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No. 81896-7

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SUPREME COURT OF THE STATE OF WASHINGTON

ANNE and CHRIS McCURRY, on behalf of themselves and others
similarly situated,

Appellants,

v.

CHEVY CHASE BANK, F.S.B.,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Respondent Chevy Chase Bank, FSB (“Chevy Chase”) respectfully submits this Supplemental Brief pursuant to RAP 13.7(d).

Chevy Chase is a federal savings bank, subject to pervasive – and exclusive – federal regulation. Petitioners Anne and Chris McCurry (the “McCurrys”) seek to bring a nationwide class action asserting state law claims that are expressly preempted by applicable federal law.

The McCurrys sued over \$20 in accumulated fax charges and a \$2 notary fee (collectively “the Fees”) that Chevy Chase expressly disclosed and charged when the McCurrys paid off their loan. The Superior Court and the Court of Appeals correctly held, as have courts across the country, that claims, for recovery of loan-related fees from a federally chartered savings bank, are expressly preempted by the Home Owners Loan Act, 12 U.S.C. § 1462 *et seq.*, (“HOLA”) and regulations promulgated by the Office of Thrift Supervision (“OTS”) pursuant to a grant of preemptive authority under HOLA.

The McCurrys now assert that there is some special privilege against federal preemption for their contract and Consumer Protection Act claim. Federal and state courts routinely dismiss such claims as preempted by applicable federal law. The decisions below dismissing those claims were correct as a matter of law.

In a foxhole conversion, the McCurrys also ask this Court to stretch their allegations to say that Chevy Chase charged them the \$2 notary fee for non-existent services. In this new theory – asserted under the guise of “hypothetical possible facts” – the notary fee was not wrongful because it was contractually barred or misleadingly described, it was wrongful because it was outright fraudulent. The Complaint does not hint that the amounts charged were fraudulent, and Civil Rules do not allow such a transformation on appeal, especially when no request was made to include such an allegation in a proposed amended complaint. The recent case of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) makes that conclusion more straightforward, but does not change the result: the Complaint does not make sufficient allegations to support such a claim.

This Court should therefore affirm the well-reasoned opinion of the Court of Appeals and the well-founded order of the Superior Court dismissing this case.

II. STATEMENT OF ISSUES

1. Did the Court of Appeals correctly affirm the Superior Court’s dismissal of this action because the Home Owners’ Loan Act preempts claims to recover loan-related fees from a federal savings bank?

2. Did the Court of Appeals properly refuse to allow the McCurrys to create new claims on appeal?
3. Should this Court affirm dismissal because the McCurrys do not state a plausible claim for relief, as set forth in *Bell Atl. Corp. v. Twombly*?

III. STATEMENT OF THE CASE¹

A. Petitioners Pay Off Their Loan And Pay Fees.

The McCurrys took out a home loan from Chevy Chase in 2003, and executed a Deed of Trust (“DOT”) that sets forth the terms of the loan.² The DOT expressly provides that it does not bar Chevy Chase from charging additional fees.³ In 2004, the McCurrys requested a Payoff Statement so they could terminate the loan early.⁴ Chevy Chase provided the statement, the McCurrys paid the full amount, including the Fees, and the McCurrys signed to agree that they had reviewed and approved the Payoff Statement as to both “form and content.”⁵

¹ Respondents accept the McCurrys’ allegations only for purposes of this appeal.

² CP 4, 12-31.

³ CP 21 (“absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition”).

⁴ CP 33.

⁵ *Id.*

B. Petitioners' Lawsuit Over The Fees Is Dismissed Because Their Claims Are Preempted.

On April 12, 2006, the McCurrys brought this action in the Superior Court of King County.⁶ They asserted three claims for damages based on the Fees: unjust enrichment; breach of contract; and violation of the Consumer Protection Act, RCW chapter 19.86 ("WCPA").⁷

Chevy Chase moved under CR 12(b)(6) to dismiss the Complaint on several grounds, including preemption under 12 C.F.R. § 560.2, a regulation promulgated under HOLA by OTS.⁸ At the hearing on the dismissal motion, the McCurrys speculated that the \$2 Notary fee was not really a loan-related fee because, hypothetically, Chevy Chase could have listed that charge on the Payoff Statement when there was actually nothing to notarize.⁹ No request was made to amend the complaint to make that allegation. Based on the allegations in the Complaint, Judge Eadie granted the motion to dismiss, holding that the McCurrys' claims were preempted.¹⁰

The McCurrys appealed. On June 2, 2008, a panel from Division I of the Court of Appeals unanimously affirmed the dismissal in a published

⁶ CP 3.

⁷ CP 7-9. Plaintiffs also seek declaratory and injunctive relief that mirrors their damages claims. *Id.*

⁸ CP 40-68.

⁹ See SRP 33:5-17 (transcript of May 11, 2007 Superior Court hearing).

¹⁰ *Id.* at 54:17-25; CP 262-63.

opinion.¹¹ It too rejected the McCurrys' "hypothetical facts" theory that the Notary Fee was phony as beyond the scope of the complaint.¹² The Court of Appeals held it had no authority to adopt *Bell Atl. Corp. v. Twombly*, but affirmed that the McCurrys' claims were preempted.¹³

This Court granted review.

IV. ARGUMENT

OTS hereby occupies the entire field of lending regulation for federal savings associations. 12 C.F.R. § 560.

A. The McCurrys Do Not State A Claim For Relief, Whether "Plausible" Or "Conceivable."

This Court reviews a motion to dismiss *de novo*. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 763, 881 P.2d 216 (1994). The typical formulation of the standard to be applied on a CR 12(b)(6) motion is that the complaint is sufficient "unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim." *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). An action must be dismissed, however, where a federal statute or regulation preempts the claims, posing an "insuperable bar" to relief.

¹¹ *McCurry v. Chevy Chase Bank, F.S.B.*, 144 Wn. App. 900, 193 P.3d 155 (2008).

¹² *See id.* at 905 n.1.

¹³ *Id.* at 905, 913.

Cutler, 124 Wn.2d at 763 (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

In *Bell Atl. Corp. v. Twombly*, the United States Supreme Court interpreted the federal rules on which CR 8 and CR 12 were based, and rejected the “no state of facts” formulation as confusing and unhelpful. *Twombly*, 127 S. Ct. at 1968 (abrogating *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)). The Court also rejected the concept that “any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings.” *Id.* Rule 8 requires a succinct statement of facts “showing that the pleader is entitled to relief.” CR 8. This showing must have “enough heft” to make entitlement to relief not just conceivable in a literal sense, but “plausible.” *Id.* at 1966, 1973.

State and federal courts now use the *Twombly* formulation for claims brought under State unfair competition and false advertising statutes. See, e.g., *Sisney v. Best Inc.*, 754 N.W.2d 804, 808, 811 (S.D. 2008) (applying *Twombly*, false advertising claim dismissed where the plaintiff alleged he ate the marketed food but had not paid for it); *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citing

Twombly, California UCL claim requires showing of advertising material misleading enough to fool consumers).¹⁴

The United States Supreme Court's interpretation is "highly persuasive" as to the effect of the CR 8 and CR 12.¹⁵ As discussed below, this case presents an apt opportunity to join the *Twombly* clarification. But the McCurrys' claims fail under either formulation.

B. Petitioners' Claims Would Regulate A Federally-Chartered Banking Institution's Lending Practices And Are Barred By Express Statutory and Regulatory Provisions.

1. OTS Regulations Expressly Preempt Judicial Regulation Of Loan-Related Fees Under State Law.

Preemption is an essential part of federal thrift law. Congress enacted HOLA to restore public confidence in and access to financing during the Great Depression, when 40 percent of all home loans were in default. *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002). The new national thrift system was a direct response to "inadequacies of the existing state systems." *Conf. of Fed. Sav. & Loan*

¹⁴ What facts are needed to state a clear, plausible claim depends on the cause of action. *Robbins v. Oklahoma*, 519 F.3d 1242, 1249-50 (10th Cir.2008) (due process claim must factually describe a violation of clearly established constitutional rights, and "exactly who is alleged to have done what to whom," to give "fair notice as to the basis of the claims."); *accord Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007).

¹⁵ *Sanderson v. Univ. Vill.*, 98 Wn. App. 403, 410 n.10, 989 P.2d 587 (1999); *and see Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219 829 P.2d 1099 (1992); *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 119 n.2, 147 P.3d 1275 (2006) (Madsen, J., concurring) ("Our version of CR 12(b) mirrors its federal counterpart.").

Ass'ns v. Stein, 604 F.2d 1256, 1257 (9th Cir. 1979), *aff'd*, 445 U.S. 921, 100 S. Ct. 1304, 63 L.Ed.2d 754 (1980). To this end, Congress authorized pervasive federal regulation so that no state could control the new banks' commercial practices. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 161-62, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982).

Under that Congressional mandate in HOLA, to carry out Congress's intent, the comprehensive OTS regulation expressly "occupies the entire field of lending regulation for federal savings associations." 12 C.F.R. § 560.2(a) (emphasis added). The field it occupies expressly includes any state law based "judicial decision" in that field. *Id.*

OTS went into further detail. It expressly preempted state regulation – including judicial regulation – of federal savings banks' "terms of credit," including "adjustments to...payments due." 12 C.F.R. § 560.2(b)(4). Courts also may not second-guess the banks' "[l]oan-related fees, including without limitation...prepayment penalties [and] servicing fees." 12 C.F.R. § 560.2(b)(5).

2. The Fees At Issue Are Loan-Related Fees.

It is undisputed that Chevy Chase is a federal savings bank regulated by OTS. CP 104. The McCurrys concede that the Fees were part of their loan payoff statement. CP 4. As stated in OTS guidance, such servicing fees in a payout statement fall squarely within the field

preempted by HOLA, and these claims must be dismissed.¹⁶

3. Courts Do Not Allow State Law Claims For Loan-Related Fees Against A Federal Savings Bank

In addition to the national consensus reflected in the briefs before the Court of Appeals, the federal Court of Appeals for the Ninth Circuit recently affirmed HOLA preemption in a case much like this one. In *Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 101 (9th Cir. 2008), home loan applicants filed a putative class action in state court under the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, 17500 (“UCL”), to recover \$400 loan rate lock-in fees from a federal savings bank. After removal, the case was dismissed, and the Court of Appeals affirmed. *Silvas*, 514 F.3d at 1003.

The Court of Appeals asked whether the UCL as applied encroached on the preempted field defined in 12 C.F.R. 560.2(b). *Silvas*, 514 F.3d at 1005. The plaintiffs’ claim that the lock-in fee was unlawful went directly to the question of what sort of fees the bank could charge; therefore, it was expressly preempted as state regulation of “loan-related

¹⁶ 2000 OTS Op., No. P-2000-6 (April 21, 2000) (in the record at CP 136-38) (these are loan-related fees, because a payoff statement is “an integral part of the lending process.”); and see *Lopez v. World Sav. and Loan Ass’n*, 105 Cal. App. 4th 729, 741, 130 Cal.Rptr.2d 42 (2003) (consumer protection claim based on fax fees in payout statement is preempted by HOLA); *Haehl v. Wash. Mut. Bank, F.A.*, 277 F.Supp.2d 933, 942 (S.D. Ind. 2003) (same as to fraud and other tort claims).

fees.” *Id.* at 1006. At that point, “the preemption analysis ends.” *Id.*

Silvas shows why Division 1 was correct to distinguish the few cases that held a particular CPA-type claim was not preempted. It is the claim, not the cause of action, that is critical; the court must ask whether the state law “*as applied*” is preempted. *Silvas*, 514 F.3d at 1005 (emphasis added); and see *Munoz v. Fin. Freedom Senior Funding Corp.*, 567 F.Supp.2d 1156, 1162 (C.D. Cal. 2008) (criticizing *McKell v. Wash. Mut., Inc.*, 142 Cal.App.4th 1457, 1482, 49 Cal.Rptr.3d 227 (2006), *Gibson v. World Sav. & Loan Ass’n*, 103 Cal.App.4th 1291, 1298, 128 Cal.Rptr.2d 19 (2002), and *Fenning v. Glenfed*, 40 Cal.App.4th 1285, 1298, 47 Cal.Rptr.2d 715 (1995)). Relevantly, a claim for charging a loan origination fee where the plaintiff did not engage the broker is preempted, whether brought under mortgage statutes, the UCL, or elder abuse law. *Id.* at 1163-65. Such claims, on any theory, may not displace federal regulation of federal thrifts’ loan-related fees. *Id.*; and see *Cross v. Downey Sav. & Loan Ass’n*, 2009 WL 481482, *4-5 (C.D. Cal. Feb 23, 2009) (California Fair Debt Collection Practice Act and fraud claims preempted under HOLA).

4. There Is No Special Preemption Exception For Contract Claims.

Petitioners contend that different rules should apply for preemption of their breach of contract claim. Pet. for Review at 1. Courts can and do preempt contract claims under 12 C.F.R. § 560.2. The regulation exempts from preemption only those contract claims that affect the federal thrift's lending activities merely "incidentally." 12 C.F.R. § 560.2(c). Where a claim goes to the core activities expressly preempted in § 560.2(b), as by alleging that a particular loan-related servicing fee is invalid or was improperly disclosed, the claim is more than "incidental," it is central, and it is preempted. *See Haehl v. Wash. Mut. Bank, F.A.*, 277 F.Supp.2d 933, 942 (S.D. Ind. 2003) (preemption of claims for breach of duty of good faith and fair dealing, fraud, unjust enrichment, consumer protection statute); *and see Moskowitz v. Wash. Mut. Bank, F.A.*, 329 Ill.App.3d 144, 768 N.E.2d 262, 265-66, 263 Ill. Dec. 502 (2002) (preempting contract claim alleging wrongful fax and statement preparation fees).¹⁷

¹⁷ A recent unpublished decision by a federal trial court, *Nava v. Virtualbank*, 2008 WL 28373406 (E.D. Cal. July 16, 2008) is not on point, as it did not involve loan-related fees. *See also Mincey v. World Sav. Bank*, 2008 WL 3845438 (D.S.C. Aug. 15, 2008) (same). The contract claim here, in contrast, seeks to regulate how a bank may disclose and demand administrative fees that were expressly not prohibited by the undisputed terms of the contract in the pleadings. That issue is well within OTS's exclusive regulatory authority.

The McCurrys' request for discovery as to whether Chevy Chase's payout statement fees produce significant revenue thus misses the point entirely. Congress does not envision a patchwork, courtroom by courtroom evaluation and regulation of federal thrifts' fee practices. Such claims go to the core activities that are already heavily regulated by the federal government. *See Silvas*, 514 F.3d at 1004. "Incidental" is not code for "*de minimis*."

The McCurrys are also mistaken when they suggest that the United States Supreme Court disfavors preemption of contract claims. Federal preemption of contract claims is commonplace. *See, e.g., Santa-Rosa v. Combo Records*, 471 F.3d 224, 227 (1st Cir. 2006) (contract claim preempted by Copyright Act). This Court also has held that a federal statute preempted a Washington contract claim. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 763, 881 P.2d 216 (1994).

Of course, a court must ask whether the relevant statute or regulation shows that the federal government intended to preempt contract claims. Unlike the cases cited by the McCurrys, the OTS regulations expressly "occupy the field," and expressly exempt only non-loan contract claims, so the inquiry is very straightforward.¹⁸ OTS intended to, and did,

¹⁸ *See* 12 C.F.R. § 560.2; *compare Wyeth v. Levine*, 2009 WL 529172 *11-13 (U.S. Mar. 4, 2009) (no express preemption by Congress or

preempt contract claims, and this Court should respect that intention.

The McCurry's First Issue for Review is therefore without merit.

5. There Is No Special Preemption Exemption For Consumer Protection Act Claims.

As discussed, federal and state courts regularly find similar consumer protection statutes preempted by HOLA. In particular, in *Fultz v. World Sav. and Loan Ass'n*, 571 F.Supp.2d 1195, 1198 (W.D. Wash. Aug 18, 2008), the court dismissed loan-related claims brought under the WCPA itself, holding that interference with the regulatory scheme under state consumer protection laws was "more than incidental." The WCPA has been held preempted due to this "pervasive federal regulation of the banking system." *Miller v. U.S. Bank of Wash., N.A.*, 72 Wn. App. 416, 420, 865 P.2d 536 (1994). This accords with the doctrine that there is no general presumption against preemption by federal banking law, an area of historic, extensive federal regulation. *Wells Fargo Bank N.A. v. Boutris*,

effectual regulation by agency); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 231-32, 115 S. Ct. 817, 130 L.Ed.2d 715 (1995) (Act expressly preserved state remedies); *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 477-78, 109 S. Ct. 1248, 103 L.Ed.2d 488 (1989) (act was intended to protect the right to contract not to occupy the field); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526 n.24, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (plurality op.) (narrow express preemption does not occupy field); and cf. *McKee v. AT & T Corp.*, 164 Wn.2d 372, 191 P.3d 845 (2008) ("nothing in the [statute] declares preemption"). The Supreme Court, in adopting part of the *Cipollone* plurality opinion in *Altria Group Inc. v. Good*, 129 S.Ct. 538, 547-48 (2008) did not address contract claims or extend the reach of *Cipollone*.

419 F.3d 949, 956-57 (9th Cir. 2005).

The McCurrys' Second Issue for Review is also without merit.

C. The McCurrys May Not Rewrite The Complaint On Appeal.

The Complaint shows clearly why the McCurrys think the Fees were wrongful. They allege that the Deed of Trust required Chevy Chase to reconvey the Deed to them “[u]pon payment of all sums secured by this Security Instrument,” so that by including the Fees in the Payoff Statement as an add-on to the amount secured by the deed of trust, Chevy Chase either breached the contract terms or gave the McCurrys a possibly misleading impression of what the deed of trust required.¹⁹ This claim, as discussed, is preempted under HOLA.

On appeal, the McCurrys seek to shift their grip to a new concept they never pleaded, that the Notary Fee was a fake. They argue it is hypothetically possible that \$2 was charged when no notary fee was incurred at all. *See* Appellants' Brief, 27-28.

If the McCurrys had a good-faith belief that this claim was true, sufficient to satisfy CR 11, their path was clear: they could have moved for leave to amend at any time under CR 15. Instead, they ask to introduce it as a set of “hypothetical facts.” *See id.*

¹⁹ CP 4.

1. The 'Hypothetical Facts' Doctrine Is Not A Way To Change Horses In Midstream.

The "hypothetical facts" concept is a gloss on CR 12(b)(6). Normally, of course, an appellate court will not consider facts not in the record. *Lemond v. Dept. of Licensing*, 143 Wn. App. 797, 807, 180 P.3d 829, 834 (2008). But on a Rule 12(b)(6) motion, it may consider "hypothetical facts" as the "conceptual backdrop" to the facts alleged. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297 n.2, 545 P.2d 13 (1975). This lets a plaintiff explain a complaint that is so bare-bones and poorly drafted that it is confusing. *See id.* For example the *Brown* complaints provided "only the briefest outline of their grounds": that the State wrongfully failed to convey certain information about the risk of avalanches at the plaintiffs' homesite, with the result that they were harmed when the avalanche occurred. 86 Wn.2d at 295. The Court held it was "extremely difficult" to tell whether there was a claim without a better notion of what information the State had not conveyed, but after the plaintiffs explained what they had meant, the Court held the Complaint was adequate. *Id.* at 297-99. Similarly, in *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978), the Court allowed a widow to specify when the City of Seattle had known about and failed to enforce the building

code violations that, she alleged, had led to her husband's death in a residential hotel. 89 Wn.2d at 675-76.

As these cases show, hypothetical facts let an incompetent pleader explain a badly-drafted claim. This Court has never held, however, that a "hypothetical fact" proffer may be used to evade CR 15 and CR 11. *See Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995) (hypothetical allegation must be treated as if it were a pleading); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 730, 189 P.3d 168 (2008) (where plaintiffs refuse to identify and allege adequate facts to state a claim and merely ask the court to draw unwarranted inferences, leave to amend would be futile).

To the contrary, in *North Coast Enterprises, Inc. v. Factoria Partnership*, 94 Wn. App. 855, 860, 974 P.2d 1257 (Wn. App. 1999), the Court of Appeals held that, although a plaintiff need not directly plead every "arcane element" of the claim, "when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." (quoting *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n. 3 (1st Cir.1976)). Therefore, a hypothetical fact proffer that would have added a new breach of contract within the limitation period to the related, but time-barred breach, was not accepted. *Id.*

Here, the McCurrys have never suggested they mean to prove the notary fee was fraudulent and they did not seek leave to make that allegation. They are not incompetent pleaders, and their Complaint is not unclear. It is simply barred by a statute. The McCurrys cannot bootstrap their invalid complaint into an excuse for class-action discovery by pretending it says something else only for the duration of the appeal.

2. The McCurrys' So-Called "Hypothetical Fact" Proffer Is Also Barred By *Twombly*

As seen here, the "no conceivable facts" formulation opens the door to ambiguous pleading and surprise, and to end runs around the pleading rules. A complaint must state more than conclusory allegations "on every material point necessary to sustain a recovery." *Berge v. Gorton*, 88 Wn.2d 756, 762-763, 567 P.2d 187, 191 (1977). In particular, a contract claim must make reasonably clear why the defendant's act breached the contract. *See Nordic Bank PLC v. Trend Group, Ltd.*, 619 F. Supp. 542, 561-562 (S.D. N.Y. 1985) (claim dismissed, where no facts "indicate if or how NBL breached the option agreement.... Litigation should not be a guessing game."); *Pritchett v. Gen. Motors Corp.*, 650 F. Supp. 758 (D. Md. 1986) (same).

To reduce confusion that the *Conley* standard might let such a vacuous pleading stand, the Massachusetts Supreme Judicial Court

adopted *Twombly* in the context of a proposed class action claim against a car manufacturer under that State's consumer protection statute. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 888 N.E.2d 879, 890 (Mass. 2008). The Massachusetts Court first ruled that the specific product defect alleged by the plaintiffs was not cognizable, and then held that even under the *Conley* pleading formula, the plaintiffs could not substitute some other defect they had not specifically alleged. *Iannacchino*, 888 N.E.2d at 887-88.

As this instance shows, *Twombly* does not change the law, it merely clarifies why inadequate and confusing pleading should be mended at the trial stage, not on appeal. The lesson of *Twombly* is that "Rule 8 has it right" – the plaintiff has to show that if he can prove his facts, he will be entitled to relief on the claim he actually asserts. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3rd Cir. 2008).²⁰

The *Twombly* Court directs greater attention to the plaintiff's burden under Rule 8 precisely in order to stop fruitless, speculative cases from proceeding to discovery based on "Mr. Micawber's optimism."

²⁰ Indeed, the United State Supreme Court had already ruled 25 years ago that it is "not proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Assoc'd Gen. Contractors of Cal., Inc. v. Cal. State C'cil of Carpenters*, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L.Ed.2d 723 (1983).

Twombly, 127 S.Ct. at 1968. The McCurrys' so-called hypothetical fact proffer reflects that earnest hope that, if only this Court will allow the case to proceed without an actual claim, 'something will turn up.' See Charles Dickens, *David Copperfield* (1850).

Stopping inadequate claims at the pleading stage serves not only economy, but justice as well, especially in large commercial litigation where the *in terrorem* effect of massive discovery burdens tends to force a settlement of even non-meritorious claims before a judge has any other opportunity to dispose of them. *Twombly*, 127 S. Ct. at 1966. Therefore, "[i]f discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim." *Limestone Development Corp. v. Village of Lemont, Ill.* 520 F.3d 797, 803-04 (7th Cir. 2008) (extending *Twombly* to RICO claims).

The *Twombly* approach to pleading therefore makes especially good sense here, where the Petitioners seek to bring a nationwide class action on the basis of "hypothetical facts." *Twombly* teaches that it is in just such circumstances that a court should be especially wary.

V. CONCLUSION

Because the basis for Petitioners' claims is that the Respondent, a federally-regulated thrift, charged loan-related administrative fees in

supposed violation of state law, these claims are preempted and this Court should affirm the published opinion of the Court of Appeals, and the order of the Superior Court dismissing all claims.

RESPECTFULLY SUBMITTED this 10th day of March, 2009.

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DECLARATION OF SERVICE

BY RONALD R. CARPENTER.

I, Emanuel F. Jacobowitz, declare as follows _____
CLERK

I am one of the Attorneys for Chevy Chase Bank, F.S.B. and am a resident of the State of Washington, residing and employed in Seattle, Washington.

I am over the age of eighteen years old and am not a party to the above-titled action. My business address 1111 Third Avenue, Suite 3400, Seattle, Washington 98101.

On March 9, 2009, I caused to be served on the parties in the manner noted: (1) Respondent's Supplemental Brief; and (2) this Declaration of Service:

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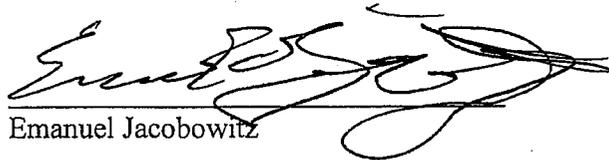
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I declare under penalty of perjury that the foregoing is true
and correct and that this declaration was executed on this 9th day
of March 2009, in Seattle, Washington.

DATED this 9th day of March, 2009.

FOSTER PEPPER PLLC


Emanuel Jacobowitz