



laws and worked with states, including Georgia, on legislative issues related to predatory payday lending. A decision to enjoin the enforcement of SB 157, even temporarily, will substantially undermine the efforts of Georgia and other states to protect their citizens from those payday lenders who now flout consumer protection laws. CRL presents this brief to assist the Court in deciding whether state efforts to regulate non-bank entities involved in payday lending are preempted by federal law.

Defendants have consented to the filing of this motion and brief amicus curiae.

WHEREFORE, amicus curiae Center for Responsible Lending respectfully requests that this Court grant leave to file the appended brief amicus curiae.

DATED: April 23, 2004.

Respectfully submitted,

By: \_\_\_\_\_

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

|   |   |                           |
|---|---|---------------------------|
| <b>BANKWEST, INC., et alia,</b>             | ) |                           |
| <b>Plaintiffs,</b>                          | ) | <b>Civil Action File</b>  |
| <b>v.</b>                                   | ) | <b>No: 1:04CV0988-MHS</b> |
|   | ) |                           |
| <b>THURBERT E. BAKER, Attorney General)</b> | ) |                           |
| <b>of the State of Georgia, et alia,</b>    | ) |                           |
| <b>Defendants.</b>                          | ) |                           |
| *****                                       |   |                           |

**ORDER**

ORDER GRANTING LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE  
CENTER FOR RESPONSIBLE LENDING  
IN SUPPORT OF DEFENDANTS' OPPOSITION  
TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

Having reviewed the proposed *amicus curiae* Center for Responsible Lending's Motion for Leave to File Brief Amicus Curiae

It is hereby ORDERED that leave is granted and the clerk shall file the attached brief.

By: \_\_\_\_\_  
Judge Marvin Shoob  
United States District Court

Dated: April \_\_\_\_, 2004.

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| <b>Plaintiffs,</b>                          | ) | <b>Civil Action File</b>  |
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| <b>THURBERT E. BAKER, Attorney General)</b> |   |                           |
| <b>of the State of Georgia, et alia,</b>    | ) |                           |
| <b>Defendants.</b>                          | ) |                           |
| *****                                       |   |                           |

**BRIEF *AMICUS CURIAE* OF THE  
CENTER FOR RESPONSIBLE LENDING  
IN SUPPORT OF DEFENDANTS' OPPOSITION  
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## **INTEREST OF AMICUS CURIAE**

*Amicus curiae* Center for Responsible Lending (CRL) is dedicated to protecting home ownership and family wealth by working to eliminate abusive financial practices. CRL is a nonprofit, nonpartisan research and policy organization that promotes responsible lending practices and access to fair terms of credit for low-wealth families. CRL is affiliated with Self-Help, one of the nation's largest community development lenders. Self-Help has provided more than \$3.5 billion in financing to help over 40,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources. Self-Help's 20 years' experience in lending to low and moderate-wealth individuals provides a practical basis for CRL's policy work.

CRL has conducted landmark studies on the impact of predatory lending laws and worked to ensure that consumers, both nationally and in Georgia, are protected from predatory lending. Even a month's delay in the implementation of S.B. 157 will have effects spanning well beyond that time period as, more often than not, payday borrowers fall into long-term cycles of increasing debt. When a loan becomes due, the typical borrower— by definition, financially troubled from the beginning -- cannot afford to pay the loan back and still have sufficient funds to

make it to the next payday. To avoid default, the borrower does one of two things – pay another double-digit fee to keep the same loan outstanding until another payday, or pay the full balance back but immediately take out another loan to handle living expenses. CRL has determined that 91% of payday loans are made to borrowers who, rather than facing the occasional emergency, take out five or more loans per year.<sup>1</sup> Accordingly, *Amicus* also has significant interest in ensuring that Georgia citizens are protected from predatory lending through the full and timely implementation of the legislation at issue in this case, Georgia Senate Bill 157 (SB 157).

*Amicus* submits this brief in support of Defendants’ opposition to Plaintiffs’ Motion for preliminary injunction. In this brief, *Amicus* will address the question of whether Georgia efforts to regulate the actions of non-banks through Senate Bill 157, codified at GA. CODE ANN. §§16-17-1 *et seq.*, is preempted by section 27 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C § 1831d.

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<sup>1</sup> Keith Ernst, *et al. Quantifying the Cost of Predatory Payday Lending*, Center for Responsible Lending at 2 (Feb. 24, 2004) [hereinafter “CRL Study”], available at <http://predatorylending.org/pdfs/CRLpaydaylendingstudy121803.pdf>

## SUMMARY OF ARGUMENT

This *amicus curiae* brief addresses Plaintiffs' argument that they are entitled to a preliminary injunction because SB 157 is preempted by Section 27 of the FDIA.<sup>2</sup> This argument is without merit because the FDIA does not limit states' authority to regulate non-bank entities.

Plaintiffs cannot sustain their burden of showing a substantial likelihood of success on the merits for three reasons. First, SB 157 is narrowly tailored to apply only to non-bank entities. SB 157 regulates non-banks that arrange loans and establishes a rebuttable presumption that non-banks that have the "predominant economic interest" in the loan are the *de facto* lender. However, nothing in the statute prevents an out-of-state bank from opening a branch in Georgia and using the power granted to it under Section 27 of the FDIA to export the interest rate cap, or the lack of a cap, from its home state.

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<sup>2</sup> The Plaintiffs have failed to satisfy their burden of proof as to each of the four prerequisites for a preliminary injunction: (1) there is a substantial likelihood of success on the merits; (2) there will be irreparable harm if an injunction is not issued; (3) the threatened injury to the plaintiffs outweighs the damage the proposed injunctive would cause; and (4) if issued, the injunction would not be adverse to the public interest. *Texas v. Seatrain Int'l*, 518 F.2d 175, 179 (5<sup>th</sup> Cir. 1979) (Fifth Circuit decisions issued before October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11<sup>th</sup> Cir. 1981). The Defendants address each of Plaintiff's arguments in their opposition.

Second, SB 157 does not conflict with an express grant of authority under the FDIA that would preempt state law. Courts have found that state law is preempted when it conflicts with an express grant of federal authority. Neither the plain language of the FDIA nor the case law interpreting the FDIA supports Plaintiffs' contention that the FDIA provision related to interest rates extend to non-bank agents of out-of-state banks. The FDIA does not give federally-insured state-chartered banks express authority to originate loans through agents, and the FDIC has not enacted any regulation that would give such power to these institutions. The FDIA does not prohibit the use of agents, but its silence on the subject (given the purposes of the statute) means that agents are not entitled to the benefits of federal preemption.

Finally, Plaintiffs' reliance on the National Bank Act (NBA), 12 U.S.C.A. § 21 is misplaced. The Office of the Comptroller of the Currency (OCC), the federal regulator of national banks, has made it clear that national banks have no authority to enter into rent-a-charter relationships with non-bank payday lenders and, if they do, the non-bank payday lenders should not receive the benefit of NBA preemption. Federal courts have also refused to confer the benefit of preemption of state laws on payday lenders who are purportedly acting as agents of national

banks. Assuming *arguendo* that the NBA permits agents of national banks to benefit from the preemption of state laws, the Plaintiffs' argument still fails because of fundamental differences in the text and purposes of the NBA and the FDIA. Section 24(Seventh) of the National Bank Act grants national banks specific powers, including the power to use third-party agents to originate loans. This grant of powers is deemed to preempt contrary state laws. In contrast, the FDIA does not confer concomitant authority on state-chartered depository institutions. Accordingly, any mechanical application of NBA precedent to persons purporting to act on behalf of federally-insured state-chartered banks would be erroneous.

## **I. PAYDAY LENDING AND RENT-A-CHARTER**

CRL estimates that U.S. families lose \$3.4 billion in equity wealth a year due to predatory payday lending.<sup>3</sup> Payday loans are structured to force borrowers to pay fees repeatedly for no new money advanced, resulting in high profits for the payday lenders and a cycle of debt for the borrowers. The salient characteristics of

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<sup>3</sup> CRL Study, at 2.

every payday loan are high fees (400% plus annual percentage rates),<sup>4</sup> short repayment term (average 14 days),<sup>5</sup> balloon payment,<sup>6</sup> and mandatory lender access to the borrower's checking account through either a signed check or an ACH debit authorization. Due to the high fees, the short repayment term and the balloon payment, most borrowers are unable to make full repayment when due.<sup>7</sup> Due to the outstanding check/debit authorization, however, most borrowers are given these loans *despite* their inability to repay the loans in full.<sup>8</sup> These borrowers pay fees – either to extend the too-short repayment term, or to enter a new loan agreement within days or hours after the previous loan was repaid - in amounts that quickly eclipse the outstanding principal, yet the principal does not decrease and the borrowers remain trapped in debt.<sup>9</sup>

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<sup>4</sup> See, e.g., COLO. REV. STAT. § 5-3.1-105 (2003) (20% fee on first \$300 lent); MONT. CODE ANN. § 31-1-722(2) (2003) (25% of principal); Deferred Presentment Services Act, 2003 Ala. Acts 359 § 12 (17.5% fee); S.C. CODE ANN. § 34-39-180 (E) (2003) (15% fee); see also State of Wisconsin Dept. of Fin. Inst., Review of Payday Lending in Wisconsin, 6 (2001) [hereinafter “WI Report”] available at [http://www.wdfi.org/\\_resources/indexed/site/newsroom/press/payday\\_loan\\_may\\_2001.pdf](http://www.wdfi.org/_resources/indexed/site/newsroom/press/payday_loan_may_2001.pdf); N.C. Comm. of Banks, Report to the General Assembly on Payday Lending, at 4 (2001) [hereinafter “NC Report”] available at <http://www.banking.state.nc.us/reports/ccfinal.pdf>.

<sup>5</sup> WI Report at 6; NC Report at 3.

<sup>6</sup> Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 11 (2002) (“lenders do not accept partial payments”).

<sup>7</sup> National Consumer Law Center, *Predatory Small Loans – A Form of Loansharking*, at Sec. II, available at [http://www.consumerlaw.org/initiatives/payday\\_loans/pay\\_menu.shtml](http://www.consumerlaw.org/initiatives/payday_loans/pay_menu.shtml).

<sup>8</sup> See Johnson, *supra*, at 10-12.

<sup>9</sup> *Id.*; see also CRL Study, *supra*, at 3.

Some payday lenders have gone to great lengths, such as disguising loans as pre-paid internet service with cash “rebates,”<sup>10</sup> to avoid state usury laws. The proliferation of these subterfuges illustrates the lengths to which this industry will go to avoid legitimate regulation of their lending activities.<sup>11</sup> The one strategy to evade regulation that has proven most popular, and profitable, is “rent-a-charter.” SB 157 is intended to stop rent-a-charter in Georgia. GA. CODE ANN. § 16-17-1(c).<sup>12</sup>

Rent-a-charter refers to a contractual relationship between a non-bank entity and a bank that under federal law is able to export a high interest rate from its home state. The non-bank uses this contractual relationship to attempt to avoid state law limitations on the interest and fees it can collect on loans. In the typical rent-a-charter relationship the non-bank entity markets the loans, advances the

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<sup>10</sup> See, e.g., Preliminary Injunction In the Matter of Dept. of Fin. Inst. and Attorney Gen. of Indiana v. Cash-Connects.Com, Inc., 31-32 (March 17, 2004), *available at* <http://www.in.gov/dfi/Documents/eff564.pdf>.

<sup>11</sup> The explosive growth of payday lending in the past decade, the history of payday lenders attempts to avoid lawful regulation, and the history of payday lending in Georgia are addressed at greater length in the Defendants’ Memorandum and the Brief *Amicus Curiae* of AARP.

<sup>12</sup> Section 16-17-1(c) provides:

The Georgia General Assembly declares that the use of agency or partnership agreements between in-state entities and out-of-state banks, whereby the in-state agent holds a predominant interest in the revenues generated by payday loans made to Georgia residents, is a scheme or contrivance by which the agent seeks to circumvent Chapter 3 of Title 7, the ‘Georgia Industrial Loan Act,’ and the usury statutes of this state.

funds, assumes the risk, and keeps most of the revenue. The bank has little involvement in the transaction other than renting its name to the non-bank entity in exchange for a fee. *See Bankwest Inc. v. Oxendine*, 2004 WL 550754, at \*3 (Ga. App. Mar. 22, 2004). SB 157 was enacted by Georgia to eliminate rent-a-charter by penalizing non-bank entities that make and arrange small loans in violation of Georgia law.

## **II. ARGUMENT**

### **A. SB 157 APPLIES ONLY TO NON-BANKS AND DOES NOT APPLY TO OUT-OF-STATE BANKS**

SB 157 is narrowly tailored to prevent non-banks from engaging in lending activities that violate Georgia law. Sections 16-17-1(b) – (e) state the Georgia legislature’s intent to restrict payday lending activities. SB 157 also specifically exempts banks chartered under the laws of another state and insured by the Federal Deposit Insurance Corporation from its coverage. Section 16-17-2 (a)(3) provides that the statute’s prohibitions on payday lending does not apply to:

. . . a bank or thrift chartered under the laws of the United States, a bank chartered under the laws of another state and insured by the Federal Deposit Insurance Corporation, or a credit card bank and is not operating in violation of the federal and state laws applicable to its charter.

GA. CODE ANN. § 16-17-1. Therefore, the issue before the court is whether Section 27 of the FDIA preempts Georgia law regulating non-bank entities involved in making or arranging loans in Georgia.

**B. SB 157, AS APPLIED TO AGENTS OF STATE-CHARTERED BANKS, DOES NOT CONFLICT WITH SECTION 27 OF THE FDIA AND IS NOT PREEMPTED.**

Plaintiffs contend that Section 27 of the FDIA, which empowers out-of-state banks to export the interest rate of their home state, also prevents state regulation of non-bank entities involved in payday lending. The Plaintiffs' arguments are without merit. Neither the statutory language of the FDIA, nor the relevant case law, supports Plaintiffs' expansive reading of the FDIA. In fact, Plaintiffs have been unable to cite a single case where a court held that the FDIA preempts states from applying their usury and consumer protection laws to regulate the actions of non-bank entities.<sup>13</sup>

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<sup>13</sup> Plaintiffs cite FDIA cases, but none support this proposition. Plaintiffs rely heavily on *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818 (1st Cir. 1992), for the proposition that Section 27 of the FDIA preempts SB 157. In *Greenwood Trust*, the court held that the express authority of federally-insured state-banks under Section 27 to use alternative interest rate ceilings must govern what fees are to be included in the term 'interest.' *Greenwood Trust*, at 827-829. *Greenwood Trust*, however, is also readily distinguishable on the facts, as the agent in the case was a wholly-owned subsidiary of the bank, rather than an unaffiliated third-party.

Plaintiffs conflate the separate issues of the permissibility of exportation of interest rates with the permissibility of using agents to originate loans. Both national banks and state-chartered insured institutions have the right to export interest rates from their home states. Section 85 of the NBA gives this power to national banks. In 1980, Congress enacted the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), which inserted into the FDIA a provision that mirrors Section 85 of the NBA. 12 U.S.C. § 1831d(a). Because the language of Section 27 of the FDIA tracks that of Section 85 of the NBA, the two provisions **regarding exportation of interest rates** have been construed *in pari materia*. See *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 827 (1<sup>st</sup> Cir. 1992). However, regarding the authority of states to regulate non-bank agents, there are fundamental differences in the statutory language of the FDIA and the NBA, as well as differences in the powers of national versus state banks.

The preemptive effect of the FDIA is much more limited than the NBA and does not preempt efforts by states to regulate non-bank agents of state-chartered

banks.<sup>14</sup> In Section 1, below, we explain that the FDIA, unlike the NBA, does not contain a statutory grant of authority for banks to originate loans through agents and therefore does not preempt SB 157. In Sections 2 and 3, we explain that unlike the NBA, the primary purpose of the FDIA is to protect the FDIC insurance fund. The FDIA also provides for a robust role for the states in its regulatory framework. Therefore, the limited grant of federal powers under the FDIA to state-chartered, federally-insured banks is consistent with the purposes of the statute.

**1. There Is No Preemptive Effect of the FDIA As Applied To Agents Because The FDIA Does Not Grant State Banks Express Powers To Use Third-Parties In Connection With Their Lending Business.**

Plaintiffs' reliance on the National Bank Act, and its case law,<sup>15</sup> is misplaced because the FDIA, unlike the NBA, contains no grant of broad powers for state-

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<sup>14</sup> Whether or not agents of national banks involved in payday lending are exempt from state regulation is a disputed legal issue. As we discuss in Section C below, the national banks do not have the authority to enter into rent-a-charter relationships. That issue, however, is not presented in the instant case and it is unnecessary for the court to reach that question.

<sup>15</sup> Plaintiffs cite a string of cases decided under the National Bank Act in support of their contention that the FDIA preempts state law that regulates the actions of agents of federally-insured state-chartered banks. *E.g. Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978); *Krispin v. May Dep't Stores Co.*, 218 F.3d 919 (8<sup>th</sup> Cir. 2000); *Cades v. H & R Block, Inc.*, 43 F.3d 869 (4<sup>th</sup> Cir. 1994); *Christiansen v. Beneficial Nat'l Bank*, 972 F. Supp. 681 (S.D. Ga. 1997). None of these cases, however, involved state-chartered banks or their agents. These cases rely on the unique powers of national banks and the purposes of the National Bank Act. For example, in *Marquette*, the Supreme Court states that "Omaha Bank is a national bank;

chartered banks to engage in activities ‘incidental’ to their banking businesses, such as utilizing agents in connection with their lending activities. Permissible activities for federally-insured state-chartered institutions are set forth in Section 24 of the FDIA, added by Section 303 of the Federal Deposit Insurance Corporation Improvement Act of 1991. This Section does not give federally-insured state-chartered banks express powers to originate loans through agents, and the FDIC has not enacted any regulation that would give such power to these institutions. The FDIA does not prohibit the use of agents, but the agents must act in compliance with applicable state law.

In contrast, the right of national banks to use third parties in connection with their lending business is not inherent, but is derived from the National Bank Act. Section 24 (Seventh) of the NBA specifically provides national banks with the right “[t]o exercise by its board of directors or duly authorized officers or agents, subject to law, *all such incidental powers as shall be necessary* to carry on the business of banking . . .” (emphasis added). Based on this statutory authority, the Office of the Comptroller of the Currency, which regulates national banks, has promulgated 12 C.F.R. § 7.1004, which states that “[a] national bank may use the

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it is an instrumentality of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.” *Marquette Nat’l Bank*, 438 U.S. at 308 (1978).

services of, and compensate persons not employed by, the bank for originating loans.”

Thus, according to the OCC, the ability of national banks to originate loans through agents to derives from Section 24(Seventh) of the NBA and 12 C.F.R. § 7.1004 rather than Section 85 of the NBA, which relates to interest rate exportation. In 2001, the OCC opined that a Michigan law attempting to regulate loans offered by a national bank through a non-bank third party should be preempted because a national bank has express powers to engage in activities incidental to its business pursuant to Section 24(Seventh) and has the express authority to use the services of non-banks pursuant to 12 CFR §§ 7.1003 and 7.1004. *Preemption Determination*, 66 Fed. Reg. 28,593 (May 23, 2001). The OCC’s analysis began with a discussion of the power of national banks to originate loans and then moves on to a discussion of national banks’ authority to use the services of third-party agents in their lending business. The OCC concluded the source of the authority was Section 24(Seventh) and regulations promulgated under that statute:

First, section 24(Seventh) specifically authorizes national banks to make loans. Thus, a national bank need look no further than the express language of the statute for authorization to make loans. section 24(Seventh) also authorizes national banks to engage in the

more general "business of banking" and activities incidental thereto. . . . An activity will be deemed "incidental" to the business of banking if it is "convenient or useful in connection with the performance of" a power authorized under Federal law. *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972).

Second, the authority of national banks under section 24(Seventh) permits a national bank to use the services of agents and other third parties in connection with a bank's lending business. Federal banking regulations specifically provide that a national bank may "use the services of, and compensate persons not employed by, the bank for originating loans." 12 CFR 7.1004(a).

*Preemption Determination*, 66 FR at 28,595. Only **after** concluding that the national bank has the authority to use the services of a third-party in connection with making a loan, did the OCC address the question of which interest rate the bank may charge.

Finally, under 12 U.S.C. 85, national banks may charge interest in accordance with the laws of the state where the bank's main office is located without regard to where the borrower resides and despite contacts between the loan and another state.

*Id.* FDIC-regulated state banks, however, have no such express federal authority to make loans through or in partnership with agents.<sup>16</sup>

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<sup>16</sup> Like Plaintiffs, the FDIC itself has conflated the issues of interest rates and agency. The FDIC issued a non-binding opinion on the same Michigan law as the OCC analyzed, coming to a similar conclusion. *Does Section 27 of the Federal Deposit Act Preempt the Michigan Motor Vehicle Sales Finance Act*, FDIC-02-06 (Dec. 19, 2002) 2002 WL 32361502 at \*7. However, the FDIC warned that the opinion letter was non-binding. *Id.* The Supreme Court has held that the authority of such a letter is not entitled to *Chevron*-style deference. *Christensen v. Harris*

## **2. The Restrictions On The Activities Of Federally-Insured State Banks In Section 24 of the FDIA Contrast Starkly With The Grant Of Powers To National Banks In Section 24 of the NBA.**

The FDIA's more limited grant of powers to federally-insured, state-chartered banks is consistent with Congress' intent in enacting the FDIA and the NBA. Section 24(Seventh) of the NBA was enacted to set forth the powers given to national banks. Section 24 of the FDIA, in contrast, was enacted during a period of weak state regulation to *restrict* the powers of state-chartered depository institutions that were engaging in risky activities that jeopardized the safety of the federal deposit insurance system.

Rather than stating the activities in which state-chartered depository institutions may engage, Section 24 of the FDIA states negatively the activities in which such institutions may not engage:

. . . an insured state bank may not engage as principal in any type of activity that is not permissible for a national bank unless—(1) the Corporation has determined that the activity would pose no significant risk to the appropriate deposit insurance fund; and (2) the State bank

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*County*, 529 U.S. 576, 587 (2000). The FDIC opinion notes that the OCC preemption determination was based in part on 12 U.S.C. § 24(Seventh), but fails to cite to any FDIA provision analogous to Section 24 (Seventh). Significantly, in the opinion letter, FDIC Counsel then suggests that “the *better approach*” for the state enforcement agency, *with respect to an insured state bank*, “would be to interpret and apply federal *and* state provisions in a way that *gives meaning to the state law* but also avoids frustrating the Congressional objective and purpose [for enacting Section 27].” The purpose of enacting Section 27 of the FDIA was to permit the exportation of interest rates by the bank, however, not to permit the use of agents.

is, and continues to be, in compliance with applicable capital standards prescribed by the appropriate federal banking agency.

12 U.S.C. § 1831a.

As the Senate Report stated:

The Committee is concerned that the existence of Federal deposit insurance may, in some cases, give States an incentive to gamble at Federal expense. At the request of Chairman Riegle, the FDIC, together with the Conference of State Bank Examiners, reviewed the powers each state has granted to its State-chartered banks. This survey indicates 42 States now allow their banks to engage as principals in activities not permitted for national banks. . . . Only 2 states require that these risky activities be carried out in separately capitalized subsidiaries. In at least 40 states, therefore, federally-insured deposits are directly funding risky activities.

\* \* \*

Because States have allowed their banks to risk federally-insured deposits in speculative ventures, some Federal restrictions on the activities of such banks are needed. . . . Title II [of the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991]<sup>17</sup> will impose **strict limits** on the ability of State-chartered banks to engage in activities **impermissible** for national banks.<sup>18</sup>

The House Report evidences a similar concern with the lack of restrictions on state-chartered depository institutions:

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<sup>17</sup> The Comprehensive Deposit Insurance Reform and Taxpayer Protection Act of 1991 (CDIRTPA) eventually was subdivided and enacted as several different acts including the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDIAIA). Both the CDIRTPA and the FDIAIA provided for the enactment of a Section 24 of the FDIA regarding activities of state-chartered depository institutions.

<sup>18</sup> S. Rep. No. 102-167, at 49, 54 (1991) (emphasis added).

Section 303. Restrictions on insured State bank activities. A new Section 24 is added to the FDI Act regarding permissible activities for federally insured State banks and their subsidiaries. This new section 24 retains the authority given to the States under the dual banking system for State bank agency activities but, as was done for savings associations in the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), State bank activities as principal may be limited based on risk.<sup>19</sup>

Both houses of Congress agreed that the FDIA needed to be amended to *limit* the authority given to state-chartered depository institutions under less restrictive state laws in order to protect the fiscal soundness of the federal deposit insurance system. Far from preempting the application of state laws to state-chartered depository institutions, Congress provided for state and federal regulation to work together.

Section 24(Seventh) of the National Bank Act grants national banks specific powers. This explicit grant of powers is deemed to preempt contrary state laws.<sup>20</sup> Section 24 of the FDIA, enacted to **restrict** the powers of state-chartered depository institutions, simply cannot be viewed *in pari materia* with

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<sup>19</sup> H.R. Report No. 102-330, at 135 (1991).

<sup>20</sup> See *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), at 34 (“[W]here Congress has not explicitly conditioned the grant of ‘power’ upon a grant of State permission, the Court ordinarily found that no such condition applies.”)

Section 24 of the NBA.<sup>21</sup> Section 24 of the FDIA clearly does not prevent the application of state laws to state-chartered depository institutions except as specifically set forth in the FDIA.

### **3. Federally-Insured State Banks Are Subject To Regulation By Both Federal And State Agencies.**

Significantly, Congress explicitly included in Section 24 of the FDIA a subsection (i) that states “[t]his section shall *not* be construed as limiting the authority of any appropriate Federal banking agency or any **State supervisory authority** to impose **more stringent restrictions**.” (emphasis added). That is, Congress explicitly provided for multiple regulators of the activities of insured state-chartered institutions. This fact is also highlighted in the FDIC’s own regulations implementing the provisions of Section 24 of the FDIA:

The FDIC intends to allow insured state banks and their subsidiaries to undertake only safe and sound activities and investments that do not present significant risks to the deposit insurance funds and that are consistent with the purposes of federal deposit insurance and other

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<sup>21</sup> In fact, the section of the FDIA that tracks Section 24 of the NBA is Section 9 of the FDIA, which sets forth the powers of the Federal Deposit Insurance Corporation itself. *Compare* 12 U.S.C. § 24 (“Corporate powers of associations--Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power— . . .” *with* 12 U.S.C. § 1819 (“Corporate powers—In general. Upon the date of enactment of the Banking Act of 1933, the [Federal Deposit Insurance] Corporation shall become a body corporate and as such shall have the power— . . .”).

applicable law. This subpart does not authorize any insured state bank to make investments or to conduct activities that are not authorized **or that are prohibited by either state or federal law.**

12 C.F.R. § 362.1(d) (emphasis added). Both Section 24 of the FDIA itself and the regulations implementing that section clearly state that Section 24 does not preempt state laws or other federal laws.

Congress' intent for federally-insured state-chartered depository institutions to remain subject to state laws, except as specifically provided to the contrary, is apparent from other provisions of the FDIA. For example, the FDIA gives states *concurrent* visitorial powers over insured state banks, expressly reserving certain aspects of the banking business to state regulation. *See* 12 U.S.C. § 1820(h)(1)(A). The FDIA defines the "State Bank Supervisor" as any party having "primary regulatory authority" over state banks. The Act further provides for a state bank supervisor or a state law enforcement officer to exercise enforcement powers if the host state laws governing "...fair lending, consumer protection, and permissible activities" are violated. *See* 12 U.S.C. § 1820(h)(2). In contrast, federal banking law provides a basis for the OCC's assertion of exclusive enforcement and supervisory powers over national banks. *See* 12 U.S.C. § 484(a) ("No national bank shall be subject to any visitorial powers except as authorized by federal

law...”); Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub.L.103-328, 108 Stat. 2338 (1994) (cited by the OCC as reaffirmation of its exclusive authority over national banks).

Section 24 of the FDIA is not equivalent to Section 24(Seventh) of the NBA and does not purport to give state-chartered depository institutions the benefit of preemption of state laws with respect to permitted activities. Congress has made clear when it intends for the FDIA to preempt conflicting state law, for example with respect to exportation of interest rates. The issue of state-chartered depository institutions using agents in connection with their lending activities is simply not an area where Congress has authorized the preemption of state law.

Furthermore, the Federal Deposit Insurance Corporation has not issued any regulations or published any opinions in the Federal Register that adopt the Plaintiffs’ expansive view that agents of state-chartered depository institutions are entitled to the benefit of preemption of state laws that conflict. In the Guidelines for Payday Lending issued by the FDIC, cited to by Plaintiffs BankWest and attached as an exhibit to Plaintiffs’ Verified Complaint, the FDIC describes payday loans as “a form of specialized lending not typically found in state nonmember institutions, and are most frequently originated by specialized **nonbank firms**

**subject to state regulation.”** Guidelines for Payday Lending (July 2003) at 2, *available at* <http://www.fdic.gov/regulations/safety/payday/index.html> (emphasis added). Contrary to Plaintiff BankWest’s assertion, the guidelines do not support their contention that FDIC has ruled that non-bank entities involved in payday lending are exempt from state interest rate limitations. Furthermore, the FDIC General Counsel has issued two agency opinions confirming that Section 27 confers most favored lender status upon insured state banks. Interest Charges under Section 27 of the Federal Deposit Insurance Act, Gen. Counsel’s Opinion No. 10, 63 Fed. Reg. 19,258 (Apr. 17, 1998) (defining charges included in "interest" under Section 27; Interest Charges by Interstate State Banks, Gen. Counsel’s Opinion No. 11, 63 Fed. Reg. 27,282 (May 18, 1998) (discussing impact of Riegle-Neal Act and Riegle Neal Amendments Act on Section 27 interest rate exportation). Neither opinion, however, discusses whether Section 27 also extends to non-banks who enter arrangements with insured state banks. *Id.*

**C. National Banks are Prohibited From Engaging in Payday Rent-a-Charter, so Plaintiffs Reliance on NBA Precedent is Unavailing.**

Despite the powers possessed by national banks, the OCC has made it clear that national banks have no authority to ‘rent’ these powers to non-bank payday lenders. In a joint statement issued with the Director of the Office of Thrift

Supervision, the Comptroller of the Currency warned non-bank payday lenders that they should not expect the benefits of a bank charter by virtue of a relationship with a national bank, nor should they count on support from the OCC should the relationship be subject to legal challenges similar to the case at bar.<sup>22</sup> Furthermore, the OCC and the federal courts have repeatedly denied attempts by both national banks and payday lending companies to obtain a regulatory or judicial decision legitimating these arrangements.<sup>23</sup> According to the OCC, arrangements with non-bank third-party providers in which the non-bank “offers products or services through the bank with fees, interest rates, or other terms that cannot be offered by the third-party directly” may constitute “abuse of the national bank charter.” *Third Party Relationships: Risk Management Principles*, OCC Bulletin 2001-47 (Nov. 1,

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<sup>22</sup> Joint Statement by John D. Hawke, Comptroller of the Currency and Ellen Seidman, Director, Office of Thrift Supervision, Nov. 27, 2000, available at <http://www.ots.treas.gov/docs/48594.pdf>. Significantly, the OCC made good on this warning when it submitted a brief *amicus curiae* in the case of *State of Colorado ex rel. Ken Salazar v. Ace Cash Express, Inc.*, 188 F. Supp. 2d 1282 (D. Colo. 2002), cited in Section IV(C)(1)(c) Defendant’s Brief, in support of the state attorney general’s motion to remand.

<sup>23</sup> See, e.g., *Long v. ACE Cash Express, Inc.*, 2001 U.S. Dist. LEXIS 24617 (M.D. Fla. 2001); *Brown v. ACE Cash Express, Inc.*, Civil Action No. S-01-2674 (D.Md. Nov. 14, 2001); *State of Colorado ex rel. Salazar v. ACE Cash Express, Inc.*, 188 F.Supp.2d 1282 (D.Colo. 2002); *Goleta Nat’l Bank and ACE Cash Express, Inc. v. Lingerfelt*, 211 F.Supp.2d 711 (E.D.N.C. 2002); *Goleta Nat’l Bank v. O’Donnell*, 239 F.Supp.2d 745 (S.D. Ohio 2002); *Flowers v. EZPawn Oklahoma, Inc.*, 2004 U.S. Dist. LEXIS 24876 (N.D. Okla. 2003), also cited at Section IV(C)(1)(b) of Defendant’s Brief. See also *OCC Preemption Determination*, 66 Fed. Reg. at 28595 n. 6 (distinguishing legitimate relationship between a national bank and its agent from those where the third-party has developed the loan product and has the preponderant economic interest in the loan).

2001) at 4 available at <http://www.occ.treas.gov/ftp/bulletin/2001-47.doc>. It is precisely these abuses that will be properly regulated by the timely implementation of SB 157.

### **III. CONCLUSION**

For the foregoing reasons, the Court should deny Plaintiffs' motions to enjoin the enforcement of Senate Bill 157.

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Respectfully submitted,

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