IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-D-1576

STATE OF COLORADO ex. rel. KEN SALAZAR, ATTORNEY GENERAL FOR THE STATE OF COLORADO, and LAURA E. UDIS, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE,

Plaintiffs,

v.

ACE CASH EXPRESS, INC.,

Defendant.

BRIEF OF *AMICUS CURIAE*
FINANCIAL SERVICE CENTERS OF AMERICA, INC.

INTRODUCTORY STATEMENT

Financial Service Centers of America, Inc. ("FiSCA") respectfully submits this *amicus curiae* brief with the consent of counsel for defendant and without opposition from counsel for plaintiffs.

Established in 1987, FiSCA is the largest voluntary trade association in the pay-day-loan industry, representing over 5,000 of the approximately 7,000 professional check-cashing outlets in the United States, and the leading voice for the industry on regulatory, compliance and legislative issues. Professional check cashers are the principal entities that make payday loans available to the consuming public, either directly

or as agents of national banks and other lenders. *Amicus* promotes the highest standards of ethical conduct in the industry and has promulgated a Code of Conduct to which its members subscribe; this Code of Conduct was the first set of professional standards to be promulgated nationally by any trade association or industry grouping in the payday-loan industry.

Amicus has no stake in any of the parties to this litigation[1] and has no interest in the outcome of this case, other than in seeking the correct and consistent availability of a federal forum for claims such as those asserted in this action. Like many of the members of *amicus*, defendant ACE Cash Express, Inc. acts as an agent for a fully disclosed principal: a national bank whose loans are governed by preemptive federal law. *Amicus* believes that any dispute regarding the interest rates on these loans raises a federal question and should be uniformly entitled to a federal forum.[2]

A majority of the outlets operated by the members of *amicus* provide payday loans, including through locations in the State of Colorado. Like defendant, many of such members act as loan-origination and -servicing agents for banks located outside Colorado. *Amicus* believes that the interests of the banking system, the payday-loan industry and the consuming public are best served by the uniform application of federal law to these claims, by the uniform availability of a federal forum for such claims, and by deterring artful pleading where plaintiffs (including state regulators) may single

[1]Defendant ACE Cash Express, Inc. is a member of FiSCA. This brief represents FiSCA's perspective. Defendant has not borne any material portion of the cost of drafting this brief.

[2]*Amicus* takes no position in this brief on whether plaintiffs may lawfully require defendant to be licensed in order to provide loan-origination services in Colorado for an out-of-state bank.

out, and assert preempted state-law claims against, agents who assist banks in originating loans on terms that are lawful for the banks under federal law.

Accordingly, *amicus* respectfully requests that plaintiffs' motion to remand be denied.

ARGUMENT

I. Plaintiffs' Renewal Claims Attack The Interest Charged On National Bank Loans And Thus Are Completely Preempted Even Though Goleta Is Not A Named Defendant.

Distribution channels in wide use by members of *amicus* involve member check-cashers and others who identify prospective borrowers, prepare paperwork, verify credit information and submit loan applications to a bank lender; the bank then makes a credit decision and engages in all of the core banking functions in making the loan. In the case at bar, defendant provides these services for Goleta National Bank, a national banking association with headquarters in Goleta, California ("Goleta").[3]

Because the Colorado Deferred Deposit Loan Act (the "DDLA"), UCCC § 5-3.1-101 *et seq.*, deems defendant — Goleta's agent — also to be a "lender," the effect of the DDLA is to proscribe the Colorado-based agent of Goleta from assisting in the origination of Goleta loans at interest rates that, but for the DDLA, would be lawful for Goleta through the express application of preemptive federal banking statutes and regulations.

[3]The Complaint alleges that defendant is "regularly engaged in the making or offering, *arranging or acting as agent for a third party* of a type of supervised loan commonly called 'payday', 'post-dated check' or 'deferred deposit loans'." Complaint at ¶5 (emphasis added).

Efforts to thwart national banking by indirect means have been rejected consistently by the federal courts for almost two hundred years. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (rejecting Maryland's onerous stamp tax on notes issued by banks incorporated elsewhere); *Cades v. H & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 515 U.S. 1103 (1995) (national bank with offices only in Delaware may use agent in foreign state to originate and close loans without destroying bank's ability to export Delaware's interest rate); *Christiansen v. Beneficial Nat'l Bank*, 972 F. Supp. 681 (S.D. Ga. 1997) (same); *Basile v. H & R Block, Inc.*, 897 F. Supp. 194 (E. D. Pa. 1995) (same); *NCNB Nat'l Bank of North Carolina v. Tiller*, 814 F.2d 931, 937 (4th Cir. 1987) (national bank with offices located only in North Carolina may originate and close loans in South Carolina without subjecting bank to South Carolina's laws).

But in an emerging trend — in which States purport to regulate the activities of *agents* of national banks — some state legislatures and regulators seek to accomplish by indirection what they are prohibited from doing directly under preemptive federal law: regulation of the interest rates and other material substantive terms of extensions of credit by a national bank. These efforts must fail because they contravene established preemptive principles of federal banking law.

A national bank, like any other body corporate, is capable of acting only through its employees, officers and agents. Ballantine on Corporations § 61; 19 C.J.S. Corporations § 1078; Restatement (Second) of Agency § 9(3). And federal banking law, which

preempts inconsistent state law,[4] expressly permits national banks to operate through agents, 12 U.S.C. § 24 (Seventh), and to "utilize the services of persons . . . not employed by the bank for originating loans." 12 C.F.R. § 7.1004(a).

Thus, plaintiffs' renewal claims, though nominally asserted against Goleta's agent and not against Goleta directly, fundamentally seek to deprive Goleta of its right under 12 U.S.C. § 85 to charge the interest allowed by the law of the state where Goleta is located *and* its right under 12 U.S.C. § 24 (Seventh) and 12 C.F.R. § 7.1004(a) to employ the services of agents. Accordingly, the DDLA and plaintiffs' claims thereunder manage to offend not just one but rather two fundamental policies under the National Bank Act. Therefore, the indirect nature of plaintiffs' attack against Goleta's exercise of its rights as a national bank presents an *additional* reason to assume federal jurisdiction of this case, not a reason to decline jurisdiction.

In *Battiste v. H & R Block, Inc.*, 209 F.3d 719 (5th Cir. 2000), the Court of Appeals affirmed without opinion the District Court's order denying the plaintiffs' motion to remand on the ground that the claims against the *agent* were completely preempted under the National Bank Act. The District Court's opinion makes it very clear that an agent of a national bank is cloaked with the same ability to preempt state laws as the national bank itself. Likewise, and squarely on point, in *Krispin v. May Dep't Stores*

[4] *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 33 (1996) (warning that "Congress would not want the States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted."); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (preemption applies when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

Co., 218 F.3d 919 (8th Cir. 2000), the Court of Appeals upheld the applicability of federal law to claims against an agent of a national bank, *even though, as here, the national bank was not itself a defendant*.

For these reasons, plaintiffs' motion should be denied.

II. Remand Must Be Denied Notwithstanding The Presence Of State-Law Claims.

While recognizing that "Courts have held that usury or interest rate claims based upon state statutes are subject to the complete preemption doctrine and removable to federal court," an *amicus* supporter of plaintiffs suggests that the "central feature" of this case is a dispute regarding a state licensing requirement,[5] and therefore that plaintiffs' motion to remand all claims should be granted. This disregard of the renewal claims that formed the basis for defendant's removal evinces a stunning misconception of the principles applicable to federal removal jurisdiction.

If plaintiffs' claims consist of both federal and state-law claims, the federal claims are removable as of right. The applicable statute, 28 U.S.C. § 1441(a), specifically allows removal from state court of civil actions where the district court would have had original jurisdiction over *any* claim, and therefore defendant was entitled to remove this case to federal court — *period*.

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, *the entire case may be removed*

[5]Brief *Amicus Curiae* of Community Financial Services Association of America in Support of Plaintiff's Motion to Remand, at 2.

> *and the district court may determine all issues therein*, or, in its discretion, may remand all matters *in which State law predominates*.

28 U.S.C. § 1441(c) (emphasis added). Thus, if the federal claims are properly removable, the only issue for the Court becomes whether any *other claims in which state law predominates* should be remanded, a matter over which the Court has discretion.

III. This Court Should Retain Jurisdiction Over Plaintiffs' State-Law Licensing Claims, Not Solely The Renewal Claims.

Under 28 U.S.C. 1441(c), this Court has discretion to remand any claims "in which State law predominates." While state law forms the basis of plaintiffs' licensing claims, defendant has substantial federal-law defenses to these claims, and state law accordingly does *not* predominate.

Amicus is uniquely able to enlighten this Court concerning federal-law issues lurking in plaintiffs' licensing claims. The DDLA purports to require agents of national banks making deferred presentment loans to obtain supervised-lender licenses,[6] and plaintiffs complain that defendant failed to be so licensed. But defendant was doomed from the outset; defendant never had any hope of acquiring or retaining such a license so long as defendant continued to assist Goleta in originating loans that were not in conformity with Colorado state law.

It is the policy of plaintiffs to deny such a DDLA license to a loan-arranger applicant unless the third-party lender's loans comply with the DDLA. Thus, defendant was trapped in a "Catch-22" situation: it could assist Goleta in arranging loans that were

[6]UCCC 5.3.1-116.

lawful for Goleta, but thereby disqualify itself from holding a DDLA license under plaintiffs' policy; or it could retain its DDLA license if, and only if, it would agree to desist from originating Goleta loans on terms that are lawful for Goleta under federal law. Thus, Goleta's licensure was effectively conditioned upon Goleta's relinquishment of its federal rights to originate loans in Colorado using a local agent and to assess California interest charges.

It is therefore clear that the licensing claims are not "separate and independent" from the renewal claims, nor do they "substantially predominate" over the renewal claims. Rather, the licensing dispute between plaintiffs and Goleta cannot be resolved absent resolution of the renewal claims.

Plaintiffs' claims are thus revealed as anything but a garden-variety state-law licensing dispute. Quite to the contrary, plaintiffs' licensing policy is a direct and deliberate assault on the ability of an out-of-state national bank to originate loans in Colorado on terms that are lawful under federal law but purportedly proscribed by the DDLA. Since Goleta has no offices or employees in Colorado, it can originate loans in Colorado only through an agent. But plaintiffs refuse to license any agent who will assist Goleta in making loans on the federally lawful terms that Goleta employs.[7]

Therefore, even plaintiffs' licensing claims are, in reality, complex disputes involving the struggle between competing state and federal sovereigns. Because the effect

[7]Plaintiffs do not dispute that this is their interpretation of the DDLA. See, Plaintiffs' Motion to Remand, p. 3, n. 3 (". . . all such agent/'arranger lenders and their loans must fully comply with the DDLA as though the agent/arranger 'made' the loans.'").

of the application of the DDLA licensing requirement by plaintiffs is to deprive an out-of-state national bank of the ability to originate loans in Colorado on terms that are lawful for the bank — thereby significantly impairing the exercise by Goleta of its lending powers under 12 U.S.C. §§ 24 (Seventh) and 85 — even this seeming-state-law provision of the DDLA should be addressed in a federal court.

Even if this Court were to conclude that state law predominates with respect to the licensing claims, this Court should exercise its discretion to retain jurisdiction of these claims, which are inextricably interwoven with and arise out the same transactions as the federal claims. *Doll v. U.S. West Communs., Inc.*, 85 F. Supp. 2d 1038 (D. Colo. 2000); *Keil v. CIGNA*, 978 F. Supp. 1365 (D. Colo. 1997). In determining whether to decline to exercise supplemental jurisdiction over any claims that may be found to be purely state-law claims, the Court should consider whether:

> the claim raises a novel or complex issue of State law, (2) the claims substantially predominate over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Gard v. Teletronics Pacing Systems, Inc., 859 F. Supp. 1349, 1351 (D. Colo. 1994). Under this standard, the failure-to-license claims do not merit remand. Neither plaintiffs nor their *amici* have suggested any novel or complex State law issues implicated by the licensing claims and, notwithstanding the Community Financial Services Association's contention to the contrary, there is no basis to conclude that the licensing claims substantially predominate over the renewal claims, particularly in light of the State's con-

ditioning of licensing upon compliance with DDLA renewal limitations. Moreover, the renewal claims remain in the case.

Accordingly, plaintiffs' motion should be denied in its entirety.

CONCLUSION

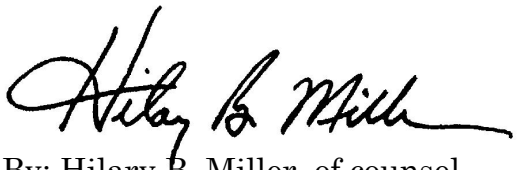
For all of the foregoing reasons, plaintiffs' motion to remand should be denied, and this Court should retain jurisdiction over all of the claims asserted in the complaint.

Dated: November 16, 2001

Respectfully submitted,

WINNE, BANTA, RIZZI, HETHERINGTON
& BASRALIAN, P.C.

Attorneys for *amicus curiae*
Financial Service Centers of America, Inc.



By: Hilary B. Miller, of counsel
and
Gerald Goldman, a member of the firm
112 Parsonage Road
Greenwich, Connecticut 06830-3942
(203) 399-1320

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered on this 16th day of November, 2001 to:

James M. Lyons, Esq.
Rothgerber, Johnson & Lyons LLP
1200 17th Street, Suite 3000
Denver, Colorado 80202

Paul Chessin, Esq.
Assistant Attorney General
Consumer Credit Unit
1525 Sherman Street — Fifth Floor
Denver, Colorado 80203

_____