No.

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, AND MIDLAND CREDIT MANAGEMENT, INC., PETITIONERS

v.

SALIHA MADDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Bank Act, which preempts state usury laws regulating the interest a national bank may charge on a loan, continues to have preemptive effect after the national bank has sold or otherwise assigned the loan to another entity.

CORPORATE DISCLOSURE STATEMENT

Petitioners Midland Funding, LLC, and Midland Credit Management, Inc., are subsidiaries of Encore Capital Group, Inc., a publicly held company. Encore Capital Group has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Midland Funding, LLC, and Midland Credit Management, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 786 F.3d 246. The oral ruling of the district court on petitioners' motion for summary judgment (App., *infra*, 21a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2015. A petition for rehearing was denied on August 12, 2015 (App., *infra*, 19a-20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the National Bank Act, 12 U.S.C. 1 *et seq.*, are reproduced in the appendix to this petition (App., *infra*, 56a-58a).

STATEMENT

This case presents a question which is critical to the operation of the national banking system and on which the courts of appeals are in conflict. The National Bank Act authorizes national banks to charge interest at particular rates on loans that they originate, and the Act has long been held to preempt conflicting state usury laws. The question presented here is whether, after a national bank sells or otherwise assigns a loan with a permissible interest rate to another entity, the Act continues to preempt the application of state usury laws to that loan. Put differently, the question presented concerns the extent to which a State may effectively regulate a national bank's ability to set interest rates by imposing limitations that are triggered as soon as a loan is sold or otherwise assigned.

Petitioners Midland Funding, LLC, and Midland Credit Management, Inc., are a debt purchaser and debt servicer, respectively. Petitioner Midland Funding purchased the loan at issue in this case from a national bank, and petitioner Midland Credit Management attempted to collect interest at the rate set by the terms of that loan—a rate that was undisputedly permissible when it was charged by the national bank that originated the

loan. Respondent, the borrower, sued petitioners; as is relevant here, she alleged that, by attempting to collect interest at the stated rate, petitioners had violated the New York criminal and civil usury laws, and, as a result, the debt should be declared void. The district court held that the National Bank Act preempted state-law claims against the assignee of a national bank and, on that basis, entered judgment in favor of petitioners. App., *infra*, 26a-29a, 51a-55a.

The Second Circuit vacated the judgment, holding that the National Bank Act ceased to have preemptive effect once the national bank had assigned the loan to another entity. App., *infra*, 1a-18a. In so holding, the Second Circuit created a square conflict with the Eighth Circuit, and its reasoning is irreconcilable with that of the Fifth Circuit. The Second Circuit also rode roughshod over decisions of this Court that provide broad protection both for a national bank's power to set interest rates and for its freedom from indirect regulation. And it cast aside the cardinal rule of usury, dating back centuries, that a loan which is valid when made cannot become usurious by virtue of a subsequent transaction.

The Second Circuit, of course, is home to much of the American financial-services industry. And if the Second Circuit's decision is allowed to stand, it threatens to inflict catastrophic consequences on secondary markets that are essential to the operation of the national banking system and the availability of consumer credit. The markets have long functioned on the understanding that buyers may freely purchase loans from originators without fear that the loans will become invalid, an understanding uprooted by the Second Circuit's decision in this case. It is no exaggeration to say that, in light of these practical consequences, this case presents one of the most significant legal issues currently facing the fi-

nancial-services industry. Because the Second Circuit's decision creates a conflict on such a vitally important question of federal law, and because there is an urgent need to resolve that conflict, the petition for a writ of certiorari should be granted.

A. Background

1. As this Court has explained, "[n]ational banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896). Enacted in 1864, the National Bank Act established the system of national banking that remains in place today, and it vests national banks with a variety of enumerated and incidental powers. See *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 10-11 (2007).

2. Primary among the enumerated powers of national banks is the power to set interest rates. The interest rates that national banks may charge on loans they originate are "governed by federal law." *Marquette National Bank of Minneapolis* v. *First of Omaha Service Corp.*, 439 U.S. 299, 308 (1978). The National Bank Act specifically authorizes a national bank to "charge on any loan * * * interest at the rate allowed by the laws of the State * * * where the bank is located." 12 U.S.C. 85; see 12 U.S.C. 25b(f) (providing that no other provision of the National Bank Act shall be construed to limit the power to set interest rates). Accordingly, a national bank is entitled to "export" rates permitted by its home State when dealing with customers from other States, even when those rates are higher than the laws of the customers' States would permit. See, *e.g.*, *Smiley* v.

Citibank (South Dakota), N.A., 517 U.S. 735, 737 (1996); *Marquette National Bank*, 439 U.S. at 314-315.[1]

The "impairment" of state usury laws "has always been implicit in the structure of the National Bank Act." *Marquette National Bank*, 439 U.S. at 318. In fact, this Court has held that Section 85, along with Section 86,[2] *completely* preempts a state-law usury claim against a national bank—a form of preemption so extraordinary that a suit asserting such a claim is automatically removable to federal court. See *Beneficial National Bank* v. *Anderson*, 539 U.S. 1, 11 (2003).

Consistent with Section 85, regulations promulgated by the Comptroller of the Currency provide that a "national bank may make, sell, * * * or otherwise deal in loans" not secured by real estate, "subject to such terms * * * prescribed by * * * Federal law." 12 C.F.R. 7.4008(a). The regulations specifically provide that a national bank is entitled to make such loans "without regard to state law limitations concerning * * * [r]ates of interest." 12 C.F.R. 7.4008(d).

3. Beyond the enumerated power to set interest rates, the National Bank Act authorizes national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. 24 (Seventh). The origination and sale of loans are unquestionably among the powers of a national bank under the

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[1] Federal law provides similar protection for loans originated by state-chartered federally insured banks. See Federal Deposit Insurance Corporation, Interpretive Letter 93-27, 1993 WL 853492, at *1 (July 12, 1993) (FDIC Letter).

[2] Section 86 prohibits the charging of interest greater than is permitted by Section 85 and provides a cause of action for those who are charged excessive interest.

Act. See 12 U.S.C. 24 (Seventh); 12 C.F.R. 7.4008(a), 34.3(a). A national bank also has the incidental power to participate in the secondary markets for loans, see 12 C.F.R. 7.4008(a); Office of the Comptroller of the Currency, Interpretive Letter 427, 1988 WL 1541148, ¶ 85,651 (May 9, 1988), as well as the power to "pursue collection of delinquent accounts" by "selling the debt to debt buyers for a fee," Office of the Comptroller of the Currency, Bulletin No. 2014-37, *Risk Management Guidance* (Aug. 4, 2014).

Aside from specifically preempting state laws concerning interest rates, the National Bank Act more generally preempts any consumer financial state law that "prevents or significantly interferes with the exercise by [a] national bank of its powers." 12 U.S.C. 25b(b)(1). That provision codifies the rule of *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25 (1996), where this Court explained that "grants of both enumerated and incidental 'powers' to national banks [are] grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.* at 32. Under the *Barnett Bank* rule, a state law may significantly interfere with a national bank's exercise of its powers even if it does so only indirectly. Cf. *Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373, 377-378 (1954) (holding preempted a New York law that would have prohibited national banks from advertising their lawful business in a particular manner). Courts have consistently noted that the level of interference that gives rise to preemption is "not very high." *Monroe Retail, Inc.* v. *RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009).

B. Facts And Procedural History

1. Respondent, a New York resident, opened a credit-card account with Bank of America, a national bank. In so doing, respondent agreed to be bound by the terms and conditions set out in the cardholder agreement. As part of a corporate restructuring at Bank of America, the bank's credit-card portfolio was subsequently consolidated into a portfolio operated by FIA Card Services (FIA), also a national bank. FIA is located in Delaware, with the result that FIA was authorized to charge interest as permitted by Delaware law. Respondent was informed of the consolidation and consented to the resulting amendment of her cardholder agreement by continuing to use her credit card. App., *infra*, 3a-5a, 24a-25a, 36a-37a, 54a; C.A. App. 46.

Respondent later defaulted. In 2010, FIA sold respondent's debt to petitioner Midland Funding; the debt was serviced by petitioner Midland Credit Management. Both entities are headquartered in California. Consistent with the terms of the cardholder agreement, petitioner Midland Credit Management sent respondent a letter seeking to collect payment on her debt at the applicable rate of 27%. App., *infra*, 3a-4a, 25a, 54a.

2. On November 10, 2011, respondent filed a class action on behalf of approximately 50,000 New York residents against petitioners in the United States District Court for the Southern District of New York. Respondent alleged that, by attempting to collect interest from her at the stated rate, petitioners had violated the New York criminal and civil usury laws, and, as a result, her debt (and the debts of others similarly situated) should be declared void. Respondent also alleged that petitioners had engaged in improper debt-collection practices in violation of the federal Fair Debt Collection Practices Act (FDCPA); that claim was predicated on the claims

that petitioners had violated the New York usury laws. App., *infra*, 4a, 16a-17a, 25a, 33a; C.A. App. 25-28; see N.Y. Gen. Oblig. Law §§ 5-501, 5-511; N.Y. Penal Law § 190.40.

3. Petitioners moved for summary judgment, arguing that respondent's state-law claims were preempted by the National Bank Act (and that respondent's federal claim, which was predicated on the state-law claims, thus also failed).

The district court entered judgment for petitioners; in an oral ruling on petitioners' motion for summary judgment, the court held that, because a national bank had originated the loan at issue, the National Bank Act preempted state-law usury claims against an assignee of the bank. App., *infra*, 21a-48a.[3] In so holding, the district court relied on two decisions from the Eighth Circuit holding that, where a national bank has assigned a loan to another entity, "[c]ourts must look at 'the originating entity (the bank), and not the ongoing assignee * * * , in determining whether the [National Bank Act] applies.'" *Phipps* v. *FDIC*, 417 F.3d 1006, 1013 (2005) (quoting *Krispin* v. *May Department Stores Co.*, 218 F.3d 919, 924 (2000)); see App., *infra*, 27a. The court also relied on a decision from the Fifth Circuit similarly holding that the applicable law is determined by looking at the loan's originator. App., *infra*, 27a-28a (discussing

[3] The district court initially denied petitioners' motion for summary judgment on the ground that there were outstanding issues of fact concerning whether respondent had received the cardholder agreement and amendment and whether the debt had validly been assigned to petitioners. See App., *infra*, 31a-32a, 37a. After the parties executed a joint stipulation resolving those factual issues in petitioners' favor, the district court entered judgment for petitioners. See *id.* at 51a-55a.

FDIC v. *Lattimore Land Corp.*, 656 F.2d 139, 148-149 (Unit B Sept. 1981)). In addition, the district court invoked the "cardinal rule of usury" that the non-usurious character of a loan does not change by virtue of a subsequent transaction involving the loan. *Id.* at 28a (citing *Nichols* v. *Fearson*, 32 U.S. (7 Pet.) 103, 109 (1833)).

The district court added that it "s[aw] no reason why a national bank's assignees should not be afforded the same protections as those given to the bank itself with regard to charging a particular interest rate." App., *infra*, 29a. "In this scenario," the court reasoned, "the assignee is merely attempting to collect what [the borrower] originally and legitimately owed, no more." *Ibid.* The court observed that, under a contrary rule, borrowers would have a "perverse incentive to avoid their obligations long enough to ensure that their debt was charged-off and assigned to a debt collector required to charge a lower interest rate." *Ibid.*

4. The court of appeals vacated the judgment and remanded, holding, as is relevant here, that the National Bank Act did not preempt respondent's state-law usury claims. App., *infra*, 1a-18a.

At the outset, the court of appeals acknowledged that Section 85 of the National Bank Act "expressly permits" national banks to charge interest at the rates allowed by the States in which they are located and "completely preempts analogous state-law usury claims" against the banks themselves. App., *infra*, 7a (alteration and citation omitted). The court also acknowledged that the Act more generally preempts state laws that significantly interfere with a national bank's exercise of its powers. *Id.* at 8a. And the court of appeals further acknowledged that this Court "has suggested that * * * [National Bank Act] preemption may extend to entities beyond a national bank itself." *Ibid.*

The court of appeals nevertheless concluded, without elaboration, that, although "usury laws might decrease the amount a national bank could charge for its consumer debt in certain [S]tates," such an effect "would not 'significantly interfere' with the exercise of a national bank power." App., *infra*, 11a. It reached that conclusion without analyzing the impact the application of state usury laws would have on a national bank's ability to originate or sell loans. Rather, according to the court, preemption did not extend to assignees such as petitioners for the simple reason that they are "non-national bank entities that are not acting on behalf of a national bank." *Ibid.* Because petitioners were not "act[ing] on behalf of [Bank of America] or FIA in attempting to collect on [respondent's] debt," the court concluded that respondent's state-law claims against petitioners were not preempted. *Id.* at 9a, 17a-18a.

In so concluding, the court of appeals brushed off the two Eighth Circuit cases on which the district court had relied, noting that "neither [Bank of America] nor FIA has retained an interest in [respondent's] account" and "[respondent] objects only to the interest charged after her account was sold by FIA to [petitioners]." App., *infra*, 11a-14a. The court of appeals did not cite the Fifth Circuit decision on which the district court relied, nor did it address the "cardinal rule of usury" which the district court recognized. See *ibid.*[4]

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[4] Because the district court's entry of judgment on respondent's FDCPA claim was "predicated on [its] erroneous holding that [petitioners] receive the same protections under the [National Bank Act] as do national banks," the court of appeals vacated the district court's judgment in its entirety. App., *infra*, 16a. Similarly, the court of appeals vacated the district court's order denying respondent's motion for class certification, reasoning that the district court's

5. The court of appeals subsequently denied rehearing. App., *infra*, 19a-20a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case creates a circuit conflict on a question of federal law at the heart of the National Bank Act. The decision below upends centuries of settled doctrine and threatens to wreak havoc on the national banking system and the Nation's credit markets by eviscerating a national bank's core prerogative to set interest rates unfettered by state regulation. Moreover, the question presented is unquestionably of substantial importance, and the Court's review is urgently required in light of the dramatic consequences of the Second Circuit's decision for the American financial-services industry. Because this case readily satisfies the criteria for further review, the petition for certiorari should be granted.

A. The Decision Below Creates A Conflict Among The Courts Of Appeals

Before the Second Circuit's decision in this case, the prevailing view among the courts of appeals was that the applicability of National Bank Act preemption turned on the identity of a loan's originator. In holding that National Bank Act preemption does not apply after a national bank has assigned a loan to another entity, the Second Circuit created a square conflict with the Eighth Circuit, and its reasoning is irreconcilable with that of the Fifth Circuit. This Court's review is necessary in order to resolve the conflict and to restore the preexisting

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ruling on class certification was "entwined with its erroneous holding that [petitioners] receive the same protections under the [National Bank Act] as do national banks." *Id.* at 17a.

understanding that the act of assigning a loan does not terminate the National Bank Act's protections.

1. The Second Circuit's decision in this case squarely conflicts with the Eighth Circuit's decision in *Krispin* v. *May Department Stores Co.*, 218 F.3d 919 (2000). In *Krispin*, a national bank extended credit on credit cards issued by a department store to its customers. *Id.* at 921. Under the applicable credit agreements, the bank charged delinquent borrowers late fees of $15, which qualified as "interest" under the National Bank Act. *Id.* at 922-923 (citing *Smiley*, 517 U.S. at 744-747). The bank sold its receivables (including any late fees or other "interest") to the department store; delinquent borrowers then sued the store, alleging that the late fees were usurious under state law. *Id.* at 922, 923.

The Eighth Circuit held that the National Bank Act preempted the borrowers' state-law usury claims, on the ground that a court must "look to the originating entity (the bank), and not the ongoing assignee (the store), in determining whether the [Act] applies." *Krispin*, 218 F.3d at 924. The court explained that, for purposes of deciding the legality of the interest rate, the "real party in interest" was the bank that originated the loans, which "issue[d] credit" and "set[] such terms as interest and late fees." *Ibid.* While the bank continued to service the accounts in certain respects, the critical fact was that "the store's purchase of the bank's receivables" did not alter the preemption analysis as to the terms of those receivables. *Ibid.*

Subsequent cases in the Eighth Circuit have confirmed the breadth of the *Krispin* rule. For example, in *Phipps* v. *FDIC*, 417 F.3d 1006 (2005), the Eighth Circuit affirmed the dismissal of state-law claims brought against both a national bank and its non-national-bank assignee. See *id.* at 1014. In so doing, the Eighth Cir-

cuit reiterated the principle that "[c]ourts must look at 'the originating entity (the bank), and not the ongoing assignee * * * in determining whether the [National Bank Act] applies.'" *Id.* at 1013 (quoting *Krispin*, 218 F.3d at 924). And at least one district court in the circuit has applied that principle in circumstances identical to those presented here, citing *Krispin* and *Phipps* in holding that state-law usury claims against the purchaser of credit-card debt from a national bank are preempted. See *Munoz* v. *Pipestone Financial, LLC*, 513 F. Supp. 2d 1076, 1079 (D. Minn. 2007).

2. Beyond the square conflict with the Eighth Circuit's decision in *Krispin*, the Second Circuit's decision is also inconsistent with a decision of the Fifth Circuit.

In *FDIC* v. *Lattimore Land Corp.*, 656 F.2d 139 (Unit B Sept. 1981), the Fifth Circuit addressed an argument by delinquent borrowers that, under the National Bank Act, the interest rate charged on a loan was usurious. *Id.* at 146-147. That case was the flipside of this one: a non-national-bank entity originated the debt and then assigned it to a national bank. *Ibid.* The law of the State governing the originator permitted a higher interest rate than the law governing the assignee. *Ibid.* The Fifth Circuit held that courts should look to the originator of the debt, not the assignee, in determining the applicable law, and thus affirmed the district court's conclusion that the assignee was entitled to charge interest under the more generous state law governing the originator. *Id.* at 146-150. The Fifth Circuit reached that conclusion by applying the overarching principle that "[t]he non-usurious character of a note should not change when the note changes hands," *id.* at 148-149—a

principle that, in the context of the facts presented by this case, compels preemption.[5]

3. Under the reasoning of the preceding decisions, a loan validly originated by a national bank in accordance with the law of the State where the bank is located cannot become subject to regulation by other States simply because it is held by another entity. The Second Circuit's decision stands alone in allowing a State to regulate the interest on a loan originated by a national bank in the exercise of its National Bank Act powers as soon as the loan passes into the hands of another entity. The ensuing conflict, on an issue critical to the functioning of national banks, warrants resolution by this Court.

B. The Decision Below Is Erroneous

Further review is also merited because the Second Circuit's decision regarding the preemptive scope of the National Bank Act is deeply flawed. It is undisputed that the national bank that originated respondent's loan was permitted to charge interest at the rate at issue. It is also undisputed that, if the bank had not assigned the loan to petitioners, any state-law claims against the bank would be preempted. The question presented is whether respondent may pursue the same state-law claims against petitioners simply by virtue of the assignment by the originating national bank.

In refusing to recognize preemption in these circumstances, the Second Circuit went astray in two funda-

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[5] The Second Circuit's decision in this case also cannot be reconciled with a decision of the First Circuit, which recognized that the National Bank Act preempts state laws that, although they purport to regulate non-national-bank entities, actually "seek[] to prohibit the sale of [a] bank product itself." *SPGGC, LLC* v. *Ayotte*, 488 F.3d 525, 534 (2007), cert. denied, 552 U.S. 1185 (2008).

mental ways. *First*, the Second Circuit failed to acknowledge the preemptive force of Section 85 of the National Bank Act, with the result that it hollowed out a national bank's fundamental power to set interest rates. *Second*, the Second Circuit eviscerated the *Barnett Bank* "significant interference" test, now codified in Section 25b(b)(1), by incorrectly concluding that state regulation of banks' assignees will not significantly interfere with the banks' exercise of their powers. Because the Second Circuit's decision cannot be reconciled with this Court's decisions regarding the preemptive scope of the National Bank Act, further review is warranted.

1. To begin with, the Second Circuit's decision allows state law to infringe the core enumerated power of national banks to set interest rates at the level allowed by their home States. As this Court has recognized, Section 85 preempts state laws that interfere with that power. See *Marquette National Bank*, 439 U.S. at 318-319.

It is a fundamental principle of usury law that "a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction." *Nichols*, 32 U.S. (7 Pet.) at 109. That principle—known as the "valid-when-made" principle—was firmly established at common law well before 1864, when Congress enacted the National Bank Act (including the provision that is now Section 85). See, *e.g.*, *ibid.*; *Gaither* v. *Farmers' & Mechanics' Bank of Georgetown*, 26 U.S. (1 Pet.) 37, 43 (1828); *Tuttle* v. *Clark*, 4 Conn. 153, 157 (1822); *Tate* v. *Wellings*, 100 Eng. Rep. 716, 721 (K.B. 1790); 1 William Blackstone, *Commentaries on the Laws of England* 379 n.32 (18th London ed., W.E. Dean 1838) (reciting the principle that "[t]he usury must be part of the contract in its inception"). Because Congress legislated against that common-law backdrop, Section 85 incorporates the principle that an interest rate set by an

originating bank cannot be invalidated by a subsequent assignment of the loan. See, *e.g.*, *Astoria Federal Savings & Loan Association* v. *Solimino*, 501 U.S. 104, 108 (1991).

The "valid-when-made" principle is essential to a national bank's ability to set interest rates. Courts, including this Court, have consistently recognized the dangers of a rule that would allow a non-usurious loan to become usurious after an assignment. See *Nichols*, 32 U.S. (7 Pet.) at 110 (noting that, under such a rule, a "contract, wholly innocent in its origin, and binding and valid, upon every legal principle, [would be] rendered, at least, valueless, in the hands of the otherwise legal holder"); *Olvera* v. *Blitt & Gaines, P.C.*, 431 F.3d 285, 287-288 (7th Cir. 2005) (rejecting such a rule on the ground that it would "produce[] a senseless result" that "would push the debt buyers out of the debt collection market and force the original creditors to do their own debt collection"); *LFG National Capital, LLC* v. *Gary, Williams, Finney, Lewis, Watson & Sperando P.L.*, 874 F. Supp. 2d 108, 125 (N.D.N.Y. 2012) (explaining that such a rule "would in effect prohibit—make uneconomic—the assignment or sale by banks of their commercial property to a secondary market," which "would be disastrous in terms of bank operations and not conformable to the public policy exempting banks in the first instance" (internal quotation marks and citation omitted)). By ignoring the "valid-when-made" principle, the Second Circuit's decision substantially vitiates the authority granted to national banks by Section 85.

The practical effect of the Second Circuit's decision is to authorize state interference in what had previously been understood to be an exclusively federal regime. Under that unprecedented decision, States are permitted to regulate a national bank's loans when they come

into the hands of its counterparties, thereby effectively restricting the bank's power to set interest rates on loans it might sell or otherwise assign. But as this Court has previously noted, "the various provisions of [Sections] 85 and 86 form a system of regulations all the parts of which are in harmony with each other and cover the entire subject, so that the State law would have no bearing whatever upon the case." *Beneficial National Bank*, 539 U.S. at 10 (alterations and internal quotation marks omitted). The Second Circuit's decision is patently incompatible with the National Bank Act's complete displacement of state law regulating interest rates.

2. The Second Circuit further erred when it rejected an additional (and distinct) source of preemption. The National Bank Act more generally preempts any consumer financial state law—whether or not it concerns interest—that "prevents or significantly interferes with the exercise by [a] national bank of its powers." 12 U.S.C. 25b(b)(1); *accord Barnett Bank*, 517 U.S. at 33. That broader form of preemption applies to all of a national bank's enumerated and incidental powers, including its powers to originate and sell loans. See 12 U.S.C. 24 (Seventh); 12 C.F.R. 7.4008(a), 34.3(a); pp. 5-6, *supra*.

The Second Circuit's decision is inconsistent with the *Barnett Bank* test, as codified in Section 25b(b)(1). Specifically, the Second Circuit's decision fails to account for the substantial impact the state regulation of assignees would have on a national bank's ability to sell on the secondary markets loans with rates greater than permitted by some States' usury laws (or otherwise to rely on counterparties for functions such as debt collection and secu-

ritization).[6] The Second Circuit's decision interferes both with the power of a national bank to originate loans in the first place and with the specific powers of a national bank to participate in the secondary markets for loans and to pursue the collection of delinquent accounts.

In rejecting preemption under the *Barnett Bank* test, the Second Circuit narrowly focused on the identity of the regulated entities, noting that assignees lack a structural connection with the banks: they are not subsidiaries, nor are they acting as banks' agents when they attempt to collect interest. See App., *infra*, 8a-9a. But the crux of the preemption analysis is the "exercise of [a national bank's] powers." *Barnett Bank*, 517 U.S. at 33; see *id.* at 32-34. The proper focus under the *Barnett Bank* test is thus on the *effect* of a state regulation on the national bank—not on any formal feature of the state law, such as the identity of the party that is the direct object of the regulation.

In other contexts, this Court has rejected the proposition that a State can avoid preemption simply by regulating the counterparties of entities as to which preemption would otherwise apply. In *Rowe* v. *New Hampshire Motor Transport Association*, 552 U.S. 364 (2008), the Court held that a federal law preempting the regulation of motor carriers also preempted the regulation of retailers in their use of motor carriers' services. The Court

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[6] Securitizing loans—that is, packaging groups of loans and selling them to third parties in the form of asset-backed securities—allows banks to create liquidity and make additional credit available. See *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Financial Services*, 108th Cong. 195, 205 (2004) (statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency).

explained that, even though a regulation that tells counterparties what services to use is "less 'direct' than it might be," such a regulation substantially alters the result that "the market might dictate" in its absence. *Id.* at 372. Consequently, "treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense." *Ibid.* (citation omitted). So too here, a state regulation that operates on assignees has obvious effects on national banks themselves, effectively restricting their ability to set interest rates on the front end by imposing limitations on loans with those rates on the back end.

The Second Circuit offered no support for its *ipse dixit* conclusion that the state regulation of banks' assignees will have no significant impact on the banks' exercise of their powers. Nor could it. In fact, the impact on national banks will be enormous. State usury laws can void debts altogether, see, *e.g.*, N.Y. Gen. Oblig. Law § 5-511; Conn. Gen. Stat. § 37-8, and they can even subject creditors to criminal sanctions, see, *e.g.*, N.Y. Penal Law § 190.40; 41 Pa. Cons. Stat. § 505. Under the Second Circuit's rule, market participants must account for the risk of invalidation of their loans, and even the additional risk of imposition of criminal sanctions, simply because the loans are made to consumers in the wrong States. A national bank can hardly make non-real-estate loans "without regard to state law limitations concerning * * * [r]ates of interest," 12 C.F.R. 7.4008(d), if those loans would become worthless as soon as they come into the hands of the bank's counterparties.

Federal regulators have repeatedly recognized that imposing liability on assignees, especially in circumstances with high uncertainty, can freeze secondary markets. See, *e.g.*, Consumer Financial Protection Bureau, *High-Cost Mortgage and Homeownership Coun-*

seling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 6,856-01, 6,944-6,945 (2013) (noting that assignee liability may result in the inability to sell a particular type of loan); *Review of the National Bank Preemption Rules: Hearing Before the S. Comm. on Banking, Housing, & Urban Affairs*, 108th Cong. 55, 88 (2004) (statement of John D. Hawke, Jr., Comptroller of the Currency) (observing that rating agencies generally will not rate securities containing loans with unquantifiable assignee liability). Indeed, the Office of the Comptroller of the Currency—the federal agency with primary responsibility for national banks—concluded that a state-law provision imposing assignee liability was preempted because it would "stand as an obstacle to the exercise of national banks' real estate lending powers, including the power to sell real estate loans into the secondary market or to securitize these loans." Office of the Comptroller of the Currency, *Preemption Determination and Order*, 68 Fed. Reg. 46,264-02, 46,278-46,279 (2003).

The state regulation permitted by the Second Circuit here would gravely interfere with the ability of national banks to sell their loans, rely on counterparties for functions such as debt collection and securitization, and participate in the secondary markets more generally. The resulting interference is plainly sufficient under the *Barnett Bank* test for preemption, as codified in Section 25b(b)(1), to the extent that the state regulation is not specifically preempted under Section 85. The Second Circuit erred by permitting respondent's state-law claims (and derivative federal claim) to proceed, and this Court should grant review and reverse the Second Circuit's judgment.

C. The Question Presented Is An Important One That Urgently Warrants The Court's Review

The question presented in this case is one of exceptional importance to the national banking system and the Nation's credit markets. The Second Circuit's decision has upset settled expectations in the American financial-services industry, and, if allowed to stand, it threatens to cause chaos in the secondary markets. Remarkably, some ten industry associations filed amicus briefs in support of petitioners' petition for rehearing below, amply demonstrating both the importance of the question presented and the urgent need for further review in this case.

1. The practical implications of the Second Circuit's decision in this case are difficult to overstate. Indeed, the decision has already "sent shockwaves through the banking industry." Barkley Clark & Mike Lochmann, *A Momentous Court Decision May Hurt Bank Lending Powers*, BankDirector.com (July 22, 2015) <tinyurl.com/clarklochmann>. Commentators have observed that the decision "may have far-reaching—and likely unintended—implications for national banks and their assignees" by "upend[ing] a fundamental and longstanding premise of lending law." Nathan Bull et al., *Second Circuit Holds Application of State Usury Laws to Third-Party Debt Purchasers Not Preempted by National Bank Act*, JD Supra Business Advisor (June 9, 2015) <tinyurl.com/jdsupraarticle>.

If the Second Circuit's decision is left undisturbed, a State will have the power to regulate key terms set by a national bank, on a loan it created, when that loan passes

out of the bank's hands.[7] It is beyond debate that "[s]tate-based restrictions on loan terms substantially affect the marketability of such loans." *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Financial Services*, 108th Cong. 195, 205 (2004) (statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency) (*Congressional Review*). Put differently, a bank's ability to sell a loan will be thoroughly obstructed by a state law that makes the loan worthless (or, worse yet, subjects a holder to criminal sanctions) when the loan passes into the hands of the purchaser. See, *e.g.*, *Olvera*, 431 F.3d at 287-288. Little wonder, then, that one commentator has observed that the Second Circuit's decision is having a "great effect on the secondary market and liquidity." Colin Wilhelm, *Madden Case Creating Uncertainty for Securitized Loan Sales*, Politico Pro (Oct. 26, 2015) <tinyurl.com/madden-politico> (internal quotation marks omitted).

In the wake of the Second Circuit's decision, national banks are left with few options. They could attempt to alter the terms of their loans in order to satisfy the nu-

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[7] In fact, the Second Circuit's decision will have even wider implications, because its reasoning applies equally to loans originated by other entities, such as savings associations and state-chartered federally insured banks, whose interest rates are also governed by federal law. See 12 U.S.C. 1463(g), 1831d(a); FDIC Letter, at *1. Further compounding the impact, the new uncertainty surrounding the "valid-when-made" principle applies to a yet broader group, because that principle governs loans made by *all* lenders, including state banks and non-banks. In light of the Second Circuit's decision, no purchaser of *any* loan can have assurance that such a loan remains protected from more stringent state usury laws.

merous and "often unpredictable" state laws that could conceivably apply, effectively succumbing to the standard set by the strictest State. *Congressional Review* 201. Or they could forgo selling their credit products on the secondary markets—a practice on which banks have depended in order to securitize their holdings, manage risk, and obtain essential liquidity. See Rustom M. Irani et al., *Loan Sales and Bank Liquidity Risk Management: Evidence from the Shared National Credit Program* 2 (Aug. 1, 2014) <tinyurl.com/iraniarticle>.

What is more, the Second Circuit's decision will have repercussions across a wide range of credit-based products, especially those for small businesses and low-income consumers, for whom bank credit is often the only means of obtaining access to funds.[8] And it will subject national banks to myriad state laws beyond the usury laws at issue here. The law of even a single State "can have a detrimental effect on [a national] bank's operations and consumers," insofar as application of that law could "cause[] secondary market participants to cease purchasing" loans in that State. *Congressional Review* 203.

2. In light of the practical consequences of the Second Circuit's decision, resolving the question presented

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[8] For example, the Second Circuit's decision casts doubt on the viability of online lending marketplaces currently envisioned by the federal government. See Department of the Treasury, *Public Input on Expanding Access to Credit Through Online Marketplace Lending*, 80 Fed. Reg. 42,866-01 (2015). The decision "pose[s] an acute risk" to lenders in those marketplaces, because they may be subject to state usury laws based on the vagaries of a particular customer's location. See Michael Tarkan et al., Compass Point Research & Trading LLC, *Lending Club Corp.: Will Evolving Institutional Demand Prompt Changes to the P2P Issuance Model?* 2 (2015).

is a matter of the utmost urgency. As this Court has repeatedly recognized, uniformity is paramount in national bank regulation. See, *e.g.*, *Beneficial National Bank*, 539 U.S. at 10-11. Indeed, "the ability of national banks to operate under consistent, uniform national standards [is] a crucial factor in their business future." *Congressional Review* 208. Under the approach adopted by the Second Circuit in this case, however, national banks are no longer subject to uniform national standards but must now navigate the laws of all fifty States in order to determine their ability to assign validly originated loans.

There is no legitimate reason to wait before granting review on the question presented. Federal regulators have recognized the need for prompt action on prior occasions where, as here, "the continuing uncertainty about the applicability of State laws has already affected national banks' ability to lend in certain markets and to access the secondary market," on the ground that such limitations may "adversely affect credit availability as well as detract from the banks' financial strength." *Congressional Review* 204. And the need for prompt action is all the more acute here because the Second Circuit is home to much of the American financial-services industry—and the Second Circuit's decision will therefore subject a disproportionate share of the industry to the very sort of disuniformity that the National Bank Act was intended to prevent.

3. Finally, this case constitutes an excellent vehicle for resolving the circuit conflict. Because the parties in this case entered into a joint stipulation, there are no factual issues that could complicate the Court's analysis. And it is undisputed that a ruling that respondent's state-law claims are preempted would dispose of the entire case. The preemption question is thus cleanly presented here for the Court's review.

States should not be permitted to "expose [a national bank] to the hazard of unfriendly legislation," *Tiffany* v. *National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 413 (1874), through the simple expedient of regulating counterparties essential to the bank's exercise of its core powers. This case presents a clear circuit conflict on a vitally important question of federal law—a conflict that is in urgent need of resolution. Accordingly, this case satisfies all of the criteria for further review. The Court should grant the petition for certiorari and resolve the conflict on an issue of enormous significance to the American financial-services industry and its customers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2015

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14-2131

Saliha Madden, on behalf of herself and all others similarly situated, Plaintiff-Appellant

v.

Midland Funding, LLC, Midland Credit Management, Inc., Defendants-Appellees

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May 22, 2015

Before: LEVAL, STRAUB and DRONEY, Circuit Judges.

OPINION

STRAUB, Circuit Judge.

This putative class action alleges violations of the Fair Debt Collection Practices Act ("FDCPA") and New York's usury law. The proposed class representative, Saliha Madden, alleges that the defendants violated the FDCPA by charging and attempting to collect interest at a rate higher than that permitted under the law of her home state, which is New York. The defendants contend that Madden's claims fail as a matter of law for two rea-

sons: (1) state-law usury claims and FDCPA claims predicated on state-law violations against a national bank's assignees, such as the defendants here, are preempted by the National Bank Act ("NBA"), and (2) the agreement governing Madden's debt requires the application of Delaware law, under which the interest charged is permissible.

The District Court entered judgment for the defendants. Because neither defendant is a national bank nor a subsidiary or agent of a national bank, or is otherwise acting on behalf of a national bank, and because application of the state law on which Madden's claims rely would not significantly interfere with any national bank's ability to exercise its powers under the NBA, we reverse the District Court's holding that the NBA preempts Madden's claims and accordingly vacate the judgment of the District Court. We leave to the District Court to address in the first instance whether the Delaware choice-of-law clause precludes Madden's claims.

The District Court also denied Madden's motion for class certification, holding that potential NBA preemption required individualized factual inquiries incompatible with proceeding as a class. Because this conclusion rested upon the same erroneous preemption analysis, we also vacate the District Court's denial of class certification.

BACKGROUND

A. Madden's Credit Card Debt, the Sale of Her Account, and the Defendants' Collection Efforts

In 2005, Saliha Madden, a resident of New York, opened a Bank of America ("BoA") credit card account. BoA is a national bank.[1] The account was governed by a document she received from BoA titled "Cardholder Agreement." The following year, BoA's credit card program was consolidated into another national bank, FIA Card Services, N.A. ("FIA"). Contemporaneously with the transfer to FIA, the account's terms and conditions were amended upon receipt by Madden of a document titled "Change In Terms," which contained a Delaware choice-of-law clause.

Madden owed approximately $5,000 on her credit card account and in 2008, FIA "charged-off" her account (i.e., wrote off her debt as uncollectable). FIA then sold Madden's debt to Defendant-Appellee Midland Funding, LLC ("Midland Funding"), a debt purchaser. Midland Credit Management, Inc. ("Midland Credit"), the other defendant in this case, is an affiliate of Midland Funding that services Midland Funding's consumer debt accounts. Neither defendant is a national bank. Upon Midland Funding's acquisition of Madden's debt, neither FIA nor BoA possessed any further interest in the account.

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[1] National banks are "corporate entities chartered not by any State, but by the Comptroller of the Currency of the U.S. Treasury." *Wachovia Bank v. Schmidt,* 546 U.S. 303, 306 (2006).

In November 2010, Midland Credit sent Madden a letter seeking to collect payment on her debt and stating that an interest rate of 27% per year applied.

B. Procedural History

A year later, Madden filed suit against the defendants—on behalf of herself and a putative class—alleging that they had engaged in abusive and unfair debt collection practices in violation of the FDCPA, 15 U.S.C. §§ 1692e, 1692f, and had charged a usurious rate of interest in violation of New York law, N.Y. Gen. Bus. Law § 349; N.Y. Gen. Oblig. Law § 5-501; N.Y. Penal Law § 190.40 (proscribing interest from being charged at a rate exceeding 25% per year).

On September 30, 2013, the District Court denied the defendants' motion for summary judgment and Madden's motion for class certification. In ruling on the motion for summary judgment, the District Court concluded that genuine issues of material fact remained as to whether Madden had received the Cardholder Agreement and Change In Terms, and as to whether FIA had actually assigned her debt to Midland Funding. However, the court stated that if, at trial, the defendants were able to prove that Madden had received the Cardholder Agreement and Change In Terms, and that FIA had assigned her debt to Midland Funding, her claims would fail as a matter of law because the NBA would preempt any state-law usury claim against the defendants. The District Court also found that if the Cardholder Agreement and Change In Terms were binding upon Madden, any FDCPA claim of false representation or unfair practice would be defeated because the agreement permitted the interest rate applied by the defendants.

In ruling on Madden's motion for class certification, the District Court held that because "assignees are entitled to the protection of the NBA if the originating bank was entitled to the protection of the NBA . . . the class action device in my view is not appropriate here." App'x at 120. The District Court concluded that the proposed class failed to satisfy Rule 23(a)'s commonality and typicality requirements because "[t]he claims of each member of the class will turn on whether the class member agreed to Delaware interest rates" and "whether the class member's debt was validly assigned to the Defendants," *id.* at 127-28, both of which were disputed with respect to Madden. Similarly, the court held that the requirements of Rule 23(b)(2) (relief sought appropriate to class as a whole) and (b)(3) (common questions of law or fact predominate) were not satisfied "because there is no showing that the circumstances of each proposed class member are like those of Plaintiff, and because the resolution will turn on individual determinations as to cardholder agreements and assignments of debt." *Id.* at 128.

On May 30, 2014, the parties entered into a "Stipulation for Entry of Judgment for Defendants for Purpose of Appeal." *Id.* at 135. The parties stipulated that FIA had assigned Madden's account to the defendants and that Madden had received the Cardholder Agreement and Change In Terms. This stipulation disposed of the two genuine disputes of material fact identified by the District Court, and provided that "a final, appealable judgment in favor of Defendants is appropriate." *Id.* at 138. The District Court "so ordered" the Stipulation for Entry of Judgment.

This timely appeal followed.

DISCUSSION

Madden argues on appeal that the District Court erred in holding that NBA preemption bars her state-law usury claims. We agree. Because neither defendant is a national bank nor a subsidiary or agent of a national bank, or is otherwise acting on behalf of a national bank, and because application of the state law on which Madden's claims rely would not significantly interfere with any national bank's ability to exercise its powers under the NBA, we reverse the District Court's holding that the NBA preempts Madden's claims and accordingly vacate the judgment of the District Court. We also vacate the District Court's judgment as to Madden's FDCPA claim and the denial of class certification because those rulings were predicated on the same flawed preemption analysis.

The defendants contend that even if we find that Madden's claims are not preempted by the NBA, we must affirm because Delaware law—rather than New York law—applies and the interest charged by the defendants is permissible under Delaware law. Because the District Court did not reach this issue, we leave it to the District Court to address in the first instance on remand.

I. National Bank Act Preemption

The federal preemption doctrine derives from the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States which shall be made in Pursuance" of the Constitution "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. According to the Supreme Court, "[t]he phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are

properly adopted in accordance with statutory authorization." *City of New York v. FCC,* 486 U.S. 57, 63 (1988).

"Preemption can generally occur in three ways: where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law." *Wachovia Bank, N.A. v. Burke,* 414 F.3d 305, 313 (2d Cir. 2005), *cert. denied,* 550 U.S. 913 (2007). The defendants appear to suggest that this case involves "conflict preemption," which "occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *United States v. Locke,* 529 U.S. 89, 109 (2000) (internal quotation marks omitted).

The National Bank Act expressly permits national banks to "charge on any loan . . . interest at the rate allowed by the laws of the State, Territory, or District where the bank is located." 12 U.S.C. § 85. It also "provide[s] the exclusive cause of action" for usury claims against national banks, *Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1, 11 (2003), and "therefore completely preempt[s] analogous state-law usury claims," *Sullivan v. Am. Airlines, Inc.,* 424 F.3d 267, 275 (2d Cir. 2005). Thus, there is "no such thing as a state-law claim of usury against a national bank." *Beneficial Nat'l Bank,* 539 U.S. at 11; *see also Pac. Capital Bank, N.A. v. Connecticut,* 542 F.3d 341, 352 (2d Cir. 2008) ("[A] state in which a national bank makes a loan may not permissibly require the bank to charge an interest rate lower than that allowed by its home state."). Accordingly, because FIA is incorporated in Delaware, which permits banks to charge interest rates that would be usurious under New

York law, FIA's collection at those rates in New York does not violate the NBA and is not subject to New York's stricter usury laws, which the NBA preempts.

The defendants argue that, as assignees of a national bank, they too are allowed under the NBA to charge interest at the rate permitted by the state where the assignor national bank is located—here, Delaware. We disagree. In certain circumstances, NBA preemption can be extended to non-national bank entities. To apply NBA preemption to an action taken by a non-national bank entity, application of state law to that action must significantly interfere with a national bank's ability to exercise its power under the NBA. *See Barnett Bank of Marion Cnty., N.A. v. Nelson,* 517 U.S. 25, 33 (1996); *Pac. Capital Bank,* 542 F.3d at 353.

The Supreme Court has suggested that that NBA preemption may extend to entities beyond a national bank itself, such as non-national banks acting as the "equivalent to national banks with respect to powers exercised under federal law." *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 18 (2007). For example, the Supreme Court has held that operating subsidiaries of national banks may benefit from NBA preemption. *Id.; see also Burke,* 414 F.3d at 309 (deferring to reasonable regulation that operating subsidiaries of national banks receive the same preemptive benefit as the parent bank). This Court has also held that agents of national banks can benefit from NBA preemption. *Pac. Capital Bank,* 542 F.3d at 353-54 (holding that a third-party tax preparer who facilitated the processing of refund anticipation loans for a national bank was not subject to Connecticut law regulating such loans); *see also SPGGC, LLC v. Ayotte,* 488 F.3d 525, 532 (1st Cir. 2007) ("The National Bank Act explicitly states that a national bank may use

'duly authorized officers or agents' to exercise its incidental powers." (internal citation omitted)), *cert. denied,* 552 U.S. 1185 (2008).

The Office of the Comptroller of the Currency ("OCC"), "a federal agency that charters, regulates, and supervises all national banks," *Town of Babylon v. Fed. Hous. Fin. Agency,* 699 F.3d 221, 224 n.2 (2d Cir. 2012), has made clear that third-party debt buyers are distinct from agents or subsidiaries of a national bank, *see* OCC Bulletin 2014-37, Risk Management Guidance (Aug. 4, 2014), *available at* http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-37.html ("Banks may pursue collection of delinquent accounts by (1) handling the collections internally, (2) using third parties as agents in collecting the debt, or (3) selling the debt to debt buyers for a fee."). In fact, it is precisely because national banks do not exercise control over third-party debt buyers that the OCC issued guidance regarding how national banks should manage the risk associated with selling consumer debt to third parties. *See id.*

In most cases in which NBA preemption has been applied to a non-national bank entity, the entity has exercised the powers of a national bank—i.e., has acted on behalf of a national bank in carrying out the national bank's business. This is not the case here. The defendants did not act on behalf of BoA or FIA in attempting to collect on Madden's debt. The defendants acted solely on their own behalves, as the owners of the debt.

No other mechanism appears on these facts by which applying state usury laws to the third-party debt buyers would significantly interfere with either national bank's ability to exercise its powers under the NBA. *See Barnett Bank,* 517 U.S. at 33. Rather, such application would "limit [] only activities of the third party which are oth-

erwise subject to state control," *SPGGC, LLC v. Blumenthal,* 505 F.3d 183, 191 (2d Cir. 2007), and which are not protected by federal banking law or subject to OCC oversight.

We reached a similar conclusion in *Blumenthal.* There, a shopping mall operator, SPGGC, sold prepaid gift cards at its malls, including its malls in Connecticut. *Id.* at 186. Bank of America issued the cards, which looked like credit or debit cards and operated on the Visa debit card system. *Id.* at 186-87. The gift cards included a monthly service fee and carried a one-year expiration date. *Id.* at 187. The Connecticut Attorney General sued SPGGC alleging violations of Connecticut's gift card law, which prohibits the sale of gift cards subject to inactivity or dormancy fees or expiration dates. *Id.* at 187-88. SPGGC argued that NBA preemption precluded suit. *Id.* at 189.

We held that SPGGC failed to state a valid claim for preemption of Connecticut law insofar as the law prohibited SPGGC from imposing inactivity fees on consumers of its gift cards. *Id.* at 191. We reasoned that enforcement of the state law "does not interfere with BoA's ability to exercise its powers under the NBA and OCC regulations." *Id.* "Rather, it affects only the conduct of SPGGC, which is neither protected under federal law nor subject to the OCC's exclusive oversight." *Id.*

We did find, in *Blumenthal,* that Connecticut's prohibition on expiration dates could interfere with national bank powers because Visa requires such cards to have expiration dates and "an outright prohibition on expiration dates could have prevented a Visa member bank (such as BoA) from acting as the issuer of the Simon Giftcard." *Id.* at 191. We remanded for further consideration of the issue. Here, however, state usury laws would

not prevent consumer debt sales by national banks to third parties. Although it is possible that usury laws might decrease the amount a national bank could charge for its consumer debt in certain states (i.e., those with firm usury limits, like New York), such an effect would not "significantly interfere" with the exercise of a national bank power.

Furthermore, extension of NBA preemption to third-party debt collectors such as the defendants would be an overly broad application of the NBA. Although national banks' agents and subsidiaries exercise national banks' powers and receive protection under the NBA when doing so, extending those protections to third parties would create an end-run around usury laws for non-national bank entities that are not acting on behalf of a national bank.

The defendants and the District Court rely principally on two Eighth Circuit cases in which the court held that NBA preemption precluded state-law usury claims against non-national bank entities. In *Krispin v. May Department Stores,* 218 F.3d 919 (8th Cir. 2000), May Department Stores Company ("May Stores"), a non-national bank entity, issued credit cards to the plaintiffs. *Id.* at 921. By agreement, those credit card accounts were governed by Missouri law, which limits delinquency fees to $10. *Id.* Subsequently, May Stores notified the plaintiffs that the accounts had been assigned and transferred to May National Bank of Arizona ("May Bank"), a national bank and wholly-owned subsidiary of May Stores, and that May Bank would charge delinquency fees of up to "$15, or as allowed by law." *Id.* Although May Stores had transferred all authority over the terms and operations of the accounts to May Bank, it subse-

quently purchased May Bank's receivables and maintained a role in account collection. *Id.* at 923.

The plaintiffs brought suit under Missouri law against May Stores after being charged $15 delinquency fees. *Id.* at 922. May Stores argued that the plaintiffs' state-law claims were preempted by the NBA because the assignment and transfer of the accounts to May Bank "was fully effective to cause the bank, and not the store, to be the originator of [the plaintiffs'] accounts subsequent to that time." *Id.* at 923. The court agreed:

> [T]he store's purchase of the bank's receivables does not diminish the fact that it is now the bank, and not the store, that issues credit, processes and services customer accounts, and sets such terms as interest and late fees. Thus, although we recognize that the NBA governs only national banks, in these circumstances we agree with the district court that it makes sense to look to the originating entity (the bank), and not the ongoing assignee (the store), in determining whether the NBA applies.

Id. at 924 (internal citation omitted).[2]

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[2] We believe the District Court gave unwarranted significance to *Krispin*'s reference to the "originating entity" in the passage quoted above. The District Court read the sentence to suggest that, once a national bank has originated a credit, the NBA and the associated rule of conflict preemption continue to apply to the credit, even if the bank has sold the credit and retains no further interest in it. The point of the *Krispin* holding was, however, that notwithstanding the bank's sale of its receivables to May Stores, it retained substantial interests in the credit card accounts so that application of state law to those accounts would have conflicted with the bank's powers authorized by the NBA. The crucial words of the sentence were "in

Krispin does not support finding preemption here. In *Krispin,* when the national bank's receivables were purchased by May Stores, the national bank retained ownership of the accounts, leading the court to conclude that "the real party in interest is the bank." *Id.* Unlike *Krispin,* neither BoA nor FIA has retained an interest in Madden's account, which further supports the conclusion that subjecting the defendants to state regulations does not prevent or significantly interfere with the exercise of BoA's or FIA's powers.

The defendants and the District Court also rely upon *Phipps v. FDIC,* 417 F.3d 1006 (8th Cir. 2005). In that case, the plaintiffs brought an action under Missouri law to recover allegedly unlawful fees charged by a national bank on mortgage loans. The plaintiffs alleged that after charging these fees, which included a purported "finder's fee" to third-party Equity Guaranty LLC (a non-bank entity), the bank sold the loans to other defendants. The court held that the fees at issue were properly considered "interest" under the NBA and concluded that, under those circumstances, it "must look at 'the originating entity (the bank), and not the ongoing assignee . . . in determining whether the NBA applies.'" *Id.* at 1013 (quoting *Krispin,* 218 F.3d at 924 (alteration in original)).

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these circumstances," which referred to the fact stated in the previous sentence of the bank's retention of substantial interests in the credit card accounts. As we understand the *Krispin* opinion, the fact that the bank was described as the "originating entity" had no significance for the court's decision, which would have come out the opposite way if the bank, notwithstanding that it originated the credits in question, had sold them outright to a new, unrelated owner, divesting itself completely of any continuing interest in them, so that its operations would no longer be affected by the application of state law to the new owner's further administration of the credits.

Phipps is distinguishable from this case. There, the national bank was the entity that charged the interest to which the plaintiffs objected. Here, on the other hand, Madden objects only to the interest charged after her account was sold by FIA to the defendants. Furthermore, if Equity Guaranty was paid a "finder's fee," it would benefit from NBA preemption as an agent of the national bank. Indeed, *Phipps* recognized that "'[a] national bank may use the services of, and compensate persons not employed by, the bank for originating loans.'" *Id.* (quoting 12 C.F.R. § 7.1004(a)). Here, the defendants do not suggest that they have such a relationship with BoA or FIA.[3]

II. Choice of Law: Delaware vs. New York

The defendants contend that the Delaware choice-of-law provision contained in the Change In Terms precludes Madden's New York usury claims.[4] Although raised below, the District Court did not reach this issue in ruling on the defendants' motion for summary judg-

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[3] We are not persuaded by *Munoz v. Pipestone Financial, LLC,* 513 F. Supp. 2d 1076 (D. Minn. 2007), upon which the defendants and the District Court also rely. Although the court found preemption applicable to an assignee of a national bank in a case analogous to Madden's suit, it misapplied Eighth Circuit precedent by applying unwarranted significance to *Krispin's* use of the word "originating entity" and straying from the essential inquiry—whether applying state law would "significantly interfere with the national bank's exercise of its powers," *Barnett Bank,* 517 U.S. at 33, because of a subsidiary or agency relationship or for other reasons.

[4] The Change In Terms, which amended the original Cardholder Agreement, includes the following provision: "This Agreement is governed by the laws of the State of Delaware (without regard to its conflict of laws principles) and by any applicable federal laws." App'x at 58, 91.

ment.[5] Subsequently, in the Stipulation for Entry of Judgment, the parties resolved in the defendants' favor the dispute as to whether Madden was bound by the Change In Terms. The parties appear to agree that if Delaware law applies, the rate the defendants charged Madden was permissible.[6]

We do not decide the choice-of-law issue here, but instead leave it for the District Court to address in the first instance.[7]

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[5] We reject Madden's contention that this argument was waived. First, although the defendants' motion for summary judgment urged the District Court to rule on other grounds, it did raise the Delaware choice-of-law clause. Defs.' Summ. J. Mem. 4 & n. 3, No. 7:11-cv-08149 (S.D.N.Y. Jan. 25, 2013), ECF No. 32. Second, this argument was not viable prior to the Stipulation for Entry of Judgment due to unresolved factual issues—principally, whether Madden had received the Change In Terms.

[6] We express no opinion as to whether Delaware law, which permits a "bank" to charge any interest rate allowable by contract, *see* Del. Code Ann. tit. 5, § 943, would apply to the defendants, both of which are non-bank entities.

[7] Because it may assist the District Court, we note that there appears to be a split in the case law. *Compare Am. Equities Grp., Inc. v. Ahava Dairy Prods. Corp.,* No. 01 Civ. 5207(RWS), 2004 WL 870260, at *7-9 (S.D.N.Y. Apr. 23, 2004) (applying New York's usury law despite out-of-state choice-of-law clause); *Am. Express Travel Related Servs. Co. v. Assih,* 26 Misc. 3d 1016, 1026 (N.Y. Civ. Ct. 2009) (same); *N. Am. Bank, Ltd. v. Schulman,* 123 Misc. 2d 516, 520-21 (N.Y. Cnty. Ct. 1984) (same) *with RMP Capital Corp. v. Bam Brokerage, Inc.,* 21 F. Supp. 3d 173, 186 (E.D.N.Y. 2014) (finding out-of-state choice-of-law clause to preclude application of New York's usury law).

III. Madden's Fair Debt Collection Practices Act Claim

Madden also contends that by attempting to collect interest at a rate higher than allowed by New York law, the defendants falsely represented the amount to which they were legally entitled in violation of the FDCPA, 15 U.S.C. §§ 1692e(2)(A), (5), (10), 1692f(1). The District Court denied the defendants' motion for summary judgment on this claim for two reasons. First, it held that there was a genuine dispute of material fact as to whether the defendants are assignees of FIA; if they are, it reasoned, Madden's FDCPA claim would fail because state usury laws—the alleged violation of which provide the basis for Madden's FDCPA claim—do not apply to assignees of a national bank. The parties subsequently stipulated "that FIA assigned Defendants Ms. Madden's account," App'x at 138, and the District Court, in accord with its prior ruling, entered judgment for the defendants. Because this analysis was predicated on the District Court's erroneous holding that the defendants receive the same protections under the NBA as do national banks, we find that it is equally flawed.

Second, the District Court held that if Madden received the Cardholder Agreement and Change In Terms, a fact to which the parties later stipulated, any FDCPA claim of false representation or unfair practice would fail because the agreement allowed for the interest rate applied by the defendants. This conclusion is premised on an assumption that Delaware law, rather than New York law, applies, an issue the District Court did not reach. If New York's usury law applies notwithstanding the Delaware choice-of-law clause, the defendants may have made a false representation or engaged in an unfair practice insofar as their collection letter to Madden stat-

ed that they were legally entitled to charge interest in excess of that permitted by New York law. Thus, the District Court may need to revisit this conclusion after deciding whether Delaware or New York law applies.

Because the District Court's analysis of the FDCPA claim was based on an erroneous NBA preemption finding and a premature assumption that Delaware law applies, we vacate the District Court's judgment as to this claim.

IV. Class Certification

Madden asserts her claims on behalf of herself and a class consisting of "all persons residing in New York [] who were sent a letter by Defendants attempting to collect interest in excess of 25% per annum [] regarding debts incurred for personal, family, or household purposes." Pl.'s Class Certification Mem. 1, No. 7:11-cv-08149 (S.D.N.Y. Jan. 18, 2013), ECF No. 29. The defendants have represented that they sent such letters with respect to 49,780 accounts.

Madden moved for class certification before the District Court. The District Court denied the motion, holding that because "assignees are entitled to the protection of the NBA if the originating bank was entitled to the protection of the NBA . . . the class action device in my view is not appropriate here." App'x at 120. Because the District Court's denial of class certification was entwined with its erroneous holding that the defendants receive the same protections under the NBA as do national banks, we vacate the denial of class certification.

CONCLUSION

We REVERSE the District Court's holding as to National Bank Act preemption, VACATE the District

Court's judgment and denial of class certification, and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of August, two thousand fifteen

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No. 14-2131

Saliha Madden, on behalf of herself and all others similarly situated, Plaintiff-Appellant

v.

Midland Funding, LLC, Midland Credit Management, Inc., Defendants-Appellees

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August 12, 2015

OPINION

Appellees, Midland Funding, LLC, and Midland Credit Management, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
/s/______________________________
Catherine O'Hagan Wolfe, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 11-8149

Saliha Madden, Plaintiff

v.

Midland Funding, LLC, Midland Credit Management, Inc., Defendants

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September 30, 2013

ORAL RULING ON MOTIONS

SEIBEL, District Judge.

* * * * *

[2] THE CLERK: Madden v. Midland Funding, LLC.

THE COURT: Good afternoon.

MR. LEGHORN: Good afternoon, Your Honor.

THE COURT: Mr. Schlanger and Mr. Leghorn. And let's get Mr. Bragg on the phone.

Hi, Mr. Bragg.

MR. BRAGG: Yes.

THE COURT: Okay. I'm here with Mr. Schlanger and Mr. Leghorn.

You guys can have a seat.

I'm ready to give my rulings on the various motions.

There's a Motion to Strike the Offer of Judgment; there's a Motion for Class Certification, and there's a Motion for Summary Judgment.

Let me start with the Motion to Strike the Defendants' Offer of Judgment.

Defendants served Plaintiff in her individual capacity with an Offer of Judgment dated November 21, 2012 under Rule 68. Plaintiff apparently did not accept the offer within the 14-day period set by that rule. Rather, in response to the Defendants' November 27th, 2012 pre-motion letter seeking permission to move for summary judgment, Plaintiff, by letter dated December 12th, 2012, sought permission to make the instant motion to strike, which [3] permission I granted at the conference on December 17th.

Plaintiff argues that the Offer of Judgment should be stricken because it is inconsistent with Plaintiff's fiduciary duty as representative of the putative class and is inherently unfair to the named Plaintiff in the event it is rejected.

The merits of Plaintiff's arguments touch on the recognized tension between Rule 23 and Rule 68 that arises when a defendant tries to "pick off" a named plaintiff in a putative class action through a Rule 68 offer.

See *Weiss* v. *Regal Collections*, 385 F.3d 337, at 344 (Third Circuit 2004), where the court said, "Allowing the defendants here to 'pick off' a representative plaintiff with an offer of judgment less than two months after the

complaint is filed may undercut the viability of the class action procedure and frustrate the objectives of this procedural mechanism for aggregating small claims, like those brought under the FDCPA."

Defendants here, have on three separate occasions represented to the Court that they have no intention of attempting to "pick off" plaintiffs here, that is, they will not move to dismiss the case as moot for lack of subject matter jurisdiction based on an Offer of Judgment. See Document 22, at Page 2; Document 36, Exhibit B, at Page 3, and Document 41, at Page 4.

[4] In view of Defendants' representation, the unaccepted Offer of Judgment simply "has no legal significance" at this stage of the proceedings. *McDowall* v. *Cogan*, 215 F.R.D. 46, at 52 (EDNY 2003).

See Rule of Civil Procedure 68(a), which provides that the offer together with the acceptance can be filed, after which the clerk will enter judgment, and Rule 68(b), which says, "Evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs."

Indeed, before Plaintiff included a copy with her Motion to Strike, the Offer of Judgment was not a part of the Court's record, so "there is nothing to strike here." That's from *McDowall*, 216 F.R.D. at 52. The Motion to Strike is therefore premature and thus denied.

In addition, given the divergence in authority and the lack of clear guidance from the Second Circuit and the Supreme Court as to the legal significance of an offer of judgment made to a named Plaintiff in a putative class action prior to the certification of a class, see, for example, *Morgan* v. *Account Collection*, 2006 Westlaw 2597865, at Page 4 (SDNY September 6, 2006), and that

the Supreme Court has distinguished class actions from collective or other individual actions for Rule 68 purposes, see *Genesis Healthcare* v. *Symczyk*, 133 Supreme Court 1523, at 1529 (2013); *Velasquez* v. *Digital Page*, 2013 Westlaw 3376903, at [5] Page 3 (EDNY July 8th, 2013), I find it appropriate to await further guidance from the higher courts on the merits of the parties' arguments or at least wait until the issue is properly before me in a proceeding under Rule 68(d). But it is my preliminary view, for what it's worth, that Plaintiff has the better of the arguments and has not unduly delayed the class certification process.

I now turn to the Motion for Summary Judgment.

The following facts are set forth based on the parties' Local Civil Rule 56.1 statements and the supporting materials:

Defendants allege that Plaintiff opened a credit card account with Bank of America on April 23rd, 2005.

Defendants contend that by opening that credit card account, Plaintiff agreed to be bound by the terms and conditions found in the Bank of America Cardholder Agreement, but Plaintiff denies receiving this agreement.

On October 19th, 2006, Bank of America's credit card program was consolidated into a single national bank, FIA Card Services, N.A.

According to Defendant, the new terms and conditions that would be applicable to Plaintiff's account after the October 19th, 2006 consolidation, which document I will refer to — which document I will refer to as the Change in Terms, were sent to Plaintiff with her August 14th, 2006 [6] account statement.

According to Defendant, that Change in Terms document allowed it to charge interest which was legal under Delaware law, and Delaware law in turn allows interest greater than 25 percent. Plaintiff contends that she never received the Change in Terms.

On September 30th, 2008, Plaintiff's account was "charged-off" in the amount of $5,291.25.

Defendants contend that on November 10th, 2010, FIA "sold, transferred, and set over unto" — that's a quote. Let me back up.

Defendants contend that on November 10th, 2010, FIA "sold, transferred, and set over unto" Midland Funding, LLC Plaintiff's outstanding debt. Defendants assert that as a result of this sale, they were granted complete authority to "settle, adjust, compromise, and satisfy" Plaintiff's account.

On November 20th, 2010, Defendants sent Plaintiff a letter seeking to collect payment of her debt, and that letter stated that the actual — that the applicable interest rate was 27 percent per year.

Plaintiff brings this action pursuant to the Fair Debt Collection Practices Act, 15, United States Code, Section 1692, the New York General Business Law, or GBL, Section 349, and the New York General Obligations Law, or [7] GOL, Section 5-501 and following, alleging that Defendants engaged in unfair debt collection practices by charging, collecting, and/or seeking to collect interest at a usurious rate.

I will assume everybody's familiarity with the legal standards governing summary judgment motions and move right to my analysis.

There are several issues in dispute on summary judgment, most significantly, whether:

One, Defendants have sufficiently demonstrated that an agreement existed between Plaintiff and Bank of America;

Two, whether Plaintiff's debt was validly assigned to the Defendants; and

Three, whether the National Bank Act applies to Defendants as assignees of a national bank.

What the parties do not dispute, however, is that the interest rate Defendants charged Plaintiff is not usurious under Delaware law. They don't dispute that Bank of America and FIA extended credit to Plaintiff and that she incurred an obligation, and they do not dispute that if the NBA does apply to the Defendants, then Plaintiff's state-law usury claims are preempted.

I will address first whether Plaintiff's state-law claims are preempted by the NBA.

In actions against national banks for usury, [8] Sections 85 and 86 of the NBA "supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive." *Beneficial National Bank* v. *Anderson*, 539 U.S. 1, at 11 (2003).

That case further stated, "Because Sections 85 and 86 provide the exclusive cause of action for usury claims against national banks, there is, in short, no such thing as a state-law claim of usury against a national bank."

See *Sullivan* v. *American Airlines*, 424 F.3d 267, at 275 (Second Circuit 2005), where the Circuit said that Sections 85 and 86 completely preempt state-law usury claims.

Multiple courts have concluded that in determining whether the National Bank Act applies, "courts must look at the originating entity, the bank, and not the ongoing assignee." *Munoz* v. *Pipestone Financial*, 513 F. Supp. 2d 1076, at 1079 (District of Minnesota 2007).

In that case, the obligation was transferred from the originating bank to the purchaser of defaulted debt portfolios through a series of assignments and the NBA was held to the assignee.

In that regard, see *Phipps* v. *FDIC*, 417 F.3d 1006, at 1011, an Eighth Circuit case from 2005, where the court held that the NBA preemption available to the loan originator also applied to the borrower's claims against a subsequent [9] purchaser of the loan.

Krispin v. *May Department Stores*, 218 F.3d 919, at 924 (Eighth Circuit 2000), which held NBA preemption available to a national bank that extended — excuse me. It held that the NBA preemption available to the national bank that extended credit also applied to a subsequent non-bank assignee of the account.

See also *FDIC* v. *Lattimore Land Corporation*, 656 F.2d 139, at 148 to 49 (Fifth Circuit 1981), where the court said, "The non-usurious character of a note should not change when the note changes hands."

In that case, although the Eighth Circuit ultimately concluded that the NBA did not apply to Hamilton National Bank, which was the assignee of a partial interest in the note at issue, it based its conclusion on the fact that there the bank was not the originator of the loan. See 656 F.2d at 147 to 48. Rather, the loan had originated from a mortgage company that was not a national banking association. In contrast, here, Bank of America

and FIA are the original creditors and they are protected by the NBA.

And, finally, in that regard, cf. *Nichols* v. *Fearson*, 32 U.S. 103, at 109, from 1833, where the court said it is a "cardinal rule of usury" "that a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction."

[10] Under the logic of this line of cases, because FIA is a national bank entitled to exemption from state usury laws, Defendants are entitled to the same if they are FIA's assignees.

Plaintiff contends that Krispin, among other cases, is inapposite, because unlike the original creditor there, FIA did not retain any interest and/or role in the debt collection.

In Krispin, the district court based its conclusion on the fact that it was the bank, and not the assignee, that was the originator of the loan, in that it "issued credit, processed and serviced customer accounts, and set such terms as interest and late fees," that's *Krispin*, at 294, all of which Bank of America or FIA did here.

Bank of America and/or FIA extended credit to the Plaintiff, processed and serviced her accounts, see, for example, the declaration of Mr. Schlanger, which is Document 36, Exhibits A through D. Excuse me. It's Exhibit 57, Exhibits A through D. Let me back up. It's Document 57.

I'm talking about Mr. Schlanger's declaration in connection with the summary judgment motion, which is Document 57, and to which is attached the Exhibits A through [11] D, and they set the applicable interest rate.

Plaintiff's contention that the Krispin court was focused on the bank's "role in servicing or collection of the debt" simply mischaracterizes the decision. Moreover, cases decided after Krispin, such as Munoz, have concluded that the NBA applies to the assignee even where the bank retains no interest in debt collection.

See *Munoz*, 513 F. Supp. 2d at 1079, holding that the NBA applied even when, through a series of assignments, plaintiff's debt was assigned from a national bank to a purchaser of defaulted debt portfolios, which was wholly responsible for collecting the debt.

Further, I see no reason why a national bank's assignees should not be afforded the same protections as those given to the bank itself with regard to changing a particular interest rate. In this scenario, the assignee is merely attempting to collect what Plaintiff originally and legitimately owed, no more.

Moreover, prohibiting assignees, such as Defendants, from changing the same interest rate as the assignor would give debtors, such as Plaintiff, a perverse incentive to avoid their obligations long enough to ensure that their debt was charged-off and assigned to a debt collector required to change a lower interest rate.

For all these reasons, I find that if Defendants [12] are valid assignees of FIA, they are entitled to protection under the NBA.

Plaintiff contends that Defendants have not adduced evidence sufficient to show that her obligation was validly assigned to Midland Funding.

Plaintiff pleaded in her Amended Complaint that she incurred an obligation with Bank of America, which was acquired by Midland Funding and placed with Midland Credit Management after it went into default. Plaintiff

did not admit, concede or contend, however, that Defendants acquired her obligation by assignment from Bank of America, and, in fact, Defendants concede that they are not assignees of Bank of America, but rather, they contend they are assignees of FIA.

Neither party disputes that Bank of America is a national bank, but Plaintiff argues that Defendants did not provide sufficient evidence to establish that FIA, the original creditor and assignor is a national bank.

To support the allegation that FIA is a national bank and thus covered by the NBA, Defendants submitted an excerpt from the List of National Banks compiled by the United States Office of the Comptroller of the Currency, or OCC, and made available to individuals online. That is Exhibit 4 to the Leghorn declaration, which is Document 31.

Plaintiff argues that because Defendants' exhibit [13] list was procured from a website, it is inadmissible as evidence and cannot be used in resolving Defendants' motion. I am, however, permitted to take judicial notice of documents, such as those found on the OCC's website, given that it is a "public record of a federal regulatory agency" and "available on the agency website." *Short* v. *Connecticut Community Bank*, 2012 Westlaw 1057302, at Page 7, Note 10 (District of Connecticut, March 28th, 2012).

See *Cancel* v. *New York City*, 2012 Westlaw 4761491, at Page 1, Note 2 (SDNY August 1, 2012), where the court took judicial notice of the government website and was affirmed in part, reversed in part on other grounds, and vacated in part, at 2013 Westlaw 2302115 (Second Circuit May 23rd, 2013).

Also see *Perez* v. *Ahlstrom Corp.*, 2011 Westlaw 2533801, at Page 2 (District of Connecticut June 27th, 2011), collecting cases where courts have taken judicial notice of government websites.

Plaintiff correctly pointed out, however, that the website did not show that FIA was a national bank at the time the debts at issue were incurred.

Defendants thereafter submitted a certificate from someone named Connie Smith, a corporate Assistant Secretary of FIA, which states that FIA has been a Delaware National Bank since its inception in June 2006 and is a successor in interest, and is a successor in interest to Bank of America [14] and other national banks. That declaration from Ms. Smith is Exhibit A to the affidavit of Ms. Pellicciaro that I'll refer to later.

Despite having had the opportunity for a surreply, Plaintiff neither raises any issue with respect to the exhibit nor adduces any evidence suggesting that FIA was not, in fact, a national bank at the time Plaintiff's obligation was assigned to Defendants or at the time she incurred debt to FIA.

To survive a motion for summary judgment, Plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." See *Matsushita Electric* v. *Zenith*, 475 U.S. 574, at 586, from 1986.

Defendants have not, however, sufficiently then — so, I therefore find that Defendants have shown that there is no genuine issue of material fact with respect to whether FIA was a national bank at the relevant times. Defendants have not, however, sufficiently demonstrated that FIA assigned them Plaintiff's debt.

Defendants have merely provided an affidavit from a process manager at Midland Collection — excuse me,

Midland Credit Management, someone named Misael — I can't read my own handwriting — Moreno, I believe. They merely provide an affidavit from this process manager at Midland Credit Management to the effect that Plaintiff's FIA account was [15] assigned to Defendants, without giving any indication how that employee of Midland Credit Management knows that Plaintiff's account was assigned and without any supporting documentation.

When Plaintiff pointed out the weakness of that showing, Defendants came back with an affidavit from an employee of FIA, that is Deborah Pellicciaro, a bank officer, to the same effect, but the Pellicciaro affidavit suffers from the same flaws. Neither affiant purports to have personal knowledge or says anything about what makes her think Plaintiff's account was assigned, or provides any documentation, which one would think would exist had an assignment occurred.

Defendants have already been told by at least one other court that such a showing is insufficient to demonstrate a valid assignment. See *Hengeller* v. *Brumbaugh & Quandahl*, 894 F. Supp. 2d 1180, at 1187 to 88, a District of Nebraska case from 2012. They should have known that more was required here. Their failure to produce any evidence of assignment makes granting summary judgment on Plaintiff's state-law claims inappropriate.

The mere say-so of an employee, without any basis provided, does not suffice to meet the movant's burden to show an absence of genuine issues of material fact. If, however, Defendants can demonstrate at trial, through [16] competent evidence, that they are valid assignees of FIA, Plaintiff's state-law claims will be preempted by the NBA, but at this stage Defendant's Motion for Summary Judgment on Plaintiff's state-law claims is denied.

I now turn to the federal claim.

Plaintiff's federal claim arises under the FDCPA, the purpose of which is, in part, "to eliminate abusive debt collection practices by debt collectors." That's 15, U.S. Code, Section 1692e. Neither party contends that the NBA preempts the FDCPA, nor does the preemption rationale of uniformity apply to a federal statute, and thus Plaintiff is entitled to bring this claim.

I turn, accordingly, to whether there are genuine issues of material fact with respect to whether Plaintiff is entitled to relief.

Plaintiff alleges that the Defendants violated Section 1692e and f of the FDCPA by using a false representation or deceptive means or unfair practices to collect interest at a rate greater than that allowed by New York law.

Section 1692(f) prohibits "the collection of any amount unless such amount is expressly authorized by the agreement creating the debt or permitted by law." That's Section 1692(f), Subsection 1.

Whether Defendants are liable thus turns not only [17] on whether Defendants are assignees of FIA entitled to the protection of the NBA, but also on whether Plaintiff's agreement with Bank of America and FIA allowed those institutions to charge the interest rate at issue. There are genuine issues of material fact as to the former issue, as just discussed, and also with respect to the latter issue.

Defendants have provided what it describes as an exemplary Cardholder Agreement, in other words, a form that it says Bank of America gave to Plaintiff when she opened her account, as well as an exemplary or form Change in Terms, which Defendants contend Plaintiff

received with her August 14th, 2006 credit card statement. Those are Exhibits A and C to the Pellicciaro affidavit. Plaintiff, however, denies receiving these documents, and thus argues that no valid agreement exists.

Although prior cases have found that a plaintiff's bare self-serving assertion that she did not receive a cardholder agreement was insufficient to raise a triable issue of fact, see *Dzanoucakis* v. *Chase Manhattan Bank*, 2009 Westlaw 910691, at Page 8 (EDNY March 31st, 2009) and collecting cases. That proposition does not apply here for several reasons:

First, Plaintiff states a bit more than just a bald assertion that she did not receive the documents. She contends that she "keeps all records of her credit card [18] agreements, bills, and mailings in one place" and these documents are not there. That's Plaintiff's declaration, Paragraph 5.

Second, Defendants have not provided enough information about the mailing of the agreement and the Change in Terms to sufficiently demonstrate that they were sent to Plaintiff. This is in contrast to the Dzanoucakis case, at Page 2, which noted that the defendant had established that it "had a permanent message system on its computer system that keeps track of what documents are sent to its customers," and that that system indicated that a particular form notice number had been mailed to the Plaintiff in a particular month, and the Defendants provided all relevant computer records.

Defendants here have not done anything of the kind. They have merely submitted the affidavit of Ms. Pellicciaro, an FIA bank officer, stating that Plaintiff received the Cardholder Agreement when she opened her

account and the Change of Terms, in August 2006, along with her account statement.

It also submitted the affidavit of Misael Moreno, the FIA process manager, who also says that the Change in Terms was sent with the August 6th account statement. The problem is, with respect to the Moreno affidavit, the affiant's basis of knowledge is simply records provided by [19] FIA to the Defendants. So, that affidavit doesn't add anything to the affidavit of the FIA employee, Ms. Pellicciaro.

The issues with her affidavit are that she works for FIA, who provides no information with regard to when or how the Cardholder Agreement was sent by Bank of America or how she knows that it was actually sent by Bank of America. No details or documents or even explanations are provided. Her affidavit and the Defendants' showing are pure say-so and not sufficient to demonstrate that Plaintiff received the agreement.

See *Hayes* v. *New York City Department of Corrections*, 84 F.3d 614, at 619, a Second Circuit case from 1996, where the court cautioned that the district court "should not weigh evidence or assess the credibility of witnesses" in reviewing a motion for summary judgment. And, in any event, the Cardholder Agreement is not properly authenticated as a business record.

There are three prongs to the business records exception to the hearsay rule, which is Federal Rule of Evidence 803(6), and the Pellicciaro affidavit does not address any of them except in a completely conclusory fashion, and even then, only addresses some of them, not all of them.

As to the Change in Terms, Ms. Pellicciaro does not [20] give any indication that she has firsthand knowledge

of the mailing, nor does she, nor does she say how she knows it was in fact mailed.

Admittedly, her statement that the Change in Terms was sent with the August 2006 account statement is corroborated by the August 14th, 2006 account statement itself, which Plaintiff does not deny receiving and which includes some of the changed terms and refers to the enclosed supplemental document containing some other of the changed terms. Defendants, however, have not sufficiently authenticated either the August 14th, 2006 statement or the enclosure, and Ms. Pellicciaro does not provide any reason to think she is in a position to say when or how Bank of America made or kept its records.

Even if Defendant had demonstrated that Plaintiff received the Change in Terms, the Change in Terms was a unilateral amendment of the Cardholder Agreement.

Unilateral amendment is allowed under the original agreement. Section 7.14 of the Cardholder Agreement provides that Bank of America "may amend this Agreement by changing, adding or deleting any term, condition, service or feature of one's Account or of this Agreement at any time." That's on Page 4 of the Cardholder Agreement, which is Exhibit B to Ms. Pellicciaro's affidavit.

Plaintiff is correct that the Cardholder Agreement [21] states that if an amendment changes the interest rate, the account holder's consent will be obtained before the change becomes effective. An individual's consent, however, may be obtained merely "by the account holder's usage of the Account after Bank of America gives the account holder notice of the amendment." Bank of America sent Plaintiff the Change in Terms in August

2006, and Plaintiff continued to use her credit card until 2008.

Thus, if Plaintiff received the original agreement, she agreed that Bank of America could unilaterally amend it, and if she received the Change in Terms, she evidenced her consent to any Change in Terms, by continuing to use the card after receiving it.

Because Plaintiff denies receiving the Cardholder Agreement and Defendants have not sufficiently shown that it was sent, an issue of fact remains as to whether Plaintiff got the original agreement that would have allowed for unilateral amendment via the Change in Terms.

If a jury finds that Plaintiff did receive these documents, and assuming Defendants to be valid assignees of FIA, it will follow that Defendants' attempt to collect interest at the rate at issue was neither a false representation nor misleading, nor an unfair practice, as the Change in Terms, which replaced the Cardholder Agreement and became the binding agreement between the parties, allowed for [22] the interest rate at which Defendants attempted to collect.

Nevertheless, an issue of fact remains as to whether Plaintiff received the agreements, and thus summary judgment is inappropriate as to Plaintiff's FDCPA claim at this time.

See *Penberg* v. *HealthBridge Management*, 823 F. Supp. 2d 166, at 185 (EDNY 2011), where a fact issue remains concerning plaintiff's compliance with agreements where no evidence demonstrated defendant provided plaintiff with the agreement and plaintiff alleged he did not read it.

Cf. *Shea Developments* v. *Watson*, 2008 Westlaw 762087, at Page 2 (SDNY March 24th, 2008), which held that a party was not bound by a forum selection clause where she did not see the agreement containing the clause and the terms of it were not communicated to her.

Accordingly, the Defendant's Motion for Summary Judgment is denied.

In light of my ruling on summary judgment, I must address Plaintiff's Motion for Class Certification. But my ruling that assignees are entitled to the protection of the NBA if the originating bank was entitled to the protection of the NBA, and that under some circumstances, interest greater than 25 percent can be permissible, those rulings mean that the class action device in my view is not appropriate here, for reasons I'll explain shortly.

[23] First, the legal standard: In determining whether to certify a putative class, I am guided by Rule 23. Class certification is appropriate under Rule 23(a) only where the class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interests of the class.

Courts have also recognized an implied requirement that there be an identifiable class. See *Jeffries* v. *Pension Trust Fund*, 2007 Westlaw 2454111, at Pages 11 and 14 (SDNY August 20th, 2007), where the court said the implied requirement of "ascertainability" requires that the plaintiff identify the existence of an aggrieved class. See also *In Re MIBE Products Liability Litigation*, 209 F.R.D. 323, at 336 to 337 (SDNY 2002).

If the requirements of Rule 23(a) are met, a court must then determine whether the class is "maintainable" as defined by Rule 23(b). See *Jeffries*, at Page 15.

Where a putative class seeks certification pursuant to Rule 23(b)(2), a plaintiff must show that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, so that final injunctive relief or corresponding declaratory relief is appropriate [24] regarding the class as a whole."

Where the class seeks certification under Rule 23(b)(3), a plaintiff must establish that questions of law or fact common to class members predominate over any questions affecting individual members, and that the class action device is superior to any other method of adjudication. *See In Re Initial Public Offering Securities Litigation*, 471 F.3d 24, at 32 (Second Circuit 2006); rehearing denied, 483 F.3d 70 (Second Circuit 2007).

A class may be certified only after a district court has determined that each of the Rule 23 requirements has been met. This determination involves a "rigorous analysis," designed to ensure "actual, not presumed conformance," with Rule 23. That's *In Re Initial Public Offerings*, at Page 29, and it is quoting *General Telephone Company of the Southwest* v. *Falcon*, 457 U.S. 147, at 160 to 61.

The putative class carries the burden of establishing that the requirements of Rule 23 are met by a preponderance of the evidence. See *Teamsters Local 445* v. *Bombardier*, 546 F.3d 196, at 202 (Second Circuit 2008).

Each of Rule 23's requirements must be proven by preponderance of the evidence, even where a requirement overlaps with a merits issue in the case. *Trawinski*

v. *KPMG*, 2012 Westlaw 6758059, at Page 5 (SDNY December 21, 2012).

[25] Here, the proposed class is all New York residents who were sent a letter by Defendants attempting to collect interest greater than 25 percent per year regarding debts incurred for personal, family or household purposes. There are alleged to be 49,780 such persons. The class is not limited to those whose underlying debt arose from a transaction with Bank of America or FIA, or even with a bank, but it encompasses anybody in New York who got such a letter regardless of the circumstances.

I'm first going to discuss commonality and typicality under Rule 23(a)(2) and (a)(3). Those requirements are usually "discussed together because courts treat them as closely linked." *In Re Telik*, 576 F. Supp. 2d 570, at 582 (SDNY 2008), which collects cases, and see *Marisol A.* v. *Giuliani*, 126 F.3d 372, at 376 (Second Circuit 1997), where the court said, "The commonality and typicality requirements tend to merge into one another, so that similar considerations animate the analysis."

The commonality requirement requires a showing that "there are questions of law or fact common to the class." "Commonality does not mean that all issues must be identical as to each member, but it does require that plaintiffs identify some unifying thread among the members' claims that warrants class treatment." *Damassia* v. *Duane Reade*, 250 F.R.D. 152, at 156 (SDNY 2008).

[26] "Generally, courts have liberally construed the commonality requirement to mandate a minimum of one issue common to all class members." *Toure* v. *Central Parking Systems*, 2007 Westlaw 2872455, at Page 6 (SDNY September 28th, 2007).

Typicality is satisfied if "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Robinson* v. *Metro-North Commuter Railroad*, 267 F.3d 147, at 155 (Second Circuit 2001).

"A named plaintiff's claim is 'typical' under Rule 23(a)(3) if it arises from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory." That's *Jeffries*, at Page 12.

Plaintiff maintains that she has met the commonality and typicality requirements because "each class member was sent a letter by Defendants attempting to collect interest in excess of 25 percent per annum on an alleged debt," and thus that "each of the class members was subjected to the same treatment which violated the FDCPA and New York law." Thus, Plaintiff continues, "the only individual issue is the identification of the class members," which can be accomplished by reviewing the Defendants' records. I'm quoting from Pages 8 and 9 of Plaintiff's memorandum in [27] support of her Motion for Class Certification, which is Document 29.

Notwithstanding Plaintiff's arguments, I am not convinced that the class is really the homogenous group that Plaintiff claims or homogenous enough for Rule 23.

While at the grossest level of generality, the purported class members may share among themselves the fact that Defendants sent them a collection letter seeking interest in excess of 25 percent per year, beyond that each purported class member would require an individual determination before he or she could be included within the class.

As to the FDCPA, such an interest rate may have been perfectly proper for some class members, specifically, those who agreed to that rate with a bank entitled to change it, such as Plaintiff would have had she received the card member agreement and Change of Terms.

There is no reason to believe that the 49,780 members of the putative class were all persons who, like Plaintiff, dispute having agreed to such terms with a bank entitled to seek them. Thus, it appears that the class is over-inclusive, since it will likely include persons who do not deny being bound by the terms and conditions of the applicable cardholder agreements and who therefore do not share Plaintiff's claims against Defendants.

[28] The problem at this juncture is that "a review of Defendant's records" will not reveal which class members dispute receipt of the cardholder agreements or otherwise dispute the originating bank's entitlement to charge a rate greater than 25 percent. Whether any member of the class has a claim will thus require individual exploration.

The same is true with respect to the validity of the assignments. If, as stated above, the class member's debt was validly assigned to Defendants by a national bank, his or her state-law claims of usury would be preempted by the NBA. Thus, in each instance, I would need to determine whether a valid assignment had taken place in order to know whether a particular class member could pursue state-law claims.

While Defendants' records should reveal whether or not there is a valid assignment, it would have to be determined Plaintiff by Plaintiff.

In other words, in light of my rulings above, the claim is not simply, as Plaintiff would have it, that "Defendants charged me interest greater than 25 percent," it is that "Defendants charged me interest greater than 25 percent in circumstances where I never received the agreement which would have authorized such interest or otherwise agreed to such interest," and/or "Defendants charged me interest greater than 25 percent in circumstances where my debt had [29] not been acquired from a national bank protected by the NBA."

Plaintiff has not met her burden of showing that the proposed members of the class share those circumstances. Thus, some of the persons included within Plaintiff's proposed class may indeed agree that they were bound by the terms and conditions of the applicable cardholder agreement or otherwise — or that they otherwise agreed to Delaware interest rates, and/or that their debt was validly assigned from a national bank, and they therefore do not have similar legal arguments as the Plaintiff.

The claims of each member of the class will turn on whether the class member agreed to Delaware interest rates, whether the class members — and whether the class member's debt was validly assigned to the Defendants, and thus they do not arise from the same event or course of conduct that gives rise to the claim of the named Plaintiff or other class members.

Where there is variance among proposed class members of "such factors as the complexity of the facts, the need for followup to verify" — excuse me, "the need for followup to verify evidence, and the difficulty of the determination," as here, the inquiry that would be necessitated "is ill-suited for disposition via a class action because there is insufficient commonality." *Dobson* v.

Hartford Financial, 342 Fed Appendix 706, at 709 (Second [30] Circuit 2009).

I might phrase it as insufficient typicality, but as noted earlier, those two requirements are usually discussed together. But there's really no reason to believe that Plaintiff's claim that she didn't receive her agreement or that there was an invalid assignment are going to be typical of the other almost 50,000 people who got letters; many of whom were dealing with other banks entirely; further — or many of which I presume were dealing with other banks entirely.

Further, even if Rule 23(a) were met, the same considerations dictate that neither Rule 23(b)(2) or (b)(3) are met. The matter could not be resolved on grounds generally applicable to the class, because there is no showing that the circumstances of each proposed class member are like those of Plaintiff, and because the resolution will turn on individual determinations as to cardholder agreements and assignments of debt.

Likewise, because of those difficulties — excuse me. Because of those differences in factual circumstances, common questions of law or fact do not predominate over individual questions and the class action device is not superior to other methods of adjudication.

As Plaintiff has failed to satisfy the requirements of Rule 23(a), her Motion for Class Certification is [31] accordingly denied.

So, to summarize, for the reasons stated above, both Plaintiff's motions and Defendants' motions are denied. The Clerk of Court is respectfully directed to terminate the pending motions, which are Documents 25, 30 and 35.

We now need to talk about our next steps. We either need to talk about a trial date or about a settlement.

I understand that the landscape has shifted considerably and you may not be able to tell me at this moment which way you think you are headed, but I can do one of two things. I can either set some dates for trial submissions and if you settle, you settle, or I can let you talk and come back to me. We can have another conference in a few weeks.

MR. LEGHORN: Your Honor, Thomas Leghorn. Mr. Schlanger and I have worked successfully on many cases. So, I would opt for the scenario of allowing us to speak, first, and then reporting back in a couple of weeks' time.

THE COURT: Is that all right with you, Mr. Schlanger?

MR. SCHLANGER: Yes, Your Honor. I would just note there was a stay of all discovery pending Your Honor's decision. So, that doesn't prohibit us from setting a trial date, but there is — no depositions have been held in this case.

[32] THE COURT: Oh, all right. So, you would need to, you would need to take some discovery, if you don't settle.

MR. LEGHORN: That's accurate, Your Honor.

THE COURT: All right. So —

MR. LEGHORN: In fact, I think that also lends itself to us discussing first.

THE COURT: So, why don't we do this. Why don't I — I don't know if you are going to be ordering the transcript. Do you think you'll be ordering the transcripts?

MR. SCHLANGER: I didn't understand what Your Honor said.

THE COURT: Do you think you'll be ordering the transcript?

MR. SCHLANGER: I will be ordering this transcript for sure, Your Honor.

THE COURT: Okay, So, let me build in some time for the reporter to get you the transcript and then for you guys to talk after you get it. So, why don't we come back in six weeks. Does that sound reasonable?

MR LEGHORN: Very reasonable, Your Honor.

MR. SCHLANGER: Your Honor, this just speaks to my not having dealt with this particular scenario before. I have never had a Judge read a substantive ruling like that from the bench. So, I don't know if I'm expected to put in an objection in on the record or the regular rules regarding [33] our time to ask for reconsideration or appeal or any of that apply here.

THE COURT: Well, I'm going to today file an order that says, "for the reasons stated in open court, the motions are denied," and that will trigger anything that a written decision would ordinarily trigger. If you want to move for reconsideration, be my guest.

MR. SCHLANGER: In terms of that triggering our time, could — I would ask that our time be triggered from when we get the transcript, not from when today's order goes in. There is a lot to digest in that ruling.

THE COURT: Yes, that makes sense. I don't know if that 14 days is one that I can extend. I think it actually comes from the local rule, not the federal rule, so I think I can extend it. But, sure, I'll extend the time to move to reconsider to two weeks after you get the transcript, but I still would like to have a conference in about six weeks where hopefully you can tell me where we are going.

MR. SCHLANGER: Sure.

THE COURT: Let me ask Ms. Cama for a date.

THE CLERK: November 15th, at 4:00 o'clock.

THE COURT: November 15th, at 4:00 o'clock.

MR. SCHLANGER: Is Mr. Bragg still on the phone with us?

THE COURT: You are still on the phone with us?

[34] MR. BRAGG: Yes.

MR. SCHLANGER: I just went to make sure this is a date you can make.

THE COURT: Mr. Schlanger just wants to make sure that date is good for you.

MR. BRAGG: I am checking as we talk.

MR. SCHLANGER: Your Honor, it says, it says on the sign outside the door I have to ask you to turn this on.

THE COURT: Go ahead and turn on your phone.

MR. SCHLANGER: Thank you.

MR. BRAGG: This is Randolph Bragg. November 15th is fine with me.

THE COURT: All right. These gentlemen here are checking their phones.

MR. SCHLANGER: November 15th is also fine for me, Your Honor.

MR. LEGHORN: It's fine for me as well, Your Honor.

THE COURT: All right. Three for three.

All right. I will see you all November 15th.

MR LEGHORN: Thank you, Your Honor.

MR. SCHLANGER: Your Honor, just so we don't end up disagreeing with this later, I just went to understand, is discovery still stayed until this next conference or are we — I don't want to be faulted for not trying to push discovery forward and I don't want to be faulted for running [35] up costs by trying to hold depositions in advance of this conference.

THE COURT: Discovery is still stayed pending the next conference, and at that time we will set a schedule for whatever additional discovery is necessary and take it from there.

MR LEGHORN: Thank you.

MR. SCHLANGER: Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. BRAGG: Thank you, Your Honor.

THE COURT: Thank you. Goodbye.

MR. BRAGG: Good-bye.

(Case adjourned)

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 11-8149

Saliha Madden, on behalf of herself and all others similarly situated, Plaintiff

v.

Midland Funding, LLC, Midland Credit Management, Inc., Defendants

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September 30, 2013

ORDER

SEIBEL, J.

On September 30, 2013, the parties appeared before me for an oral ruling on Plaintiff's Motion to Strike Defendants' Offer of Judgment, (Doc. 35), Plaintiff's Motion for Class Certification, (Doc. 25), and Defendants' Motion for Summary Judgment, (Doc. 30). For the reasons stated on the record, Plaintiff's Motions are DENIED and Defendant's Motion is DENIED. The Clerk of Court is respectfully directed to terminate the pending Motions. (Docs. 25, 30, 35.)

Should the parties wish to file a motion for reconsideration, they shall do so within fourteen (14) days of receipt of the September 30, 2013 conference transcript. The parties are directed to appear for a status conference on November 15, 2013 at 4:00 p.m. Discovery will be stayed pending the status conference.

SO ORDERED.

Dated: September 30, 2013
White Plains, New York

/s/ ______________________
CATHY SEIBEL, U.S.D.J.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 11-8149

Saliha Madden, on behalf of herself and all others similarly situated, Plaintiff

v.

Midland Funding, LLC, Midland Credit Management, Inc., Defendants

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STIPULATION FOR ENTRY OF JUDGMENT FOR DEFENDANTS FOR PURPOSE OF APPEAL

Plaintiff Saliha Madden ("Ms. Madden" or "Plaintiff") and Defendants Midland Funding LLC ("Midland") and Midland Credit Management ("MCM") (collectively, "Defendants") stipulate to the entry of Judgment for Defendants in order that Plaintiff may expeditiously appeal the denial of her motion for class certification which was encompassed within the Court's Order dated September 30, 2013, which also denied Defendants' motion for summary judgment. (Doc. 64) (formalizing the more detailed oral ruling issued earlier that day). Specifically, the parties state as follows:

WHEREAS within its oral ruling of September 30, 2013 ("the Order"), the Court held that the National Bank Act ("NBA")'s preemption of New York's usury

laws applies to non-bank assignees of national banks, regardless of whether the national bank retains any interest in or control over the assigned accounts. ("[M]y ruling that assignees are entitled to the protection of the NBA if the originating bank was entitled to the protection of the NBA, and that under some circumstances, interest greater than 25 percent can be permissible, those rulings mean that the class action device in my view is not appropriate here." Order at 22.);

WHEREAS Plaintiff's Motion for Certification of Interlocutory Appeal pursuant to 28 U.S.C. 1292(b) was denied;

WHEREAS Plaintiff's Petition for Leave To File An Appeal Of A Denial Of Class Certification Pursuant To Fed. R. Civ. P. Rule 23(f) was denied;

WHEREAS the September 30, 2013 Order denied Defendants' motion for summary judgment with regard to Plaintiff's individual claims on grounds that disputed issues of fact remain for determination, including whether Defendants were assigned and owned Ms. Madden's account, and whether Defendants provided notification to Plaintiff with certain documents;

WHEREAS determination of these remaining issues involve questions specific to Ms. Madden's account, impact only her ability to prevail on her individual claims, and do not relate to the theory of liability underlying Plaintiff's claims on behalf of the putative class of approximately 49,780 consumers, or Ms. Madden's ability to proceed on behalf of the putative class, i.e. will not alter or affect the Court's ruling that the exemption for national banks pursuant to the National Bank Act ("NBA") from state usury laws applies to their assignees;

WHEREAS on April 2, 2014 by Minute Entry the Court set the deadline for conducting depositions as June 30, 2014, the close of discovery as July 30, 2014, and scheduled a status conference for August 15, 2014;

WHEREAS, if Ms. Madden were to proceed to trial individually (i.e. not on a class basis), her maximum recovery would be limited;

WHEREAS, Defendants made a Rule 68 Offer of Judgment dated November 21, 2012 ("the Offer"), offering to have judgment entered against them by Ms. Madden in her individual capacity plus attorney's fees and costs in an amount to be decided by the Court upon application;

WHEREAS, Plaintiff filed a Motion to Strike Defendants' Rule 68 Offer Of Judgment, and the Court, in its 9/30/13 Order declined to rule conclusively on the Offer's validity until such time as the Offer was filed;

WHEREAS the parties wish to avoid the expenditure of additional time and expense involved in completing discovery and trial in order to resolve the remaining issues in this case relevant only to Ms. Madden's individual claims.

WHEREAS Plaintiff wishes to appeal the central issue of whether the National Bank Act ("NBA") preempts New York's usury laws, as applied to an entity that purports to be a non-bank assignee of a national bank, where the national bank retains no interest in or control over the assigned accounts to the U.S. Court of Appeals for the Second Circuit;

WHEREAS the parties agree that Defendants have expressly preserved all grounds and arguments for dismissal and have not waived any of those defenses in permitting judgment to be entered at this time;

WHEREFOR:

1. The parties stipulate solely for purposes of expediting appeal that FIA assigned Defendants Ms. Madden's account, and that Plaintiff received the Cardholder Agreement and Change In Terms discussed in the Order;
2. The parties acknowledge that the stipulation regarding assignment of the account and receipt of the Cardholder Agreement and Change in Terms, may not be revoked or undone regardless of the outcome of Plaintiff's anticipated appeal to the Second Circuit.
3. In light of this stipulation, a final, appealable judgment in favor of Defendants is appropriate, and the parties hereby stipulate to the entry of Judgment for Defendants per Rule 54 of the Federal Rules of Civil Procedure.
4. Defendants hereby withdraw their Offer of Judgment, agree that it is null and void, and further agree to make no additional Offers of Judgment directed at Plaintiff solely in her individual capacity in this litigation.
5. Defendants agree that they shall not pursue fees or costs as against Ms. Madden in this litigation pursuant to Rule 54(d), 15 U.S.C. § 1692k, or otherwise.
6. Defendant agrees that they shall not use the fact of the stipulation or any of its contents as a basis for challenging Ms. Madden's suitability as a class representative.

Agreed.

Dated: 5/30/14 — SCHLANGER & SCHLANGER, LLP
By: /s/____________________
Daniel A. Schlanger
For Plaintiffs

Dated: 5/30/14 — HORWITZ, HORWITZ & ASSOC.
By: /s/____________________
O. Randolph Bragg
For Plaintiffs

Dated: 5/30/14 — WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP
By: /s/____________________
Thomas A. Leghorn
For Defendants

So Ordered.

/s/____________________
Hon. Cathy Seibel, U.S.D.J.

6/2/14

APPENDIX F

STATUTORY PROVISIONS

1. Section 25b(b)(1) of Title 12 of the United States Code provides:

(b) Preemption standard

(1) In general

State consumer financial laws are preempted, only if—

(A) application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;

(B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A.* v. *Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law; or

(C) the State consumer financial law is preempted by a provision of Federal law other than title 62 of the Revised Statutes.

2. Section 25b(f) of Title 12 of the United States Code provides:

(f) Preservation of powers related to charging interest

No provision of title 62 of the Revised Statutes shall be construed as altering or otherwise affecting the authority conferred by section 85 of this title for the charging of interest by a national bank at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of "interest" under such provision.

3. Section 85 of Title 12 of the United States Code provides as follows:

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning

the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.