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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
MARTHA FULFORD, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, Plaintiff, v. MARLETTE FUNDING, LLC d/b/a BEST EGG; WILMINGTON TRUST, N.A., not in its individual capacity, but solely as trustee for certain trusts; and WILMINGTON SAVINGS FUND SOCIETY, FSB, not in its individual capacity, but solely as trustee for certain trusts, Defendants, and CROSS RIVER BANK, Intervenor Defendant.	▲ **COURT USE ONLY** ▲
Attorney: Michael C. Landis Address: The Center for Public Interest Research, Inc. 1543 Wazee St., Ste. 400 Denver, CO 80202 Phone: (303) 573-5995 ext. 389 Email: mlandis@publicinterestnetwork.org Atty. Reg. #: 50135	Case No.: 17CV30376 Courtroom: 269

BRIEF OF AMICI CURIAE, CENTER FOR RESPONSIBLE LENDING, NATIONAL CONSUMER LAW CENTER, AND COLORADO PUBLIC INTEREST RESEARCH GROUP, IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the Colorado Rules of Civil Procedure and, because the Colorado Rules of Civil Procedure do not address the filing of a brief of an amicus curiae, is guided by the Colorado Appellate Rules. Specifically, the undersigned certifies that:

The amicus brief complies with the form requirements of Rule 10 of the Colorado Rules of Civil Procedure.

The amicus brief complies with the length limit set forth in Rule 29(d) of the Colorado Appellate Rules, and it does not exceed one-half the maximum length for the plaintiff's motion for summary judgment.

S/ Michael C. Landis

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INTEREST OF AMICI CURIAE

Amici curiae, Center for Responsible Lending, National Consumer Law Center, and Colorado Public Interest Research Group, share a commitment to protecting and defending consumer rights, and thus submit this amicus brief in support of plaintiff, Martha Fulford, Administrator, to share their concerns and offer their expertise.

ARGUMENT

I. Introduction & Summary of Argument

Since the founding of our nation, states have limited interest rates as the primary protection against predatory lending. Evasions of usury laws are as old as the laws, but courts consistently look beyond form to the substance of the transaction to prevent subterfuge.

Ever since banks were provided with legislative exemptions from state usury laws, nonbank lenders have tried to use "rent-a-bank" arrangements to avoid state interest rate laws. But courts look beyond the nominal bank that funded and put its name on a loan, holding that state usury laws apply to the true lender and are not preempted by federal law. The purported valid-when-made theory is irrelevant when the true lender is not a bank. Moreover, unambiguous statutory language, legislative history, and caselaw, all show that federal law does not preempt state usury laws as applied to nonbank assignees.

Allowing Marlette Funding, LLC ("Marlette") to evade Colorado's usury laws would open up Colorado to an explosion of predatory lending. There is no limit to the rates that could be charged if the Court allows rent-a-bank schemes. Lenders could bring back triple-digit loans of 160% annual percentage rate ("APR") or higher—expressly rejected by Colorado voters—as is happening in other states that have not strongly defended their usury laws.

II. For purposes of both avoiding usury evasions and assessing federal preemption, courts look beyond form to the true lender.

Since the American Revolution, states have limited interest rates to protect their residents from predatory lending. James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 Ariz. St. L.J. 61 (1981). In recent years, a handful of states eliminated their rate caps, others carved out limited exceptions for short-term payday loans, and a combination of federal and state laws exempt most banks from interest rate limits. *See generally* NCLC, Consumer Credit Regulation (2d ed. 2015), *updated at* www.nclc.org/library. But the vast majority of states retain interest rate caps for nonbank installment loan lenders. *Id.* Interest rate limits are the simplest and most effective protection against predatory lending. *See* NCLC, *Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default* (July 2016), https://www.nclc.org/issues/misaligned-incentives.html.

Attempts to evade usury laws are as old as the laws themselves. In 1835, the U.S. Supreme Court described courts' abhorrence of usury evasions:

> The ingenuity of lenders has devised many contrivances by which, under forms sanctioned by law, the [usury] statute may be evaded. [. . .] Yet it is apparent, that if giving [its stated] form to the contract will afford a cover which conceals it from judicial investigation, the statute would become a dead letter. Courts, therefore, perceived the necessity of disregarding the form, and examining into the real nature of the transaction.

Scott v. Lloyd, 34 U.S. 418, 419 (1835). Courts too numerous to count, including Colorado's, have embraced this principle.[1]

This case involves a modern form of usury evasion, rent-a-bank lending, where a nonbank claims it is only the agent or service provider for the bank that funds the loan, and thus that state usury laws outside the bank's home state are preempted. In the instant case, Marlette claims that federal law, presumably Section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. § 1831d, preempts state usury laws as applied to nonbank assignees. (Marlette Answer at 7.)

But applying the longstanding anti-evasion principle, courts have recognized that federal bank preemption does not apply where, going beyond the form of a transaction, the totality of the

[1] *See, e.g.*, *Oasis Legal Finance Group v. Suthers*, 361 P.3d 400, 406 (Colo. 2015) (stating that to determine whether transactions are loans, "we examine the substance of the transaction"); *State ex rel. Salazar v. The Cash Store Now*, 31 P.3d 161, 166 (Colo. 2001) (reversing court of appeals, which "refused to undertake a disguised loan analysis," stating "we favor a broad reading of the UCCC's definition of 'loan' over the court of appeals' narrow interpretation"); *Seeman v. Philadelphia Warehouse Co*., 274 U.S. 403, 408 (1927); *Crim v. Post*, 41 W. Va. 397, 23 S.E. 613, 614 (1895) ("But the statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction be dealt with as usury if it be such in fact."); *State ex rel. Beck v. Assocs. Disc. Corp*., 162 Neb. 683, 708 (1956); *Tennessee Fin. Co. v. Thompson*, 278 F. 597 (6th Cir. 1922); *State v. Cent. Purchasing Co*., 118 Neb. 383, 225 N.W. 46, 48 (1929).

circumstances shows that a nonbank lender is the real party in interest or the "true lender."[2] Even where courts find preemption, it is because the facts show that the bank is the real party in interest.

[2] Courts have recognized the relevance of who the true lender is for purposes of both substantive preemption defense, *see BankWest, Inc. v. Baker*, 411 F.3d 1289 (11th Cir. 2005), *reh'g granted, op. vacated*, 433 F.3d 1344 (11th Cir. 2005), *op. vacated due to mootness*, 446 F.3d 1358 (11th Cir. 2006); *Eul v. Transworld Sys.*, 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017); *Commonwealth v. Think Fin., Inc.*, 2016 WL 183289 (E.D. Pa. Jan. 14, 2016); *CashCall, Inc. v. Morrisey*, 2014 WL 2404300 (W. Va. May 30, 2014); *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190 (N.D. Cal. 2012); *Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d 711 (E.D.N.C. 2002); *Goleta National Bank v. O'Donnell*, 239 F. Supp. 2d 745 (S.D. Ohio 2002); *In re Advance America*, No. 05:008:CF *43-44 (N.C. Comm'r of Banks, Dec. 22, 2005), and complete preemption, *see Community State Bank v. Strong*, 651 F.3d 1241 (11th Cir. 2011) (agreeing with *BankWest* that "Section 27(a) [of the FDIA] does not provide immunity to a state bank for usury-related offenses if it is not the true lender of the loan under federal law"); *Community State Bank v. Knox*, 523 Fed. Appx. 925 (4th Cir. 2013) ("Knox disputes that CSB had authority over the loan terms and was the 'real lender.'"); *Meade v. Avant of Colorado, L.L.C.*, 307 F. Supp. 3d 1134, 1150–1152 (D. Colo. 2018); *West Virginia v. CashCall*, 605 F. Supp. 2d 781, 787 (S.D. W.Va. 2009); *Spitzer v. County Bank of Rehoboth*, 846 N.Y.S.2d 436 (N.Y. App. Div. 2007); *Flowers v. EZ See also Colorado ex rel. Salazar v. Ace Cash Exp., Inc*, 188 F. Supp. 2d 1282, 1284-85 (D. Colo. 2002) (rejecting complete preemption where no claims were asserted against the bank); *Georgia Cash America v. Greene*, 734 S.E.2d 67 (Ct. App. Ga. 2012) (finding triable issue about whether payday lender or

See Krispin v. May Department Store, 218 F.3d 919 (8th Cir. 2000); *Discover Bank v. Vaden*, 489 F.3d 594, 601 (4th Cir. 2007) (finding bank is real party in interest, but if it is not, "the FDIA does not apply because [the named defendant] is not a bank"), *rev'd and remanded*, 556 U.S. 49 (2009).

The only district court rulings to the contrary are unreasoned and against this weight of authority, *see Sawyer v. Bill Me Later*, Inc., 23 F. Supp. 3d 1359 (D. Utah 2014); *Hudson v. Ace Cash Express, Inc.*, 2002 WL 1205060 (S.D. Ind. May 30, 2002), or are interpreting particular state laws, *see Beechum v. Navient Solutions, Inc*., 2016 WL 5340454 (C.D. Cal. Sept. 20, 2016); *Adkison v. First Plus Bank*, 143 S.W.3d 29 (Mo. Ct. App. 2004).

A true lender analysis often focuses on which party has the "predominant economic interest." *Morrisey*, 2014 WL 2404300, at *15. Regardless who nominally originated the loan, the true lender is the entity that "puts money at risk." *Easter v. Am. West Financial*, 381 F.3d 948, 957 (9th Cir. 2004). Other factors include what party designed, brands or holds the intellectual property on the loan product and collateral; markets, offers, and processes loan applications; services the loans and handles customer service, purchases, has first right of refusal, or ultimately holds the

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bank was the true lender); *BankWest Inc. v. Oxendine*, 598 S.E.2d 343 (Ga. Ct. App. 2004) (under Georgia law, state could investigate whether purported bank agent was true lender); *Consumer Financial Protection Bureau v. CashCall, Inc.*, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (considering whether tribe is the true lender).

bulk of the loans, receivables or participation interests, or has the ability to change the entity that originates the credit or to whom the credit or receivables are sold.[3]

Even if one accepts the purported "valid-when-made" theory that an assignee may charge any rate that the originator could charge (discussed below), the loan must be, in fact, valid when made. The Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corp. (FDIC), which have proposed rules to codify valid-when-made, have stated that their proposals "do not affect the application of State law in determining whether a State bank or insured branch of a foreign bank is a real party in interest with respect to a loan or has an economic interest in a loan."[4] *Cf. Miller v. Tiffany*, 68 U.S. 298, 307–10 (1863) (holding that while contractual choice

[3] *See, e.g., Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190 (N.D. Cal. 2012) (nonbank defendant used its own copyrighted forms, promissory notes, brands and platforms); *Flowers v. EZPawn Oklahoma, Inc.*, 307 F. Supp. 2d 1191 (N.D. Okla. 2004) (adopting report of magistrate indicating that payday lenders that owned and controlled the branding of the loans were the true lenders); *Glaire v. La Lanne-Paris Health Spa, Inc.*, 12 Cal. 3d 915, 924-25 (1974) (finance company's practice of purchasing vast majority of gym's membership installment contracts contemporaneously with their execution was functional equivalent of extending loans directly); *Eul v. Transworld Systems*, 2017 WL 1178537 (N.D. Ill. Mar. 30, 2017) (the nonbank designated who would administer the loans, designated the servicer, and directed who the loans would be sold to after origination).

[4] FDIC, Federal Interest Rate Authority, 84 Fed. Reg. 66845, 66846 (Dec. 6, 2019) ("The FDIC views unfavorably a State bank's partnership with a nonbank entity for the sole purpose of evading

of law provisions for usury are enforceable, when done with intent to evade the law, the law of the contract location applies).

Here, the facts alleged by Colorado have all of the hallmarks to find that Marlette, not the bank that nominally originated the loans, is the true lender for purposes of both a preemption analysis and Colorado usury laws. Marlette paid Cross River Bank's cost to initiate the loan program, pays all of Cross River Bank's legal fees and expenses related to the program, pays the lending program's marketing fees, bears responsibility for selecting and communicating with borrowers, services and administers the loans, and raises capital to fund the loans. (Sec. Amended Compl. ¶ ¶ 26-44.) Cross River Bank bears little to no risk whatsoever that it will lose money if a borrower defaults, and sold the loans quickly, "without recourse." *Id.*

No single fact is determinative, just as there is no single form of usury evasion. As rent-a-bank schemes become more sophisticated, banks sometimes nominally hold the accounts and only sell receivables; retain the right to approve the nonbank lender's activities including underwriting recommendations; or hold some of the loans or receivables and thus some of the risk. *See, e.g., Georgia Cash America v. Greene*, 734 S.E.2d 67 (Ct. App. Ga. 2012) (after defendant adjusted its contract with bank to receive only a 49% participation interest, triable issue remained on whether it used a contrivance, device or scheme to evade the law). But looking at the totality of the circumstances, this is an easy case in light of Marlette's overwhelming share of the economic

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a lower interest rate established under the law of the entity's licensing State(s)"); *accord* OCC, Permissible Interest on Loans that are Sold, Assigned, or Otherwise Transferred, 84 Fed. Reg. 64229, 64232 (Nov. 21, 2019).

interest and risk, and its extensive role both on the front end (marketing, offering, processing loan applications) and on the back end (taking assignment, servicing the loans).

Marlette is not an arm of the bank. It has no affiliate or subsidiary relationship with the nonbank entity. *See Krispin*, 218 F.3d at 924; *see also Citibank (South Dakota) v. Martin*, 807 N.Y.S.2d 284 (N.Y. Civ. Ct. 2005) (observing that rate exportation rules "are not extended to independent third-parties acting under an agency agreement or other contract with such a bank"). Marlette is an entirely unrelated entity, the driving force behind the lending program, and clearly the true lender.

III. Even if the Bank is the True Lender, the FDIA Does Not Preempt State Usury Law Governing Interest Charged by Nonbank Assignees.

Even if the bank is the true lender, once the loans are assigned to a nonbank, state usury laws apply. Federal rate exportation provisions do not preempt state usury laws as applied to nonbank assignees. *Madden v. Midland Funding*, LLC, 786 F.3d 246, 249-53 (2d Cir. 2015); *In re Community Bank of N. Va.*, 418 F.3d 277 (3d Cir. 2005) (finding that rate exportation laws "apply only to national and state chartered banks, not to nonbank purchasers of second mortgage loans such as RFC"); *Eul v. Transworld Sys.*, No. 15 C 7755, 2017 WL 1178537, at *5 (N.D. Ill. Mar. 30, 2017). The purpose of the rate exportation provision of the FDIA was to prevent states from imposing rate caps on "foreign" state-chartered *banks* – not wholly separate *nonbanks*. *See Griner v. Synovus Bank,* 818 F. Supp. 2d 1338, 1347 (N.D. Ga. 2011).

Moreover, under the *same* legislation that enacted Section 27 of the FDIA, Congress *did* extend mortgage preemption to nonbank entities including assignees. 12 U.S.C. §§ 1735f-7, 1735f-a. In fact, Section 1735f-7a(a)(1)(C)(v) refers to the specific circumstance in which a mortgage

loan is sold to a nonbank investor. *See also* S. REP. 96-368, 1980 U.S.C.C.A.N. 236, 254-55 (1980) ("It is the committee's intent that loans originated under this usury exemption will not be subject to claims of usury even if they are later sold to an investor who is not exempt under this section."). Congress knew how to preempt usury rates for nonbank assignees, and it chose not to do so in Section 1831d.

Additionally, it would be especially inappropriate to rely on older cases to interpret the FDIA to reach nonbank assignees. In 2010, Congress overturned the broad view that national bank preemption applies to bank affiliates, subsidiaries, or agents. *See* 12 U.S.C. §§ 25b(e), (h)(2). The FDIA's preemptive reach is even more limited than that of the National Bank Act (NBA). *See, e.g., Thomas v. US Bank*, 575 F.3d 794, 798-99 (8th Cir. 2009) (DIDA "clearly indicates the limited nature of the federal statute's preemption of state law"); *Robinson v. First Hawaiian Bank*, 2017 WL 3641564 at *6 (D. Haw. Aug. 24, 2017); *Griner*, 818 F. Supp. 2d at 1346 (finding the language of DIDA "underscores the narrowness of the preemptive effect"), *appeal after remand*, 739 S.E.2d 504 (Ga. Ct. App. 2013) (finding no substantive preemption). And even if broader NBA preemption applied, application of state usury law to Marlette "would not significantly interfere with" a bank's exercise of its powers. *Madden*, 786 F.3d at 249; *see SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007).

Further, the FDIA does not incorporate the "valid-when-made" doctrine. *See Meade v. Avant of Colorado*, 307 F. Supp. at 1147 (finding no complete preemption and that nonbank Avant cannot "overcome the lack of either a textual basis [in the FDIA] or any prior case law supporting Avant's argument …."). While *Rent-Rite Superkegs West. Ltd.*, 603 B.R. 31 (Bankr. D. Colo. 2019), found otherwise, *Rent-Rite* misinterpreted older usury cases that do not address whether an

assignee is subject to a different set of laws. *See* Amicus Curiae Brief of Professor Adam J. Levitin In Support Of Appellant, *Rent-Rite Super Kegs West., Ltd*., No. 1:19-cv-01552-REB (D. Colo. Sept. 19, 2019). Those older cases address the *separate* question whether subsequent transactions can retroactively change the *rate itself* to result in a higher, usurious rate. *See Nichols v. Fearson*, 32 U.S. (7 Pet.) 103 (1833); *Gaither v. Farmers' & Mechanics' Bank of Georgetown*, 26 U.S. (1 Pet.) 37 (1828).

The FDIA itself says nothing whatsoever about the rates that nonbanks may charge or that assignees may charge. The valid-when-made theory is just a creative interpretation of state law usury cases in a different context that have nothing to do with the FDIA's preemptive reach.

IV. Allowing rent-a-bank evasions will eviscerate Colorado's usury laws.

It would be bad enough to permit lenders like Marlette to evade state rate caps. But the stakes in this case are greater than that. Rent-a-bank schemes, once permitted, will be used by lenders to make loans at triple-digit interest rates. As demonstrated by the *Rent-Rite* case, where the court expressed dismay at the "ultra-high" 120.86% rate that World Business Lenders (WBL) charged on a $550,000 business loan that "makes no sense," 603 B.R. at 49, it nonetheless felt powerless to enforce Colorado's usury laws when a Wisconsin bank originated the loan. In other recent cases as well, WBL has hidden behind banks so it could make mortgages at 74% and even 138% APR.[5] But this court has the power to prevent those abuses, especially as it can address a question that was not raised in *Rent-Rite*: whether the bank is the true lender.

[5] *See* Complaint, *Deramo et al. v. World Business Lenders, LLC*, et. al, No. 8:17-cv-01435-RAL-MAP (Cir. Ct. of 12th Jud'l Cir., Sarasota Co., FL June 16, 2017); Complaint, *Adoni, Harbor Park*

Permitting the rent-a-bank model to flout state usury laws presents real and ominous risks for consumers and for the States' role in consumer protection. Such a practice will not only eviscerate hard-fought state rate caps, but control over usury limits will be wrestled from the states and handed over to rogue banks in the small number of states that do not have usury laws.

In other states, high-cost lenders are already using rent-a-bank schemes to make loans up to 160% APR in states that do not vigorously enforce their usury laws. *See* NCLC, "Stop Payday Lenders' Rent-A-Bank Schemes" (Dec. 2019), http://bit.ly/StopRent-a-BankSchemes ("NCLC, Rent-a-Bank Schemes") (showing map of states that rent-a-bank lenders avoid). OppLoans is using FinWise Bank in Utah to launder 160% APR loans in several states where those rates are illegal. *See* NCLC, "FDIC/OCC Proposal Would Encourage Rent-a-Bank Predatory Lending" at 2 (Dec. 2019), http://bit.ly/FDICrent-a-bankproposal. Elevate, through its Rise brand, is doing the same for its 99% to 149% APR installment loans. *Id.* Elevate's Elastic brand uses Republic Bank & Trust out of Kentucky to originate a line of credit with an effective APR up to 109% in states that do not permit that rate. *Id.*

But these lenders are staying out of Colorado for now, waiting to see if this Court will sanction their illegal efforts to circumvent valid Colorado usury limits. Give them even the smallest

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Realty, LLC v. World Business Lenders, LLC, Axos Bank f/k/a B-of-I Federal Bank, filed Oct. 17, 2019 in Supreme Court of the State of N.Y., County of Suffolk, removed to E.D.N.Y on Dec. 12, 2019 as No. 2:2019cv06971-JMA-GRB.

crack and they will blast away the overall 36% interest rate cap that Colorado voters approved in November 2018 with an overwhelming 77% vote.[6]

Rent-a-bank schemes are getting increasingly bold. In California, a new law limits the rates on loans up to $10,000 in order to address the abuses of rates up to 200%.[7] In a dire cautionary warning, several California payday lenders informed their investors that they would nonetheless continue to charge triple-digit interest rates by blatantly evading the new usury law through forging rent-a-bank relationships with banks.[8]

Meanwhile, the impact on mainstream lenders of enforcing state rate caps as to nonbank assignees is minimal and speculative. The FDIC "is not aware of any widespread or significant negative effects on credit availability or securitization markets having occurred to this point as a result of the *Madden* decision." 84 Fed. Reg. at 66845. But the dangers of allowing state-regulated lenders to launder their loans through banks are manifest. Thus, as the Second Circuit cautioned,

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[6] *See* Pat Ferrier, Fort Collins Coloradoan, "Colorado election: Proposition 111, capping interest on payday loans, passes" (Nov. 6, 2018). Colorado has lower interest rate caps for larger loans, such as those at issue in the instant case.

[7] Calif. Office of the Governor, Press Release, "Governor Newsom Signs Legislation to Fight Predatory Lending in California" (Oct. 10, 2019), https://www.gov.ca.gov/2019/10/10/governor-newsom-signs-legislation-to-fight-predatory-lending-in-california/; Calif. Assembly Bill No. AB 539 (effective Jan. 1, 2020).

[8] *See* NCLC, "Payday Lenders Plan to Evade California's New Interest Rate Cap Law Through Rent-A-Bank Schemes" (Oct. 2019), http://bit.ly/rent-a-bank-ib (quoting earnings calls).

extending federal banking preemption to third parties "would create an end-run around usury laws." *Madden*, 786 F.3d at 251–52.

V. Conclusion

For the reasons above, Amici urge this court to look beyond the form of the transaction to find that Marlette is the true lender, to hold that federal rate exportation laws do not preempt state usury laws as applied to nonbank assignees, and to enforce Colorado's usury laws.

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