DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock, Rm 256 Denver, Colorado, 80202	DATE FILED: June 9, 2020 3:43 PM CASE NUMBER: 2017CV30376
Plaintiff: MARTHA FULFORD, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE v. **Defendant(s):** MARLETTE FUNDING, LLC d/b/a BEST EGG; WILMINGTON TRUST, N.A. solely as trustee for certain trusts; and WILMINGTON SAVINGS FUND SOCIETY, FSB, solely as trustee for certain trusts, And, **Intervenor Defendant:** CROSS RIVER BANK	**▲COURT USE ONLY▲** Case Number: **17CV30376** **Courtroom: 269**

ORDER REGARDING PLAINTIFF'S MOTION FOR DETERMINATION OF LAW

This Matter is before the Court on Plaintiff's Motion Pursuant to C.R.C.P. 56(h) for Determination Of Law on Statutory Interpretation of Section 27 (12 U.S.C. § 1831(d)(a)("Section 27") of the Federal Depository Insurance Act).

Summary of Issue:

Plaintiff argues, in summary, that while Section 27 permits qualifying out-of-state banks to export the interest rate limit of their home states while

lending in Colorado, they may not pass that same interest rate on to non-banks such as Defendant Marlette (and Avant of Colorado LLC, Defendant in companion case 17CV30677). In her Motion For Partial Summary Judgment, the Administrator argues that Marlette (and Avant) are the "true lenders," but that for purposes of this Motion, even if Cross River Bank ("CRB") is the true lender, it may not export the interest rate of its home state to Defendant Marlette, a non-bank. Additionally, while the National Banking Act (NBA), 12 U.S.C. § 85, provides that national banks may charge interest on loans of the state where they are located, and Section 27 permits state banks the same ability, which removed an unfair advantage of national banks, the Administrator argues that this privilege under the act does not extend to non-banks. Plaintiff also cites to *Madden v. Midland Funding, LLC.*, 786 F.3d 246, 250 (2d Cir. 2015) in support of this argument.

In opposition, Defendants argue that under Colorado law, a third-party lender, such as Marlette, an assignee, stands in the same shoes as the assignor bank, citing *Tivoli Ventures, Inc. v. Bumann*, 870 P.2d 1244, 1248 (Colo. 1994)(where the FDIC assigned a loan to a non-bank third party, the Court found that the Colorado statute of limitations did not apply because the

assignee's position was the same as the assignor). Further, that contrary to what the Administrator argues, Section 27 protects banks' rights both to make and sell loans without impairing their terms, which, Defendants argue, has been the law for over two centuries. Finally, Defendants argue that to interpret Section 27 as Plaintiff does would violate the Dormant Commerce Clause and the Contracts Clause of the United States Constitution.

Applicable Law:

> In order to prevent discrimination against State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates, if the applicable rate prescribed in this subsection exceeds the rate such State bank or insured branch of a foreign bank would be permitted to charge in the absence of this subsection, such State bank or such insured branch of a foreign bank may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest . . . at the rate allowed by the laws of the State, territory, or district where the bank is located, whichever may be greater.

12 U.S.C. § 1831d(a)

C.R.S. § 5-2-201 establishes a maximum of 12% per annum for consumer loans that are not "supervised" and 21% per annum for "supervised loans."

Under the National Bank Act, a national bank may charge interest on any loan at the rate allowed by the laws of the state in which the bank is located. 12 U.S.C. § 85 (1988). In addition, a national bank may "export" a favorable interest rate from the state in which it is located in transactions with borrowers from other states. *Marquette National Bank v. First Omaha Service Corp.,* 439 U.S. 299 (1978); *Hill v. Chemical Bank,* 799 F. Supp. 948 (D.Minn.1992).

Analysis:

There is no dispute that the loans at issue in this matter were made at a rate above that permitted by Colorado law. There is no dispute that Defendant Marlette, and the other Defendants, are not banks. Defendants argue that the interest rate on loans issued by Marlette is permissible because the originating lender on the loans in question in this matter, was CRB. As an out of state bank, CRB may export the interest rates of its home state of New Jersey to other states that have lower usury rates. Any loans by CRB that are above limits set by Colorado law are permissible, it is argued, because any state law to the contrary is preempted by federal law, Section 27. Plaintiffs concede this point, but argue that Marlette is a non-bank entity. Further, that Section 27,

by its plain language does not apply to non-banks, therefore federal preemption does not apply. The Court agrees.

The Administrator is authorized to enforce compliance with the Colorado Uniform Consumer Credit Code (UCCC) including conducting investigations of violations of the UCCC. *See* C.R.S. §§ 5-6-104, 5–6–106, 5–2–305. Analysis of federal preemption begins with the basic assumption that Congress did not intend to displace state law. *Forfar v. Wal-Mart Stores, Inc.* 436 P.3d 580, 588 (Colo. App. 2018). Section 27 refers to state banks or branches of banks. Congress could have easily included additional language if it intended this privilege to extend beyond banks, their branches, or their subsidiaries. For instance, Congress could have added language such as ". . . such state bank or such insured branch of a foreign bank, and any approved non-bank lender, . . ." It did not, and the language it did use is not so broad as to include non-banks. Although, the United States District Court of Colorado was analyzing this matter on a removal issue and whether complete federal preemption applied, the federal court, wrote, "The Court rejects this argument and agrees instead with the courts holding that, even if complete preemption applies to claims brought against state-chartered banks, it does not apply to claims

against non-bank entities. The statute at issue refers only to the lending powers of a "State bank or such insured branch of a foreign bank" and does not make any reference to non-bank entities." *Meade v. Marlette Funding, LLC*, 17-CV-00575-PAB-MJW, 2018 WL 1417706 at *3.

Additionally, "The National Bank Act, expressly permits national banks to charge on any loan . . . interest at the rate allowed by the laws of the state, Territory, or District where the bank is located." *Madden* 786 F. 3d at 250. (internal citations omitted). However, the privilege is limited to national banks because extending NBA preemption to third parties would be an overly broad application of the NBA. *Id.* at 251. "[E]xtending those protections to third parties would create an end-run around usury laws for non-national bank entities." *Id.* at 252. While Defendants and *amici* are adamant in their disagreement with *Madden*, this Court finds its analysis under the NBA to be persuasive and applicable to this matter and analysis of Section 27. "Generally, similar language should be interpreted in the same manner, unless the context requires different interpretation." *Stoorman v. Greenwood Trust Co.*, 908 P.2d 133, 135 (Colo. 1995)(interpreting the terms "interest" or

"interest rate" in the NBA and Depository Institutions Deregulation and Monetary Control Act also known as Federal Deposit Insurance Act.)

Considering the above, the Court agrees with Plaintiff that Section 27 applies to state banks and does not extend the privilege of interest exportation to non-banks such as Marlette and other defendant trust banks.

Valid When Made Doctrine

Defendants argue that under the "Valid When Made" doctrine, if the loan with its interest rate was valid when made by CRB, then it was valid when transferred to a non-bank entity such as Marlette. The parties debate whether Valid When Made is an established banking doctrine. Plaintiff argues that it is simply a doctrine, not a rule, and, further, that it is not a "cardinal rule." Mot. at 10. Defendants, of course, argue that it is long established and has been a guiding principle of banking for over a hundred years. *See Nichols v. Fearson*, 32 U.S.103 (1833). Interestingly, however, the question presented was whether a subsequent transfer of a promissory note rendered the original contract usurious. The Court found that it did not. *Id.* at 109. However, the argument here does not concern the validity of the original contract upon a transfer, but rather whether the assignee of a loan, regardless of its nature, may charge the

interest rate of the assignor so long as the assignor's interest rate was valid. It is debatable, then, whether the version of "Valid When Made" is a cardinal rule greater than a century old. Defendants further argue that the Court should consider the doctrine when reviewing Section 27 because, "Congress has understood for centuries that the right to make a loan must include the right to sell a loan, and Section 27 must be construed in light of that legislative understanding." Resp. at p. 9. However, in this Court's view, Section 27 is clear in that it applies to banks, and therefore, resort to interpretive rules of statutory construction is unnecessary. *See State Board of Equalization v. American Airlines, Inc.,* 773 P.2d 1033, 1040 (Colo. 1989). Additionally, with that background in mind, Congress, nevertheless, did not make even the simplest modification to the statute that would have put this issue to rest. As stated above, Congress could have included language such as "or third party" or "approved non-banks," however, Section 27 only states, ". . . State-chartered insured depository institutions, including insured savings banks, or insured branches of foreign banks with respect to interest rates . . ." The Court reads Section 27 to limit interest rate exportation rights to banks and does not include non-banks.

Further, the Valid When Made doctrine implies that the first transaction was valid. This question is explored further in the Court's Order regarding summary judgment, but suffice it to say, if Marlette were the "true lender," then the interest rates associated with the loans in question were invalid in the first instance under Colorado usury law.

Additional Arguments:

Defendants also argue that both the Federal Deposit Insurance Corporation ("FDIC") and Comptroller of the Currency ("OCC,") endorse their position, reject *Madden*, and have proposed rule changes to Congress. While the Court accepts that these federal agencies are entitled to some deference, the fact is that the rule proposals are not yet law and the Court is not obligated to follow their proposals.

Regarding claim preemption, the Court agrees with Plaintiff that its claims are not preempted because Defendant-Intervenor CRB, of course, can assign loans to other banks with interest rates greater than those allowed by Colorado, or discount the loans if assigned to non-banks. Thus, Colorado law, does not prevent or significantly interfere with the bank's exercise of its powers. *See Barnett Bank of Marion Cty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996).

Regarding Defendants' constitutional arguments, the Court again agrees with Plaintiff that this Court's interpretation of Section 27, does not violate the Dormant Commerce Clause and Contracts Clause.

> "Although the Supremacy Clause demands that state law yield to federal law, neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a federal court's interpretation other than that of the United States Supreme Court; thus, Colorado Supreme Court is not bound by decisions of the lower federal courts."
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> *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999).

This Court simply reads Section 27 to plainly exclude non-banks and, assuming that is correct, this interpretation and Colorado's usury statute, C.R.S. § 5-2-201, are not at odds with federal law.

CONCLUSION:

Accordingly, in light of the above, Plaintiff's Motion is **Granted** and the Court holds that the non-bank purchasers are prohibited under C.R.S. § 5-2-201 from charging interest rates in the designated loans in excess of Colorado's interest caps and, further, that CRB cannot export its interest rate to a non-bank such as Defendant Marlette, and finally, that the statute is not preempted by Section 27.

SO ORDERED;

BY THE COURT, JUNE 9, 2020:

Michael J. Vallejos
District Court Judge