaha*, 548 F.2d 255, 259 (8th Cir. 1977).

It is also well-established that a national bank may export the *entire* law of its home state relating to interest charges, not just the portions of that law that relate to the maximum numerical rate. *See, e.g.*, *Daggs v. Phoenix Nat'l Bank*, 177 U.S. 549, 555 (1900) ("The intent of [Section 85] is to adopt the state law, and permit to national banks what the state law allows to its citizens and to the banks organized by it."); *First Nat'l Bank in Mena v. Nowlin*, 509 F.2d 872, 876 (8th Cir. 1975) ("[T]he federal Act adopts the entire case law of the state interpreting the state's limitations on usury; it does not merely incorporate the numerical rate adopted by the state."). Courts have

repeatedly recognized that laws that limit or restrict *when* and *how* a bank may impose interest charges are part of a state's law relating to the permissible "rate" of interest that may be charged. *See, e.g.*, *Citizens Nat'l Bank v. Donnell*, 195 U.S. 369, 374 (1904); *American Timber & Trading Co. v. First Nat'l Bank of Ore.*, 690 F.2d 781, 787-88 (9th Cir. 1982); *Acker v. Provident Nat'l Bank*, 512 F.2d 729, 732-33 (3d Cir. 1975); *Partain v. First Nat'l Bank of Montgomery*, 467 F.2d 167 (5th Cir. 1972).

The Office of the Comptroller of the Currency ("OCC") – the primary federal regulator for national banks – has likewise recognized that when a national bank's home state law permits the bank to charge interest, a bank may export both the right to impose that interest charge and the method for determining the total amount of interest charged across the country. *See, e.g.*, OCC Interp. Ltr. 822, 1998 WL 121663 (Feb. 17, 1998). The OCC long observed that a bank may export any provisions of state law "which are material to the determination of the interest rate.'" OCC Interp. Ltr., 1992 WL 136390, at *4 (Feb. 4, 1992); *see also* OCC, *Adjustable-Rate Mortgages*, 46 Fed. Reg. 18,932, 18939 (Mar. 27, 1981) (Section 85 "provide[s] national banks with a method … of avoiding state usury limits and restrictions on compounding as they relate to these state limits"). The OCC has also observed that if a fee "is permissible for lender to impose under the laws of the state where a bank is located, they may be charged and 'exported.'" OCC Interp. Ltr. 744, 1996 WL 685467, at *3 (Aug. 21, 1996).

B. The National Bank Act Preempts All Other State Laws Relating To the Propriety Of Interest Charges.

The Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters v. Wachovia Bank, N.A*, 550 U.S. 1, 11 (2007). As a result, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition

applies." *Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25, 34 (1996). Instead, the Supreme Court has emphasized that when Congress has "explicitly granted" a banking power to a national bank – as it has in Section 85 – state law may "not prevent or significantly interfere with the national bank's exercise of that power." *Id.* at 33.

The National Bank Act provisions that relate to a national bank's power to charge interest have special preemptive force.[1] As mentioned above, 12 U.S.C. § 85 gives national banks the power to charge a single uniform rate of interest on interstate laws. "If … the interest that the bank charged … did not violate § 85 limits, the statute unquestionably pre-empts any common law or [state] statutory rule that would treat those rates as usurious." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003). 12 U.S.C. § 86 establishes the "exclusive cause of action" for a claim that a bank has changed interest not permitted by the laws of its home state. *See id.* at 9-11.

Together, Sections 85 and 86 "form a system of regulations" that "cover the entire subject" of a national bank's right to charge interest. *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 32 (1875). The Supreme Court has long recognized that Sections 85 and 86 were intended to create "uniform rules limiting the liability of national banks" and to prevent states from imposing "substantive limits on the rates of interest that national banks may charge." *Beneficial Nat'l Bank*, 539 U.S. at 9, 10. For this reason, those provisions protect national banks not merely from claims arising under usury statutes, but from any "possible unfriendly State legislation" that seeks to limit a national bank's interest charges. *Id.* at 10 (quotation marks omitted).

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[1] The preemptive force of these provisions is so powerful that when a state-law complaint that includes only state-law challenges to the amount of a bank's interest charges, the complaint may be removed to federal court and a federal court may decide the extent to which the claims are preempted. *See Beneficial Nat'l Bank*, 539 U.S. at 10-11; *see also Phipps v. FDIC*, 417 F.3d 1006, 1013 (8th Cir. 2005) ("Once the district court determined the plaintiffs' claims are [completely] preempted, it was a short step to conclude these claims must be dismissed.").

Other Supreme Court decisions further confirm that Sections 85 and 86 preempt *all* state laws purporting to limit a national bank's interest charges, not just usury laws. *See Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 738 n.1, 747 (1996) (holding that 12 U.S.C. § 85 preempted unjust enrichment and unfair practices claims directed at national bank's interest charges); *Tiffany*, 85 U.S. at 412 (Section 86 was deemed "indispensable" to protect national banks "against possible unfriendly State legislation"); *Dearing*, 91 U.S. at 35 ("In any view that can be taken of [the provision that became Sections 85 and 86], the power to supplement it by State legislation is conferred neither expressly nor by implication.").

Courts of appeals and district courts have likewise confirmed that the National Bank Act preempts any claim "challenging the lawfulness of the interest charged by a national bank." *Phipps v. FDIC*, 417 F.3d 1006, 1011 (8th Cir. 2005). Courts have therefore found claims challenging a national banks' interest charges preempted even when the complaint "never makes use of the term 'usury'" *Austin v. Provident Bank*, 2005 WL 1785285, at *5 (N.D. Miss. July 26, 2005), and even when a plaintiff "expressly disclaim[s] any usury or federal claims," *Budnik v. Bank of Am. Mortgage.*, 2003 WL 22964372, at *1 (N.D. Ill. Dec. 16, 2003). *See also Smiley*, 517 U.S. at 738 n.1, 747 (California unfair business practices claims preempted by 12 U.S.C. § 85); *Phipps*, 417 F.3d at 1010-13 (Missouri consumer protection claims preempted by 12 U.S.C. § 85); *Santos v. Household Int'l, Inc.*, 2003 WL 25911112, at *3 (N.D. Cal. Oct. 24, 2003) (California unlawful business practices claims completely preempted); *Hill v. Chem. Bank*, 799 F. Supp. 948, 951-54 (D. Minn. 1992) (Minnesota deceptive practices claim completely preempted); *Nelson v. Citibank (S.D.) N.A.*, 799 F. Supp. 312, 314 (D. Minn. 1992) (same).

The decision in *Bank of America, N.A. v. Shelborne Development Group*, 732 F. Supp. 2d 809 (N.D. Ill. 2010), illustrates how these principles apply to a challenge to the manner in which a

bank imposes or calculates interest charges. In *Shelborne*, the plaintiff alleged that the national bank's decision to impose interest charges based on a common banking practice of calculating daily interest charges using a 360-day fiscal year was prohibited by the law of the borrower's state, which required creditors to calculate interest using a 365-day fiscal year. *Id.* at 816. Because the Complaint did not allege that the bank's method of calculating interest was not permitted by the law of the national bank's home state, *Shelborne* held that such a claim was preempted by the National Bank Act because it was essentially a claim that the bank "charg[ed] fees that exceeded those allowed by law." *Id.* at 819-20.

II. INTERLOCUTORY APPEAL WOULD CLARIFY THE SCOPE OF NATIONAL BANKS' POWER TO EXPORT INTEREST CHARGES.

A. The Order Creates Confusion About The Extent To Which The Laws Of A National Bank's Home State Preempt The Laws Of The Borrower's Home State.

It is notable that the Complaint in this case does not allege that the interest charges at issue in the Complaint violate the defendant bank's home state's law.[2] This is for good reason: any claim that a national bank has imposed interest charges not permitted by the law of a bank's home state can only be asserted under 12 U.S.C. § 86, not a state usury or other consumer protection law. *See, e.g., Beneficial Nat'l Bank*, 539 U.S. at 11 (Sections 85 and 86 "create a federal remedy for overcharges that is exclusive"). Other courts have concluded that a state-law claim of improper

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[2] As far as *amici* are aware, the overwhelming majority of states do not prohibit the practice challenged in the Complaint; *amici* are aware of only six states expressly prohibit this practice. *See, e.g.*, Cal. Civ. Code § 2954.4(b); Mass. Gen. Laws ch. 183, § 59; N.J. Stat. § 46:10B-25(d); N.M. Stat. § 58-21A-4(K)(3); Wis. Stat. § 138.052(6); W.V. Code § 46A-3-112. Moreover, at least two courts in these states have concluded that federal banking law nevertheless preempts these laws. *See, e.g., Akopyan v. Wells Fargo Home Mortg.*, 155 Cal. Rptr. 3d 245, 271 (Cal. App. 2013) (National Bank Act preempts California law); *Bishop v. Ocwen Loan Servicing*, 2010 WL 415463, at *6-7 (S.D. W. Va. Oct. 19, 2010) (Home Owners' Loan Act preempts W.V. Code § 46A-3-112).

interest charges is preempted when, as here, the Complaint fails to allege that the interest charge is improper under the law of the bank's home state. *See, e.g.*, *Shelborne*, 732 F. Supp. 2d at 819 n.2.

To avoid this result, Plaintiffs urged this Court to focus narrowly on only one component of the bank's interest charges: those that relate to late fees.[3] According to Plaintiffs, so long as they challenge the propriety of that *entire* interest charge, and not the *amount* of that specific interest charge, their claim is not preempted by Sections 85 and 86. *See* Order at 8. However, Plaintiffs' position that their Complaint does not challenge the "amount" of interest is both legally and factually flawed.

As a legal matter, Plaintiffs' characterization of their claim improperly elevates form over substance. If states were free to *ban* national banks from including certain charges in the total amount of interest assessed so long as they refrained from *capping the amount* of those individual component charges, the Congressional goal of protecting national banks from state-law limits on their interest charges would lie in ruins, and the purposes of Sections 85 and 86 would be thwarted. The cases make clear that Sections 85 and 86 are not so easily evaded. *Supra* at 5-7; *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004) ("Distinguishing between pre-empted and non-preempted claims based on the particular label affixed to them would elevate form over substance and allow parties to evade the pre-emptive scope" of federal law (quotation marks omitted)); *Davis v. Bell Atlantic-West Virginia, Inc.*, 110 F.3d 245, 247 (4th Cir. 1997) ("Form is not to triumph over substance" in the preemption analysis).

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[3] It is well established that the laws of a national bank's home state that relate to late fees are laws that relate to "interest" and may therefore be exported. The OCC has concluded that "[t]he term 'interest' as used in 12 U.S.C. § 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of a credit, or any default or breach by a borrower of a condition upon which credit was extended." 12 C.F.R. § 7.4001(a). "[L]ate fees" are expressly included in Section 85's definition of "interest," *id.*, and the Supreme Court upheld this interpretation in *Smiley v. Citibank*, 517 U.S. 735, 740-44 (1996).

As a factual matter, Plaintiffs ignore the fact that their state-law claim does in fact challenge the total amount of interest a national bank may charge. Properly understood, the Complaint alleges that the law of the *borrower's* home state prohibits a national bank from charging the *entire* amount of interest permitted by the law of *the bank's* home state.

Two examples – drawn from the facts of Plaintiffs' own case as set forth in the defendant bank's memorandum – illustrate how the Complaint challenges the "amount" of the defendant bank's interest charges. *First*, the defendant bank's home state's laws permitted the imposition of $563.53 in interest charges in October 2012: $548.53 of which is normal periodic interest, and $15 of which is a late fee. *See* ECF No. 65, at 2-3 & n.1. However, Plaintiffs argue that their home state's law prohibits the bank from charging that $15 late fee. According to Plaintiffs, even though it may be lawful under the defendant bank's home state's law to charge $563.53 in interest in October 2012, *see id.*, West Virginia law permits that national bank to only charge $548.53 in interest that month.

Second, the defendant bank's home state's laws permitted the imposition of interest charges each month Plaintiffs remained delinquent on their mortgage repayment obligations. *See* ECF No. 65, at 2-3, 6. Here, however, Plaintiffs seek to use the law of the borrower's home to cap the total amount of interest a consumer may be charged when they have fallen behind on their repayment obligations. According to Plaintiffs, even though it may be lawful under the defendant bank's home state's law to charge $45 in interest if the consumer remained behind on their repayment obligations for three months, West Virginia law caps the maximum amount of such interest charges during that time period at $15.

The Order nevertheless embraces both outcomes. As a result, the Order calls into question what has long been a settled principle of banking law: national banks have an unchallenged right

to export interest charges that are lawful under their home state, even if the borrower's state has contrary rules on the interest charges. *See, e.g., Marquette Nat'l Bank*, 439 U.S. at 310-18. The effect of the Order is to disrupt the "uniform rules" applicable to a national bank's interest charges that have been deemed "indispensable" to the national banking system enacted by Congress. *Beneficial Nat'l Bank*, 539 U.S. at 9, 10; *Tiffany*, 85 U.S. at 412. The Order also opens the door for state-consumer-protection-law challenges to the propriety of certain interest charges by attacking the legality of the entire fee, even though Congress intended that Section 86 provide the "exclusive cause of action" for such challenges. *See Beneficial Nat'l Bank*, 539 U.S. at 10-11.

B. Other Federal Courts Have Reached Different Conclusions On The Scope of A National Bank's Power To Charge Interest.

The Order – and the consequences that flow from the Order – conflict with the decisions of other courts. Those courts have concluded that the National Bank Act preempts borrower's attempts to use the laws of their home state to prohibit banks from imposing certain interest charges permitted by the law of the national bank's home state.

For example, numerous courts have concluded that a challenge to the lawfulness of a late fee is a challenge to the amount of interest, and is preempted by Section 85. *See, e.g., Smiley*, 517 U.S. at 743-47*; Krispin v. May Dept. Stores Co.*, 218 F.3d 919, 923-24 (8th Cir. 2000); *Akopyan v. Wells Fargo Home Mortg., Inc.*, 155 Cal. Rptr. 3d 245, 271-72 (Cal. Ct. App. 2013); *Taylor v. Wells Fargo Home Mortg.*, 2004 WL 856673, at *3 (E.D. La. Apr. 20, 2004); *Tikkanen v. Citibank (SD), N.A.*, 801 F. Supp. 270 (D. Minn. 1992); *Hill*, 799 F. Supp. 948; *Nelson*, 794 F. Supp. at 318; *cf. Forness v. Cross Country Bank, Inc.*, 2006 WL 240535, at *3-5 (S.D. Ill. Jan. 13, 2006) (different federal banking law preempts challenge to late fees).

Outside the context of late fees, courts have concluded that challenges seeking to prohibit a national bank from charging other fees that are "interest" are still preempted. *See, e.g., Beneficial*

Nat'l Bank, 539 U.S. at 11 (numerical periodic interest); *Phipps*, 417 F.3d at 1013 (loan origination, discount, underwriting, and application fees); *Taft v. Wells Fargo Bank, N.A.*, 828 F. Supp. 2d 1031, 1037-38 (D. Minn. 2011) (mortgage insurance, origination fees, and servicing fees); *Lewis v. Wells Fargo Bank, N.A.*, 2011 WL 5374575, at *4-5 (D. Minn. Nov. 4, 2011) (same); *Austin*, 2005 WL 1785285, at *5-6 (broker fees); *Santos*, 2003 WL 25911112, at *3 (overlimit fees); *Budnik*, 2003 WL 22964372, at *2-3 (periodic interest). The rulings in these cases are consistent with other decisions holding that the National Bank Act preempts state laws seeking to prohibit national banks from charging "non-interest" fees. *See, e.g.*, *Monroe Retail Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283-84 (6th Cir. 2009) (preemption of limits on garnishment fees); *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 555-56 (9th Cir. 2010) (preemption of limits on underwriting fees); *Bank of Am. v. City & County of San Francisco*, 309 F.3d 559, 563-64 (9th Cir. 2002) (preemption of limits on ATM fees).

With the exception of the Order, the only cases *amici* are aware of holding that the National Bank Act does not preempt the lawfulness of a national bank's interest charges involved claims of alleged affirmative misrepresentations, fraud, or breach of contract. The Order (at 11) cited several such decisions. *See Hood ex rel. Mississippi v. JPMorgan Chase & Co.*, 737 F.3d 78, 90-92 (5th Cir. 2013) (challenge to banks' practice marketing and disclosure practices that allegedly caused "improperly enrolling [of] certain unqualified customers in the Plans" was not a challenge to the amount of the fee charged for those plans); *West Virginia ex rel. McGraw v. Capital One Bank (USA), N.A.*, 2010 WL 2901801, at *3 (S.D. W. Va. July 22, 2010) (challenge to "practices and methods used to entice, deceive, or dupe cardholders into accruing interest" is not a challenge to the amount of interest); *Young v. Wells Fargo & Co.*, 671 F. Supp. 2d 1006, 1021 (S.D. Iowa 2009) (challenge to automated process of imposing late fees in a manner prohibited by

the contract is not a challenge to amount of those fees); *Cross-Country Bank v. Klussman*, 2004 WL 966289, at *6 (N.D. Cal. Apr. 30, 2004) (challenge that "Defendants misrepresented the nature and cost of their services" is not a challenge to the amount of interest).

However, the Complaint here does not include the same types of allegations and claims present in cases like *Hood*, *McGraw*, *Young*, or *Klussman*. For example, this Complaint does not include a claim for breach of contract (as in *Young*) or allegations that the defendant bank affirmatively misrepresented how it would impose interest charges (as in *Hood*, *McGraw*, or *Klussman*). Instead, the only reason why the defendant bank allegedly acted deceptively in this case was because it imposed an interest charge permitted by Ohio law but not permitted by West Virginia law. Such claims are textbook examples of claims preempted by the National Bank Act. *See supra* at 5-7, 10-11.

C. Other Federal Banking Laws Have Been Held To Preempt State-Law Prohibitions On The Imposition Of Interest Charges.

The Order also conflicts with decisions from other courts that have found other federal banking laws preempt state laws regulating how depository institutions impose interest charges.

For example, another court in this District has concluded that same laws at issue in the Complaint – W.V. Code § 46A-3-112 and W.V. Code § 46A-2-127 – were preempted by the Home Owners' Loan Act. *See Bishop v. Ocwen Loan Servicing*, 2010 WL 4115463, at *6-7 (S.D. W. Va. Oct. 19, 2010). *Bishop* observed that a claim that "use[s] the WVCCPA to independently attack the imposition of late fees as a matter of policy is an attempt to apply the applicable provisions in a manner which directly regulates conduct that is sanctioned by federal law," and is therefore preempted. *Id.* at *6 (quotation marks omitted). It would be an odd result if the laws at issue in the Complaint were preempted by one federal banking law (the HOLA) but not another federal banking law (the National Bank Act).

Similarly, the First Circuit has held that 12 U.S.C. § 1831d(a) preempts laws that limit the power of a state-chartered bank to charge late fees. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 822 (1st Cir. 1992). Like this case, *Greenwood Trust* involved a question of whether "a bank may continue to use the favorable interest laws of its home state in certain transactions with out-of-state borrowers" to impose late fees prohibited by the borrower's state laws. *Id.* at 827. The First Circuit answered this question in the affirmative because Section 1831d(a) "should be interpreted *in para materia* with its direct lineal ancestor, [12 U.S.C. § 85]," and national banks had long been permitted to export their home state's laws regarding late fees. *Id.* at 829-31. As a result, Section 1831d(a) preempted state laws prohibiting the imposition of late fees.

D. The Fourth Circuit Would Likely Conclude That The National Bank Act Preempts W.V. Code § 46A-3-112.

Unlike other jurisdictions, the Fourth Circuit has not yet expressly ruled on the preemptive force of Section 85. However, the Fourth Circuit's decision in a highly similar case involving a different federal banking law strongly suggests that the Fourth Circuit would find that the National Bank Act preempts the claims asserted in the Complaint.

In *Discover Bank v. Vaden*, 489 F.3d 594 (4th Cir. 2007), a consumer claimed a state bank had improperly charged certain interest charges that were banned by Maryland laws regulating finance charges, late fees, and compounding of interest on consumer credit card accounts. The Fourth Circuit held that federal banking law preempted claims that "fees and interest rates" were charged "in violation of Maryland laws regulating finance charges, late fees, and compounding interest." *Id.* at 606. Because these charges "fall squarely" within the OCC's definition of permissible "interest" charges set forth in 12 C.F.R. § 7.4001(a), the Fourth Circuit held that Maryland law prohibiting the imposition of these charges must yield, via the federal interest rate

exportation formula, to the bank's home state law of Delaware that permitted these charges to be imposed. *Id.* at 606-07.

To be sure, *Vaden* involved the Federal Deposit Insurance Act (the "FDIA"), which applies to a state-chartered bank.[4] But, as the Fourth Circuit observed, 12 U.S.C. § 1831d(a) is in "virtual identity" with 12 U.S.C. § 85. *Id.* at 606. *Compare* 12 U.S.C. § 1831d(a) (state-chartered bank "may … take, receive, reserve, and charge on any loan or discount made … interest … at the rate allowed by the laws of the State … where the bank is located) *with* 12 U.S.C. § 85 (national bank "may take, receive, reserve, and charge on any loan or discount made … interest at the rate allowed by the laws of the State … where the bank is located"). In concluding that Section 85 and Section 1831 should be interpreted the same, the Fourth Circuit also relied on Supreme Court interpretations of the National Bank Act and the *Greenwood* decision comparing the National Bank Act to the FDIA. *Vaden*, 489 F.3d at 604-05 & n.11. Thus, there is no reason to believe the Fourth Circuit would reach a different preemption decision in this case simply because the National Bank Act is involved.[5]

Accordingly, if the Fourth Circuit was given the opportunity to rule on whether the claims in the Complaint are preempted by the National Bank Act, *Vaden* strongly suggests that the Fourth Circuit would answer that question in the affirmative.

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[4] Other court decisions refer to this law as the Depository Institutions Deregulation and Monetary Control Act, or "DIDA." *See, e.g.*, *Greenwood Trust*, 971 F.2d at 822.

[5] It is also true that the Supreme Court reversed *Vaden*'s separate jurisdictional holding that the fact that a challenge to the amount of "interest" was raised in a counterclaim did not give federal jurisdiction over a petition to compel arbitration. *See Vaden v. Discover Bank*, 556 U.S. 49, 53-54 (2009). However, the Supreme Court did not disturb *Vaden*'s holding that federal banking law preempted an attempt to limit a bank's interest charges, and that holding remains good law. *See id.* at 56 n.4.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to certify the Order for interlocutory appeal.

Dated: October 9, 2014

Respectfully submitted,

AMERICAN BANKERS ASSOCIATION
and CONSUMER BANKERS
ASSOCIATION

By Counsel

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JEREMY A. POWELL and TINA M. POWELL, individually and on behalf of a class of similarly-situated persons,

Plaintiffs,

v.

Civil Action No. 13-C-1929
Judge Bloom

THE HUNTINGTON NATIONAL BANK,

Defendant.

COMPLAINT

Preliminary Statement

1. This case arises out of the systematic abusive loan-servicing practices of the Defendant, The Huntington National Bank (Huntington). In particular, this case concerns the assessment by Huntington of illegal and multiple late fees to its West Virginia consumers who have their home loans serviced by Huntington. In direct violation of West Virginia law prohibiting the "pyramiding" of late fees, Huntington regularly and systematically charges late fees to consumers who have made a timely payment of the current month's installment. To enforce West Virginia law and to stop these abusive practices, Plaintiffs bring this action on his own behalf and on behalf of a class of West Virginia consumers who have had unlawful late fees charged to their home loan accounts.

PARTIES

2. The named Plaintiffs Jeremy A. Powell and Tina M. Powell are West Virginia residents who reside at 1288 Blake Street, Barboursville, WV 25504. The named Plaintiffs are unsophisticated in financial matters.

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3. Defendant Huntington is a nationally chartered bank, with its principal place of business in Columbus, Ohio, that services home loans in West Virginia.

FACTS

4. The named Plaintiffs have a home-secured loan with Huntington.

5. Pursuant to Paragraph 4(a) of Plaintiffs' Note, their payments to Huntington were due on the first day of each month.

6. Pursuant to Paragraph 6(A) of Plaintiffs' Note, however, Huntington agreed not to impose a late fee if it received a payment "by the end of fifteen calendar days after the payment is due," *i.e.*, by the end of the sixteenth day of the month.

7. Pursuant to Paragraph 6(A) of Plaintiffs' Note, Huntington also agreed to only charge Plaintiffs one late fee for each missed payment in an amount not to exceed $15.00.

8. Nevertheless, Huntington regularly assessed late fees for months in which a payment was timely made within the period stated in Plaintiffs' Note.

9. For example, although Plaintiffs made a full payment on October 8, 2012, within the contractual period set forth in his Note, Huntington assessed Plaintiffs a late fee on October 17, 2012.

10. Then, on November 5, 2012, Plaintiffs made another full payment, which included a $15.00 late fee, within the contractual period described in his Note. Nevertheless, on November 19, 2012, Huntington assessed Plaintiffs another late fee.

11. Huntington regularly and systematically assesses late fees in this matter.

THE PROPOSED CLASS

12. The named Plaintiffs bring this action on their own behalf and on behalf of all other similarly situated individuals pursuant to Rule 23 of the West Virginia Rules of Civil

Procedure. The class is presently defined as:

> All West Virginia citizens at the time of the filing of this action who, within the applicable statute of limitations preceding the filing of this action through the date of class certification, had or have consumer home loans serviced by Defendant Huntington and who were charged late fees in months that they made full principal and interest payments.

13. The requirements of Rule 23 are satisfied as follows:

(a) The class is so numerous that joinder of all members is impracticable;

(b) There are questions of law and fact common to all members of the class; and

(c) The named Plaintiffs' claims are typical of those of the class as a whole.

14. The Plaintiffs have displayed an interest in vindicating the rights of the class members, will fairly and adequately protect and represent the interests of the class, and are represented by skillful and knowledgeable counsel. The relief sought by the named Plaintiffs will inure to the benefit of the class generally.

15. The common questions of law and fact predominate over individual questions, and the class action device is superior to other available methods for the fair and efficient adjudication of the controversy.

16. Additionally, the Defendant has acted or refused to act on grounds generally applicable to the entire class.

CLAIMS FOR RELIEF

COUNT I — Illegal Assessment of Late Fees (Class and individual claim)

17. Plaintiffs incorporate the preceding paragraphs by reference.

18. Plaintiffs' Note prohibits the assessment of late fees for payments made within the

contractual period and prohibits the assessment of more than one late fee for each late payment.

19. Pursuant to West Virginia Code, § 46A-3-112, Huntington must first credit payments, for purposes of assessing late fees, to current installments. Moreover, Huntington may only charge a late fee once, no matter how long an installment remains in default.

20. Nevertheless, Huntington regularly and systematically assessed Plaintiffs late fees for months in which they made timely monthly payments.

21. As a result, Defendant assessed Plaintiffs and the putative class members late fees in violation of the terms of their contracts and West Virginia Code § 46A-3-112.

22. By assessing Plaintiffs and the putative class members these unlawful late fees, Huntington caused Plaintiffs and the putative class members to suffer damages.

COUNT II — False Representation of Amount of Claim
(Class and individual claim)

23. Plaintiffs incorporate the preceding paragraphs by reference.

24. By assessing or collecting late fees that it had no right to assess, Huntington misrepresented the amount of a claim in violation of West Virginia Code § 46A-2-127.

STIPULATION

25. Plaintiffs stipulate that, with respect to his individual claims, they seek a recovery of not more than $75,000, exclusive of costs and interest.

RELIEF SOUGHT

WHEREFORE, Plaintiffs seek the following relief for themselves and for all class members:

(a) A declaration that the conduct above is unlawful;

(b) Actual and compensatory damages;

(c) A civil penalty for each violation of Chapter 46 A, under West Virginia Code §§ 46A-101(1) and - 106;

(d) Reasonable attorneys' fees and the costs of this action, under West Virginia Code §§ 46A-5-104 and - 106(a);

(e) Pre- and post-judgment interest; and

(f) All other relief the Court deems appropriate.

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES.

JEREMY A. POWELL and
TINA M. POWELL,
Individually and on behalf of
a class of similarly-situated
persons,
By Counsel.

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Co-counsel for Plaintiffs

Binding Stipulation

Plaintiffs and their counsel stipulate by their signatures below, with respect to Plaintiffs' individual claims, that they are not seeking and will not in any event seek a recovery in excess of $75,000, exclusive of costs and interest.

Jeremy A. Powell

Tina M. Powell

Jonathan R. Marshall

State of West Virginia
County of Kanawha

The foregoing instrument was acknowledged before the undersigned authority by Jeremey A. Powell, Tina M. Powell, and Jonathan R. Marshall on this the 16 day of July, 2013.

Notary Public

My commission expires: July 11, 2020.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Carla L. Abbott
1100 26th Street
Huntington, WV 25705
My Commission Expires July 11, 2020

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Addendum to Binding Stipulation

Counsel stipulates by his signature below, with respect to Plaintiffs' individual claims, that they are not seeking and will not in any event seek a recovery in excess of $75,000, exclusive of costs and interest.

Jonathan R. Marshall

State of West Virginia
County of Kanawha

The foregoing instrument was acknowledged before the undersigned authority by Jonathan R. Marshall on this the 15TH day of OCTOBER, 2013.

Notary Public

My commission expires: JANUARY 2, 2018.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
Arnold S. Mason, III
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My Commission Expires Jan. 2, 2018

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