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<tr><td>UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK</td><td rowspan="2">▲ COURT USE ONLY ▲</td></tr>
<tr><td>DAVID PETERSEN, WAYNE LITCHFIELD, CHRISTY OGRODOSKI, LINDA JOHNSON, and WILLIAM COHEN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CHASE CARD FUNDING, LLC, CHASE ISSUANCE TRUST, and WILMINGTON TRUST COMPANY, as Trustee of Chase Issuance Trust,

Defendants,</td></tr>
<tr><td>Motion for leave to file an amicus brief in support of neither party in response to the magistrate judge's report and recommendation granted 2/6/20</td><td>Case No.:
19-CV-00741-LJV-JJM</td></tr>
<tr><td colspan="2">BRIEF OF AMICI CURIAE CENTER FOR RESPONSIBLE LENDING AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF NEITHER PARTY IN RESPONSE TO THE MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION</td></tr>
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INTEREST OF AMICI CURIAE

Amici curiae Center for Responsible Lending (CRL) and National Consumer Law Center (NCLC) share a commitment to protecting and defending consumer rights, and thus submit this amicus brief in support of neither party to share their concerns and offer their expertise.[1]

ARGUMENT

I. Introduction & Summary of Argument

Since the founding of our nation, States have limited interest rates as the primary protection against predatory lending. Evasions of usury laws are as old as the laws themselves. In recent years, a growing number of predatory lenders have tried to avoid state usury laws by using "rent-a-bank" arrangements whereby a state-regulated lender uses a bank that nominally originates the loan and then sells the loan or receivables back to the lender or a related entity.

Amici are very concerned that an overbroad ruling regarding Defendant's Motion to Dismiss would embolden nonbank assignees that seek to evade state laws through their relationships with national and state-chartered banks. *Amici* take no position on the merits of this case or the pending motion. However, an unnecessary, overbroad ruling on the legal issues presented potentially pose an enormous threat to states seeking to retain their historic power to

[1] *Amici curiae* certify that neither party's counsel authored any portion of this brief, that neither party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no persons, other than *amici curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief. CRL, a non-profit organization under section 501(c)(3) of the Internal Revenue Code, is a supporting organization of the Center for Community Self-Help, also a non-profit organization. Neither CRL nor the Center for Community Self-Help has issued shares or securities. NCLC is a non-profit organization under section 501(c)(3) of the Internal Revenue Code and has not issued shares or securities.

protect their residents from predatory rent-a-bank lending. Therefore, *amici* urge this Court to fully consider the broader implications of its decision on the pending motion and to limit it legal rulings accordingly.

Amici object to two aspects of the reasoning in the Magistrate Judge's Report and Recommendation. First, the Report and Recommendation ignored binding Second Circuit precedent in finding that any limit on the interest rate charged by nonbank assignees of loans originated by a bank is preempted by federal banking law because it prevents the bank from assigning receivables. *See* Report and Recommendation at 8 ("R&R"). Whether state usury laws apply in the context of this case is a separate question from the broad language used in the Report and Recommendation. While there is a disputed issue now, development of the facts may show that preemption applies if the interest on the credit cards at issue is actually being charged by a national bank that benefits directly and substantially from the interest charges.

Second, the Report and Recommendation found that application of state usury laws in this case would prevent exercise of the bank's powers, applying a loose preemption standard that is incompatible with both Second Circuit precedent and the more rigorous requirements for preemption adopted by Congress in 2010. At the motion to dismiss stage, "the court 'may find a claim preempted only if the facts alleged in the complaint do not plausibly give rise to a claim that is not preempted.'" R&R at 4.[2] Dismissal of Plaintiff's claims should only be made where plaintiff's *complaint* fails to establish any plausible claim that preemption may not apply.

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[2] *See also Galper v. JP Morgan Chase Bank, N.A.*, 802 F.3d 437, 444 (2d Cir. 2015) ("[W]hen considering a preemption argument in the context of a motion to dismiss, the factual allegations relevant to preemption must be viewed in the light most favorable to the plaintiff. A district court may find a claim preempted only if the facts alleged in the complaint do not plausibly give rise to a claim that is not preempted.").

A broad ruling in this case could threaten New York's historic power to protect its residents from predatory lending and its strong public policy against usury. Predatory rent-a-bank lending is spreading. High-cost lenders across the country are looking for ways to use banks to evade usury caps. Most recently, three payday lenders brazenly announced they intend to start using banks to originate their loans in order to evade a new California law that caps interest rates for loans over $2,500. As discussed below, in many States including New York, a nonbank company has made second mortgages as high as 139% APR secured by the homes of small business owners, claiming that usury laws do not apply because loan was originated by a bank, which quickly sold the loan back to the company that arranged it. These lenders will likely exploit a ruling that state usury laws do not apply to assignees of bank loans.

II. The Broad Finding That Usury Limits on Nonbank Assignees Are Necessarily Preempted Is Based on Flawed Reasoning, and Ignores Binding Second Circuit Precedent

Amici object to the Report and Recommendation's rationale for finding preemption: its implication that any state law limitation on the assignee's new charges automatically results in a failure of the assignment, and that this assignment failure does not merely interfere with the bank's powers, but actually prevents exercise of them. *See* R&R at 8 ("[I]f defendants do not have Chase USA's right to receive interest irrespective of state usury laws, then there has been no assignment, since 'an assignee takes all of the rights of the assignor, no greater and no less'…. Therefore, since applying New York's usury statutes to defendants would prevent Chase USA's ability to sell or assign the receivables from its credit card accounts, they are preempted."). This broad finding ignores binding Second Circuit precedent, and as the *Madden* court warned, "would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank." *Madden v. Midland Funding, LLC,* 786 F.3d 246, 252 (2d Cir. 2015). Under the reasoning of the Report and Recommendation, it is difficult to imagine *any* circumstances in which applying state usury law to a nonbank assignee would not be preempted.

Further, the Report and Recommendation's reasoning behind its overbroad finding is incompatible with the Second Circuit's ruling in *Madden*. *See id.* at 251. The Second Circuit found that limits on a nonbank assignee did not meet the "prevent or significantly interfere" standard under the National Bank Act (NBA). *Id*.

That is not to say that *Madden* compels a ruling for plaintiffs. There may be key differences between, on the one hand, the assignment of receivables in an active bank lending program in which the bank is the real party in interest and, on the other, the assignment of charged-off debt to debt buyers, as the court in *Madden* itself noted. *Id*. at 252 & n.2. For example, there is a legitimate, factual question as to whether the national bank itself, or the Defendants, are actually charging the interest and who primarily benefits from the interest charges. Plaintiffs allege that "Defendants charge, collect, and receive usurious rates of interest (Compl. ¶ 2; *see id.* ¶ 8.), while the bank claims it "remains the owner of the accounts themselves, 'retain[ing] the right to change various terms and conditions [. . .] including increasing or decreasing periodic interest charges'. Prospectus, pp. 26, 46." R&R at 3. The complaint further alleges that "Defendant Chase Card Funding LLC is solely a shell company that has no employees and engages in no activity other than the purchase and re-sale of debts," (Compl. ¶ 59), and the Defendant Chase Issuance Trust is also a "passive," "single-purpose entity with no employees," (Compl. ¶ 50, 53, 69.). The bank, on the other hand, "acts as 'servicer for the credit card receivables . . . . The servicer's duties include billing, collecting …. " R&R at 3, -- in a sense, doing the actual charging. The complaint does not reveal whether the bank purchases any of the securities or ultimately receives a significant portion of the interest charges beyond compensation for servicing.

The mere fact that the bank retains ownership of the accounts does not necessarily mean that state usury laws do not apply. In some rent-a-bank situations, as discussed below, the nonbank lenders have the primary role in the lending operation and the predominant economic interest, while claiming to be merely acting as agents for a bank that nominally continues to own the account while only selling receivables or participation interests. *See Spitzer v. County Bank of Rehoboth*, 846 N.Y.S.2d 436 (N.Y. App. Div. 2007) (although the bank performed three "nonministerial" functions – the decision to extend credit, the extension of credit, and the disbursal of the proceeds -- summary judgment was inappropriate where evidence showed that the nonbank defendants opened and maintained a funding account for the loans, purchased a 95% participation interest in every loan, assumed all the risk, agreed to indemnify the bank, and the bank exercised little oversight over the loan operations); *Meade v. Avant of Colorado, L.L.C.*, 307 F. Supp. 3d 1134, 1144-45 (D. Colo. 2018) (finding no complete preemption by the Federal Deposit Insurance Act and rejecting argument that "under common law principles the assignee of a loan 'steps into the shoes of the assignor'" because the statutory language "does not on its face regulate interest or charges that may be imposed by a non-bank, including one which later acquires or is assigned a loan made or originated by a state bank"); *Ubaldi v. SLM Corp*., 852 F. Supp. 2d 1190, 1192, 1202 (N.D. Cal. 2012) (denying motion to dismiss on grounds of preemption under NBA "at this early stage" where plaintiff alleges that the loan was made "pursuant to a forward purchase commitment agreement with Stillwater National Bank intended to disguise Sallie Mae's role as the de facto lender"). The overbroad ruling in the Report and

Recommendation on the right of assignment is not only incompatible with *Madden* but would prevent courts from distinguishing these rent-a-bank situations.

III. The Report & Recommendation Finding That Application of Usury Laws Would "Prevent or Significantly Interfere" with The Bank's Powers Is Inconsistent with the Standard for Determining Preemption under the NBA

Amici also object to the Report and Recommendation's analysis of whether application of New York's usury law "prevents or significantly interferes" with the national bank's exercise of its powers. 12 U.S.C. § 25b(b)(1)(B); *see* R&R at 4. As explained above, the Second Circuit's analysis of preemption under the NBA — under the standard of *Barnett Bank of Marion County, N. A. v. Nelson, Florida Insurance Commissioner, et al*., 517 U.S. 25 (1996), incorporated into Section 25b of the NBA — does not support the view that all limits on a nonbank assignees' charges meet that standard. See 12 U.S.C. § 25b(b)(1)(B).

Further, the NBA itself argues for a more rigorous analysis than the Recommendation and Report provides. In the Dodd-Frank Act, Congress adopted a new preemption standard "to undo broad preemption determinations, which [Congress] believed planted the seeds 'for long-term trouble in the national banking system'" and allowed abusive lending to "flourish without State controls." *Lusnak v. Bank of America*, 883 F.3d 1185, 1189 (9th Cir. 2018) (quoting S. Rep. No. 111-176, at 17). Congress also prohibited the OCC from preempting state laws unless "substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption ….", and only on a "case-by-case basis". 12 U.S.C. §§ 25b(c), 25b(b)(1)(B).

While the requirements for a case-by-case basis and substantial evidence on the record do not directly apply to the courts, Congress undoubtedly expected that courts would always proceed case-by-case and on a record that supports significant interference. The 2010 amendments to the NBA suggest that such matters of preemption should not be made lightly, and especially at this dismissal stage should only be made if the facts alleged in the complaint "do not plausibly give rise to a claim that is not preempted." R&R at 4. Further, when a case involves a law – like the usury law in this case – adopted for consumer protection, a field traditionally regulated by the States, "compelling evidence" of Congress's intent to preempt state law is required. *Lusnak*, 883 F.3d at 1192; *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011); *accord Boerner v. LVNV Funding L.L.C.*, 358 F. Supp. 3d 767, 777 (E.D. Wis. 2019). The bank has the burden of proving its preemption defense. *Lusnak*, 883 F.3d at 1192.

Moreover, courts should be especially cautious when finding that a restriction on a nonbank entity prevents or significantly interferes with a power of the bank. In 2010, through the Dodd-Frank Act, Congress amended the NBA to limit preemption to national banks themselves, overturning the broad view that national bank preemption applies to bank affiliates, subsidiaries, or agents. The *Madden* court also noted that in cases where NBA preemption has been extended to non-banks, "the entity has exercised the powers of the national bank – i.e. has acted on behalf of a national bank in carrying out the national bank's business." 786 F.3d at 251. Consistent with Congress's directive, when *Madden* applied the *Barnett Bank* standard, it found that limiting interest rate charges by nonbank assignees might decrease the amount banks could charge, but would not *significantly* interfere with a national bank's power. *Id*.

The Report and Recommendation's finding that limiting an assignee's interest charges would necessarily prevent the bank from selling receivables would have been equally applicable to the debt buyer in *Madden* and, therefore, is inconsistent with the holding in that case and with the analysis of "prevent or significantly interfere" required by the NBA and the Second Circuit. *Id*.

Moreover, beyond an abstract analysis of the meaning of "sale" and "assignment," R&R at 7-8, the ruling contains no explanation of how applying New York's usury laws to defendants would impact the bank or its credit card program, let alone *significantly* interfere.

While it may be that Defendants can meet the *Barnett Bank* standard in a specific context, such as securitization used as a liquidity mechanism for a credit card program active run by a bank, once again, this Court should not dismiss Plaintiff's allegations unless the facts alleged in the *complaint* do not plausibly give rise to a claim that is not preempted. Thus, the mere fact that securitization is involved or that Defendants have made liquidity arguments is not dispositive at this motion to dismiss stage unless a conclusive finding of *significant* interference with the exercise of a national bank's powers can be shown in the complaint.[3] The Report and Recommendation failed to undertake the analysis of the "prevent or significantly interfere" standard required by the NBA and the Second Circuit based on the complaint.

IV. An Overbroad Ruling Threatens New York's and other States' Historic Police Power to Protect their Residents from Predatory Lending

Since the American Revolution, States have limited interest rates to protect their residents from predatory lending. James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 Ariz. St. L.J. 61 (1981). In recent years, a combination of federal and state laws exempt most banks from interest rate limits, but the vast majority of States retain interest rate caps for many types of loans made by nonbank lenders. *See generally* NCLC, Consumer Credit Regulation (2d ed. 2015), *updated at* www.nclc.org/library. Interest rate limits are the simplest and most effective protection against predatory lending. *See* NCLC, *Misaligned Incentives: Why*

[3] Note also that some predatory rent-a-bank programs in which the bank is not the true lender could also make liquidity arguments. Indeed, the funding of those loans by third parties is often the very reason the nonbank entities are found to be the true lenders.

High-Rate Installment Lenders Want Borrowers Who Will Default (July 2016), https://www.nclc.org/issues/misaligned-incentives.html.

New York "has a strong public policy against interest rates which exceed 25% …." *Am. Equities Grp., Inc. v. Ahava Dairy Prods. Corp*., No. 01-CV-5207, 2004 WL 870260, at *8 (S.D.N.Y. Apr. 23, 2004); *Madden v. Midland Funding*, *LLC*, 237 F.Supp.3d 130, 150 (S.D.N.Y. 2017) (citing cases). New York is not alone, as many other States have public policies that would be significantly threatened by a ruling in this case that would broadly allow assignees of bank loans to charge the contract rate or that would find that the *Barnett Bank* preemption standard is necessarily met any time there is a limit on those charges; a survey by *amicus* NCLC shows that over 43 states limit the interest rate of a $500, 6-month loan and that 38 do so for a $10,000, 5-year loans; the median rate cap for a $10,000 loan is 25% APR. *See* NCLC, *Fact Sheet: State Annual Percentage Rate (APR) Caps for $500, $2,000, and $10,000 Installment Loans* (March 2019), https://www.nclc.org/images/pdf/high_cost_small_loans/fact-sheet-apr-caps-for-installment-loans.pdf, based on Carolyn Carter et al., *NCLC, A Larger and Longer Debt Trap? Analysis of States' APR Caps for a $10,000 Five-Year Installment Loan* (Oct. 2018), https://www.nclc.org/issues/a-larger-and-longer-debt-trap-installment-loan.html and, *Carolyn Carter et al., NCLC, Predatory Installment Lending in 2017: States Battle to Restrain High-Cost Loans* (Aug. 2017), http://bit.ly/2vRZkEf.

A ruling giving nonbank assignees *carte blanche* to charge whatever rate the bank assignor could charge would give space for nonbank lenders to game the system by using banks to originate and then assign loans and would allow what is known as the "rent-a-bank" model to flourish. Under this model, a nonbank lender that normally would be subject to a state's rate cap and usury laws asserts the state's usury laws are preempted because the lender claims it is only the agent, service provider or assignee of either a national bank or an FDIC-insured out-of-state bank that funds the loan. The Report and Recommendation's broad recommendation could present real and ominous risks for consumers and for the States' role in consumer protection. If this Court declares that state law categorically cannot apply to a bank's assignee, without considering the total context of the loan and properly analyzing whether state law prevents or significantly interferes with the exercise of a bank's powers, nonbanks using the rent-a-bank model will likely seize on this opening to develop structures that will further discourage vigorous inquiries into the actual facts underlying their loans. Control over usury limits will be wrestled from the States and handed over to rogue banks willing to partner with predatory lenders and are located in States that do not limit their rates.

Rent-a-bank schemes are growing in both the small business and consumer areas. In one case filed in New York, the plaintiff challenged a $28,000 loan at 73% APR secured by his home. He alleged that World Business Lenders (WBL) "solicits consumers to engage in usurious loans, then arranges with Liberty [Bank] to lend to consumers business loans with interest rates that are illegal in New York but legal in Utah, wherein the loans are immediately assigned from Liberty to WBL." Complaint, B&S Medical Supply, Boris Simon v. World Business Lenders, Liberty Bank, Inc., No. 1:17-cv-03234 (S.D.N.Y. filed May 2, 2017). *Amici* are aware of numerous other cases on similar facts involving WBL, many still pending.[4]

[4] World Business Lenders is the same party that claimed a right to charge 120% APR on an assigned loan in a case cited by Defendants, *In Rent-Rite Superkegs West. Ltd.*, 603 B.R. 31 (Bankr. D. Colo. 2019), a court that "respectfully disagrees with *Madden*." *Id.* Other examples of rent-a-bank lending by World Business Lenders at equally horrendous rates are described in our comments in opposition to a proposed rule by the OCC. *See* Comments of CRL, NCLC et al. on OCC Notice of Proposed Rulemaking, Permissible Interest on Loans That Are Sold, Assigned, or Otherwise Transferred, 12 CFR Part 7 and Part 160, Docket ID OCC-2019-0027,

Rent-a-bank schemes are also getting increasingly bold. In California, a new law limits the rates on loans up to $10,000 in order to address the abuses of rates up to 200%. Calif. Office of the Governor, Press Release, "Governor Newsom Signs Legislation to Fight Predatory Lending in California" (Oct. 10, 2019), https://www.gov.ca.gov/2019/10/10/governor-newsom-signs-legislation-to-fight-predatory-lending-in-california/; Calif. Assembly Bill No. AB 539 (effective Jan. 1, 2020). But several California payday lenders informed their investors that they would nonetheless continue to charge triple-digit interest rates by blatantly evading the new usury law through forging rent-a-bank relationships with banks. *See* NCLC, *Payday Lenders Plan to Evade California's New Interest Rate Cap Law Through Rent-A-Bank Schemes*"(Oct. 2019), http://bit.ly/rent-a-bank-ib (quoting earnings calls).

High-cost lenders are already using rent-a-bank schemes to make loans up to 160% APR in States that do not vigorously enforce their usury laws. *See* NCLC, *Stop Payday Lenders' Rent-A-Bank Schemes* (Dec. 2019), http://bit.ly/StopRent-a-BankSchemes ("NCLC, Rent-a-Bank Schemes") (showing map of States that rent-a-bank lenders avoid). OppLoans funnels its loans through FinWise Bank in Utah so it can charge 160% APR in several States where those rates are illegal. *See* NCLC, *FDIC/OCC Proposal Would Encourage Rent-a-Bank Predatory Lending* at 2 (Dec. 2019), http://bit.ly/FDICrent-a-bankproposal. Elevate, through its Rise brand, is doing the same for its 99% to 149% APR installment loans. *Id.* Elevate's Elastic brand uses Republic Bank & Trust out of Kentucky to originate a line of credit with an effective APR up to 109% in States that do not permit that rate. *Id.*

RIN 1557-AE73 at 23-26 (Jan. 21, 2020), https://www.nclc.org/images/pdf/rulemaking/comments-occ-interest-rates-and-apps.pdf. The OCC has filed an amicus brief in support of WBL in the *Rent-Rite* case on the same grounds used to support the proposed rule, making clear that acceptance of their theory would lead to exactly this kind of triple-digit predatory lending. *See id.*

In the case of Elevate and likely other rent-a-bank cases as well, a bank nominally originates the credit and retains ownership of the account, but then sells receivables to the nonbank lender, which services the loan program, or to a related entity of which the high-cost lender is the primary beneficiary.[5]

New York has kept these and other usurious lenders out, thanks to the state's vigorous enforcement of its usury laws against payday lenders and rent-a-bank schemes, and has thereby saved its residents an estimated $790 million per year in payday loan fees alone. *See* CRL, *Shark-Free Waters: States are Better Off without Payday Lending* (2016), https://www.responsiblelending.org/research-publication/shark-free-waters-states-are-better-without-paydaylending. The state has had to remain vigilant, however, against constant threats by payday and other usurious lenders to circumvent its usury laws. A ruling that undermines the States' ability to limit the interest rates of non-banks will also trample on the rights of voters in States like Arizona, Montana, South Dakota and most recently Colorado, where supporters of both parties have overwhelmingly voted to adopt rate caps of 36% APR or less. *See* NCLC, *After Payday Loans: How do Consumers Fare When States Restrict High-Cost Loans?* (Oct. 2018), http://bit.ly/2NZ2NLF; Pat Ferrier, Fort Collins Coloradoan, *Colorado election: Proposition 111, capping interest on payday loans, passes* (Nov. 6, 2018).

V. Conclusion

For the reasons above, *Amici* urge this Court to carefully consider the wider implications of its ruling and the facts that are available to it at this stage of the litigation. We ask this Court to

[5] Elevate Credit, Inc., Form 10-Q for the period ending Sept. 30, 2019, S.E.C. file no. 001-37680 at 21, 22, 44, https://www.sec.gov/Archives/edgar/data/1651094/000165109419000048/elevate10-qxq22019.htm.

avoid a ruling that could have implications far beyond the facts of this case and could help to eviscerate centuries old usury laws, undercut the States' historic role in consumer protection, and encourage predatory lending that destroys lives and businesses.

Dated: February 7, 2020

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