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Eastern District of Arkansas

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3:05-ap-01038 Notice will be electronically mailed to:

Joyce Bradley Babin ecfmail@13ark.com

Michael E. Brown mike.brown@kutakrock.com,
mary.hartzler@kutakrock.com;leslie.greathouse@kutakrock.com;sally.burns@kutakrock.com

Leslie A. Greathouse leslie.greathouse@kutakrock.com,

Stephen N. Joiner sjoiner@roselawfirm.com,

Roger McNeil rmcneil@wlpmm-firm.com

Andrew Stuart Paine apaine@burkelaw.com,

Kathryn Bennett Perkins kperkins@roselawfirm.com

Roger D. Rowe rrowe@lvfm.net

Herbert C. Rule hrule@roselawf! irm.com,

Kimberly Wood Tucker ktucker@wlj.com, jtalley@wlj.com;cwadley@wlj.com

Mart Vehik mart@mcmathlaw.com, karen@mcmathlaw.com

3:05-ap-01038 Notice will not be electronically mailed to:

Claire S. Hancock
WRIGHT, LINDSEY & JENNINGS
200 W. Capitol Ave., Ste. 2200
Little Rock, AR 72201

C. Kent Jolliff
WILSON & ASSOCIATES, PLLC
1521 Merrill Dr., Ste. D220
Little Rock, AR 72211

Mark A. Olthoff
SHUGHART THOMSON & KILROY, P.C
Twelve Wyandotte Plaza
120 W. 12th Street
Kansas City, MO 64105-1929

William A. Waddell
FRIDAY, ELDREDGE & CLARK
400 W. Capitol Ave., Ste. 2000
Little Rock, AR 72201-3407

Arlon L. Woodruff
WOODRUFF LAW FIRM
P.O. Box 500
Lake City, AR 72437

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE: DELMORE AND PEARLIE MAE TRULY — DEBTORS

STACY BRYANT, ET AL. — PLAINTIFFS

v. — No. 4:05MC00012 GH

ROSSLARE FUNDING, INC., ET AL. — DEFENDANTS

ORDER

On March 24th, movants filed a motion for withdrawal of reference from the bankruptcy court pursuant to 28 U.S.C. §157(d). They recount that this action was instituted in the Greene County Circuit Court on February 11, 2002 alleging that the defendants at that time held and/or serviced usurious second mortgage loans made to plaintiffs. Upon the filing of the first amended and substituted complaint adding U.S. Bank as a defendant, U.S. Bank removed the case in March of 2003 which was assigned to the undersigned on the basis of federal question jurisdiction that the claim of alleged usurious interest against it is regulated solely by Section 85 of the National Bank Act ("NBA"), 12 U.S.C. §85. The plaintiffs at the time filed a motion to remand which was granted by this Court in March of 2004. The Court found that U.S. Bank was not being sued – by originating or by assignment – as the owner of the loans because it violated usury laws, but rather, that the trusts, of which U.S. Bank was a trustee, owned the loans alleged to be usurious and it was the trusts that have received the interest payments. Thus, the Court held that U.S. Bank had simply not provided

any authority demonstrating total preemption and removability. The Court also granted plaintiffs' motion to clarify the record by dismissing all claims against U.S. Bank personally.

The fourth amended complaint filed in state court added the Trulys as plaintiffs who had filed a Chapter 13 proceeding in February of 2003 as well as Wells Fargo Bank and The Bank of New York as defendants which were served on January 24, 2005. The movants removed the state litigation to the Bankruptcy Court on February 11th.

On February 24th, the Bankruptcy Court, *sua sponte*, issued an order to show cause why the adversary proceeding should not be remanded to the state court. The Bankruptcy Judge reviewed the history of the adversary proceeding; noted that while the Bankruptcy Court had "related to" jurisdiction, it was unlikely that the state court lawsuit would impact the Trulys' pending bankruptcy; and concluded that – given the predominance of nondebtor parties and issues unrelated to the Bankruptcy Code – discretionary abstention and equitable remand appeared appropriate. The parties responded to the show cause order and the motion to withdraw reference was filed the same date.[1]

In the motion to withdraw, the movants ask this Court to exercise its original jurisdiction – pursuant to federal question jurisdiction and relation to a case under Title 11 – to hear the proceeding and all matters related including the abstention and remand questions raised by the Bankruptcy Court. They contend that withdrawal is mandatory since they have raised the preemption defense based on the NBA and the Depository Institutions Deregulation and Monetary Control Act ("DIDA") and that there is cause as the claims are non-core matters alleging legal claims as to which defendants are entitled to a jury trial.

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[1]The motion was docketed here on April 5th as this miscellaneous case.

Plaintiffs responded on April 11th that the issue of federal jurisdiction was previously raised and addressed in the prior remand. They state that, after this removal, the removing defendants actively commenced litigation in the Bankruptcy Court until the issuance of the show cause order. Plaintiffs continue that their response to the show cause order pointed out that although the bank defendants had removed in their individual capacities and consented in their trustee capacities, the fourth amended complaint does not sue them in their individual capacities – only as trustees so there is no federal jurisdiction implicated in accordance with the March 30, 2004 remand order. They assert that the motion for withdrawal of reference should be denied and the Bankruptcy Court should determine whether the case should be remanded. Alternatively, plaintiffs state the motion to withdraw should be denied on the basis of a lack of federal jurisdiction because no federal question is implicated on the face of the state law complaint, on the basis of abstention and/or remand for the reasons stated in the show cause order, on the basis of the absence of substantial questions of non code federal law applicable to the state law cause of action, and for untimeliness as well as forum shopping and judicial efficiency.

On April 14th, the movants filed a reply that a ruling should be made on withdrawal before the Bankruptcy Court decides whether to abstain or remand. They argue that critical federal issues of the protections afforded to national banks and federally insured state chartered banks are raised. The movants continue that federal question jurisdiction exists contending that while certain of the paragraphs refer to the removing defendants as trustees, they also seek damages from defendants. They assert that even if the removing bank defendants are named solely as trustees, that the NBA and DIDA would still preempt the claims. Regarding the undersigned's prior remand of this case, the movants state that the plaintiffs there had moved to dismiss all claims against U.S. Bank

personally before that order was issued and that fact was relied upon heavily by the Court while here plaintiffs have not filed a motion to dismiss their claims against Wells Fargo and the Bank of New York personally. Finally, on the issue of federal question, they contend that the DIDA preempts the loans by FirstPlus Bank, a federally-insured state-chartered bank.

Turning to the issue of timeliness, the movants state that they acted promptly upon learning that the bankruptcy court would not fully and fairly consider the federal questions raised in this proceeding. They also dispute that they are forum shopping and instead submit that they are merely wishing to ensure that the proper court hears all matters related to the pending remand and abstention requests.

On July 25th, plaintiff filed a supplement in opposition to the motion for withdrawal. In support of their argument that this Court's remand ruling should apply in contrast to the movants' argument that preemption would still apply even if they are sued as trustees, plaintiffs reply on a January 14, 2005 opinion letter by the Comptroller of the Currency that there is not preemption when loans are held by national banks acting as trustees. They continue that the fourth amended complaint is clear that Wells Fargo and The Bank of New York are not being sued in their individual capacities as well as the summons served on them only as trustees. Plaintiffs argue that as the federal question of preemption under the NBA and DIDA does not exist here, this Court should either abstain from ruling or deny the motion for lack of subject matter jurisdiction.

The movants filed a response to the supplement on July 28th. They state that the opinion specifically based its conclusion on the assumption that the banks were not exposed to any liability for violation of the state consumer act at issue while here Wells Fargo and The Bank of New York are directly liable for damage under Arkansas usury laws under the allegations in the fourth amended

complaint and so complete preemption is warranted. The movants further contend that the summons cannot contest the plain language of the allegations in the fourth amended complaint that they are seeking actual damages from these defendants.

In the March 30, 2004 order, this Court stated:

> In Beneficial Nat. Bk v. Anderson, 123 S.Ct. 2058, 2064 (2003), the United States Supreme Court did state:
>
> > The same federal interest that protected national banks from the state taxation that Chief Justice Marshall characterized as the "power to destroy," McCulloch v. Maryland, 4 Wheat. 316, 431, 4 L.Ed. 579 (1819), supports the established interpretation of §§ 85 and 86 that gives those provisions the requisite pre-emptive force to provide removal jurisdiction. In actions against national banks for usury, these provisions supersede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank. Even though the complaint makes no mention of federal law, it unquestionably and unambiguously claims that petitioners violated usury laws. This cause of action against national banks only arises under federal law and could, therefore, be removed under § 1441.
>
> However, neither that case nor that language addresses the situation here where U.S. Bank is not being sued because it violated usury laws. Rather, the trusts, of which U.S. Bank is a trustee, own the loans alleged to be usurious and it is the trusts that have received the interest payments. The Court agrees with plaintiffs that such cases as Beneficial, M. Nahas & Co. v. First Nat. Bank of Hot Springs, 930 F.2d 608 (8th Cir. 1991) and Krispin v. May Dept. Stores Co., 218 F.3d 919 (8th Cir. 2000) all reflect situations where the bank was, by originating or by assignment, the owner of the loans as compared with here where it is undisputed that the trusts are the owners of the loans and U.S. Bank is acting as trustee. U.S. Bank has simply not provided any authority demonstrating total preemption and removability under similar circumstances.

As reflected in the above passages, the plaintiffs are correct in their argument that this Court has already rejected similar arguments that the NBA would be applicable – thereby providing the basis for removal from state court. While the Court noted that plaintiffs there had moved to clarify

U.S. Bank's role by dismissing any claims alleging that U.S. Bank was personally liable even in a trustee capacity, the Court's decision did not rely heavily on that fact.

After review of the language contained in the fourth amended complaint, the Court is satisfied that the movants here are being sued in their capacities as trustees just as U.S. Bank was. The Court also rejects, like it did before, that the NBA would still be applicable whether the movants are sued individually or as trustee. This reasoning is equally applicable to the DIDA.

Accordingly, the April 5th motion (#1) for withdrawal of reference is hereby denied.

IT IS SO ORDERED this 2nd day of August, 2005.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

IN RE: DELMORE TRULY and PEARLIE MAE TRULY, DEBTORS	**3:03-bk-11737E CHAPTER 13**
STACY BRYANT, et al.	**PLAINTIFFS**
v.	**AP NO. 3:05-ap-1038**
ROSSLARE FUNDING, INC., et al.	**DEFENDANTS**

ORDER REMANDING ADVERSARY PROCEEDING

Now before the Court is the *Order to Show Cause Why Adversary Proceeding Should Not Be Remanded to State Court* entered on February 24, 2005 (the "**Order to Show Cause**"), the *Plaintiffs' Response to the Court's Order to Show Cause and in Support of Motion to Remand and for Costs and Attorneys' Fees*, and the responses filed thereto. On July 8, 2005, the Court heard oral arguments on these matters and took them under advisement. Roger Rowe and Mark Olthoff appeared on behalf of Bank of New York and Wells Fargo Bank (the "**Removing Bank Defendants**") and Ocwen Federal Bank FSB. Herb Rule, along with Robert Thompson and Paul Decef, appeared on behalf of Wilmington Trust Company, as Owner Trustee for and on behalf of First Plus Home Loan Owner Trust 1998-4, and U.S. Bank National Association, as Co-Owner Trustee and Indenture Trustee for and on behalf of

FirstPlus Home Loan Owner Trust 1998-4 (the "**Removing Trust Defendants**"). (The Removing Bank Defendants and the Removing Trust Defendants are collectively referred to herein as the "**Defendants**.") Clare Hancock appeared on behalf of Countrywide Home Loans. Mart Vehik appeared on behalf of the Plaintiffs.

Upon consideration of the pleadings filed, oral argument at hearing, and applicable law, the Court exercises its powers of discretionary abstention under 28 U.S.C. § 1334(c)(1) and remands this case to the Greene County Circuit Court on equitable grounds under section 1452(b).

In its Order to Show Cause, the Court stated it had non-core "related to" jurisdiction over this matter. However, the Court also concluded that both discretionary abstention and equitable remand appeared to be appropriate in this case where although the outcome of this lawsuit could conceivably affect the Debtor's bankruptcy case, the likelihood of that happening was remote. Because the Court raised the issues *sua sponte*, the parties were given the opportunity to be heard on the matter prior to a final decision by this Court. The Defendants requested that oral argument be scheduled, and in the interim (between the request for oral argument and the presentation of oral argument), the Defendants moved to withdraw the reference to bankruptcy court. The Motion to Withdraw was transferred to District Court in accordance with Federal Rule of Bankruptcy Procedure 5011, and ultimately assigned

to Judge George Howard, Jr., who declined to withdraw the reference on August 2, 2005.[1]

At the hearing on this matter, the following two issues were presented to the Court: (1) whether federal preemption mandates that the case remain in federal court, and (2) whether the proceeding was core such that the Court has "arising under" rather than merely "relating to" jurisdiction as described in the Court's Order to Show Cause. As to the first issue, the Defendants asserted that any claim of usury that purported to be brought under state law was entitled to complete preemption and could be brought only in a federal court (either this bankruptcy court or the district court upon withdrawal of the reference). In support of this argument, the Defendants directed this Court to the National Bank Act ("**NBA**") codified in 12 U.S.C. §§ 85 and 86, *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), and the Depository Institutions' Deregulation and Monetary Control Act ("**DIDA**") codified in 12 U.S.C. § 1831(d). In response to the Defendants' preemption argument, Plaintiffs asserted that in the Fourth Amended Complaint the banks were sued in their capacity as trustees and not in their individual capacity.

On August 2, 2005, Judge Howard entered an order determining that the

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[1]U.S. Bank previously filed a notice of removal to District Court; however, in an order entered March 29, 2004, Judge Howard remanded the case to State Court.

Defendants were being sued in their capacity as trustees and rejecting the Defendants' argument in support of withdrawal of the reference that the NBA and the DIDA would be applicable in this case. Thus, the District Court concluded that the Defendants' complete preemption arguments must fail, and the Defendants' Motion for Withdrawal of Reference from the bankruptcy court was denied. This Court adopts Judge Howard's ruling and finds that the Defendants' claims are not completely preempted by federal law. Thus, federal preemption does not provide the basis for the bankruptcy court to retain jurisdiction over this case.

As to the second issue, while the Court's Order to Show Cause provided the Defendants with the opportunity to present oral argument at the hearing as to whether this Court should exercise its powers of discretionary abstention and equitable remand, apparently the Defendants made the decision to forfeit their opportunity to address this issue during oral argument.[2] Instead, the Defendants, with the basis of their argument being that there were several Plaintiffs in the present case who have or have had a bankruptcy case pending in this Court, attempted to convince the Court that the case is a core proceeding under 28 U.S.C. § 157. The Defendants argued that

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[2]The Court notes that the issue of discretionary abstention and equitable remand was argued in the Removing Trust Defendants' Response to the Court's Order to Show Cause; however, the issue was not addressed during oral presentation at the hearing.

there were potential bankruptcy issues in those filings and that, therefore, this lawsuit was a core proceeding and must be addressed by the bankruptcy court. Plaintiffs responded to the Defendants' arguments by asserting that the Defendants conceded that this lawsuit was non-core in their Notice of Removal, never argued that this was a core proceeding in their briefs filed in preparation for the hearing, and could not now assert that this lawsuit is a core proceeding for the first time. The Court finds that Defendants' argument that this case is a core proceeding was not made in the Defendants' Notice of Removal[3], the Defendants' Motion for Withdrawal of Reference[4], the Defendants' Memorandum of Points and Authority in Support of Defendants' Withdrawal of Reference[5], or the Removing Trust Defendants' Response to the Court's Order to Show Cause[6]. In fact, each of the four pleadings specifically

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[3]The Defendants' Notice of Removal specifically states that, "[t]he plaintiffs' alleged cause of action is non-core."

[4]The Defendants' Withdrawal of Reference specifically states that, "[t]he claims identified in the Proceeding are non-core matters. . ."

[5]The Defendants' Memorandum of Points and Authority in Support of Defendants' Withdrawal of Reference specifically states that, "[n]on-core, related proceedings are those that do not invoke a substantive right created by federal bankruptcy law and could exist outside of a bankruptcy. . . The claims raised by the plaintiffs in the Proceeding are not claims or causes or action that were created by or based upon a provision of the Bankruptcy Code nor are they dependent on the bankruptcy case's existence."

[6]The Removing Trust Defendants' Response to the Order to Show Cause specifically states that, "the claims raised in the proceeding are non-core. . ."

states that this is a non-core proceeding. Therefore, the Court finds that Defendants were therefore estopped[7] from making the argument that this is a core proceeding during oral presentation at the hearing[8].

The Court finds that, despite having "related to" jurisdiction in this matter, based on its reasoning set forth in its Order to Show Cause, the Court will exercise its discretion to abstain and remand the case to State Court on equitable grounds. The Court heard nothing at the hearing on this matter to persuade it otherwise.

The adversary proceeding will not be closed until the Court issues a separate order addressing the issue of whether the removal of the class-action lawsuit to the bankruptcy court constituted forum shopping, and if so, whether attorneys fees and/or costs will be awarded and in what amount.

For these reasons, it is hereby,

ORDERED that the Plaintiffs' Motion to Remand is **GRANTED**; and it is further

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[7]The Court uses the term "estopped" in the most general sense. *See* Blacks Law Dictionary 570 (7th ed. 1999) (defining "estoppel" as "[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.").

[8]Even if the Defendants were not estopped from arguing that this is a core proceeding, the arguments presented at hearing were not sufficient to convince the Court that this is a core matter.

ORDERED that the above-captioned adversary proceeding and all matters filed therein are **REMANDED** to the Circuit Court of Greene County, Arkansas.

IT IS SO ORDERED.

Audrey R Evans

HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATE:

cc: Mart Vehik, Attorney for Plaintiffs
Henry Means, Attorney for Debtors
Arlon L. Woodruff, Attorney for Defendant(s)
C. Kent Jolliff, Attorney for Defendant(s)
Claire S. Hancock, Attorney for Defendant(s)
Roger McNeil, Attorney for Defendant(s)
Stephen N. Joiner, Attorney for Defendant(s)
William A. Waddell, Attorney for Defendant(s)
Michael E. Brown, Attorney for Defendant(s)
Leslie A. Greathouse, Attorney for Defendant(s)
Mark A. Olthoff, Attorney for Defendant(s)
Andrew Stuart Paine, Attorney for Defendant(s)
Kathryn Bennett Perkins, Attorney for Defendant(s)
Roger D. Rowe, Attorney for Defendant(s)
Herbert C. Rule, III, Attorney for Defendant(s)
Kimberly Wood Tucker, Attorney for Defendant(s)
Chapter 13 Trustee
U.S. Trustee