

JUDGE PRESKA

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5636

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OFFICE OF THE COMPTROLLER OF THE)
CURRENCY,)

250 E Street, S.W.)
Washington, D.C. 20219)

Plaintiff,)

v.)

ELIOT SPITZER,)
in his official capacity as Attorney General for)
the State of New York,)

Defendant.)

120 Broadway)
New York City, NY 10271)

Civil No. _____

COMPLAINT FOR DECLARATORY
RELIEF, PRELIMINARY INJUNCTION
AND PERMANENT INJUNCTION

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U.S. DISTRICT COURT

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

The Office of the Comptroller of the Currency ("OCC"), hereby alleges for its complaint
as follows:

Jurisdiction and Venue

1. This is a civil action for declaratory relief under 28 U.S.C. § 2201, for injunctive relief, and for other appropriate relief under 28 U.S.C. § 2202.
2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under Article VI, Clause 2 of the United States Constitution and 12 U.S.C. §§ 24(Seventh)

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1. This is a civil action for declaratory relief under 28 U.S.C. § 2201, for injunctive relief, and for other appropriate relief under 28 U.S.C. § 2202.

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and 484, and pursuant to 28 U.S.C. § 1345 because the OCC, a bureau of the United States Department of Treasury, is the plaintiff. The OCC is statutorily authorized to litigate in its own behalf and is the appropriate plaintiff to bring this action pursuant to 12 U.S.C. § 93(d).

3. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the defendant is located in this district.

Parties

4. Plaintiff OCC is a bureau within the United States Department of the Treasury charged with broad responsibility for the chartering and oversight of national banks organized under the National Bank Act. Under the National Bank Act and other federal banking laws, unless otherwise provided by federal law, the OCC has exclusive licensing, regulatory, supervisory, examination, and enforcement authority with respect to national banks' compliance with federal and non-preempted state laws. 12 U.S.C. §§ 24(Seventh), 484(a), 1818(b); *see also* 12 C.F.R. § 7.4000.

5. Defendant Eliot Spitzer is sued in his official capacity as the Attorney General for the State of New York. As such, he is the state official generally charged under New York law with enforcing state laws on behalf of the people of the State of New York.

The Federal Banking Laws and OCC Regulations

Visitorial Exclusivity

6. National banks are federally chartered institutions created under the National Bank Act and governed by federal law.

7. In 12 U.S.C. § 484, which remains substantially unchanged since its enactment in 1864, Congress strictly limited the exercise of "visitorial" authority over national banks by

providing that “[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.” 12 U.S.C. § 484(a).

8. Congress authorized the OCC to “make a thorough examination of all the affairs” of any national bank, 12 U.S.C. § 481, but Section 484 generally forbids any assertion of visitorial authority by state officers to supervise or examine national banks and prohibits state authorities from inspecting the records of national banks or bringing enforcement actions against national banks, except as specifically authorized by federal law.

9. Pursuant to its regulation-writing authority under 12 U.S.C. § 93a, the OCC has adopted 12 C.F.R. § 7.4000, implementing the statutory prohibition found in 12 U.S.C. § 484. That regulation states that “[u]nless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.” 12 C.F.R. § 7.4000(a)(3).

10. Although Section 484 provides that national banks are subject to such visitorial powers as are vested in the courts of justice, “[t]his exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.” 12 C.F.R. § 7.4000(b)(2).

11. Pursuant to 12 U.S.C. § 24(Seventh) and 12 U.S.C. § 93a, the OCC has issued a regulation that permits national banks to “conduct in an operating subsidiary activities that are

permissible for a national bank to engage in directly * * * ”, 12 C.F.R. § 5.34(e)(1), and a regulation explaining that “[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.” 12 C.F.R. § 7.4006.

12. Under the OCC’s interpretation of 12 U.S.C. § 484 and 12 C.F.R. §§ 7.4000 and 7.4006, the OCC’s visitorial exclusivity applies to national bank operating subsidiaries just as it does to national banks. *Wachovia Bank, N.A. v. Burke*, 319 F. Supp. 2d 275 (D. Conn. 2004), *appeal pending* 2nd Cir. No. 04-3770; *Wells Fargo Bank, N.A. v. Boutris*, 252 F.Supp. 2d 1065 (E.D. Cal 2003) & *National City Bank of Indiana v. Boutris*, 2003 WL 21536818 (E.D. Cal. No. 03-655, July 2, 2003), *consolidated for appeal*, (9th Cir., Nos. 0-3-16194, 03-16197, 01-16461); *Wachovia Bank, N.A. v. Watters*, 334 F. Supp. 2d 957 (W.D. Mich. 2004); *appeal pending* 6th Cir. No. 04-2257; *National City Bank of Indiana v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005) notice of appeal filed June 3, 2005.

13. Congress has granted the OCC broad authority to take administrative enforcement actions against national banks and affiliated parties for violations of federal law and any applicable state laws. 12 U.S.C. §§ 93, 1818.

14. To the extent that a state law is not preempted by federal law, the OCC enforces that state law with respect to national banks and their operating subsidiaries to the exclusion of state officials. 12 U.S.C. §§ 36(f), 484 and 12 C.F.R. §§ 7.4000 and 7.4006; *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir. 1980).

15. The OCC does not argue that the substantive provisions of New York State Executive Law § 296-a are preempted by federal law, but rather that the OCC, not the Defendant, enforces those provisions as applied to nationally chartered banks and their operating subsidiaries.

Interest of the OCC

16. The OCC is charged with plenary supervision of the national banking system. The OCC's visitorial exclusivity is crucial to the integrity of that federal regime. The OCC is also responsible for ensuring that national banks have the opportunity to exercise fully the powers granted them under federal law, consistent with principles of safety and soundness, free from state direction and control except as federal law provides. Defendant's actions constitute a violation of federal law and interference with the OCC's authority over the national banking system, actual harms caused by Defendant and redressable by action of this Court. *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999). For the same reasons, the OCC is threatened with irreparable harm within the meaning of the applicable standard for injunctive relief. *Id.*

The Present Controversy

17. Citibank, National Association, is a national bank chartered by the OCC in accordance with 12 U.S.C. §§ 26, 27, and 35, with its main office in New York, New York. It is a wholly-owned subsidiary of Citicorp, Inc., which is a subsidiary of Citigroup, Inc.

18. JP Morgan Chase Bank, National Association, is a national bank chartered by the OCC in accordance with 12 U.S.C. §§ 26, 27, and 35, with its main office in Columbus, Ohio. It is a wholly-owned subsidiary of JP Morgan Chase & Company.

19. HSBC Bank USA, National Association, is a national bank chartered by the OCC in accordance with 12 U.S.C. §§ 26, 27, and 35, with its main office in Wilmington, Delaware. It is

a wholly-owned subsidiary of HSBC USA, Inc. HSBC Bank USA, N.A., exercises its power under federal law to conduct real estate lending through HSBC Mortgage Corporation, an OCC-licensed operating subsidiary of the bank.

20. Wells Fargo Bank, National Association, is a national bank chartered by the OCC in accordance with 12 U.S.C. §§ 26, 27, and 35, with its main office located in Sioux Falls, South Dakota. It is a wholly-owned subsidiary of Wells Fargo & Company. During a portion of calendar year 2004, Wells Fargo Bank, N.A., exercised its power to conduct real estate lending under federal law through Wells Fargo Home Mortgage, Incorporated, an OCC-licensed operating subsidiary.

21. The OCC conducts continuous examinations of Citibank, N.A., JP Morgan Chase, N.A., HSBC USA Bank, N.A., and Wells Fargo Bank, N.A., and their operating subsidiaries, through teams of resident examiners, supplemented by subject-matter experts, in accordance with 12 U.S.C. § 481, and the OCC can compel these national banks and their operating subsidiaries to comply with applicable federal and state law through enforcement actions authorized by 12 U.S.C. §§ 93, 504, and 1818.

22. The OCC enforces national bank compliance with the requirements of the Equal Credit Opportunity Act (“ECOA”) using its enforcement authority under 12 U.S.C. § 1818. 15 U.S.C. § 1691c(a)(1). ECOA gives the states no enforcement role with respect to the activities of national banks.

23. Pursuant to the federal Home Mortgage Disclosure Act (“HMDA”), certain depository institutions, as defined in 12 U.S.C. § 2802(2), are required to maintain records and make available to the public data derived from those records regarding applications, origination,

and purchases of home purchase loans, home improvement loans, and loan refinancings for each calendar year. 12 U.S.C. § 2803.

24. In accordance with the directions of Congress, the Board of Governors of the Federal Reserve System (the “FRB”) has issued regulations, codified at 12 C.F.R. Part 203, regarding the maintenance and disclosure of data required to be collected under the HMDA. Those regulations specify the types of information that must be collected as well as the types of information that must be made public.

25. Citibank, N.A., JP Morgan Chase, N.A., HSBC USA Bank, N.A., and Wells Fargo Bank, N.A. filed their HMDA loan application registers (“LARs”) for calendar year 2004 in accordance with 12 C.F.R. § 203.5(a)(1) and App. A (II).

26. In accordance with 12 C.F.R. § 203.5(c), Citibank, N.A., JP Morgan Chase, N.A., HSBC USA Bank, N.A., and Wells Fargo Bank, N.A., were required, for requests received on or before March 1, 2005, to make available to the public by March 31, 2005, specific HMDA data of their respective institutions after removing information that could identify particular loan applications. For requests received after March 1, 2005, HMDA reporters are required to make their modified LARs available within 30 calendar days. 12 C.F.R. § 203.5(c).

27. On April 6, 2005, Jeffrey K. Powell, an Assistant Attorney General in the Office of the Attorney General, sent a letter to Citigroup requesting its HMDA LARs as well as non-public information concerning the operation of Citigroup’s mortgage lending programs, including the mortgage lending operations of any Citigroup subsidiary that is a national bank.

28. On April 19, 2005, Dennis D. Parker, the Bureau Chief for the Civil Rights Bureau of the Office of the Attorney General, sent a letter to HSBC USA, N.A. Citing reports of disparities

in the pricing of loans between white borrowers and African-American and Hispanic borrowers, the letter stated that the alleged disparities “unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.” After stating that a preliminary inquiry had been commenced to determine the causes of the reported disparities, the letter stated: “In lieu of issuing a formal subpoena, we write to request that HSBC provide our office with certain information regarding its HMDA reportable loans and applications.” The letter requested that HSBC USA, N.A., provide its HMDA LARs as well as non-public information concerning this national bank’s mortgage lending operations, including the operations of its operating subsidiaries, in connection with the inquiry into whether violations of federal and state anti-discrimination laws had occurred.

29. On April 19, 2005, Dennis D. Parker, the Bureau Chief for the Civil Rights Bureau of the Office of the Attorney General, sent a letter to Wells Fargo & Company. Citing reports of disparities in the pricing of loans between white borrowers and African-American and Hispanic borrowers, the letter stated that the alleged disparities “unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.” After stating that a preliminary inquiry had been commenced to determine the causes of the reported disparities, the letter stated: “In lieu of issuing a formal subpoena, we write to request that Wells Fargo voluntarily provide our office with certain information regarding its HMDA reportable loans and applications.” The letter requested that Wells Fargo & Company provide its HMDA LARs as well as non-public information concerning its mortgage lending operations, including the operations of its national

bank subsidiaries and bank operating subsidiaries, in connection with the inquiry into whether violations of federal and state anti-discrimination laws had occurred.

30. On April 20, 2005, Dennis D. Parker, the Bureau Chief for the Civil Rights Bureau of the Office of the Attorney General, sent a letter to JP Morgan Chase & Company. Citing reports of disparities in the pricing of loans between white borrowers and African-American and Hispanic borrowers, the letter stated that the alleged disparities “unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.” After stating that a preliminary inquiry had been commenced to determine the causes of the reported disparities, the letter stated: “In lieu of issuing a formal subpoena, we write to request that JP Morgan Chase provide our office with certain information regarding its HMDA reportable loans and applications.” The letter requested that JP Morgan Chase & Company provide its HMDA LARs as well as non-public information concerning JP Morgan Chase & Company’s mortgage lending operations, including the operations of any subsidiary that is a national bank, in connection with the inquiry into whether violations of federal and state anti-discrimination laws had occurred.

31. Pursuant to federal law, Defendant may obtain from national banks their HMDA LARs that must be made available to the public.

32. In a letter dated April 19, 2005, Citigroup responded to the April 6, 2005 letter from Jeffrey K. Powell by providing its HMDA LARs and certain non-public information concerning the operation of Citigroup’s mortgage lending program, including the operations of Citigroup’s national bank subsidiaries.

33. JP Morgan Chase & Company responded to the April 20, 2005 letter from Dennis D. Parker by providing its HMDA LARs and certain other public information concerning its mortgage lending operations, including the operations of its national bank subsidiaries.

34. In a letter dated April 26, 2005, HSBC USA, N.A., responded to the April 19, 2005 letter from Dennis D. Parker by providing its HMDA LARs and certain other public information.

35. In a letter dated May 2, 2005, Wells Fargo & Company responded to the April 19, 2005 letter from Dennis D. Parker by providing its HMDA LARs for all subsidiaries, including the holding company's national banks and their operating subsidiaries. In a letter dated May 16, 2005, Wells Fargo & Company provided certain non-public information regarding its subsidiaries that were not national banks or bank operating subsidiaries. Wells Fargo & Company declined to provide non-public information regarding its national bank subsidiaries and their operating subsidiaries.

36. On June 16, 2005, Dennis Parker notified representatives of Wells Fargo & Company that its failure to provide the documents requested in his April 19, 2005 letter concerning the real estate lending activities of the national bank subsidiaries of the bank holding company was likely to result in one of two actions by the Defendant: a formal subpoena or initiation of enforcement proceedings to investigate the reported discrepancies identified in the letter.

Claim for Relief

37. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1-36 of this Complaint as though fully set forth herein.

38. Defendant's demand for the nonpublic records of national banks or their operating subsidiaries concerning their mortgage lending operations in aid of Defendant's assertion of

authority to investigate the compliance of national banks and their operating subsidiaries with federal or state law represents an attempt to exercise visitorial power that is expressly prohibited by 12 U.S.C. § 484 and OCC regulations.

39. Pursuant to 12 U.S.C. §§ 484, 36(f), and 1818 and 12 C.F.R. §§ 5.34 and 7.4006, only the OCC may enforce with respect to national banks and their operating subsidiaries New York State Executive Law § 296-a, and other non-preempted state laws affecting the banking activities of national banks and their operating subsidiaries.

40. Defendant's assertion of visitorial authority over national banks and their operating subsidiaries represents an interference with the OCC's plenary authority to ensure the efficiency and integrity of the federal national bank supervisory regime.

41. Defendant's violation of the federal law interferes with the OCC's ability to carry out its responsibilities under federal law, causing irreparable harm to the OCC's administration of the national banking system.

42. Defendant's interference with the OCC's ability to carry out its responsibilities under federal law creates a justiciable controversy between the OCC and Defendant.

43. The OCC has no adequate remedy at law under which it may obtain redress for the interference with its supervisory and regulatory authority caused by Defendant's unlawful behavior.

Prayer for Relief

WHEREFORE, the OCC requests that judgment be entered in this action:

1. Declaring that Defendant, and all those acting under his direction or in concert with him, may not demand, examine, or inspect the books and records of national banks or their operating subsidiaries, except as specifically authorized by federal law;

2. Declaring that Defendant, and all those acting under his direction or in concert with him, has no authority to enforce against national banks and their operating subsidiaries the Equal Credit Opportunity Act, New York State Executive Law § 296-a, or any other law, rule or regulation concerning the banking activities of national banks or their operating subsidiaries, except as specifically authorized by federal law;

3. Permanently enjoining Defendant, and all those acting under his direction or in concert with him, from demanding, examining or inspecting the books and records of any national banks or their operating subsidiaries, except as specifically authorized by federal law;

4. Permanently enjoining Defendant, and all those acting under his direction or in concert with him, from instituting any enforcement activities against national banks or their operating subsidiaries, except as specifically authorized by federal law;

6. Permanently enjoining Defendant, and all those acting under his direction or in concert with him, from any further usurpation of OCC's exclusive authority to supervise and examine national banks or their operating subsidiaries, except as specifically authorized by federal law; and

7. Granting such other and further relief as this Court may deem just and proper.

Respectfully submitted,

June 2005

By: _____
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