

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ANTONIO P. SALAZAR, in his official capacity as Commissioner of The Office of the Commissioner of Financial Regulation

*
* Case No.

Plaintiff,

*

v.

Removed from the Office of Administrative Hearings, Maryland

*

Case No. LABOR-CFR-76-21-03142

FORTIVA FINANCIAL, LLC, ATLANTICUS SERVICES CORPORATION, and THE BANK OF MISSOURI s/b/m MID-AMERICA BANK & TRUST COMPANY

*

*

*

Defendants.

* * * * *

NOTICE OF REMOVAL

Defendants The Bank of Missouri as successor by merger to Mid-America Bank & Trust Company (the “Bank”), Atlanticus Services Corporation (“Atlanticus” or “ASC”), and Fortiva Financial, LLC (“Fortiva”) (collectively the “Removing Defendants”), hereby file, under 28 U.S.C. §§ 1331, 1367, 1441, and 1446, this Notice of Removal from the Maryland Office of Administrative Hearings to the United States District Court for the District of Maryland. Removal is proper because this Court has federal question jurisdiction under 28 U.S.C. § 1331. Removing Defendants remove this action and, in support of removal, state as follows.

I. BACKGROUND

1. Antonio P. Salazar, in his official capacity as the Commissioner of The Office of the Commissioner of Financial Regulation (the “Commissioner”) filed a Charge Letter dated January 21, 2021 against the Removing Defendants in the Maryland Office of Administrative Hearings (the “OAH”), Case No. LABOR-CFR-76-21-03142.

2. The Charge Letter asserts five claims alleging that one or more Removing Defendants has violated the Credit Grantor Closed End Credit Provisions, Md. Code Ann., Com. Law § 12-1001 *et seq.*; the Credit Grantor Revolving Credit Provisions, *id.* § 12-901 *et seq.*; the Maryland Consumer Loan Law, *id.* § 12-301 *et seq.* and Md. Code Ann., Fin. Inst. § 11-201 *et seq.*; the Maryland Collection Agency Licensing Act, Md. Code Ann., Bus. Reg. § 7-101 *et seq.*; the Maryland Credit Services Businesses Act, Md. Code Ann., Com. Law § 14-901; and other statutes and regulations. As explained below, however, the Commissioner’s claims against the Bank are completely preempted by Section 27 of the Federal Deposit Insurance Act (“FDIA”), 12 U.S.C. § 1831d.

3. Copies of the process, pleadings, and orders served upon Removing Defendants are attached as **Exhibit A**.

4. The Bank, a federally insured, state-chartered Missouri bank, received the Charge Letter and Notice of Hearing by Certified Mail on March 4, 2021. ASC and Fortiva received the Charge Letter and Notice of Hearing through their registered agent by Certified Mail on March 11, 2021. This Notice of Removal is thus filed within thirty days of receiving the Charge Letter and the associated Notice of Hearing, as required by 28 U.S.C. § 1446(b)(1).

5. In accordance with 28 U.S.C. § 1446(d), concurrent with filing this Notice of Removal, Removing Defendants are filing a Notice of Filing of Notice of Removal with the OAH and will attach a copy of this Notice of Removal thereto. A copy of the Notice of Filing of Notice of Removal is attached as **Exhibit B**.

II. THE COURT HAS FEDERAL QUESTION JURISDICTION OVER THE CLAIMS AGAINST THE BANK.

6. Removal is proper under 28 U.S.C. § 1441(a). Under that statute, “any civil action brought in a State court of which the district courts of the United States have original jurisdiction,

may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a).

A. This Court Has Original Jurisdiction Because the Commissioner’s Claims Are Completely Preempted.

7. This Court has “original jurisdiction” under 28 U.S.C. § 1441(a) because it is a “civil action[]” that “aris[es] under the Constitution, laws, or treaties of the United States,” 28 U.S.C. § 1331. While the Commissioner’s claims nominally are brought under state law, the claims against the Bank are completely preempted by Section 27 of the FDIA and thus arise under that statute.

8. Section 27 of the FDIA prescribes the interest that state-chartered, federally insured banks like the Bank can charge, “notwithstanding any State constitution or statute which is hereby preempted.” *Vaden v. Discover Bank*, 556 U.S. 49, 55 (2009) (quoting 12 U.S.C. § 1831d(a) (the codification of Section 27(a)). Section 27 grants federally insured, state-chartered institutions preemption and interest-rate exportation authority. It does so “to prevent discrimination against State-chartered insured depository institutions.” 12 U.S.C. § 1831d(a); 12 C.F.R § 331.4(a).

9. Section 27 is one of the select few federal statutes that not only expressly preempt state law on the merits, but also trigger so-called “complete preemption.” “Complete preemption ‘is a jurisdictional doctrine,’” *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005), that applies where the preemptive force of a statute is so extraordinary that a “state cause of action [may be recast] as a federal claim for relief,” thereby conferring federal-question jurisdiction, *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009). “Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987).

10. Section 27 completely preempts any state law that purports to restrict a federally insured, state-chartered bank’s ability to charge interest and fees. *See, e.g., Discover Bank v. Vaden*,

489 F.3d 594, 606-07 (4th Cir. 2006) (holding that Section 27(a) completely preempts state laws that restrict a federally insured, state-chartered bank’s exportation rights), *rev’d on other grounds*, 556 U.S. 49 (2009); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005) (holding that § 1831d(a) “completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge.”); *Greenwood Tr. Co. v. Massachusetts*, 971 F.2d 818, 826-28 (1st Cir. 1992) (same).

11. Here, the Maryland licensing statutes facially restrict the Bank’s right under Section 27 to export interest rates from its home state: those statutes purport to bar unlicensed lenders from “receiv[ing] or retain[ing] any . . . interest” on loans and purport to compel out-of-state banks to forfeit any interest collected. Md. Code Ann., Com. Law § 12-314(b).

12. Because Maryland’s bank-licensing statutes interfere with the Bank’s lending authority under the FDIA, they are completely preempted by federal law. Thus, each of the Commissioner’s “claim[s] purportedly based on [those] pre-empted” Maryland statutes “is considered, from its inception, a federal claim, and therefore arises under federal law.” *Caterpillar*, 482 U.S. at 393.

B. The OAH Functions Like a Court and Federal Interests Predominate.

13. The Commissioner’s claims were “brought in a State court” for purposes of 28 U.S.C. § 1441(a). Whether a tribunal is a “State court” is determined by a functional test that turns on whether the agency functions like a court, and, *more importantly*, whether federal interests predominate over state interests. *See Kolibash v. Comm. on Legal Ethics of the W. Va. Bar*, 872 F.2d 571, 576 (4th Cir. 1989) (explaining that to “hold” an ethics committee’s “proceeding outside the operation of the removal statute . . . would be to elevate form over substance”); *see also Wilson v. Gottlieb*, 821 F. Supp. 2d 778, 790-91 (D. Md. 2011) (holding that *Kolibash* compels the

conclusion that the Maryland Health Claims Alternative Dispute Resolution Office qualifies as a State court for purposes of similar federal removal provision 28 U.S.C. § 1442).

14. The Charge Letter was filed with the OAH, which functions like a court—it is empowered by Maryland statute to make factual findings and conclusions of law following an evidentiary hearing. *See* Md. Code Ann., State Gov’t § 10-205(b). Indeed, OAH issued a Notice of Hearing, at which time the OAH would make a determination as to whether “the attached order issued to [Removing Defendants], including any fines and/or restitution, is legally authorized and consistent with applicable statutes, regulations, policies and procedures.” Ex. A, at 1. Thus, absent removal, the OAH would adjudicate the federally insured, federally regulated Bank’s federal statutory and constitutional rights.

15. As for the more important element of the functional test, federal interests predominate over state interests. *Wilson*, 821 F. Supp. 2d at 789. As noted above, the preemptive force of Section 27 is so extraordinary that it “completely preempts” any state law that interferes with a federally insured state-chartered bank’s right to export its home state’s interest rates. *Discover Bank v. Vaden*, 489 F.3d at 605. Federal interests are thus at their apex. By contrast, states have no legitimate interest in regulating federally regulated banks or restricting those banks’ rights to charge interest in the manner prescribed by Congress in the FDIA.

III. THE COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER THE CLAIMS AGAINST ASC AND FORTIVA.

16. The Court should exercise supplemental jurisdiction over the remaining claims—those against ASC and Fortiva. ASC and Fortiva are bank service companies for the Bank. ASC is the Bank’s program manager for the loans that the Bank issues to Maryland residents. Fortiva identifies and manages the merchants and businesses whose customers may apply to the Bank for a loan.

17. Under 28 U.S.C. § 1367(a), “in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy” Supplemental jurisdiction should only be declined if: “(1) the claim raises a novel or complex issue of state law; (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.” *Roten v. Galen of W. Va., Inc.*, 149 F.3d 1170 (4th Cir. 1998) (citing 28 U.S.C. § 1367).

18. The claims against ASC and Fortiva are part of the same case or controversy as the completely preempted claims against the Bank. The Charge Letter alleges that ASC and Fortiva violated related Maryland statutes by processing (at the direction of the Bank) applications and servicing the loans made by the Bank, for which the Bank remains, at all times, the account-creditor. ASC’s involvement in this matter stems from its role as a Bank-directed vendor, which subjects ASC to oversight from the Federal Deposit Insurance Corporation under the Bank Service Company Act. *See* 12 U.S.C. § 1867(c). Fortiva’s role is to identify and engage merchants to participate in the Bank’s retail lending program in Maryland. Thus, the claims against ASC and Fortiva “form part of the same case or controversy” as the completely preempted claims against the Bank. 28 U.S.C. § 1367(a).

19. None of the factors for declining supplemental jurisdiction are present here. First, well-settled Maryland law establishes that the licensing statutes do not apply to ASC or Fortiva. Second, Section 27’s complete preemption of the licensing statutes predominates over the claims against ASC and Fortiva. Third, the district court has not dismissed the preempted statutory claims

against the Bank. Fourth, there are no exceptional circumstances that warrant declining jurisdiction. The Court should thus exercise supplemental jurisdiction over the claims against ASC and Fortiva.

III. CONCLUSION

20. For all these foregoing reasons, Removing Defendants respectfully request that this action be, and is hereby, removed to this Court; this Court assume jurisdiction of this action; and this Court enter such other orders as may be necessary to accomplish the requested removal and promote the ends of justice.

Dated: April 5, 2021

Respectfully submitted,

/s/ Douglas Gansler

Douglas Gansler (Fed. Bar No. 21010)
Rachel Rodman (*pro hac vice forthcoming*)
CADWALADER, WICKERSHAM & TAFT LLP
700 Sixth Street, N.W.
Washington, DC 20001
(202) 862-2300
douglas.gansler@cwt.com
rachel.rodman@cwt.com

Jonathan M. Watkins (*pro hac vice forthcoming*)
CADWALADER, WICKERSHAM & TAFT LLP
200 Liberty Street
New York, NY 10281
(212) 504-6000
jonathan.watkins@cwt.com

Ava E. Lias-Booker (Fed. Bar No. 05022)
Melissa O. Martinez (Fed Bar No. 28975)
MCGUIREWOODS LLP
500 E. Pratt Street, Suite 1000
Baltimore, Maryland 21202-3169
(410) 659-4400
alias-booker@mcguirewoods.com
mmartinez@mcguirewoods.com

*Counsel for Defendants Bank of Missouri as
successor by merger to Mid-America Bank &
Trust Company, Atlanticus Services
Corporation, and Fortiva Financial, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021 a copy of the foregoing *Notice of Removal* was served via first-class mail, postage prepaid on:

Kevin W. McGivern
Assistant Attorney General
Department of Labor
500 North Calvert Street, Suite 406
Baltimore, Maryland 20202

*Counsel for Plaintiff Antonio P. Salazar, in his official capacity as
Commissioner of The Office of the Commissioner of Financial
Regulation*

/s/ Douglas Gansler

Douglas Gansler