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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CLEARING HOUSE ASSOCIATION, L.L.C., Plaintiff, v. ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Defendant.	:	No. 05 Civ. 5629 (SHS)

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

H. Rodgin Cohen (HC7168)
Gandolfo V. DiBlasi (GD5913)
Michael M. Wiseman (MW3209)
Robinson B. Lacy (RL8282)
Adam R. Brebner (AB0914)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Attorneys for Plaintiff

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Since the origin of the national banking system in the 19th century, national banks have been subject to the supervisory and regulatory authority of the Office of the Comptroller of the Currency ("OCC")—and later other federal agencies—to the exclusion of state authorities, except as specifically authorized by federal law. In particular, a provision of the National Bank Act now codified as 12 U.S.C. § 484 ("Section 484") prohibits any exercise of "visitorial powers" with respect to national banks except as expressly authorized by federal law. Congress' decision to grant such exclusive authority to the OCC was clearly designed to prevent state authorities from interfering with the operations of national banks. Congress thereby continued the regulatory scheme for federally chartered banking organizations that was first upheld by the Supreme Court in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Currently, national banks are regulated by the OCC. Exercising its authority under the National Bank Act, the OCC regulates, supervises, and examines national banks on an ongoing basis and enforces national bank compliance with both federal and state laws. In accordance with its rule-making authority under the National Bank Act, the OCC has issued regulations interpreting the Act's limitation on visitorial powers specifically to prohibit state officials from either inspecting the books and records of national banks or prosecuting enforcement actions against national banks. 12 C.F.R. § 7.4000.

Despite the clear statutory language, these regulations, and numerous recent court decisions enjoining state officials from exercising visitorial powers over

national banks and their operating subsidiaries, the Defendant is attempting to require the production of the books and records of national banks and threatening to bring enforcement proceedings against them. The Clearing House Association, L.L.C. (the "Clearing House"), representing the interests of its national bank members, seeks a preliminary injunction to prevent these violations of federal law.

STATEMENT

The Clearing House is an association of leading commercial banks, including eight national banks. (*See* Declaration of Norman R. Nelson, executed June 15, 2005, submitted in support of the motion ("Nelson Decl.") ¶¶ 2-3.) The Clearing House is dedicated to protecting the rights and interests of its members, as well as advancing the interests of the domestic commercial banking industry. The Clearing House frequently presents the views of its members on important public policy issues affecting the commercial banking industry by, among other things, participating in federal court actions and issuing comment letters on various proposed regulatory actions. (Nelson Decl. ¶¶ 4-6.)

HSBC Bank USA, N.A., JPMorgan Chase Bank, N.A., and Wells Fargo Bank, N.A. (collectively, the "Clearing House Members") are each national banks organized under the National Bank Act, 12 U.S.C. § 21 *et seq.*, and are members of the Clearing House. (Nelson Decl. ¶ 3.) The National Bank Act and the OCC's regulations permit national banks to conduct their banking business through separately incorporated operating subsidiaries that are treated as divisions of the bank for regulatory purposes. 12 C.F.R. § 5.34. Either directly or through their operating subsidiaries, the Clearing House Members each engage in residential mortgage lending. Their mortgage lending programs

are designed to promote home ownership and, consistent with the Community Reinvestment Act, include mortgage lending to less creditworthy borrowers. As a matter of prudent and sound lending practice, loans to borrowers with different risk factors bear different interest rates. (*See* Declaration of David L. Moskowitz, executed June 14, 2005, submitted in support of the motion ("Moskowitz Decl.") ¶ 3.)

In letters dated April 19, 2005, the Defendant informed the Clearing House Members or their parent companies that, based on certain loan data reported pursuant to the Home Mortgage Disclosure Act ("HMDA"), the Defendant had commenced an inquiry regarding potential violations of federal and state discrimination-in-lending laws. (*See* Moskowitz Decl. ¶ 6; Declaration of Janet L. Burak, executed June 15, 2005, submitted in support of the motion ("Burak Decl. ¶ 4"); Nelson Decl. ¶ 8.) The Defendant requested that, in lieu of a formal subpoena, the Clearing House Members "voluntarily" provide the Defendant with information regarding their loans and lending practices.

The Defendant's requests sought two categories of documents. First, the Defendant asked the Clearing House Members to produce all data contained in their HMDA Loan Application Register ("LAR") for loans and applications during 2004 relating to property located in New York. (*See* Moskowitz Decl. ¶ 7; Burak Decl. ¶ 5.) Second, the Defendant requested a variety of non-public information concerning the Clearing House Members' residential real estate lending operations (the "lending information"). (*See* Moskowitz Decl. ¶ 7, Exh. A; Burak Decl. ¶ 5, Exh. A.)

Federal law obligates banks to make modified HMDA LAR data available to the public upon request. 12 C.F.R. § 203.5(c). Accordingly, the Clearing House

Members have produced the first category of information to the Defendant. (*See* Moskowitz Decl. ¶ 8; Burak Decl. ¶ 6.) The second category of information sought by the Defendant is, however, nonpublic lending information that the Clearing House Members are not required to disclose to state officials. Accordingly, the Clearing House Members have not produced this information to the Defendant. (*See* Moskowitz Decl. ¶ 9; Burak Decl. ¶ 6-7.) [1]

The Defendant has also publicly declared that he intends to proceed with his investigation into the lending practices of the Clearing House Members despite being told by the OCC that it is impinging on the OCC's exclusive supervisory jurisdiction over national banks. (*See* Declaration of Adam R. Brebner, executed June 16, 2005, submitted in support of the motion ("Brebner Decl."), Exh. A (Hanna Bergman, *Spitzer: OCC is Blocking N.Y.'s Probe of Lenders*, Am. Banker, May 19, 2005, No. 96, Vol. 170, at 1 (quoting the Defendant as saying "As recently as two days ago I got a phone call from the very top of the OCC saying, 'We think you're preempting.' Well, I don't think we are, and we're going to find out in court someday.").

Despite the exclusive jurisdiction of the OCC, the Defendant has told at least one Clearing House Member that, if it does not produce the requested lending information, the Defendant will subpoena the information or institute state court proceedings against the bank "within the next few days." (Moskowitz Decl. ¶ 13.) The Defendant has also said that the documents and lending information requested in his

[1] Moreover, most of the information requested by the Defendant is highly confidential, either because it involves trade secrets or proprietary information that could cause the Clearing House Members significant commercial harm if released, or because it

April 19 letters represent only the first stage of the Defendant's inquiry and that the Defendant anticipates requesting substantial additional documents and information as his inquiry continues. (Moskowitz Decl. ¶ 13.)

The national bank members of the Clearing House and their operating subsidiaries commit considerable resources to ensuring their compliance with myriad applicable federal and state laws and regulations, including discrimination-in-lending laws and the Community Reinvestment Act. They undergo continuous regulation, supervision, examination, and monitoring by the OCC, and are subject to the OCC's enforcement jurisdiction with respect to both federal and state law. They are also subject to special targeted examinations relating to laws governing consumer protection, including anti-discrimination statutes. By seeking to inspect the books and records of the Clearing House Members and to otherwise exercise visitorial powers over them, the Defendant threatens to increase—and if not enjoined will increase—the compliance burden faced by the Clearing House Members in a manner expressly prohibited by federal law. (Moskowitz Decl. ¶ 6.)

ARGUMENT

To obtain a temporary restraining order or preliminary injunction, a movant must show (1) a threat of irreparable injury and (2) either (a) a probability of success on the merits or (b) a sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation and a balance of hardships tipping decidedly in favor of the moving party. *Time Warner Cable of New York City* v.

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involves detailed personal information about bank customers that could cause serious personal privacy violations if released. (*See* Burak Decl. ¶ 8.)

Bloomberg, L.P., 118 F. 3d 917, 923 (2d Cir. 1997);[2] *Local 1814 Int'l Longshoreman's Ass'n AFL-C10* v. *N.Y. Shipping Ass'n, Inc.*, 965 F.2d 1224, 1228 (2d Cir. 1992) (same requirements for temporary restraining order and preliminary injunction). When a request for a preliminary injunction implicates the public interest, a court should give some consideration to the balance of such interests. *See Time Warner*, 188 F.3d at 929.[3]

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[2] In some instances, the Second Circuit has stated that in suits seeking a preliminary injunction of government action pursuant to a statutory or regulatory scheme, only the "likelihood of success on the merits" standard is applicable. *See, e.g. Freedom Holdings, Inc.* v. *Spitzer*, __ F.3d __, 2005 WL 1164038 (2d Cir. May 18, 2005). *But see Time Warner*, 118 F.3d at 923-24. Here, plaintiff is entitled to relief under either standard.

[3] The Clearing House has associational standing to bring this action on behalf of its member national banks in accordance with the Supreme Court's three prong test in *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). *See America's Cmty. Bankers* v. *FDIC*, 200 F.3d 822, 827 n.2 (D.C. Cir. 2000) (finding that banking association had standing to "sue to redress its members' injuries, even if the organization cannot demonstrate an injury to itself."). First, the Banks that received letters of request from the NYAG otherwise have standing to sue in their own right. *See Wachovia Bank, N.A.*, v. *Burke*, 319 F. Supp. 2d 275, 280-81 (D. Conn. 2004) (injury to right under § 484 to be subject to visitation by federal regulators alone sufficient to establish standing) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992), *appeal docketed*, No. 04-3770-CV (2d Cir. July 8, 2004); *see also Nat'l City Bank of Ind.* v. *Turnbaugh*, 367 F. Supp. 2d 805, 810-11 (D. Md. 2005) (case filed to prevent further action by state commissioner after state commissioner sent letters to bank enclosing consumer complaints and requesting list of borrowers charged prepayment penalty), *appeal docketed*, No. 05-1647 (4th Cir. June 13, 2005). Second, the interests that the Clearing House seeks to protect—specifically the common interests of its members as nationally chartered banks and, more broadly, the efficient regulation of the banking industry—are central to its purpose. (*See* Nelson Decl. ¶¶ 4-6.) Third, because its claims are purely legal and seek only injunctive relief, adjudication does not require participation of the individual banks. *See Int'l Union,United Auto., Aerospace & Agric. Implement Workers of Am.* v. *Brock*, 477 U.S. 274, 287-88 (1986) (finding third prong satisfied where union challenged legality of federal policy directive).

I. PLAINTIFF HAS A CLEAR PROBABILITY OF SUCCESS ON THE MERITS

In enacting the National Bank Act in 1864, Congress explicitly provided,

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

12 U.S.C. § 484(a).[4] Section 484 was intended to create an exclusive federal regime that would protect national banks from state interference.[5] Section 484 was amended in 1982 to provide a limited exemption to this exclusive federal regulatory, supervisory, and

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[4] "[12 U.S.C. §] 484 derives almost unchanged from § 54 of the National Bank Act of 1864." *Nat'l State Bank, Elizabeth, N.J.* v. *Long*, 630 F.2d 981, 988 n.10 (3d Cir. 1980).

[5] Congress enacted the National Currency Act in 1863 and the National Bank Act the next year for the purpose of establishing a new national banking system separate and independent from the existing state banks. In the midst of a great rebellion in the name of states rights, "[Congress] was compelled to resort to some scheme by which to nationalize and arrange upon a secure and firm basis a national currency." CONG. GLOBE, 37th Cong., 3d Sess. 844 (1863) (remarks of Sen. Sherman). To fulfill this purpose, it was recognized that the newly-created national banking system "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under the Government from which it derives its functions." CONG. GLOBE, 38th Cong. 1st Sess., 1893 (1864) (remarks of Sen. Sumner). The courts have consistently acknowledged the unique status of the national banks and the limits placed on states by the National Bank Act. *See Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 375 (1954) ("The United States has set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories."); *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) ("National 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.").

examination jurisdiction of national banks, but it applies only "to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws." 12 U.S.C. § 484(b).[6] As the Supreme Court explained,

> Congress had in mind, in passing [12 U.S.C. § 484], that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him . . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

Guthrie v. *Harkness*, 199 U.S. 148, 159 (1905).

The plain meaning of Section 484 should be preclusive of any attempt by state authorities to exercise visitorial powers over national banks. *See, e.g., BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous."); *Browder* v. *United States*, 312 U.S. 335, 338 (1941) ("The plain meaning of the words of the act covers this use. No single argument has more weight in statutory interpretation than this.").

The National Bank Act also expressly authorizes the OCC "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a; *see also Conference of State Bank Supervisors* v. *Conover*, 710 F.2d 878, 885 (D.C. Cir. 1983) (OCC has broad rulemaking authority under § 93a, including power to issue

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[6] *See* Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, § 412, 96 Stat. 1469, 1521 (1982) (amending Section 484).

regulations that preempt state laws); *Turnbaugh*, 367 F. Supp. 2d at 817; *Wachovia Bank, N.A.* v. *Watters*, 334 F. Supp. 2d 957, 964-65 (W.D. Mich. 2004) ("Section 93a contains a broad grant of authority to promulgate regulations" and the "OCC holds broad and pervasive authority to regulate national banking associations"), *appeal docketed*, No. 04-2247 (6th Cir. Oct. 14, 2004).

The OCC's regulations confirm the exclusive nature of the OCC's visitorial powers over national banks. In particular, 12 C.F.R. § 7.4000(a)(1) states:

> Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law.

The regulations further provides that visitorial powers specifically include (i) examination of a bank; (ii) inspection of a bank's books and records; (iii) regulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) enforcing compliance with any applicable federal or state laws concerning those activities. 12 C.F.R. § 7.4000(a)(2).

The same regulation also addresses the limited statutory exception for visitorial powers "vested in the courts of justice":

> National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

12 C.F.R. § 7.4000(b)(2). As the OCC stated when it initially noticed this rule for comment:

> It would be completely contrary to the express purposes of section 484 to read the "vested in the courts of justice" exception as enabling state authorities to accomplish exactly what Congress deliberately and expressly intended states *not* to be able to do—namely, inspect and supervise the activities of national banks and compel their adherence to a variety of state-set standards.

68 Fed. Reg. 6363, 6370 (Feb. 7, 2003) (emphasis in original). Instead, the plain language of the statute

> permits the exercise of "visitorial powers" that are "vested in the courts of justice," powers, in other words, that courts possess. . . . To read the exception to permit state authorities to inspect, regulate, supervise, direct, or restrict the activities of national banks simply by filing a complaint in a court would be to create a visitorial power that states do not otherwise possess under Federal law.

Id. (emphasis in original); *see also Bank One Delaware, N.A.* v. *Wilens*, No. SACV 03-274-JVS ANX, 2003 WL 21703629, at *2 (C.D. Cal. July 7, 2003) (agreeing with OCC's interpretation).

The OCC has promulgated other regulations confirming that the entire body of federal regulation applicable to national banks, including the exclusive visitorial power of the OCC, extends to the operating subsidiaries of national banks. 12 C.F.R. § 5.34(e)(3) provides, "An operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."[7] 12 C.F.R. § 7.4006 provides, "Unless

[7] 12 C.F.R. § 5.34 interprets the "incidental powers" that Congress granted to national banks in 12 U.S.C. § 24(Seventh) (national banks shall have the power to exercise "all such incidental powers as shall be necessary to carry on the business of

otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

As regulator of the national banking system, the OCC conducts extensive examinations of the banking operations of the national banks and their operating subsidiaries to evaluate compliance with principles of safe and sound banking and with consumer protection, anti-discrimination and other applicable laws. *See* 12 U.S.C. § 481. Federal law authorizes the OCC to inspect banks' records and supervise their activities, including the records and activities of any operating subsidiaries. The OCC has available a wide array of supervisory measures to address unsafe or unsound banking practices or violations of law by national banks. *See, e.g.*, 12 U.S.C. § 93 (forfeiture of charter, civil money penalties); 12 U.S.C. § 1818 (cease and desist orders, restitution; removal of officers and directors, civil money penalties). The OCC also uses informal procedures to

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banking"). The OCC first recognized in 1966 that national banks have the incidental power to conduct banking activities through operating subsidiaries. *See* Acquisition of Controlling Stock Interest in Subsidiary Operations Corporation, 31 Fed. Reg. 11,459 at 11,459-60 (Aug. 31, 1966); *Wells Fargo Bank, N.A.* v. *Boutris*, 265 F. Supp. 2d 1162, 1168 & n.8 (E.D. Cal. 2003), *appeal docketed*, No. 03-16194 (9th Cir. June 25, 2003) (quoting and discussing 12 C.F.R. § 5.34 and the OCC's original interpretative announcement); *see also* S. REP. NO. 106-44, at 8 (1999) (Senate report regarding the Gramm-Leach-Bliley Act ("GLBA"), noting that "[f]or at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly," and giving mortgage lending as an example of the exercise of this authority). The GLBA distinguished between operating subsidiaries and financial subsidiaries, with the latter being subject to a different regulatory regime than national banks. In its present form, 12 C.F.R. § 5.34 also provides the guidelines for establishing operating subsidiaries, which include licensing by the OCC and the financial consolidation of the subsidiary's operations with its parent bank. *See* 12 C.F.R. § 5.34(b), (e)(4).

obtain the compliance of national banks. *See First Union Nat'l Bank* v. *Burke*, 48 F. Supp. 2d 132, 137-39 (D. Conn. 1999) (describing enforcement and compliance powers of the OCC).[8]

Thus, even where state substantive law applies to national banks, the OCC is responsible for enforcement where such law touches on banking operations. *See, e.g.*, 12 U.S.C. § 36(f)(1)(B) (noting with regard to interstate branches of national banks that are subject to certain laws of the "host" states, "[t]he provision of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency").[9]

The OCC's regulations concerning Section 484 and the status of operating subsidiaries of national banks are entitled to substantial deference. The Supreme Court has held:

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the

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[8] The OCC has initiated enforcement actions against national banks, and imposed significant monetary sanctions, in connection with violations of laws prohibiting discrimination in lending, and referred other matters to the Departments of Justice. *See In re First Central Bank, N.A.*, OCC Enf. Act. 99-13, 1999 OCC Enf. Dec. LEXIS 6 (Feb. 12, 1999)(consent order requiring, *inter alia*, $400,000 restitution fund and $25,000 civil penalty); *In re First National Bank of Vicksburg*, OCC Enf. Act. 94-220, 1994 OCC Enf. Dec. LEXIS 271 (Jan. 21, 1994) ($750,000 restitution fund); OCC, Fair Lending Referrals, available at http://www.occ.treas.gov/foia/fair.htm (summarizing referrals).

[9] The OCC has also made it clear in interpretive and advisory letters that it generally has exclusive authority to enforce compliance with both federal and state law. *See* Brebner Decl., Exhs. B (OCC Interpretive Letter 971 (Jan. 16, 2003), *available at* http://www.occ.treas.gov/interp/sep03/int971.doc)); C (OCC Advisory Letter 2002-9 (Nov. 25, 2002), *available at* http://www.occ.treas.gov/ftp/advisory/2002-9.doc.)

> invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

NationsBank of N.C., N.A. v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) (quoting *Clarke* v. *Sec. Indus. Ass'n*, 479 U.S. 388, 403-404 (1987)). The Court explained that under the settled rule set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "when we confront an expert administrator's statutory exposition we inquire first whether 'the intent of Congress is clear' as to 'the precise question at issue.'" *NationsBank*, 513 U.S. at 257 (quoting *Chevron*, 467 U.S. at 842). If the statute "is silent or ambiguous with respect to the specific issue," then the second step of the *Chevron* analysis obtains and "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (quoting *Chevron*, 467 U.S. at 843).[10]

In *National State Bank, Elizabeth, N.J.* v. *Long*, 630 F.2d 981 (3d Cir. 1980), the Third Circuit considered whether a New Jersey statute prohibiting "redlining" was preempted by the Home Mortgage Disclosure Act and whether the Commissioner of the New Jersey State Banking Department was entitled to enforce the statute. *Id*. at 982. The Court held that the state statute was not preempted by federal law, but added that "[q]uestions about the applicability of state legislation to national banks must be distinguished from the related inquiry of who is responsible for enforcing national bank compliance." *Id.* at 987-88. Noting that enforcement of the anti-redlining statute

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[10] Similarly, courts have deferred repeatedly to the OCC's interpretation of the National Bank Act. *See United States* v. *Mead Corp*., 533 U.S. 218, 231 & n.13 (2001); *First Nat'l Bank of E. Ark.* v. *Taylor*, 907 F.2d 775, 777-78 (8th Cir. 1990) (OCC's determination should be sustained if reasonable); *see also Wells Fargo Bank of Texas, N.A.* v. *James*, 321 F.3d 488 (5th Cir. 2003) (OCC regulations preempt state law); *Conference of State Bank Supervisors*, 710 F.2d at 880 (same).

involved analysis of lending risk and bore a relationship to the banks' financial stability, the court found that "when state law prohibits the practice of redlining, its enforcement so directly implicates concerns in the banking field that the appropriate federal regulatory agency has jurisdiction." *Id.* at 988.

The Court of Appeals specifically relied on Section 484 and the applicable interpretive ruling stating that visitorial powers over national banks are vested in the OCC and state banking officials have no authority to inspect or require production of bank records except as authorized by law. It held, "Enforcement of the antiredlining statute no doubt would require examination of bank records. We need not meet the Comptroller's interpretive ruling in all respects but, in the circumstances of this case, exclusivity of the power to examine is a reasonable interpretation of the National Bank Act." *Id.* at 989. Thus, the court held that "while the substantive law of New Jersey prohibiting redlining is not preempted, enforcement of the state statue is the responsibility of the Comptroller of the Currency rather than the State." *Id.* at 989; *cf. Conference of Fed. Sav. & Loan Ass'ns* v. *Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979) (concluding that the Federal Home Loan Bank Board's control over federal thrifts is so pervasive that "[i]f state-conferred rights are to be enforced against federal associations by any regulatory body (a question we do not reach), enforcement must be by the Bank Board"), *aff'd*, 445 U.S. 921 (1980).

Similarly, five recent district court decisions have closely analyzed the regulations and statutory scheme and held that state officials may not exercise visitorial powers over national banks and their operating subsidiaries. *See Turnbaugh*, 367 F. Supp. 2d at 817-821 (regulation of mortgage lending of national bank operating

subsidiaries constituted prohibited exercise of visitorial powers); *Wachovia Bank, N.A.* v. *Watters*, 334 F. Supp. 2d at 962-65 (invalidating Michigan statutory scheme subjecting mortgage lending by operating subsidiaries of national banks to state licensing, investigation, and reporting requirements); *Wachovia Bank, N.A.* v. *Burke*, 319 F. Supp. 2d at 281-88 (same as applied to Connecticut statutory scheme providing for state record-keeping, inspection, and enforcement requirements); *Wells Fargo Bank, N.A.* v. *Boutris*, 265 F. Supp. 2d at 1178 (enjoining California Commissioner of Corporations from exercising visitorial powers over bank or enforcing preempted state laws); *Nat'l City Bank of Indiana* v. *Boutris*, No. Civ. S-03-0655 GEB, 2003 WL 21536818, at *2-4, 7 (E.D. Cal. July 2, 2003) (same), *appeal docketed*, No. 03-16461 (9th Cir. Aug. 8, 2003);[11] *see also Bank One Delaware, N.A.*, 2003 WL 21703629, at *2 ("private attorney general action" enjoined); *Mayor of New York* v. *Council of New York*, 780 N.Y.S.2d 266, 272 (N.Y. Sup. Ct. 2004) (New York City ordinance placing conditions on banks doing business with the City was unenforceable against national banks, and "federal law … prevents local regulatory access to national bank records"). In each of these five cases, the district courts granted declaratory or injunctive relief to the plaintiff banks to protect their rights to be free of state visitorial authority.

The facts in this case are on all fours with the Third Circuit's holding in *Long*. The Defendant is attempting to enforce a state discrimination-in-lending statute and seeks to inspect bank records to do so. This is an impermissible attempt to exercise

[11] Also of note is that in each of these five cases, the OCC filed an amicus brief in support of the plaintiff national banks.

visitorial powers. Enforcement of the federal and state discrimination-in-lending laws with respect to national banks is the exclusive responsibility of the OCC.

II. THE CLEARING HOUSE MEMBERS ARE THREATENED WITH IRREPARABLE HARM.

The national banks and their operating subsidiaries will be irreparably injured in the absence of a preliminary injunction because their right to be free from the exercise of visitorial powers by state regulators will be destroyed by the very process of investigation and (potentially) litigation, no matter what the ultimate outcome on the merits. *See, e.g.*, *First Union Nat'l Bank*, 48 F. Supp. 2d at 149-50 (finding irreparable injury sufficient to warrant the granting a preliminary injunction in a visitorial powers case because "the Commissioner's enforcement actions continue to displace the OCC's supervisory authority in a way that cannot be undone, since the exercise of such administrative authority by the Commissioner is mutually inconsistent with the OCC's exclusive authority"); *see also Nat'l City Bank of Indiana*, 2003 WL 21536818, at *7 (State Commissioner's exercise of visitorial powers and enforcement of preempted state statute would cause irreparable harm); *Wells Fargo Bank, N.A.* v. *Boutris*, 252 F. Supp. 2d at 1073 (State Commissioner preliminarily enjoined from exercising visitorial powers when bank's lending business would be disrupted and bank would face significant compliance costs); *cf. Trans World Airlines, Inc.* v. *Mattox*, 897 F.2d 773, 784 (5th Cir. 1990) (irreparable injury to deprive airlines of a federally created right to have only one regulator), *aff'd in part, rev'd in part on other grounds*, 504 U.S. 374 (1992).

The National Bank Act was "clearly intended" to confer on national banks "the precise benefit of being free from state visitation." *Wachovia Bank, N.A.*, 319 F. Supp. 2d at 288-89. This benefit consists of freedom from the burden of unnecessarily gathering and disclosing information and defending against possible state enforcement actions, regardless of the ultimate outcome of any such actions. As such, the present case is closely analogous to cases where courts have found irreparable harm involving privileges from disclosure,[12] sovereign or other immunity,[13] or double jeopardy,[14] in

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[12] *See, e.g.*, *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987) ("[A]n order that information be produced that brushes aside a litigant's claim of a privilege not to disclose, leaves only an appeal after judgment as a remedy. Such a remedy is inadequate at best. Compliance with the order destroys the right sought to be protected."); *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1065 (D.C. Cir. 1998) (per curiam) (petition for writ of mandamus to stop discovery related to grand jury proceedings was warranted because "petitioner is asserting something akin to a privilege insofar as 'once [the] putatively protected material is disclosed, the very right sought to be protected has been destroyed.'") (citation omitted); *Admiral Ins. Co.* v. *United States Dist. Ct.*, 881 F.2d 1486, 1491 (9th Cir. 1988) (orders compelling discovery of allegedly privileged materials can be challenged by writs of mandamus in order to avoid "the irreparable harm a party likely will suffer if erroneously required to disclose privileged materials.").

[13] *See, e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 512 (1985) (denial of qualified immunity subject to immediate appeal because the "entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial") (emphasis in original); *Helstoski* v. *Meanor*, 442 U.S. 500, 507 (1979) (denial of Speech and Debate Clause immunity subject to immediate appeal because Clause protects not only from consequences of litigation but also from burden of defense); *United States* v. *Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) ("[S]overeign immunity is an immunity from the burdens of becoming involved in any part of the litigation process, from pre-trial wrangling to trial itself. Regardless of what the plaintiff seeks from the foreign defendant, the risk of harm from having to defend the lawsuit remains constant and is an irreparable loss . . . ."); *Rhode Island* v. *United States*, 115 F. Supp. 2d 269, 279 (D.R.I. 2000) (granting preliminary injunction of claims against a state because irreparable harm would flow from violation of state's right to be free "from being required to appear and defend itself").

[14] *See, e.g.*, *Abney* v. *United States*, 431 U.S. 651, 659 (1977) (denial of double jeopardy claim subject to immediate appeal because the Constitution protects not only

which courts have frequently found the risk of irreparable injury sufficient to justify a preliminary injunction, writ of mandamus, or immediate appeal of collateral orders.

Here, a temporary restraining order is necessary to prevent the Defendant from instituting state court proceedings before a preliminary injunction hearing in this matter. The Clearing House Members' federally created right to be free from state enforcement would be lost if they are forced to defend a state court proceeding.

In contrast to the irreparable harm to the banks, there will be no harm to the Defendant from preliminarily enjoining his unlawful exercise of visitorial powers over the banks. "Since Congress expressly preempted this area of regulation, the state[] [will] not [be] injured by the injunction." *Trans World Airlines, Inc.*, 897 F.2d at 784.

III. THE PUBLIC INTEREST WILL BE SERVED BY THE PRELIMINARY INJUNCTION.

Because the OCC has been granted the exclusive authority by Congress to enforce federal and state anti-discrimination standards with respect to national banks, *see Long*, 630 F.2d at 989, the public interest will be served by enjoining the Defendant from seeking to exercise visitorial powers over the banks. *See Wells Fargo Bank, N.A.* v.

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against double punishments but against the ordeal of a second trial, and such protections would be irreparably lost if the Government "hale[d] [defendant] into court to face trial on the charge against him") (internal quotations omitted); *Whiting* v. *Lacara*, 187 F.3d 317, 320 (2d Cir. 1999) (immediate appeal is available for denials of immunity, double jeopardy claims, or similar allegations where "having to go through a trial is itself a loss of the right involved").

Boutris, 252 F. Supp. 2d at 1073; *First Union Nat'l Bank*, 48 F. Supp. 2d at 149-50. "[T]he public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law." *Bank One* v. *Guttau*, 190 F.3d 844, 847-48 (8th Cir. 1999). "[I]t is undeniable that the public interest weighs in favor of enjoining the government from violating federal law." *Berne Corp.* v. *Gov't of the Virgin Islands*, 120 F. Supp. 2d 528, 537 (D.V.I. 2000). [15]

The Defendant has no greater and no less jurisdiction over the Clearing House Members than the attorneys general of numerous other states, and there is no principled reason why the Clearing House Members would submit to review by the Defendant and not similar requests from other attorneys general. Accordingly, the Defendant's actions threaten the fundamental regulatory approach which was adopted by Congress for national banks and has consistently been upheld by the Supreme Court and other courts.

The OCC is actively reviewing the implications of the HMDA data in the proper exercise of its supervisory and regulatory authority over national banks.[16] A

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[15] Moreover, there are also "very real privacy concerns" associated with the collection and dissemination of additional lending data. Brebner Decl., Exh. D (Edward M. Gramlich, Federal Reserve Governor, Remarks to the National Association of Real Estate Editors (June 3, 2005), *available at* http://www.federalreserve.gov/boarddocs/speeches/2005/20050603/default.htm ("Gramlich Speech") (noting that banks are limited by the Fair Credit Reporting Act from sharing consumer reports with third parties and that banks' disclosing additional information on their own is "questionable from a legal standpoint")).

[16] *See* Brebner Decl., Exh. E (OCC News Release 2005-52, Acting Comptroller of the Currency Julie L. Williams Issues Statement Responding to New York Attorney General (May 19, 2005), *available at* http://www.occ.treas.gov/05rellst.htm ("*If* Attorney General Spitzer is suggesting by his public comments that he would undertake duplicative work in connection with institutions currently under review by the OCC, that activity would potentially disrupt and certainly impede our ability to conduct our exam

redundant inquiry by the Defendant will not serve the public interest. Indeed, by creating regulatory uncertainty and adding to the compliance burden faced by the national banks, the Defendant's inquiry could, ultimately, harm the public interest.

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work promptly and efficiently—a result neither of us should want."); *see also* Gramlich Speech (describing the HMDA data and noting the complex and detailed analysis federal regulators are undertaking to properly understand its significance).

CONCLUSION

The Defendant's inquiries and threatened enforcement proceedings against the Clearing House Members are in clear violation of federal law, as set forth in the plain language of Congress and as applied by the OCC and numerous courts. This Court should enter a preliminary injunction prohibiting the Defendant, his agents, and all persons acting in concert with them, pending the entry of a final judgment and decree in this action, from (1) investigating, requesting or issuing subpoenas for information concerning, or taking any other action to enforce federal and state discrimination-in-lending laws against the national banks that are members of the Clearing House, or their operating subsidiaries, with respect to their mortgage lending operations, or (2) otherwise exercising visitorial powers with respect to those banks and operating subsidiaries in violation of Section 484.

Dated: New York, New York
June 16, 2005

/s/ Robinson B. Lacy
H. Rodgin Cohen (HC7168)
Gandolfo V. DiBlasi (GD5913)
Michael M. Wiseman (MW3209)
Robinson B. Lacy (RL8282)
Adam R. Brebner (AB0914)
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000 (telephone)
(212) 558-3588 (facsimile)

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that on June 20, 2005, I served a true copy of the Corrected Memorandum of Law in Support of The Clearing House's Motion for a Preliminary Injunction and Temporary Restraining Order on the defendant by delivering it in court to Dietrich L. Snell, Deputy Attorney General, attorney for the defendant.

/s/ Robinson B. Lacy
Robinson B. Lacy