IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-00832-PAB-KMT

CROSS RIVER BANK,

Plaintiff,

v.

JULIE ANN MEADE, in her official capacity as Administrator of the Uniform Consumer Credit Code for the State of Colorado,

Defendant.

DEFENDANT'S 12(b)(1) and (6) MOTION TO DISMISS CROSS RIVER'S COMPLAINT [DKT. #1]

Defendant Julie Ann Meade ("Administrator") filed a civil enforcement action ("Enforcement Action") in Denver District Court against Marlette Funding LLC, relating to loans made to Colorado consumers. (**Ex. A**.)[1] The Administrator alleges that Marlette and Cross River Bank, a New Jersey state-chartered bank, have entered into an arrangement whereby Marlette purports to use Cross River's right under federal law to "export" the interest rate of Cross River's home state when lending in Colorado in order to exceed Colorado's state interest rate caps. (*Id.* at ¶ 27.) However, Marlette is the true lender of the loans—performing the tasks fundamental to lending and holding the predominant economic interest in the loans. (*Id.* at ¶¶ 31-

[1] In resolving a motion to dismiss, the Court may consider documents referenced in the complaint or that otherwise inform the basis of the plaintiff's claim and may take judicial notice of facts which are a matter of public record. *Wolfe v. AspenBio Pharma, Inc.*, 2012 U.S. Dist. LEXIS 130490, *7 (D. Colo. Sept. 13, 2012).

33.) Cross River receives a small share of the profit (approximately 1%) for its nominal role in the arrangement. (*Id.* at ¶ 33.)

The Enforcement Action against Marlette—not Cross River—asserts only state-law claims. Marlette removed the case to this Court (No. 1:17-cv-00575-PAB-MJW), claiming federal preemption as the basis for jurisdiction. The Administrator's remand motion is pending.

In the meantime, Cross River filed this suit, seeking to address the federal preemption issues already being litigated in the Enforcement Action. Cross River's claim, which seeks only declaratory and injunctive relief, should be dismissed because:

1. this Court lacks subject matter jurisdiction over Cross River's claim under the well-pleaded complaint rule;
2. the alleged injury belongs to Marlette, and Cross River thus lacks standing;
3. Cross River's suit fails as a matter of law because the subject preemption rights cannot be enforced by non-banks; and
4. pursuant to *Younger* abstention, Cross River's complaint should be dismissed if the Administrator's pending motion to remand the Enforcement Action is granted.

ARGUMENT

I. The Court lacks subject matter jurisdiction under the well-pleaded complaint rule because Cross River seeks only to establish a defense

Cross River asserts that this Court has subject matter jurisdiction over its claims pursuant to 28 U.S.C. § 1331 and §§ 2201-2202. (Dkt. #1, at ¶ 13.) As the plaintiff, Cross River bears the burden of establishing the Court's subject matter jurisdiction. *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008). Applying the well-pleaded complaint rule, however, this Court lacks subject matter jurisdiction over Cross River's claim.

The well-pleaded complaint rule provides that a federal preemption defense does not, by itself, give rise to federal question jurisdiction. *See Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 6

(2003) ("a defense that relies on … the pre-emptive effect of a federal statute … will not provide a basis for removal") (citations omitted). When a party seeks to declare that a state law is preempted, the suit effectively reverses the position of plaintiff and defendant—stating an affirmative defense in the form of a complaint. Under those circumstances, the well-pleaded complaint rule nevertheless applies. "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction…." *Madsen v. Prudential Fed. S&L Ass'n*, 635 F.2d 797, 803 (10th Cir. 1980) (citation omitted).

Here, Cross River seeks a declaration, based on the Administrator's Enforcement Action against Marlette, that Colorado law is preempted by federal banking law. (Dkt. #1, at ¶ 104.) The character of the state-court action determines whether there is federal question jurisdiction, and the Administrator asserts only state-law claims in that action. Accordingly, under the well-pleaded complaint rule, the Court lacks subject matter jurisdiction over Cross River's suit.

An exception to the well-pleaded complaint rule exists but is inapplicable here. The Supreme Court has held that state usury claims asserted directly against a *national* bank are "completely preempted" notwithstanding the well-pleaded complaint rule. *See Anderson*, 539 U.S. at 11. Cross River, however, is a state bank. The Supreme Court has never applied the complete preemption doctrine to usury claims against state-chartered banks.

The Eight Circuit has held that usury claims against state banks are *not* completely preempted, examining the textual differences between the two applicable federal interest exportation statutes in support of its conclusion. *Thomas v. US Bank Nat'l Ass'n*, 575 F.3d 794,

799-800 (8th Cir. 2009) (rejecting contrary holdings of the Third and Fourth Circuits which did not examine the textual differences). As a state bank, complete preemption therefore does not apply, and Cross River's claims should be dismissed for lack of subject matter jurisdiction.

II. Cross River lacks standing because the Enforcement Action seeks relief only from Marlette; the alleged Cross River injury is too attenuated

Throughout its complaint, Cross River alleges that it has standing because it has suffered harm as a result of the Enforcement Action. (Dkt. #1, at ¶¶ 10, 93-97.) However, the Enforcement Action seeks no relief against Cross River. (1:17-cv-00575-PAB, Dkt. #5 (Ex. A)) Aside from Cross River's conclusory allegations, which cannot give rise to standing, the alleged injuries identified by Cross River belong to Marlette or are too attenuated to constitute standing.

A federal plaintiff must establish standing by alleging "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Qwest Corp. v. PUC of Colo.*, 479 F.3d 1184, 1191 (10th Cir. 2007) (citation omitted). Cross River alleges broadly that it "has been—and continues to be—harmed as a result of the" Enforcement Action. (Dkt. #1, at ¶ 93.) However, such conclusory allegations do not give rise to standing. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Cross River also alleges past and continuing loss of revenue—not as a result of any action taken directly against Cross River—but as a result of the Enforcement Action's challenge to *Marlette's* ability to enforce the bank's interest exportation rights on purchased loans. (Dkt. #1, at ¶¶ 93-97.) However, another district court has rejected this exact argument, holding that a bank's allegations of such indirect harm do not give rise to standing. *See Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 714, 719 (E.D. N.C. 2002).

In *Lingerfelt*, a state attorney general sued a non-bank payday lender, alleging that the non-bank was liable under state usury law for charges that it made on loans that purported to be originated by a national bank. *Id*. at 713-14. After the non-bank unsuccessfully attempted to remove the attorney general's state claims to federal court, the bank sued the attorney general in a separate action in federal court and sought a declaration that the payday lender, which acted as the bank's "agent in promoting, originating, and servicing [the bank's loans]," was not subject to state usury laws because of the bank's interest exportation rights. *Id*. at 714 & n. 4.

In dismissing the bank's claim for lack of standing, the court reasoned that the attorney general asserted only state-law claims against the non-bank, that the attorney general had alleged the bank was not the true lender, and that the indirect effect on the bank was not enough to give it standing. *Id*. Cross River's complaint raises nearly identical claims, seeking a declaration that the Enforcement Action against Marlette is preempted because of Cross River's role in originating the subject loans. Like *Lingerfelt*, Cross River's allegations are insufficient to give it standing. Accordingly, Cross River's complaint should be dismissed for lack of standing.

III. Cross River's complaint fails to state a claim under Rule 12(b)(6) because interest exportation does not preempt the application of state usury laws to non-banks as a matter of law

Cross River's claim should also be dismissed under Rule 12(b)(6) because, as a matter of law, it is not entitled to the declaration it seeks. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). Cross River contends that its interest exportation right preempts the application of state law with respect to loans that Cross River sells to third parties such as Marlette. (Dkt. #1, at ¶

104.) But, as explained below, that right cannot be assigned to non-banks as a matter of law.[2]

A. Interest exportation is created by federal statute

Interest exportation originates from the National Bank Act, passed in 1864. Under the NBA, banks may charge "interest at the rate allowed by the laws of the State, Territory, or District where the bank is located." 12 U.S.C. § 85. When a state's usury laws are more restrictive than the laws of a national bank's home state, "state usury laws must … give way to the federal statute." *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 318 n. 31 (1978).

The NBA's exportation provision does not apply to state-chartered banks; however, Congress extended interest exportation rights to FDIC-insured state banks by enacting Section 521 of Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA").[3] *See Greenwood Trust Co. v. Mass.*, 971 F.2d 818, 826 (1st Cir. 1992) (citing 12 U.S.C. § 1831d(a)).

B. Only banks can export interest; the right cannot be enforced by bank subsidiaries, affiliates, or agents, and cannot be assigned

Cross River asserts that federal law preempts Colorado's ability to enforce its usury laws against Marlette. (Dkt. #1 at ¶ 104.) When courts determine whether federal statutes preempt state law, the "ultimate touchstone" is the intent of Congress. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Thus, the inquiry here is whether Congress, when enacting the interest

[2] Pursuant to this Court's 12(b)(6) practice standards, the Administrator does not contend that Cross River failed to plead a necessary element of its claim; rather, the Administrator contends Cross River is not entitled to the relief it seeks as a matter of law.

[3] Section 521 of DIDA was codified by adding Section 27 to the Federal Deposit Insurance Act (12 U.S.C. § 1831d).

exportation provisions of the NBA and DIDA, intended to preempt state laws that would otherwise apply to non-banks.

If Congress has not explicitly stated that a statute is intended to preempt a specific area of state law, a court can find that a state law is preempted only if the statute's "structure and purpose" reveal an implicit Congressional intent to preempt. *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 30 (1996) (citation omitted). This occurs where Congress has created a pervasive regulatory scheme (field preemption) or if a state law prevents or significantly interferes with federal law (conflict preemption). *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

Federal banking laws do not preempt the entire field of regulation. *Nelson*, 517 U.S. at 33. Instead, a conflict preemption analysis applies. 12 U.S.C. § 25b(b) (adopting the *Nelson* preemption standard and confirming that the NBA "does not occupy the field in any area of State law"); *Bankwest, Inc. v. Baker*, 411 F.3d 1289, 1302 (11th Cir. 2005) (applying conflict preemption to state bank loans), *vacated as moot*, 446 F.3d 1358 (11th Cir. 2006).

Congress could have provided in the NBA and DIDA that the banks' interest exportation rights preempt state laws as applied to non-banks. However, neither statute includes any such express provision, stating instead that interest exportation rights belong to banks. *See* 12 U.S.C. § 1831d(a); 12 U.S.C. § 85.

Legislation was introduced into Congress last year that would have amended the NBA and DIDA to extend exportation rights to non-banks. House Bill 5724 sought to amend both statutes to provide that "[a] loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether

the loan is subsequently sold, assigned, or otherwise transferred to a third party." H.R. 5724, 114th Cong. (2016) (**Ex. B**.) However, House Bill 5724 was never enacted.

In 2007, the Supreme Court held that the NBA interest exportation provision applied to operating subsidiaries and other non-bank "affiliates" of national banks. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 19-21 (2007) ("The NBA is thus properly read … to protect from state hindrance a national bank's engagement in the 'business of banking' whether conducted by the bank itself or by an operating subsidiary….") But in 2010 Congress overturned *Watters* by enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203. Dodd-Frank amended the NBA to clarify that the NBA's preemptive scope specifically does *not* extend to subsidiaries, affiliates, or agents of national banks. 12 U.S.C. § 25b(h). *See Gordon v. Kohl's Dept. Stores.*, 172 F. Supp. 3d 840, 863-64 (E.D. Pa. 2016) (noting that Dodd-Frank "effectively overturned" *Watters* and citing 12 U.S.C. § 25b(h) in finding that state-law claims against a store that serviced the national bank's loans were not preempted).

Given that state usury claims against bank subsidiaries, affiliates, and agents are not preempted, such claims certainly are not preempted when asserted against third parties who purchase bank loans. Third-party purchasers act on their own behalf and have an even more remote claim to a bank's interest exportation rights than bank subsidiaries or agents. *E.g. Penn. v. Think Fin., Inc.*, 2016 U.S. Dist. LEXIS 4649, *40-41 (E.D. Pa. Jan. 14, 2016) (preemption defense weaker for loan assignees that for bank subsidiaries) (citing cases).

In accord, the Second Circuit recently held that although a non-bank could purchase credit card debt from a national bank, the non-bank could not enforce the bank's interest exportation rights. *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251 (2d Cir. 2015), *cert.*

denied, 136 S. Ct. 2505 (2016). The loan at issue in *Madden* was extended by a national bank to a New York consumer. *Id*. at 248. The loan carried an interest rate that exceeded New York's usury limits but was permissible in the bank's home state. *Id*. at 248-49. The bank then sold the loan to Midland, and the consumer challenged Midland's right to enforce the bank's interest exportation rights. *Id*. The court concluded that applying New York's interest cap to Midland would not "significantly interfere" with the bank's powers; therefore, conflict preemption did not apply. *Id*. at 251-52. The "extension of NBA preemption to third-party debt collectors such as the defendants would be an overly broad application of the NBA." *Id*.[4]

Thus, the language of the relevant banking statutes, supported by the case law, compels the conclusion that Congress unambiguously intended to grant interest exportation rights only to *banks*. Those rights do not preempt state law as applied to non-bank purchasers.

C. The "valid when made" rule is irrelevant to whether Cross River may assign its interest exportation rights

In an effort to rebut the foregoing precedent, Cross River alleges that it may lawfully transfer its interest exportation rights to Marlette pursuant to the "valid when made rule." (Dkt. #1, at ¶¶ 3, 78, 90-92, 103-104.) According to Cross River, that rule provides that "a loan which was non-usurious when made cannot become usurious upon assignment." (*Id*. at ¶ 90.)

As support for this argument, Cross River quotes two Supreme Court cases from the 1800s—*Gaither v. Farmers & Mechs. Bank of Georgetown*, 26 U.S. 37, 43 (1828) and *Nichols v. Fearson*, 32 U.S. 103, 106 (1833). (Dkt. #1, at ¶ 90.) However, Cross River incorrectly interprets

[4] Courts have similarly held that preemption rights provided to banks under the Home Owners' Loan Act ("HOLA") (12 U.S.C. §§ 1461 *et seq*.) cannot be assigned because "preemption is not some sort of asset that can be bargained, sold, or transferred." *Gerber v. Wells Fargo Bank*, 2012 U.S. Dist. LEXIS 15860, at *4 (D. Ariz. Feb. 9, 2012).

those cases. When the nature of the transactions is examined, it is evident that the valid when made rule applies under circumstances wholly different from those Cross River alleges in this case.

Gaither and *Nichols* both address whether promissory notes from valid loans become unenforceable merely because they are transferred (as loan collateral, for example) through a subsequent usurious loan transaction to a new obligee. The cases thus have no bearing on the issue here—whether bank interest exportation rights are assignable—because there is no allegation that Cross River's assignment of the loans to Marlette involves a subsequent usurious transaction.

In *Gaither*, a lender (W.W. Corcorran) made a non-usurious loan (Loan 1) to a borrower (Gaither). 26 U.S. at 41-42. The lender then used the promissory note from Loan 1 as collateral to secure a subsequent loan (Loan 2) from a third party (F&M Bank). *Id*. at 41. Loan 1 was "unaffected with usury in its origin" but Loan 2 carried a usurious rate. *Id*. at 42. The third-party, who received Loan 1's promissory note by assignment from the first lender, sued the borrower to enforce his obligation under the Loan 1 note. *Id*. at 41-42. As a defense, the borrower asserted that because the third party received the note in connection with Loan 2, which was usurious, the third party could not enforce the Loan 1 promissory note against the borrower. *Id*. at 42.

The court rejected the borrower's defense and held that "if the note be free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury." *Id*. at 43. *Nichols* involved the same general fact pattern as was at issue in *Gaither*.[5]

[5] In *Nichols*, the lender (Fearson) made a non-usurious loan (Loan 1). *Nichols*, 32 U.S. at 106. The lender then received a usurious loan from a third party (Nichols) by selling the third party the promissory note from Loan 1 at "a discount beyond the legal rate of interest." *Id*. The

In contrast to *Gaither* and *Nichols*, there is no "subsequent usurious transaction" between Cross River and Marlette that is alleged to invalidate a consumer's loan obligation. Instead, Marlette merely purchased the subject consumer loans from Cross River. (Dkt. #1, at ¶ 5, 84) Accordingly, although Cross River cites to *Gaither* and *Nichols* as primary support for the applicability of the "valid when made rule," neither case provides relevant precedent for the issue presented by Cross River's complaint.[6]

IV. If the Enforcement Action is remanded, this Court should abstain under *Younger v. Harris*, or, alternatively, decline jurisdiction under the Declaratory Judgments Act

If the Enforcement Action—currently pending in federal court—is remanded pursuant to the Administrator's pending motion, this case is properly dismissed under principles of abstention. Under the *Younger* abstention doctrine, "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 237-38 (1984). *Younger* and its progeny require federal courts to abstain from exercising jurisdiction if (1) there is an ongoing state criminal, civil, or

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question presented was whether the obligation under the Loan 1 note was invalidated because the third party received the note through a usurious transaction (the discounted sale of the existing note). The court held that the third party could enforce the note, notwithstanding the subsequent usurious transaction, because, citing *Gaither*, "a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction." *Id.* at 106.

[6] In further support of the valid when made rule, Cross River cites to an amicus brief that the United States and the Comptroller of the Currency collectively submitted to the Supreme Court in connection with *Madden*, *cert denied*, 136 S. Ct. 2505 (2016). (Dkt. #1, ¶ 91.) However, the judiciary—not the executive branch—interprets federal statutes. *Bishop v. Smith*, 760 F.3d 1070, 1090 (10th Cir. 2014). Also, the amicus brief relied upon the misunderstanding of the holding in *Gaither* and *Nichols* that is explained above. *See also Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1369 (D. Utah 2014) (citing *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 148-49 (5th Cir. 1981), which, in turn, cites to *Nichols* in support of its misapplication of the valid when made rule).

administrative proceeding; (2) the state proceeding provides an adequate forum to hear the plaintiff's federal claims; and (3) the state proceeding involves important state interests. *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999).[7] If these three elements are met, *Younger* is mandatory and the case must be dismissed, absent extraordinary circumstances. *Id.*

The type of state civil proceeding that implicates *Younger* is a "civil enforcement proceeding[]" initiated by a state entity to sanction the state-court defendant for a wrongful act. *See Brown v. Day*, 555 F.3d 882, 890 (10th Cir. 2009) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975)). Here, the Administrator filed the Enforcement Action pursuant to her authority to enforce the Uniform Consumer Credit Code (UCCC)—precisely the type of proceeding contemplated by *Younger*. (**Ex.A**.at ¶ 1)

However, the state proceeding has since been removed to federal court, where the Administrator's motion to remand for lack of subject matter jurisdiction is currently pending. (No. 1:17-cv-00620-WJM-STV, Dkt. #28.) If the Court grants the Administrator's motion, *Younger* applies and abstention is required. *See, e.g., Monster Beverage Corp. v. Herrera*, 2013 U.S. Dist. LEXIS 189315 *14-16 (C.D. Cal. December 16, 2013), *aff'd Monster Bev. Corp. v. Herrera*, 650 Fed. Appx. 344 (9th Cir. 2016) (dismissing complaint based on *Younger* abstention after state case was remanded from federal court).

The second element—that the state proceeding provides an adequate forum—is met by

[7] This Court has since questioned whether *Amanatullah*'s three-factor test was implicitly overruled by *Sprint Commns. Inc. v. Jacobs*, 134 S. Ct. 584 (2013). *See Brumfiel v. U.S. Bank, N.A.*, 2014 U.S. Dist. LEXIS 171471 (D. Colo. Dec. 11, 2014). However, the Tenth Circuit continues to recite the test. *See, e.g., Hunter v. Hirsig*, 660 Fed. Appx. 711, 714 (10th Cir. 2016). In any event, the Administrator's civil enforcement proceeding, akin to a criminal proceeding, fits within *Sprint's* framework of cases to which *Younger* abstention applies.

the Enforcement Action. Cross River seeks a declaration that federal law preempts Colorado's usury laws and seeks an injunction against the Administrator from enforcing Colorado's UCCC against loans it ostensibly originates. (Dkt. #1, at ¶¶ 99-107). Likewise, Marlette raises the same defense in its Notice of Removal. (1:17-cv-00575-PAB-MJW, Dkt. #1, at ¶¶ 4-5.) Anticipating this, the Administrator addressed the inapplicability of federal law in her state-court complaint. (Ex. A, at ¶¶ 29-30.)

Cross River's interests thus are aligned with Marlette's on the issue of preemption because, if remanded, the state court will necessarily determine whether state law applies to the Marlette-purchased loans originated by Cross River. "The rule in *Younger v. Harris* is designed to permit state courts to try state cases free from interference by federal courts," and "[t]he same comity considerations apply … where the interference is sought by [individuals who are] not parties to the state case." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975) (internal quotation marks and citations omitted). Thus, the second element is satisfied.

The final element requires the state proceeding to involve important state interests, which the Administrator's case fulfills. State interests are important when they implicate "matters which traditionally look to state law for their resolution, or implicate separately articulated state policies." *Amanatullah*, 187 F.3d at 1164-65. Usury laws for non-bank entities are traditionally regulated by state law or a state's constitution. "All but a small minority of states have capped interest rates on loans with usury laws, and the price charged for making usurious loans has been regulated by laws in almost every state…" 73 A.L.R.6th 571. Colorado has adopted the UCCC, which applies interest rate caps to consumer credit transactions. *See generally* C.R.S. § 5-1-101 *et seq.* Because the Administrator's complaint involves an issue that traditionally looks to state

law for resolution and implicates state policies, the third element is satisfied. All three *Younger* elements are present, if the Marlette case is remanded to state court, and abstention would then be mandatory. *See Amanatullah*, 187 F.3d at 1163.

Alternatively, this Court may also decline to exercise its jurisdiction under the Declaratory Judgments Act. 28 U.S.C. §§ 2201-2202. The "existence of a 'case' in the constitutional sense does not confer upon a litigant an absolute right to a declaratory judgment." *Kunkel v. Cont'l Casualty Co.*, 866 F.2d 1269, 1273 (10th Cir. 1989). "A federal court generally should not entertain a declaratory judgment action over which it has jurisdiction if the same fact-dependent issues are likely to be decided in another pending proceeding." *Id.* at 1276. The Tenth Circuit applies a five-factor test in determining whether a district court should decline to exercise jurisdiction:

> [1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to res judicata"; [4] whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

State Farm Fire Cas. Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir. 1994).

Cross River's complaint raises legal issues, already being addressed by the Administrator and Marlette, which will necessarily be decided in the Enforcement Action. Cross River filed this case after the Administrator's complaint was filed against Marlette, and after Marlette removed the case to federal court; thus, the complaint appears to be used for the purpose of "procedural fencing" or "to provide an arena for a race to res judicata." If the Marlette case is remanded to state court, this declaratory action could increase friction between the federal and state courts and

encroach upon state jurisdiction. No declaration by this Court is necessary to resolve the legal issues raised in this case. Accordingly, this Court may decline jurisdiction under the Declaratory Judgments Act.

CONCLUSION

The Administrator respectfully requests that the Court dismiss Cross River's complaint with prejudice. First, this Court lacks subject matter jurisdiction over the claims because they seek only to enforce a defense to the Administrator's state law claims against Marlette. Second, Marlette, and not Cross River, has standing to litigate. Third, Cross River's claim fails as a matter of law because interest exportation belongs to banks only and cannot be assigned. Finally, the court should dismiss this case pursuant to *Younger* abstention if the Enforcement Action is remanded to state court, or, alternatively, should decline to exercise jurisdiction pursuant to the Declaratory Judgments Act.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: February 15, 2017 10:46 AM FILING ID: 1D0A27BA15030 CASE NUMBER: 2017CV30376
JULIE ANN MEADE, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, Plaintiff, v. MARLETTE FUNDING LLC d/b/a BEST EGG, Defendant.	▲ **COURT USE ONLY** ▲
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AMENDED COMPLAINT	

Plaintiff Julie Ann Meade, Administrator, Uniform Consumer Credit Code ("the Administrator"), by and through the undersigned counsel, for her amended complaint against Marlette Funding LLC d/b/a Best Egg ("Marlette"), alleges as follows:

I. PARTIES

1. The Administrator is the duly appointed Administrator of the Uniform Consumer Credit Code ("the UCCC"). She is authorized to enforce compliance with the UCCC, *see* C.R.S. §§ 5-6-101, *et seq.*, and may bring a civil action against those who make or collect charges in excess of those permitted by the UCCC. In such action, the Administrator may seek injunctive relief to restrain persons from violating the UCCC, obtain consumer restitution, and collect civil penalties for violations of the UCCC. *See* C.R.S. §§ 5-6-111, 5-6-112, 5-6-113, and 5-6-114.

EXHIBIT A

2. Defendant Marlette does business as "Best Egg" and is a foreign company organized under the laws of Delaware. Marlette identifies its principal place of business as 1523 Concord Pike, Suite 201, Wilmington, Delaware 19803. Marlette is licensed by the Administrator as a Colorado supervised lender, license number 992119.

II. GENERAL FACTS

A. Marlette's Supervised Lender's License

3. Marlette has been licensed by the Administrator as a Colorado supervised lender from May 2014 through the present.

B. The Best Egg Loans

4. Per the "About" page of its website (**Exhibit A**), Marlette is a self-described "specialty finance company" formed in 2013.

5. In 2014, Marlette launched its first product, which it refers to as "Best Egg personal loans" (hereinafter "Best Egg Loans").

6. The Best Egg Loans are loans that are made or arranged by a business entity that is regularly engaged in the business of making loans.

7. Consumers can apply for and obtain Best Egg Loans via a website that is owned and operated by Marlette. The website has the following internet address: https://www.mybestegg.com/.

8. The Best Egg Loans are made to consumers who are persons, as opposed to business entities.

9. By receiving Best Egg Loans, consumers incur debt, and the debt is incurred primarily for personal, family, or household purposes.

10. The debt that consumers incur as a result of the Best Egg Loans is by written agreement payable in installments and a finance charge is made.

11. The principal loaned to consumers who receive Best Egg Loans does not exceed $75,000.

12. Best Egg Loans have been made to consumers who are residents of Colorado (hereinafter "the Colorado Best Egg Loans").

13. The residents of Colorado who have received the Colorado Best Egg

Loans have received the loans from a creditor who has solicited or advertised the Colorado Best Egg Loans in Colorado.

14. The means of advertising the Colorado Best Egg Loans have included, without limitation, advertisements that were sent to Colorado residents by mail.

15. From approximately September 2014 through the present, Marlette has acted as a "creditor," as defined in C.R.S. § 5-1-301(17), with respect to the Colorado Best Egg Loans.

16. From approximately September 2014 through the present, Marlette has made charges to Colorado consumers on the Colorado Best Egg Loans that are owned by non-bank entities ("Non-Bank Colorado Best Egg Loans").

17. From approximately September 2014 through the present, Marlette has undertaken direct collection of payments from or enforcement of rights against consumers arising from Non-Bank Colorado Best Egg Loans.

18. Marlette has made or collected charges from consumers on Non-Bank Colorado Best Egg Loans which exceed the maximum finance charges that are permitted for supervised loans under Colorado law.

19. The written agreements evidencing Non-Bank Colorado Best Egg Loans state, "[i]f your payment is not received by us within three days of the due date, we may charge a late fee in the amount of $15."

20. Marlette has made or collected delinquency charges on Non-Bank Colorado Best Egg Loans when consumers have not made a payment on Non-Bank Colorado Best Egg Loans by the scheduled due date.

21. Marlette has made or collected delinquency charges on Non-Bank Colorado Best Egg Loans without waiting at least ten days after the scheduled due date before making or collecting the delinquency charges.

22. The written agreements evidencing Non-Bank Colorado Best Egg Loans state, "to the extent that state law applies [to this Agreement], the laws of the state of New Jersey" apply.

23. The written agreements evidencing Non-Bank Colorado Best Egg Loans state, "Extension Fees. You agree to pay a fee of $25 or such other amount as provided by law for the processing of your request for an extension of this Agreement."

C. Marlette's Association with Cross River Bank

24. The Best Egg Loans are made to consumers pursuant to a lending program established by written agreements between Marlette and Cross River Bank, a New Jersey state-chartered bank (the "Best Egg lending program"). The agreements were originally dated February 28, 2014 and have subsequently been amended.

25. Cross River Bank is identified in the agreements as the entity that makes the Best Egg Loans to consumers.

26. However, within two business days of when the loans are made, Cross River Bank sells approximately 90% of the Best Egg Loans to Marlette or Marlette's non-bank designees.

27. With respect to such Best Egg Loans that Cross River Bank sells to Marlette or Marlette's non-bank designees, a primary purpose of Cross River Bank's involvement is to allow Marlette and other non-banks to circumvent state laws, including Colorado laws, that limit the interest rates and other finance charges that may be assessed on the Best Egg Loans.

28. Specifically, unlike Marlette, certain banks may, pursuant to federal law, lawfully lend in Colorado and other states at rates that exceed the interest and other finance charge limits imposed by state law. This right is sometimes referred to as federal interest rate exportation.

29. Marlette and other non-banks cannot, however, enforce a bank's federal interest rate exportation rights when they purchase loans from banks because banks cannot validly assign such rights to non-banks. *E.g. Madden v. Midland Funding, LLC*, 786 F.3d 246, 250 (2d Cir. 2015) (distinguishing contrary precedent, and holding that non-bank purchaser of national bank's loan could not enforce bank's right to federal interest rate exportation).

30. Further, with respect to the Best Egg Loans that Cross River Bank sells to Marlette or Marlette's non-bank designees, Cross River Bank is not the true lender of the loans and, because the loans therefore are not made by a bank, federal interest rate exportation does not apply for this additional reason. *E.g. CashCall, Inc. v. Morrisey*, 2014 W. Va. LEXIS 587 (W. Va. May 30, 2014) (memorandum decision) (national bank that sold loans to non-bank was not the true lender of the loans because the non-bank purchaser bore the predominant economic interest in the loans and non-bank purchaser therefore could not enforce bank's right to federal interest rate exportation).

31. Cross River Bank is not the true lender of the Best Egg Loans that it sells to Marlette or Marlette's non-bank designees because Cross River Bank does not bear the predominant economic interest in the loans.

32. Among other reasons, Cross River Bank does not bear the predominant economic interest in such loans because:

a. Marlette paid all of Cross River Bank's costs associated with the initiation of the Best Egg lending program.

b. Marlette pays Cross River Bank's legal fees related to the Best Egg lending program.

c. Marlette pays the costs associated with marketing the Best Egg Loans to consumers.

d. Marlette pays all costs of determining which loan applicants will receive Best Egg Loans, including employing staff to evaluate loan applications and including the cost of purchasing credit reports.

e. Marlette decides which loan applicants will receive Best Egg Loans, applying lending criteria agreed to by Marlette and Cross River Bank.

f. Marlette has established and maintains, at its own expense, an accounting and loan tracking system to track Best Egg Loan applications, Best Egg Loans, and Best Egg Loan repayment information.

g. Cross River Bank bears no risk that it will lose its principal in the event that consumers default on the Best Egg Loans that it sells to Marlette or Marlette's non-bank designees: (1) when Cross River Bank makes Best Egg Loans that are to be sold, Cross River Bank knows in advance that Marlette has sufficient funds to purchase the loans because Marlette is required to maintain a bank account at Cross River Bank (or another approved bank) with such funds; (2) Marlette or its designee purchase the Best Egg Loans from Cross River Bank within two business days of when the loans are made and the purchase price includes the amount that Cross River Bank advanced to the consumer, in addition to other amounts; (3) by contractual agreement, Cross River Bank has no liability to Marlette for the repayment of the Best Egg Loans, which are sold "without recourse;" and (4) Marlette is obligated to indemnify Cross River Bank against any claim that any aspect of the Best Egg lending program violates the law.

h. Marlette raises capital to fund the origination of Best Egg Loans. On July 17, 2015, Marlette announced that it raised $75 million in equity funding to accelerate growth, further its partnership agenda, and begin putting Best Egg Loans on its own balance sheet, as opposed to selling them to third-party investors. As of July 17, 2015, Marlette's 2015 Best Egg Loan originations had already far exceeded its 2014 full-year total of $383 million. In August 2016, Marlette raised $205 million through the sale of securities to be used by Marlette to fund the Best Egg Loans. Marlette is actively closing over $2 billion through the sale of securities to be used by Marlette to fund the origination of Best Egg Loans.

i. When a consumer pays off a Best Egg Loan in accord with the loan agreement, both Cross River Bank and Marlette (or its designee) share in the profit earned on the loan, but Cross River Bank's share is only approximately one percent (1%) of the total profit.

j. Cross River Bank cannot use, sell, or transfer information regarding consumers who have applied for or obtained Best Egg Loans unless it obtains Marlette's consent.

33. Accordingly, Marlette and its affiliated non-bank entities are the true lender of the Best Egg Loans that Marlette purchases, or that are purchased by its designees.

D. The Administrator's Compliance Examination

34. In 2015, the Administrator conducted a compliance examination of Marlette, pursuant to the statutory authority set forth in C.R.S. § 5-2-305.

35. By a report of examination dated December 4, 2015, the Administrator informed Marlette, amongst other things, that Marlette was charging finance charges, late charges, and extension fees that violated Colorado law. The report of examination further informed Marlette that the loan agreements for the Colorado Best Egg Loans contracted for the application of New Jersey law, in violation of Colorado law.

36. In the report of examination, the Administrator directed Marlette to make refunds to consumers of certain excess charges and fees and to apply Colorado law instead of New Jersey law with respect to loan agreements with Colorado consumers.

37. Marlette responded to the report of examination by stating that its

association with Cross River Bank meant that Colorado law provisions regarding finance charge limits and choice of law restrictions were preempted.

38. After reviewing additional information from Marlette and considering its position, the Administrator informed Marlette that she rejected the position and renewed her request that Marlette take the corrective actions identified in the report of examination.

39. Marlette has refused to take the corrective actions directed by the Administrator in her report of examination with respect to excess finance charges, late charges, extension fees, and provisions in consumer agreements contracting for the application of New Jersey law.

III. FIRST CLAIM FOR RELIEF
EXCESS CHARGES

40. The Administrator repeats and realleges the paragraphs above, as if alleged herein.

41. Marlette has charged, assessed, collected, or received finance charges and delinquency charges in connection with Non-Bank Colorado Best Egg Loans that exceed the finance charges authorized and allowable under C.R.S. § 5-2-201 and the delinquency charges authorized and allowable under C.R.S. § 5-2-203.

IV. SECOND CLAIM FOR RELIEF
UNLAWFUL CHOICE OF LAW PROVISION

42. The Administrator repeats and realleges the paragraphs above, as if alleged herein.

43. The written agreements evidencing Non-Bank Colorado Best Egg Loans include terms that purport to provide that the law of a state other than Colorado applies, in violation of C.R.S. § 5-1-201(8).

V. THIRD CLAIM FOR RELIEF
UNLAWFUL EXTENSION FEE PROVISION

44. The Administrator repeats and realleges the paragraphs above, as if alleged herein.

45. The written agreements evidencing Non-Bank Colorado Best Egg Loans include terms that purport to permit the creditor to charge a fee of $25 for the processing of a consumer's request for the extension of the agreement, in violation of

C.R.S. §§ 5-2-201 and 5-2-204.

WHEREFORE, the Administrator requests judgment, as follows:

(i) preliminarily and permanently enjoining Marlette, and its officers, directors, agents, servants, employees, attorneys, heirs, successors, and assigns, from committing any of the practices, acts, conduct, transactions, or violations described above, or otherwise violating the UCCC, together with all such other relief as may be required to completely compensate or restore to their original position all consumers injured or prevent unjust enrichment of any person, by reason or through the use or employment of such practices, acts, conduct, or violations, or as may otherwise be appropriate, including, without limitation, requiring Marlette to disgorge to the Administrator or make restitution to consumers of all amounts charged, assessed, collected, or received in violation of the UCCC;

(ii) for every consumer credit transaction as may be determined at trial or otherwise in which a consumer was charged an excess charge in violation of the UCCC, ordering Marlette to refund to each such consumer the excess charge;

(iii) for every consumer credit transaction as may be determined at trial or otherwise in which a consumer was charged an excess charge, ordering Marlette to pay to each such consumer a civil penalty determined by the Court not in excess of the greater of either the amount of the finance charge or ten times the amount of the excess charge;

(iv) ordering Marlette to pay to the Administrator a civil penalty determined by the Court within the limits set forth by statute;

(v) awarding pre- and post-judgment interest to the Administrator, as may be allowed by contract, law, or otherwise; and

(vi) awarding the Administrator the costs and disbursements of this action, including attorney's fees, together with all such further relief as the Court deems just.

DATED: February 15, 2017

CYNTHIA H. COFFMAN
Attorney General

/s/ *Nikolai N. Frant*
NIKOLAI N. FRANT, 38716*
Senior Assistant Attorney General
Consumer Credit Unit
Consumer Protection Section
Attorneys for Plaintiff
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing AMENDED COMPLAINT was duly served by E-Filing upon the following this 15th day of February, 2017:

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I

114TH CONGRESS
2D SESSION

H. R. 5724

To amend the Revised Statutes of the United States and the Federal Deposit Insurance Act to require the rate of interest on certain loans remain unchanged after transfer of the loan, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 2016

Mr. MCHENRY introduced the following bill; which was referred to the Committee on Financial Services

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A BILL

To amend the Revised Statutes of the United States and the Federal Deposit Insurance Act to require the rate of interest on certain loans remain unchanged after transfer of the loan, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Protecting Consumers' Access to Credit Act of 2016''.

SEC. 2. RATE OF INTEREST AFTER TRANSFER OF LOAN.

(a) AMENDMENT TO THE REVISED STATUTES.—Section 5197 of the Revised Statutes of the United States

EXHIBIT
B

(12 U.S.C. 85) is amended by adding at the end the following new sentence: ''A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party.''.

(b) AMENDMENT TO THE FEDERAL DEPOSIT INSURANCE ACT.—Section 27(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831d(a)) is amended by adding at the end the following new sentence: ''A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party.''.

○

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:17-cv-00786-PAB-CBS

WEBBANK,

Plaintiff,

v.

JULIE ANN MEADE, in her official capacity as Administrator of the Uniform Consumer Credit Code for the State of Colorado,

Defendant.

DEFENDANT'S 12(b)(1) and (6) MOTION TO DISMISS WEBBANK'S COMPLAINT [DKT. #1]

Defendant Julie Ann Meade ("Administrator") filed a civil enforcement action ("Enforcement Action") in Denver District Court against Avant, Inc. (and its subsidiary), relating to loans made to Colorado consumers. (**Ex. A**.)[1] The Administrator alleges that Avant and WebBank, a Utah state-chartered bank, have entered into an arrangement whereby Avant purports to use WebBank's right under federal law to "export" the interest rate of WebBank's home state when lending in Colorado in order to exceed Colorado's state interest rate caps. (*Id.* at ¶ 27.) However, Avant is the true lender of the loans—performing the tasks fundamental to the business of lending and holding the predominant economic interest in the loans. (*Id.* at ¶¶ 32-35.) WebBank receives a small share of the profit (approximately 1%) for its nominal role in the

[1] In resolving a motion to dismiss, the Court may consider documents referenced in the complaint or that otherwise inform the basis of the plaintiff's claim and may take judicial notice of facts which are a matter of public record. *Wolfe v. AspenBio Pharma, Inc.*, 2012 U.S. Dist. LEXIS 130490, *7 (D. Colo. Sept. 13, 2012).

arrangement. (*Id.* at 34.)

The Enforcement Action against Avant—not WebBank—asserts only state-law claims. Avant removed the case to this Court (No. 1:17-cv-00620-WJM-STV), claiming federal preemption as the basis for jurisdiction. The Administrator's motion to remand is pending.

In the meantime, WebBank filed this suit, seeking to address the federal preemption issues already being litigated in the Enforcement Action. WebBank's claim, which seeks only declaratory and injunctive relief, should be dismissed because:

1. this Court lacks subject matter jurisdiction over WebBank's claim under the well-pleaded complaint rule;
2. the alleged injury belongs to Avant, and WebBank thus lacks standing;
3. WebBank's suit fails as a matter of law because the subject preemption rights cannot be enforced by non-banks; and
4. pursuant to *Younger* abstention, Cross River's complaint should be dismissed if the Administrator's pending motion to remand the Enforcement Action is granted.

ARGUMENT

I. The Court lacks subject matter jurisdiction under the well-pleaded complaint rule because WebBank seeks only to establish a defense

WebBank asserts that this Court has subject matter jurisdiction over its claims pursuant to 28 U.S.C. § 1331 and §§ 2201-2202. (Dkt. #1, at ¶ 14.) As the plaintiff, WebBank bears the burden of establishing the Court's subject matter jurisdiction. *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008). Applying the well-pleaded complaint rule, however, this Court lacks subject matter jurisdiction over WebBank's claim.

The well-pleaded complaint rule provides that a federal preemption defense does not, by itself, give rise to federal question jurisdiction. *See Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) ("a defense that relies on … the pre-emptive effect of a federal statute … will not provide

a basis for removal") (citation omitted). When a party seeks to declare that a state law is preempted, the suit effectively reverses the position of plaintiff and defendant—stating an affirmative defense in the form of a complaint. Under those circumstances, the well-pleaded complaint rule nevertheless applies. "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction…." *See Madsen v. Prudential Fed. S&L Ass'n*, 635 F.2d 797, 803 (10th Cir. 1980) (citation omitted).

Here, WebBank seeks a declaration, based on the Administrator's Enforcement Action against Avant, that Colorado law is preempted by federal banking law. (Dkt. #1, at ¶¶ 74, 85-92.) The character of the state-court action determines whether there is federal question jurisdiction, and the Administrator asserts only state-law claims in that action. Accordingly, under the well-pleaded complaint rule, the Court lacks subject matter jurisdiction over WebBank's suit.

An exception to the well-pleaded complaint rule exists but is inapplicable here. The Supreme Court has held that state usury claims asserted directly against a *national* bank are "completely preempted" notwithstanding the well-pleaded complaint rule. *Anderson*, 539 U.S. at 11. WebBank, however, is a state bank. The Supreme Court has never applied the complete preemption doctrine to usury claims against state-chartered banks.

The Eighth Circuit has held that usury claims against state banks are *not* completely preempted, examining the textual differences between the two applicable federal interest exportation statutes in support of its conclusion. *Thomas v. US Bank Nat'l Ass'n*, 575 F.3d 794, 799-800 (8th Cir. 2009) (rejecting contrary holdings of the Third and Fourth Circuits which did

not examine the textual differences). As a state bank, complete preemption therefore does not apply, and WebBank's claims should be dismissed for lack of subject matter jurisdiction.

II. WebBank lacks standing because the Enforcement Action seeks relief only from Avant; the alleged WebBank injury is too attenuated

Throughout its complaint, WebBank alleges that it has standing because it has suffered harm as a result of the Enforcement Action. (Dkt. #1, at ¶¶ 10, 11, 12, 28, 78, 80–83.) However, the Enforcement Action seeks no relief against WebBank. (Ex. A, at ¶¶ 42-45.) Aside from WebBank's conclusory allegations, which cannot give rise to standing, the alleged injuries identified by WebBank belong to Avant or are too attenuated to constitute standing.

A federal plaintiff must establish standing by alleging "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Qwest Corp. v. PUC of Colo.*, 479 F.3d 1184, 1191 (10th Cir. 2007). WebBank acknowledges that the Enforcement Action is against Avant alone, but contends that it "cannot leave its dispute with the Administrator to be resolved only in [that] context" because "the impact of that action is not limited to Avant." (Dkt. #1, at ¶ 10.) However, such conclusory allegations do not give rise to standing. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

WebBank also alleges that since August 1, 2016, it has retained "an economic interest" in loans originated through the "Avant platform" because it is "entitled to a portion of the borrower payments." (Dkt. #1, at ¶ 27.) However, the Enforcement Action does not seek to prevent *WebBank* from collecting borrower payments, but WebBank claims that it has been indirectly injured by the suit's impact on Avant and the "secondary investor market." (*Id*. ¶ 28.) Another district court has rejected this exact argument—that a bank's allegations of indirect harm gave rise to standing. *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711 (E.D. N.C. 2002).

In *Lingerfelt*, a state attorney general sued a non-bank payday lender, alleging that the non-bank was liable under state usury law for charges that it made on loans that purported to be originated by a national bank. *Id*. at 713-14. After the non-bank unsuccessfully attempted to remove the attorney general's state claims to federal court, the bank sued the attorney general in a separate action in federal court and sought a declaration that the payday lender, which acted as the bank's "agent in promoting, originating, and servicing [the bank's loans]," was not subject to state usury laws because of the bank's interest exportation rights. *Id*. at 714 & n.4.

In dismissing the bank's claim for lack of standing, the court reasoned that the attorney general asserted only state-law claims against the non-bank, that the attorney general had alleged the bank was not the true lender, and that the indirect effect on the bank was not enough to give it standing. *Id*. WebBank's complaint raises nearly identical claims, seeking a declaration that the Enforcement Action against Avant is preempted because of WebBank's role in originating the subject loans. Like *Lingerfelt*, WebBank's allegations are insufficient to give it standing.

Finally, WebBank contends that it ceased making Avant loans in Colorado in August 2016, another alleged injury. (Dkt. #1, at ¶ 28.) However, that injury is self-inflicted because the Enforcement Action does not seek to enjoin WebBank from lending. Self-inflicted injuries do not give rise to standing. *Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (citations omitted) ("self-inflicted" harm does not satisfy the standing requirement because it is not a "cognizable injury" under Article III); *Pierce v. Green Tree Servicing*, 2015 U.S. Dist. LEXIS 148809, 5-6 (D. Colo. Nov. 3, 2015) (same). Accordingly, WebBank's complaint should be dismissed for lack of standing.

III. WebBank's complaint fails to state a claim under Rule 12(b)(6) because interest exportation does not preempt the application of state usury laws to non-banks as a matter of law

WebBank's claim should also be dismissed under Rule 12(b)(6) because, as a matter of law, it is not entitled to the declaration it seeks. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks and citation omitted). WebBank contends that its interest exportation right "preempts the application of state law" with respect to loans that WebBank sells to third parties such as Avant. (*Id*. at ¶ 90.) But, as explained below, that right cannot be assigned to non-banks as a matter of law.[2]

A. Interest exportation is created by federal statute

Interest exportation originates from the National Bank Act, passed in 1864. Under the NBA, banks may charge "interest at the rate allowed by the laws of the State, Territory, or District where the bank is located." 12 U.S.C. § 85. When a state's usury laws are more restrictive than the laws of a national bank's home state, "state usury laws must … give way to the federal statute." *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 319 (1978).

The NBA's exportation provision does not apply to state-chartered banks; however, Congress extended interest exportation rights to FDIC-insured state banks by enacting Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA").[3]

[2] Pursuant to this Court's 12(b)(6) practice standards, the Administrator does not contend that Cross River failed to plead a necessary element of its claim; rather, the Administrator contends Cross River is not entitled to the relief it seeks as a matter of law.

[3] Section 521 of DIDA was codified by adding Section 27 to the Federal Deposit Insurance Act (12 U.S.C. § 1831d).

Greenwood Trust Co. v. Mass., 971 F.2d 818, 826 (1st Cir. 1992) (citing 12 U.S.C. § 1831d(a)).

B. Only banks can export interest; the right cannot be enforced by bank subsidiaries, affiliates, or agents, and cannot be assigned

WebBank asserts that federal law preempts Colorado's ability to enforce its usury laws against Avant. (Dkt. #1, at ¶¶ 65, 90.) When courts determine whether federal statutes preempt state law, the "ultimate touchstone" is the intent of Congress. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Thus, the inquiry here is whether Congress, when enacting the interest exportation provisions of the NBA and DIDA, intended to preempt state laws that would otherwise apply to non-banks.

If Congress has not explicitly stated that a statute is intended to preempt a specific area of state law, a court can find that a state law is preempted only if the statute's "structure and purpose" reveal an implicit Congressional intent to preempt. *Nelson*, 517 U.S. at 30-31. This occurs where Congress has created a pervasive regulatory scheme (field preemption) or if a state law prevents or significantly interferes with federal law (conflict preemption). *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

Federal banking laws do not preempt the entire field of regulation. *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 30 (1996). Instead, a conflict preemption analysis applies. 12 U.S.C. § 25b(b) (adopting the *Nelson* preemption standard and confirming that the NBA "does not occupy the field in any area of State law"); *Bankwest, Inc. v. Baker*, 411 F.3d 1289, 1302 (11th Cir. 2005) (applying conflict preemption to state bank loans), *vacated as moot* 446 F.3d 1358 (11th Cir. 2006).

Congress could have provided in the NBA and DIDA that the banks' interest exportation rights preempt state laws as applied to non-banks. However, neither statute includes any such

express provision, stating instead that interest exportation rights belong to banks. *See* 12 U.S.C. § 1831d(a); 12 U.S.C. § 85.

Legislation was introduced into Congress last year that would have amended the NBA and DIDA to extend exportation rights to non-banks. House Bill 5724 sought to amend both statutes to provide that "[a] loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party." H.R. 5724, 114th Cong. (2016) (**Ex. B**). However, House Bill 5724 was never enacted.

In 2007, the Supreme Court held that the NBA interest exportation provision applied to operating subsidiaries and other non-bank "affiliates" of national banks. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 19-21 (2007) ("The NBA is thus properly read … to protect from state hindrance a national bank's engagement in the 'business of banking' whether conducted by the bank itself or by an operating subsidiary…."). But in 2010 Congress overturned *Watters* by enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203. Dodd-Frank amended the NBA to clarify that the NBA's preemptive scope specifically does *not* extend to subsidiaries, affiliates, or agents of national banks. 12 U.S.C. § 25b(h). *See Gordon v. Kohl's Dept. Stores.*, 172 F. Supp. 3d 840, 863-64 (E.D. Pa. 2016) (noting that Dodd-Frank "effectively overturned" *Watters* and citing 12 U.S.C. § 25b(h) in finding that state-law claims against store that serviced national bank's loans were not preempted).

Given that state usury claims against bank subsidiaries, affiliates, and agents are not preempted, such claims certainly are not preempted when asserted against third parties who purchase bank loans. Third-party purchasers act on their own behalf and have an even more

remote claim to a bank's interest exportation rights than bank subsidiaries or agents. *E.g.*, *Pennsylvania v. Think Fin., Inc.*, 2016 U.S. Dist. LEXIS 4649, *40-41 (E.D. Pa. Jan. 14, 2016) (preemption defense weaker for loan assignees than for bank subsidiaries) (citing cases).

In accord, the Second Circuit recently held that although a non-bank could purchase credit card debt from a national bank, the non-bank could not enforce the bank's interest exportation rights. *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2505, 195 L. Ed. 2d 839 (2016). The loan at issue in *Madden* was extended by a national bank to a New York consumer. *Id*. at 248. The loan carried an interest rate that exceeded New York's usury limits but was permissible in the bank's home state. *Id*. at 248-49. The bank then sold the loan to Midland, and the consumer challenged Midland's right to enforce the bank's interest exportation rights. *Id*. The court concluded that applying New York's interest cap to Midland would not "significantly interfere" with the bank's powers; therefore, conflict preemption did not apply. *Id*. at 251-52. The "extension of NBA preemption to third-party debt collectors such as the defendants would be an overly broad application of the NBA." *Id*.[4]

Thus, the language of the relevant banking statutes, supported by the case law, compels the conclusion that Congress unambiguously intended to grant interest exportation rights only to banks. Those rights do not preempt state law as applied to non-bank purchasers.

C. The "valid when made" rule is irrelevant to whether WebBank may assign its interest exportation rights

In an effort to rebut the foregoing precedent, WebBank alleges that it may lawfully

[4] Courts have similarly held that preemption rights provided to banks under the Home Owners Loan Act ("HOLA") (12 U.S.C. §§ 1461 *et seq*.) cannot be assigned because "preemption is not some sort of asset that can be bargained, sold, or transferred." *E.g., Gerber v. Wells Fargo Bank*, 2012 U.S. Dist. LEXIS 15860,vat *4, 10 (D. Ariz. Feb. 9, 2012).

transfer its interest exportation rights to Avant pursuant to the "valid when made rule." (Dkt. #1, at ¶¶ 40-42, 90.) According to WebBank, that rule provides that "if the interest-rate terms in a bank's original loan agreement were valid when made, then those terms remain valid after assignment, and the assignee may lawfully charge interest at the original rate." (*Id.* ¶ 42.)

As support for this argument, WebBank quotes two Supreme Court cases from the 1800s—*Gaither v. Farmers & Mechanics Bank of Georgetown*, 26 U.S. 37, 43 (1828) and *Nichols v. Fearson*, 32 U.S. 103, 109 (1833). (Dkt. #1, at ¶ 42 n.5.) However, WebBank incorrectly interprets those cases. When the nature of the transactions is examined, it is evident that the valid when made rule applies under circumstances wholly different from those WebBank alleges in this case.

Gaither and *Nichols* both address whether promissory notes from valid loans become unenforceable merely because they are transferred (as loan collateral, for example) through a subsequent usurious loan transaction to a new obligee. The cases thus have no bearing on the issue here—whether bank interest exportation rights are assignable—because there is no allegation that WebBank's assignment of the loans to Avant involves a subsequent usurious transaction.

In *Gaither*, a lender (W.W. Corcorran) made a non-usurious loan (Loan 1) to a borrower (Gaither). 26 U.S. at 41-42. The lender then used the promissory note from Loan 1 as collateral to secure a subsequent loan (Loan 2) from a third party (F&M Bank). *Id.* at 41. Loan 1 was "unaffected with usury in its origin" but Loan 2 carried a usurious rate. *Id.* at 41-42. The third-party, who received Loan 1's promissory note by assignment from the first lender, sued the borrower to enforce his obligation under the Loan 1 note. *Id.* As a defense, the borrower asserted

that because the third party received the note in connection with Loan 2, which was usurious, the third party could not enforce the Loan 1 promissory note against the borrower. *Id*. at 42.

The court rejected the borrower's defense and held that "if the note be free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury." *Id*. at 43. *Nichols* involved the same general fact pattern as was at issue in *Gaither*.[5]

In contrast to *Gaither* and *Nichols*, there is no "subsequent usurious transaction" between WebBank and Avant that is alleged to invalidate a consumer's loan obligation. Instead, Avant merely purchased the subject consumer loans from WebBank. (Dkt. #1, at ¶¶ 17, 22, 40.) Accordingly, although WebBank cites to *Gaither* and *Nichols* as primary support for the applicability of the "valid when made rule," neither case provides relevant precedent for the issue presented by WebBank's complaint.[6]

[5] In *Nichols*, the lender (Fearson) made a non-usurious loan (Loan 1). *Nichols*, 32 U.S. at 106. The lender then received a usurious loan from a third party (Nichols) by selling the third party the promissory note from Loan 1 at "a discount beyond the legal rate of interest." *Id*. The question presented was whether the obligation under the Loan 1 note was invalidated because the third party received the note through a usurious transaction (the discounted sale of the existing note). The court held that the third party could enforce the note, notwithstanding the subsequent usurious transaction, because, citing *Gaither*, "a contract, which, in its inception, is unaffected by usury, can never be invalidated by any subsequent usurious transaction." *Id.* at 109.

[6] In further support of the valid when made rule, WebBank cites to an amicus brief that the United States and the Comptroller of the Currency collectively submitted to the Supreme Court in connection with *Madden v. Midland Funding, LLC, supra*. (Dkt. #1, at ¶ 43.) However, the judiciary—not the executive branch—interprets federal statutes. *Bishop v. Smith*, 760 F.3d 1070, 1090 (10th Cir. 2014). Also, the amicus brief relied upon the misunderstanding of the holding in *Gaither* and *Nichols* that is explained above. *See also Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1369 (D. Utah 2014) (citing *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 148-49 (5th Cir. 1981), which, in turn, cites to *Nichols* in support of its misapplication of the valid when made rule).

IV. If the Enforcement Action is remanded, this Court should abstain under *Younger v. Harris*, or, alternatively, decline jurisdiction under the Declaratory Judgments Act

If the Enforcement Action—currently pending in federal court—is remanded pursuant to the Administrator's pending motion, this case is properly dismissed under principles of abstention. Under the *Younger* abstention doctrine, "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 237-38 (1984). *Younger* and its progeny require federal courts to abstain from exercising jurisdiction if (1) there is an ongoing state criminal, civil, or administrative proceeding; (2) the state proceeding provides an adequate forum to hear the plaintiff's federal claims; and (3) the state proceeding involves important state interests. *Amanatullah v. Colo. Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999). If these three elements are met, *Younger* is mandatory and the case must be dismissed, absent extraordinary circumstances. *Id.*

The type of state civil proceeding that implicates *Younger* is a "civil enforcement proceeding[]" initiated by a state entity to sanction the state-court defendant for a wrongful act. *See Brown v. Day*, 555 F.3d 882, 889-90 (10th Cir. 2009) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 602 (1975)). Here, the Administrator filed the Enforcement Action pursuant to her authority to enforce the Uniform Consumer Credit Code (UCCC)—precisely the type of proceeding contemplated by *Younger*. (Ex. A, at ¶ 1.)

However, the state proceeding has since been removed to federal court, where the Administrator's motion to remand for lack of subject matter jurisdiction is currently pending. (No. 1:17-cv-00620-WJM-STV, Dkt. #28.) If the Court grants the Administrator's motion, the

first element of *Younger* is satisfied, and, upon a showing of the other two elements, abstention is required. *See, e.g., Monster Beverage Corp. v. Herrera*, 2013 U.S. Dist. LEXIS 189315, *14-16 (C.D. Cal. December 16, 2013), *aff'd Monster Bev. Corp. v. Herrera*, 650 Fed. Appx. 344 (9th Cir. 2016) (dismissing complaint based on *Younger* abstention after state case was remanded from federal court).

The second element—that the state proceeding provides an adequate forum—is met by the Enforcement Action. WebBank seeks a declaration that federal law preempts Colorado's usury laws and seeks an injunction against the Administrator from enforcing Colorado's UCCC against loans it ostensibly originates. (Dkt. #1, ¶¶ 85-95). Likewise, Avant raises the same defense in its Notice of Removal. (No. 1:17-cv-00620-WJM-STV, Dkt. #1, ¶¶ 20, 22.) Anticipating this, the Administrator addressed the inapplicability of federal law in her state-court complaint. (Ex. A, at ¶¶ 32-33.)

WebBank's interests thus are aligned with Avant's on the issue of preemption because, if remanded, the state court will necessarily determine whether state law applies to the Avant-purchased loans originated by WebBank. "The rule in *Younger v. Harris* is designed to permit state courts to try state cases free from interference by federal courts," and "[t]he same comity considerations apply … where the interference is sought by [individuals who are] not parties to the state case." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975) (internal quotation marks and citations omitted). Thus, the second element is satisfied.

The final element requires the state proceeding to involve important state interests, which the Administrator's case fulfills. State interests are important when they implicate "matters which traditionally look to state law for their resolution, or implicate separately articulated state

policies." *Amanatullah*, 187 F.3d at 1164-65. Usury laws for non-bank entities are traditionally regulated by state law or a state's constitution. "All but a small minority of states have capped interest rates on loans with usury laws, and the price charged for making usurious loans has been regulated by laws in almost every state…." 73 A.L.R.6th 571. Colorado has adopted the UCCC, which applies interest rate caps to consumer credit transactions. *See generally* C.R.S. § 5-1-101 *et seq*. Because the Administrator's complaint involves an issue that traditionally looks to state law for resolution and implicates state policies, the third element is satisfied. All three *Younger* elements are present, if the Avant case is remanded to state court, and abstention would then be mandatory. *See Amanatullah*, 187 F.3d at 1163.

Alternatively, this Court may decline to exercise its jurisdiction under the Declaratory Judgments Act. 28 U.S.C. §§ 2201-2202. The "existence of a 'case' in the constitutional sense does not confer upon a litigant an absolute right to a declaratory judgment." *Kunkel v. Cont'l Casualty Co.*, 866 F.2d 1269, 1273 (10th Cir. 1989). "A federal court generally should not entertain a declaratory judgment action over which it has jurisdiction if the same fact-dependent issues are likely to be decided in another pending proceeding." *Id.* at 1276. The Tenth Circuit applies a five-factor test in determining whether a district court should decline jurisdiction:

> [1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to *res judicata*"; [4] whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir. 1994).

WebBank's complaint raises legal issues, already being addressed by the Administrator

and Avant, that will necessarily be decided in the Avant case. WebBank filed this case after the Administrator's complaint was filed against Avant, and after Avant removed the case to federal court; thus, the complaint appears to be used for the purpose of "procedural fencing" or "to provide an arena for a race to *res judicata*." If the Avant case is remanded to state court, this declaratory action could increase friction between the federal and state courts and encroach upon state jurisdiction. No declaration by this Court is necessary to resolve the legal issues raised in this case. Accordingly, this Court may decline jurisdiction under the Declaratory Judgments Act.

CONCLUSION

The Administrator respectfully requests that the Court dismiss WebBank's complaint with prejudice. First, this Court lacks subject matter jurisdiction over the claims because they seek only to enforce a defense to the Administrator's state law claims against Avant. Second, Avant, and not WebBank, has standing to litigate. Third, Web Bank's claim fails as a matter of law because interest exportation belongs to banks only and cannot be assigned. Finally, the court should dismiss this case pursuant to Younger abstention if the Enforcement Action is remanded to state court, or, alternatively, should decline to exercise jurisdiction pursuant to the Declaratory Judgments Act.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: February 15, 2017 10:06 AM FILING ID: 296570CFDAA95 CASE NUMBER: 2017CV30377
JULIE ANN MEADE, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, Plaintiff, v. AVANT OF COLORADO LLC d/b/a AVANT, and AVANT INC., Defendants.	▲ **COURT USE ONLY** ▲
CYNTHIA H. COFFMAN, Attorney General NIKOLAI N. FRANT, #38716* Senior Assistant Attorney General Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, Colorado 80203 Phone Number: 720-508-6111 FAX Number: 720-508-6033 Email: nikolai.frant@coag.gov *Counsel of Record	Case No. 17CV30377 Courtroom 368
AMENDED COMPLAINT	

Plaintiff Julie Ann Meade, Administrator, Uniform Consumer Credit Code ("the Administrator"), by and through the undersigned counsel, for her amended complaint against Avant of Colorado LLC d/b/a Avant and Avant Inc., alleges as follows:

I. PARTIES

1. The Administrator is the duly appointed Administrator of the Uniform Consumer Credit Code ("the UCCC"). She is authorized to enforce compliance with the UCCC, *see* C.R.S. §§ 5-6-101, *et seq.*, and may bring a civil action against those who make or collect charges in excess of those permitted by the UCCC. In such action, the Administrator may seek injunctive relief to restrain persons from violating the UCCC, obtain consumer restitution, and collect civil penalties for violations of the UCCC. *See* C.R.S. §§ 5-6-111, 5-6-112, 5-6-113, and 5-6-114.

EXHIBIT A

2. Defendant Avant of Colorado LLC d/b/a Avant ("Avant of CO") is a foreign limited liability company organized under the laws of Delaware. Avant of CO identifies its principal place of business as 222 N. LaSalle Street, Suite 1700, Chicago, Illinois 60601. Avant of CO was formerly known as AvantCredit of Colorado, LLC. Avant of CO is a wholly-owned and wholly-operated subsidiary of Avant Inc.

3. Defendant Avant Inc. is a foreign corporation organized under the laws of Delaware. Avant Inc. identifies its principal place of business as 222 N. LaSalle Street, Suite 1700, Chicago, Illinois 60601. Avant Inc. was formerly known as Avant Credit Corporation.

II. FACTS

A. Avant of CO's Supervised Lender's License

4. Avant of CO applied with the Administrator for a Colorado supervised lender's license in March 2013.

5. In its application for a Colorado supervised lender's license, Avant of CO stated that it expected to engage in: (1) making (i.e., originating) small installment loans of $1,000 or less (per C.R.S. § 5-2-214,); and (2) making (i.e., originating) unsecured loans or loans secured by personal property and/or autos.

6. Avant of CO is licensed by the Administrator as a Colorado supervised lender, license number 991833.

B. The Avant Loans

7. Consumers can apply for and obtain loans via a website ("the Avant website") that has the following internet address: https://www.avant.com/.

8. Avant Inc. owns and operates the Avant website.

9. The Avant website describes the loan products that are available through the Avant website ("the Avant Loans") as follows: "Avant currently provides access to standard consumer installment loans with an Avant twist."

10. The Avant Loans are loans that are made or arranged by a business entity that is regularly engaged in the business of making loans.

11. The Avant Loans are made to consumers who are individuals, as opposed to business entities.

12. By receiving the Avant Loans, consumers incur debt, and the debt is incurred primarily for personal, family, or household purposes.

13. The debt that consumers incur as a result of the Avant Loans is by written agreement payable in installments and a finance charge is made.

14. The principal loaned to consumers who receive Avant Loans does not exceed $75,000.

15. Avant Loans are made to consumers who are residents of Colorado (hereinafter "the Colorado Avant Loans").

16. The residents of Colorado who have received Colorado Avant Loans have received the loans from a creditor who has solicited or advertised the Colorado Avant Loans in Colorado.

17. From approximately May 2014 through the present, Avant of CO and Avant Inc. have acted as a "creditor," as defined in C.R.S. § 5-1-301(17), with respect to Colorado Avant Loans.

18. From approximately May 2014 through the present, Avant of CO and Avant Inc. have made charges to Colorado consumers on Colorado Avant Loans that are owned, in whole or in part, by non-bank entities ("Non-Bank Colorado Avant Loans").

19. From approximately September 2014 through the present, Avant of CO and Avant Inc. have undertaken direct collection of payments from or enforcement of rights against consumers arising from Non-Bank Colorado Avant Loans.

20. Avant Inc. and Avant of CO have made or collected charges from consumers on Non-Bank Colorado Avant Loans which exceed the maximum finance charges that are permitted for supervised loans under Colorado law.

21. The written agreements evidencing Colorado Avant Loans state: "You will be charged a late fee of $25.00 if any scheduled payment is not paid in full within 10 days after its due date."

22. Avant Inc. and Avant of CO have made or collected delinquency charges on Non-Bank Colorado Avant Loans when consumers have not made a payment on Colorado Avant Loans by the scheduled due date.

23. Avant Inc. and Avant of CO have made or collected a delinquency charge of $25.00 as a result of a consumer's late payment on a Non-Bank Colorado Avant Loan.

24. The written agreements evidencing Non-Bank Colorado Avant Loans state, "[T]o the extent that state law applies [to this Agreement], the laws of the state of Utah" apply.

C. Avant Inc.'s Association with WebBank

25. The Avant Loans are made to consumers pursuant to a lending program established by written agreements between Avant Inc., AvantCredit II, LLC, and WebBank, a Utah-chartered industrial bank (the "Avant lending program"). The agreements were originally dated March 28, 2014 and were subsequently amended on June 30, 2016 (effective August 1, 2016).

26. No Avant Loans are currently being made to residents of Colorado. Upon information and belief, all of the Colorado Avant Loans that have been made to date originated prior to the August 1, 2016 effective date of the June 30, 2016 amendments to the Avant lending program.

27. WebBank is identified in the Avant lending program agreements as the entity that makes the Avant Loans to consumers.

28. However, within two business days of when certain Avant Loans are made, WebBank sells the Avant Loans to Avant Inc. or to Avant Inc.'s non-bank affiliates such as AvantCredit II, LLC. As a result of the June 20, 2016 amendments, the agreements now provide that WebBank sells only the loan "receivables," which are defined to consist of all economic interests in the payments and income received from the borrower.

29. With respect to the Avant Loans that WebBank sells to Avant Inc. or Avant Inc.'s affiliates (including loans in which WebBank sells only the receivables), a primary purpose of WebBank's involvement is to allow Avant Inc. or other non-banks to circumvent state laws, including Colorado laws, that limit the interest rates and other finance charges that may be assessed on the Avant Loans.

30. Specifically, certain banks may, pursuant to federal law, lawfully lend in Colorado and other states at rates that exceed the interest and other finance charge limits imposed by state law. This right is sometimes referred to as federal interest rate exportation.

31. Avant Inc., Avant of CO, and other non-banks cannot, however, enforce a bank's federal interest rate exportation rights when they purchase loans from banks (or purchase loan receivables) because banks cannot validly assign such rights to non-banks. *E.g., Madden v. Midland Funding, LLC*, 786 F.3d 246, 250 (2d Cir. 2015) (distinguishing contrary precedent, and holding that non-bank purchaser of

national bank's loan could not enforce bank's right to federal interest rate exportation).

32. Further, with respect to the Avant Loans that WebBank sells to Avant Inc. or Avant Inc.'s affiliates (including loans in which WebBank sells only the receivables), WebBank is not the true lender of the loans and, because the loans therefore are not made by a bank, federal interest rate exportation does not apply for this additional reason. *E.g. CashCall, Inc. v. Morrisey*, 2014 W. Va. LEXIS 587 (W. Va. May 30, 2014) (memorandum decision) (national bank that sold loans to non-bank was not the true lender of the loans because the non-bank purchaser bore the predominant economic interest in the loans and non-bank purchaser therefore could not enforce bank's right to federal interest rate exportation).

33. WebBank is not the true lender of the Avant Loans that it sells to Avant Inc. or Avant Inc.'s non-bank affiliates because WebBank does not bear the predominant economic interest in the loans.

34. Among other reasons, WebBank does not bear the predominant economic interest in such loans because:

a. Avant Inc. paid WebBank an "implementation fee" of $100,000 in connection with the initiation of the Avant lending program and also has paid all of WebBank's legal fees and expenses related to the program, including the expenses and legal fees that WebBank has incurred when negotiating the terms of the program with Avant Inc.

b. Avant Inc. bears all of the expenses incurred in marketing the Avant lending program to consumers.

c. Avant Inc. pays all costs of determining which loan applicants will receive Avant Loans, including paying employees to evaluate loan applications, purchasing credit reports, and paying wire transfer and ACH costs for money transfers in connection with the Avant lending program.

d. Avant Inc. decides which loan applicants will receive Avant Loans, applying lending criteria agreed to by Avant and WebBank.

e. Avant Inc. developed and implemented the processes used by Avant Inc. to identify qualifying loan applicants.

f. Avant Inc. is responsible for ensuring that the Avant Inc. lending program complies with all applicable federal and state laws.

g. Avant Inc. developed and implemented a Bank Secrecy Act policy for the Avant lending program, which was used to prevent money laundering by consumers, amongst other practices.

h. Avant Inc. developed and implemented policies to ensure the Avant lending program complies with federal Truth in Lending Act requirements.

i. Avant Inc. is responsible for all communications with loan applicants and with consumers who receive Avant Loans, including providing adverse action notices or loan agreements.

j. Avant Inc. is responsible for all servicing and administration of the Avant Loans, even during the period before WebBank sells the loans to Avant Inc. or its affiliates.

k. When consumers apply for Avant Loans but are declined, Avant Inc. has the right to solicit them for other credit products such as other loan products. In contrast, except as required to carry out its rights and responsibilities under the Avant lending program, WebBank cannot use information regarding Avant Loan applicants or Avant Loan borrowers for any reason.

l. WebBank bears no risk that it will lose its principal in the event that consumers default on Avant Loans that it sells to Avant Inc. or Avant Inc.'s affiliates: (1) when WebBank makes Avant Loans that are to be sold, WebBank knows in advance that Avant Inc. has sufficient funds to purchase the loans because Avant Inc. is required to maintain a bank account at WebBank with such funds, to be used by WebBank as collateral to secure Avant Inc.'s purchase obligations; (2) Avant Inc. or its affiliates purchase the Avant Loans (or the loan receivables) from WebBank within two days of when the loans are made and the purchase price includes the amount that WebBank advanced to the consumer, in addition to other amounts; (3) by contractual agreement, WebBank has no liability to Avant Inc. for the repayment of the Avant Loans, which have been sold "without recourse"; and (4) Avant Inc. is obligated to indemnify WebBank from and against claims arising from WebBank's participation in the Avant lending program.

m. Avant Inc. raises capital to fund the origination of Avant Loans. Specifically, Avant Inc. utilizes a hybrid approach to finance money that is advanced to the consumers who receive the Avant Loans. From 2015 through the second quarter of 2016, Avant Inc. financed 100% of

the Avant Loans through an allocation process where 45% of the Avant Loans were sold to institutional investors and where Avant Inc. retained 55% of the Avant Loans on its balance sheet. Avant Inc. maintains committed, multiyear warehouse liquidity that Avant Inc. uses to fund the origination of Avant Loans. As of June 30, 2016, Avant Inc. had over $900 million available, in the form of committed warehouse lines, to fund the origination of Avant Loans. As of June 30, 2016, Avant Inc. had $92 million available, in the form of unrestricted cash and loan purchase programs with institutional investors, to fund the origination of Avant Loans. As of August 2, 2016, Avant Inc. had retained approximately $1.6 billion of Avant Loans as its own assets. As of August 2, 2016, Avant Inc. had sold approximately $1.3 billion of Avant Loans to institutional investors.

n. Beginning in the second quarter of 2016, Avant Inc. tightened the underwriting criteria that it used when determining which Avant Loan applicants would receive loans and the terms that would apply to such loans. Avant tightened the underwriting criteria in order to reduce the default rate of Avant Loans that served as the collateral that backed an Avant Inc. securitization. The securitization is referred to by Avant Inc. as ACNT 2016-C.

o. When a consumer pays off an Avant Loan in accord with the loan agreement, both WebBank and Avant Inc. (or other non-bank entities) share in the profit earned on the loan, but WebBank's share in the profit is only approximately one percent (1%) of the total profit.

35. Accordingly, Avant Inc. and its affiliated non-bank entities are the true lenders of the Avant Loans.

D. The Administrator's Compliance Examination

36. In January 2016, the Administrator conducted a compliance examination of Avant of CO, pursuant to the statutory authority set forth in C.R.S. § 5-2-305.

37. By a report of examination dated January 11, 2016, the Administrator informed Avant of CO, amongst other things, that Avant of CO was charging finance charges and delinquency charges that violated Colorado law and that the loan agreements for the Colorado Avant Loans contracted for the application of Utah law, in violation of Colorado law.

38. In the report of examination, the Administrator directed Avant of CO to make refunds to consumers of certain excess charges and fees and to apply Colorado

law instead of Utah law with respect to loan agreements with Colorado consumers.

39. Avant of CO responded to the report of examination by stating that its association with WebBank meant that Colorado law provisions regarding finance charge limits and choice of law restrictions were preempted.

40. After reviewing additional information from Avant of CO and considering its position, the Administrator informed Avant of CO that she rejected the position and renewed her request that Avant of CO take the corrective actions identified in the report of examination.

41. Avant of CO has refused to take corrective actions directed by the Administrator in her report of examination with respect to excess finance charges, excess delinquency charges, and provisions in consumer agreements contracting for the application of Utah law.

III. FIRST CLAIM FOR RELIEF
EXCESS CHARGES

42. The Administrator repeats and realleges the paragraphs above, as if alleged herein.

43. Avant Inc. and Avant of CO have charged, assessed, collected, or received finance charges and delinquency charges in connection with Non-Bank Colorado Avant Loans that exceed the finance charges authorized and allowable under C.R.S. § 5-2-201 and the delinquency charges authorized and allowable under C.R.S. § 5-2-203.

IV. SECOND CLAIM FOR RELIEF
UNLAWFUL CHOICE OF LAW PROVISION

44. The Administrator repeats and realleges the paragraphs above, as if alleged herein.

45. The written agreements evidencing Non-Bank Colorado Avant Loans include terms that purport to provide that the law of a state other than Colorado applies, in violation of C.R.S. § 5-1-201(8).

WHEREFORE, the Administrator requests judgment:

(i) preliminarily and permanently enjoining Avant Inc. and Avant of CO, and their officers, directors, agents, servants, employees, attorneys, heirs, successors, and assigns, from committing any of the practices, acts, conduct, transactions, or

violations described above, or otherwise violating the UCCC, together with all such other relief as may be required to completely compensate or restore to their original position all consumers injured or prevent unjust enrichment of any person, by reason or through the use or employment of such practices, acts, conduct, or violations, or as may otherwise be appropriate, including, without limitation, requiring Avant Inc. and Avant of CO to disgorge to the Administrator or make restitution to consumers of all amounts charged, assessed, collected, or received in violation of the UCCC;

(ii) for every consumer credit transaction as may be determined at trial or otherwise in which a consumer was charged an excess charge in violation of the UCCC, ordering Avant Inc. and Avant of CO to refund to each such consumer the excess charge;

(iii) for every consumer credit transaction as may be determined at trial or otherwise in which a consumer was charged an excess charge, ordering Avant Inc. and Avant of CO to pay to each such consumer a civil penalty determined by the Court not in excess of the greater of either the amount of the finance charge or ten times the amount of the excess charge;

(iv) ordering Avant Inc. and Avant of CO to pay to the Administrator a civil penalty determined by the Court within the limits set forth by statute;

(v) awarding pre- and post-judgment interest to the Administrator, as may be allowed by contract, law, or otherwise; and

(vi) awarding the Administrator the costs and disbursements of this action, including attorney's fees, together with all such further relief as the Court deems just.

DATED: February 15, 2017

CYNTHIA H. COFFMAN
Attorney General

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Plaintiff's Address:

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I

114TH CONGRESS
2D SESSION

H. R. 5724

To amend the Revised Statutes of the United States and the Federal Deposit Insurance Act to require the rate of interest on certain loans remain unchanged after transfer of the loan, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 2016

Mr. MCHENRY introduced the following bill; which was referred to the Committee on Financial Services

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A BILL

To amend the Revised Statutes of the United States and the Federal Deposit Insurance Act to require the rate of interest on certain loans remain unchanged after transfer of the loan, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Protecting Consumers' Access to Credit Act of 2016''.

SEC. 2. RATE OF INTEREST AFTER TRANSFER OF LOAN.

(a) AMENDMENT TO THE REVISED STATUTES.—Section 5197 of the Revised Statutes of the United States

EXHIBIT
B

(12 U.S.C. 85) is amended by adding at the end the following new sentence: ''A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party.''.

(b) AMENDMENT TO THE FEDERAL DEPOSIT INSURANCE ACT.—Section 27(a) of the Federal Deposit Insurance Act (12 U.S.C. 1831d(a)) is amended by adding at the end the following new sentence: ''A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party.''.

○