No.

In the Supreme Court of the United States

BETTY E. VADEN,

Petitioner,

v.

DISCOVER BANK & DISCOVER FINANCIAL SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a suit seeking to enforce a state-law arbitration obligation brought under Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, "aris[es] under" federal law, see 28 U.S.C. § 1331, when the petition to compel itself raises no federal question but the dispute sought to be arbitrated—a dispute that the federal court is not asked to and cannot reach—involves federal law.

2. If so, whether a "completely preempted" state-law *counter*claim in an underlying state-court dispute can supply subject matter jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority and dissenting opinions of the Fourth Circuit (App., *infra*, 1a-39a) are reported at 489 F.3d 594. The initial opinion of the Fourth Circuit (App., *infra*, 57a-74a) is reported at 396 F.3d 366. The opinion (App., *infra*, 40a-54a) and order (App., *infra*, 55a-56a) of the district court are reported at 409 F. Supp. 2d 632. An earlier opinion (App., *infra*, 75a-88a) and order (App., *infra*, 89a-90a) of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2006. The court of appeals denied a timely petition for rehearing on July 20, 2007 (App., *infra*, 91a-92a). On September 24, 2007, the Chief Justice extended the time within which to file this petition for certiorari to and including December 7, 2007. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Section 4 of the Federal Arbitration Act, 9 U.S.C. § 4, provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

STATEMENT

This case presents two issues: (1) whether 28 U.S.C. § 1331 grants federal courts subject matter jurisdiction over petitions to compel arbitration, see 9 U.S.C. § 4, that themselves do not raise federal questions but that seek arbitration of federal claims; and (2) if "looking through" the pleadings to find federal question subject matter jurisdiction is permissible, whether a "completely preempted" state-law *counter*claim can supply such jurisdiction.

A. Statutory Framework

1. Section 1331 vests federal courts with subject matter jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This Court has long recognized, however, that Section 1331 does not extend to every case in which federal law is potentially an "ingredient" of the plaintiff's claim, *Osborn* v. *Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 822-827 (1824). See *Franchise Tax Bd.* v.

Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8 n.8 (1983).

In particular, a case "aris[es] under" federal law for purposes of Section 1331 only where "the plaintiff's statement of his own cause of action shows that it is based upon [federal law.] It is not enough that the plaintiff alleges some anticipated defense to his cause of action * * * invalidated by some provision of the Constitution of the United States." *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908); see *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002); *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). Even "[a] suit to enforce a right which takes its origin in [federal law] * * * is not necessarily, or for that reason alone, one arising under those laws"; rather, the suit must "really and substantially involve[] a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal,* 225 U.S. 561, 569 (1912). And such a claim will still not be heard in federal court if doing so would "disturb[] [the] * * * balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

This construction not only avoids complicated inquiries at the jurisdictional stage, see *Holmes Group*, 535 U.S. at 832, but also helps to reduce friction between federal courts and states, see *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 32 (2002) ("Due regard for the rightful independence of state governments * * * requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

(quoting *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934)). These principles also apply to suits on removal under 28 U.S.C. § 1441(a). *Caterpillar*, 482 U.S. at 392; see also *Holmes Group*, 535 U.S. at 831-834 (applying construction to "arising under" language of 28 U.S.C. §§ 1338(a) and 1295(a)(1)); cf. *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("[Federal courts] possess only that power authorized by Constitution and statute[.] * * * It is to be presumed that a cause lies outside this limited jurisdiction." (citation omitted)).

2. The Federal Arbitration Act (FAA or the Act), 9 U.S.C. §§ 1 *et seq.*, was enacted to overturn centuries of judicial hostility to arbitration[1] and "to make arbitration agreements as enforceable as other contracts," *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). The "centerpiece" of the FAA is Section 2, which "makes a written agreement to arbitrate * * * 'valid, irrevocable, and enforceable.'" *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quoting 9 U.S.C. § 2). Sections 9, 10, and 11 of the Act, 9 U.S.C. §§ 9-11, prescribe the procedures for, respectively, confirming, vacating, or modifying an arbitration award by application to the district court "where the award was made or in any

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[1] For an example of judicial hostility to arbitration, see *Atlantic Fruit Co.* v. *Red Cross Line*, 5 F.2d 218 (2d Cir. 1924), a pre-FAA admiralty case refusing to enforce an arbitration agreement because "federal courts like those of the states and of England have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes." *Id.* at 220 (quoting *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-121 (1924)).

district proper under the general venue statute [28 U.S.C. § 1391]." *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 195 (2000).

Section 4—the subject of this petition—provides parties a remedy for enforcing arbitration agreements. It states in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. Because the FAA is an "anomaly" in not itself creating federal jurisdiction, a federal court can hear a Section 4 petition only when there is an "independent" ground for jurisdiction. *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). This result, courts have explained, is consistent with Congress's determination that agreements to arbitrate be placed on equal footing—*i.e.*, be "as enforceable as other contracts, *but not more so*." *E.g.*, *Community State Bank* v. *Strong*, 485 F.3d 597, 628 (11th Cir.) (Marcus, J., concurring) (quoting *Prima Paint*, 388 U.S. at 404 n.12), reh'g en banc granted, No. 06-11582, 2007 WL 4111380 (11th Cir. Sept. 10, 2007).

B. Proceedings Below

1. *Vaden I*

In July 2003, Discover Financial Services, Inc. (DFS) sued petitioner Betty E. Vaden in Maryland state court for nonpayment of a credit card balance over $10,000. App., *infra*, 59a. Ms. Vaden responded with counterclaims against DFS for "illegal assessment of finance charges, late fees, and interest rates and breach of contract in violation of Maryland law." *Id.* at 41a; see also *id.* at 44a. Respondents DFS and Discover Bank (together "Discover") then filed a petition in Maryland federal court to compel arbitration of Vaden's state-law counterclaims. *Id.* at 59a.

According to Discover, arbitration was required under an amendment to Ms. Vaden's credit card agreement. App., *infra*, 59a. Discover claimed that it mailed her a notice of the amendment and because she continued to use her credit card she had accepted the change. *Id.* at 60a. Ms. Vaden maintained, though, that no agreement existed, pointing to Discover's records indicating that the notice had been sent only to "Platinum" card holders and that her account had not been upgraded to "Platinum" status at the time it was sent out. *Ibid.*

After finding that a valid and enforceable arbitration agreement existed, the federal district court ordered arbitration of Ms. Vaden's state-law counterclaims. App., *infra*, 61a; *id.* at 86a. On appeal, the Fourth Circuit raised the issue of the district court's subject matter jurisdiction, *id.* at 61a, holding that a suit seeking to compel arbitration "aris[es] under" federal law for purposes of

Section 1331 whenever "the controversy *underlying* the arbitration agreement presents a federal question." *Id.* at 63a (emphasis added).

The Fourth Circuit recognized that it was deepening a conflict among the courts of appeals concerning federal question jurisdiction over Section 4 petitions. App., *infra*, 62a. Under the "narrower" approach to jurisdiction, "the federal question must be evident on the face of the arbitration petition itself." *Ibid.* (citing *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263 (2d Cir. 1996) as representative of that view). By contrast, the "broader" approach, followed by the Eleventh Circuit in *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212 (1999), "permits a federal court to examine the underlying dispute between the parties to determine if a federal question is present." *Id.* at 63a.

The Fourth Circuit committed itself to this latter, "look-through" approach, identifying three phrases in Section 4 as supporting its position. The court read the phrase "jurisdiction * * * arising out of the controversy between the parties" to refer to the "overall substantive conflict between the parties" and not to the "discrete dispute" about the arbitration agreement itself. App., *infra*, 66a. The court also reasoned that requiring federal questions to appear on the face of the petition itself would "siphon[] off federal question jurisdiction" and thus effectively rewrite "Title 28" to exclude Section 1331. *Ibid.* Finally, the court interpreted "save for such agreement" as an "instruction to set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently," *id.* at 64a, *i.e.*,

to look through to the underlying dispute, rejecting the position that those words were included to express the FAA's break with the common law's refusal to entertain claims seeking specific performance of promises to arbitrate, *id.* at 65a n.2.

To further support its holding, the Fourth Circuit analogized this approach to that governing jurisdiction over declaratory judgment suits. App., *infra*, 68a-70a. In a declaratory judgment action, jurisdiction may be based on the presence of a federal question in the hypothetical complaint prompting the would-be defendant's preemptive action; jurisdiction over Section 4 petitions, the Fourth Circuit reasoned, should similarly depend on "whether a federal action prompted the motion to compel arbitration." *Id.* at 69a. The contrary position, the court explained, would frustrate the "liberal federal policy favoring arbitration agreements." *Id.* at 70a (quoting *Moses H. Cone*, 460 U.S. at 24).

The court concluded that even under the look-through rule, however, the district court's subject matter jurisdiction over Discover's petition was uncertain. App., *infra*, 73a. Because Ms. Vaden's counterclaims alleged violations of *state* law, look-through jurisdiction would require a finding that the claims were "*completely* preempted." *Id.* at 73a n.3 (emphasis added); see *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6-8 (2003); App., *infra*, 44a ("Under the doctrine of complete preemption, a complaint that alleges only state law causes of action may be removed when the state claims necessarily invoke a federal law." (citing *Caterpillar*, 482 U.S. at 393)). Moreover, because her claims were against DFS, not Discover Bank, and the only plausible

theory of complete preemption implicated the Federal Deposit Insurance Act (FDIA), 12 U.S.C. §§ 1811 *et seq.*—a statute applicable only to Discover Bank—the petition could proceed only if the district court determined that the real "party of interest" for her claims was Discover Bank. App., *infra*, 73a n.3. The Fourth Circuit also instructed the district court, if it found subject matter jurisdiction, to reexamine whether a genuine factual dispute remained as to whether Ms. Vaden had agreed to arbitration. *Id.* at 73a n.4.

2. *Vaden II*

On remand, the district court found federal question jurisdiction over the petition, concluding that the FDIA has "complete[ly] preempt[ive]" force, App., *infra*, 48a, and that Discover Bank was the "real party in interest," *id.* at 46a, 48a. Finding further that an agreement to arbitrate existed, it again ordered Ms. Vaden to arbitrate her counterclaims. *Id.* at 53a.

A divided panel of the Fourth Circuit affirmed. App., *infra*, 28a. Acknowledging that the complete preemption doctrine "orginate[d] in the removal context," where it has only been applied to *complaints* (not counterclaims), the panel majority nevertheless held that applying the doctrine in this context was justified. *Id.* at 8a n.3. It was not, in the panel's words, "a logical leap" to rely on complete preemption to find federal question jurisdiction because the doctrine was not tied to "the procedural act of removal, but [to] the dominance of federal law over the preempted state law." *Ibid.*

Judge Goodwin dissented, faulting the majority opinion's "inexplicabl[e] use [of] the removal doctrine of complete preemption to recharacterize a *counterclaim* in a state court civil action as federal." App., *infra*, 28a. He also criticized the majority opinion for "evad[ing] [this Court's] clear holding in *Holmes Group*," *id.* at 34a, *i.e.,* that federal question jurisdiction could not be grounded on a counterclaim, *id.* at 33a. "[C]omplete preemption," he explained, "is solely a removal doctrine," *id.* at 34a, that has "but one purpose—that is, the recharacterization of a *plaintiff*'s state *complaint* so that it may be considered federal for the purposes of the well-pleaded complaint rule," *id.* at 35a.

The dissenting opinion also registered disagreement with *Vaden I*, noting that the initial decision was against the "clear weight of authority." App., *infra*, 39a. "[F]inding federal question jurisdiction * * * only to enforce a private contract," Judge Goodwin explained, "considerably, and * * * unjustifiably, expands federal court jurisdiction," *ibid.* (citing *Strong*, 485 F.3d at 616 (Marcus, J., concurring)), and "elevate[s] [arbitration agreements] over other forms of contract," *id.* at 38a (quoting *Prima Paint*, 388 U.S. at 404 n.12). Thus "troubled" that the FAA had become a "make weight for jurisdiction," Judge Goodwin rejected not only the majority's holding, but also the underlying look-through jurisdiction rule embraced in *Vaden I*. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Look-Through Rule Worsens An Already Deep Split Among The Circuits And Is Incorrect On The Merits

A. The Courts Of Appeals Are Divided As To Whether The Federal Character Of The Issue The Parties Have Agreed To Arbitrate Can Supply Federal Jurisdiction Over A Section 4 Petition

As the Fourth Circuit acknowledged, "the courts of appeals are in disagreement as to whether—in a suit to compel arbitration authorized by [FAA] § 4—a district court has subject matter jurisdiction of a case when the underlying dispute between the parties raises a federal question." App., *infra*, 62a.[2] In this situation, four circuits have held that Section 1331 does not permit a federal district court to "look through" pleadings that themselves contain no properly invoked federal question to find jurisdiction based on a federal question in the underlying dispute.

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[2] Other courts have also noted this split. See, *e.g.*, *Community State Bank* v. *Strong*, 485 F.3d 597, 615 (11th Cir.) (Marcus, J., concurring) (noting that "the circuits are plainly split" as to whether jurisdiction over a Section 4 petition can be based on federal questions in the dispute to be arbitrated), reh'g en banc granted, No. 06-11582, 2007 WL 4111380 (11th Cir. Sept. 10, 2007); *In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M:06-cv-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007) (noting "a substantial circuit split" on the issue and granting certification for interlocutory appeal on this basis), interlocutory appeal granted, No. 07-80046 (9th Cir. July 24, 2007).

The Fourth Circuit has unequivocally committed itself to the opposite conclusion, joining two other circuits. Given the starkness of the conflict and the pervasiveness of lower court confusion about this fundamental and recurring question of federal jurisdiction—not to mention the costly uncertainty engendered by the Fourth Circuit's expansive approach—this Court's review is warranted.

1. The Second, Fifth, Sixth, and Seventh Circuits have held that federal question subject matter jurisdiction over a Section 4 suit must be determined by reference to the well-pleaded allegations of the petition itself. Under this well-pleaded petition rule, a petition that seeks to enforce a contractual arbitration obligation does not "arise under" federal law merely because the issue to be arbitrated is federal in character.

The Fifth Circuit was the first to reject explicitly the argument that federal question jurisdiction should depend on the character of the issues to be arbitrated. In *Prudential-Bache Securities, Inc.* v. *Fitch*, 966 F.2d 981 (5th Cir. 1992), plaintiffs filed suit in state court, asserting state-law and federal securities law claims. *Id.* at 983. After unsuccessfully trying to remove the suit, the defendant brought a second suit in federal court, seeking to compel arbitration. *Ibid.* The court dismissed this second suit for want of jurisdiction, holding that "a party seeking to enforce rights created by the FAA must do so in state court unless federal jurisdiction is independently established by the allegations of the plaintiff's own complaint or unless the case is already in federal court." *Id.* at 989. Because the plaintiffs sought only to enforce the

terms of the parties' arbitration agreement—a state-law contract—their underlying dispute with the defendant was not properly part of the petition filed in federal court to compel arbitration. *Id.* at 988. And in light of this Court's admonition that the FAA "does not create any independent federal-question jurisdiction," *ibid.* (quoting *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)), the Fifth Circuit concluded, there was "no indication that Congress in enacting the FAA, or the Supreme Court in interpreting it, intended to change the rules for determining federal jurisdiction over a complaint," *id.* at 988.[3] Thus, the federal securities law claims in the underlying case were irrelevant and the court had no federal question jurisdiction over the action. *Ibid.*[4]

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[3] The court also read the FAA's history as support for its conclusion, linking Section 4 with Congress's rejection of the "arcane English common law rule" of ouster, under which courts—staffed by judges paid by the case—refused to enforce arbitration agreements that would "deprive the court of jurisdiction over a case" and therefore cause "depletion of the judge's case load and accompanying fees." *Prudential-Bache*, 966 F.2d at 987. Section 4's reference to the court that would have jurisdiction "save for such agreement" was not meant to abrogate ordinary limitations on federal question jurisdiction (as the Fourth Circuit concluded below, see App., *infra*, 64a-65a), but rather to make clear that federal courts were, on the terms set out, authorized and required to entertain suits whose only demand for relief was specific performance of an executory agreement to arbitrate. 966 F.2d at 987-988.

[4] Although a later Fifth Circuit decision, *Rio Grande Underwriters, Inc.* v. *Pitts Farms, Inc.*, 276 F.3d 683 (2001), appears to take an approach similar to the Fourth Circuit's—and has created some confusion in district courts of the Fifth Circuit, see p. 18, *infra*—it is clear that *Prudential-Bache*

Likewise, the Second Circuit has held that a federal court does not have jurisdiction over a petition to compel arbitration "merely because the underlying claim raises a federal question." *Westmoreland Capital Corp.* v. *Findlay*, 100 F.3d 263, 268 (1996). In *Westmoreland*, the court held that the federal courts lacked subject matter jurisdiction over an investment firm's petition to stay arbitration that had been commenced by customers alleging violations of federal securities law. *Id.* at 264-265.[5] It explained that basic rules of federal jurisdiction required dismissal because the federal nature of the customers' claims was not the source of any right asserted in the Section 4 suit and was therefore "not part of a 'well-pleaded complaint' asking the court to stay arbitration." *Id.* at 269.

The Second Circuit also recognized the "odd distinction" that would result from reading Section 4 as expanding jurisdiction. Other sections of the FAA, the court explained, contain language that "suggests a bestowal of jurisdiction"—but have been interpreted

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remains binding there. *Goodman* v. *Harris County*, 443 F.3d 464, 467-468 (5th Cir. 2006) ("In the event of conflicting panel opinions[,] * * * the earlier one controls." (citation omitted)). Indeed, even absent this strict "prior panel" rule, it would be clear that *Rio Grande*, which addressed the issue only in *dictum*, and did so in a case where neither the court nor the parties even cited *Prudential-Bache*, could not overrule precedent.

[5] *Westmoreland* involved a suit brought under FAA Section 4 seeking to *stay* arbitration, a remedy not explicitly authorized by the text of that provision. Because the court concluded that subject matter jurisdiction was lacking, it did not reach the question whether a stay is in fact available under Section 4. *Westmoreland*, 100 F.3d at 266 n.3.

as not conferring jurisdiction. *Westmoreland*, 100 F.3d at 268; see 9 U.S.C. § 9 (authorizing application to confirm arbitration award "to the United States court in and for the district within which such award was made"); *id.* § 10 (authorizing an action to vacate arbitration award in "the United States court in and for the district wherein the award was made"). Under the look-through construction of Section 4, a petition to compel arbitration could be brought in federal court on the basis of a federal question in the underlying dispute but an application to confirm or vacate the resulting arbitration award could not, a result the Second Circuit saw as "truly * * * 'bizarre.'" *Westmoreland*, 100 F.3d at 268 (quoting *Drexel Burnham Lambert, Inc.* v. *Valenzuela Bock*, 696 F. Supp. 957, 963 (S.D.N.Y. 1988)).

The Sixth and Seventh Circuits, too, have held that a federal question in the underlying dispute does not supply jurisdiction over a Section 4 petition. See *Smith Barney, Inc.* v. *Sarver*, 108 F.3d 92, 94 (6th Cir. 1997) (noting that "the federal nature of the underlying claims that were submitted to arbitration" does not supply federal jurisdiction over a Section 4 petition, but concluding that diversity jurisdiction was present); *Wisconsin* v. *Ho-Chunk Nation*, 463 F.3d 655, 660 (7th Cir. 2006) ("[W]e do not look through to the underlying complaint in arbitration to ascertain whether subject matter jurisdiction obtains."); see also *Kasap* v. *Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1246 (D.C. Cir. 1999) (observing that the "clear weight of authority" supports this understanding of federal question jurisdiction).

2. In direct conflict with these decisions adhering to the well-pleaded complaint rule in Section 4 cases, the First, Fourth, and Eleventh Circuits have now taken the starkly opposite approach. As noted above, the Fourth Circuit could not have been more emphatic in its disagreement—it expressly considered and rejected the reasoning of the Second and Fifth Circuits before concluding that "when a party comes to federal court seeking to compel arbitration, the presence of a federal question in the underlying dispute is sufficient to support subject matter jurisdiction." App., *infra*, 59a.

In holding that federal courts should look through the petition filed in federal court to find jurisdiction based on federal issues in the underlying dispute, the Fourth Circuit joined two other circuits that had previously reached this conclusion. See *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999) ("[I]t is appropriate for us to 'look through' Tamiami's arbitration request at the underlying licensing dispute in order to determine whether Tamiami's complaint states a federal question."); *PCS 2000 LP* v. *Romulus Telecomms., Inc.*, 148 F.3d 32, 34-35 (1st Cir. 1998) (deciding jurisdiction over a Section 4 petition based on the underlying dispute, but affirming dismissal because the claim was not federal).

3. The conflict evident in decisions such as *Westmoreland* and the one below has led to substantial confusion and disagreement among (and within) the courts of appeals, as well. Indeed, this confusion can be seen even in the circuits that have come down on one side of the circuit split or the other.

The leading decision of the First Circuit, for example, takes a peculiar zig-zag approach to the question. The court in *PCS 2000* looked to the underlying dispute and dismissed a Section 4 petition for lack of jurisdiction because it found no federal issue. 147 F.3d at 34-35. But strangely, the court *also* cited—with apparent approval—the Second Circuit's decision in *Westmoreland*, a case on the opposite side of the circuit split. See *id.* at 34.

The Eleventh Circuit's position has also become unsettled, having been called into question by *Community State Bank* v. *Strong*, 485 F.3d 597 (11th Cir.), reh'g en banc granted, No. 06-11582, 2007 WL 4111380 (11th Cir. Sept. 10, 2007). There, a three-judge panel, applying the look-through rule announced in *Tamiami Partners*, held that the federal court had "arising under" jurisdiction over a Section 4 petition brought by several payday lenders and an associated bank because one of the issues to be arbitrated was federal in character. *Id.* at 612-613. But two judges, including Judge Marcus, the main opinion's author, emphasized that they applied the look-through rule only because they were bound to do so by circuit precedent. *Id.* at 613-614 (Marcus, J., concurring). They added a lengthy concurring opinion, expressing the view that the look-through rule is "wrong, or at the very least ill-considered" and that the issue was "ripe for * * * certiorari review." *Id.* at 614-615. In this opinion, Judge Marcus carefully considered—and rejected—each of the arguments advanced by the Fourth Circuit in support of the look-through approach. See *id.* at 625-634.

Nor have the courts on the other side of the conflict been immune from confusion and

uncertainty. Although, as noted above, *Prudential-Bache*, which rejected the look-through rule, remains the law of that Circuit, a later panel decision (apparently unaware of that precedent, which was not cited by either party) took the jurisdiction-expanding approach to Section 4 laid out in *Vaden*. See *Rio Grande Underwriters, Inc.* v. *Pitts Farms, Inc.*, 276 F.3d 683, 685 (5th Cir. 2001) (positing that orders compelling arbitration are "available in federal district court * * * only if the court would have had subject matter jurisdiction over the underlying civil action"). That decision held subject matter jurisdiction lacking (on the ground that the issue to be arbitrated was one of state law), but at least one court of that circuit has relied upon it to find look-through jurisdiction, see *Ellison* v. *Fannie Mae*, No. 3:05-CV-1155-G, 2007 WL 2089368, at *2 (N.D. Tex. July 23, 2007) (applying *Rio Grande* to uphold federal jurisdiction on the basis of a federal question in the underlying dispute, without discussing *Prudential-Bache*), even as others have continued to recognize *Prudential-Bache* as the governing precedent, see, *e.g.*, *CitiFinancial, Inc.* v. *Murray*, 340 F. Supp. 2d 743, 748 (S.D. Miss. 2004) (noting that *Prudential-Bache* establishes that "jurisdiction for a petition to compel arbitration must be determined from the face of the petition" and finding jurisdiction on the basis of diversity, without discussing *Rio Grande*).[6]

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[6] The Ninth Circuit provides further confirmation of the currency of the issue and the need for this Court's intervention. Although it specifically reserved the question (because it was not argued by the parties), that court has "recognize[d] that there is a substantial body of case law which holds that the existence of a federal question in the underlying dispute is not sufficient to create subject matter

B. The Fourth Circuit's Look-Through Rule Conflicts With Basic Principles Of Federal Subject Matter Jurisdiction And Impermissibly Privileges Arbitration Agreements

Beyond conflicting with the decisions of four other circuits, the Fourth Circuit's look-through approach is also wrong on the merits. By departing from the well-pleaded complaint rule, the look-through approach privileges arbitration agreements over other state-law contracts and requires costly and time-consuming litigation over the threshold issue of subject matter jurisdiction—even though providing a federal forum advances no federal interest. These incongruous results are in no way required by a proper reading of Section 4.

1. As a number of courts have explained, the Fourth Circuit's decision to base jurisdiction on the character of the issue whose arbitration the Section 4 petitioner seeks to compel flouts the rule that "has long governed whether a case 'arises under' federal law for purposes of § 1331," *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830

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jurisdiction over a petition to compel arbitration." *Blue Cross of Cal.* v. *Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1050 n.5 (9th Cir. 1999). It recently agreed to address the issue it expressly left undecided in *Blue Cross* by granting interlocutory appeal after a district court had noted "that there is a substantial circuit split" on this issue and certified its order upholding jurisdiction over 70 freestanding Section 4 petitions on that basis. *In re Cintas Corp. Overtime Pay Arbitration Litig.*, No. M:06-cv-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007), interlocutory appeal granted, No. 07-80046 (9th Cir. July 24, 2007).

(2002), that statutory "arising under" jurisdiction is to be determined by reference to the well-pleaded allegations of the complaint. See *Westmoreland*, 100 F.3d at 269; *Prudential-Bache*, 966 F.2d at 988; see also *Strong*, 485 F.3d at 635 (Marcus, J., concurring). "[A] § 4 petitioner merely asks the court to specifically enforce a contract," the parties' arbitration agreement. *Strong*, 485 F.3d at 618; cf. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964) ("The duty to arbitrate [is] of contractual origin."). Because the Section 4 petitioner's cause of action is a creature of the parties' arbitration agreement (generally arising out of state law) and the federal court's role is limited to determining whether a contractual obligation exists and has been violated, the nature of the underlying dispute (*i.e.*, issues the petitioner does not ask the federal court to decide and, in fact, claims it cannot decide) is irrelevant to the suit and is not part of the well-pleaded complaint. By nonetheless providing a federal forum for a petition to enforce a state-law arbitration agreement, the Fourth Circuit's look-through rule distorts basic jurisdictional rules and impermissibly privileges arbitration. It is fundamentally inconsistent with the FAA's aim of placing arbitration agreements on equal footing, *i.e.*, making them "as enforceable as other contracts, *but not more so*." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added).

Nor are any of the interests animating the statutory grant of federal question jurisdiction advanced by providing a forum for Section 4 suits whenever a party seeks to compel arbitration of an

issue that is federal in character.[7] The interests in uniform or expert interpretation of federal law are not advanced or even implicated by having federal courts adjudicate suits that resolve only whether particular parties actually agreed to arbitrate a particular question (the only provision of federal law that the Section 4 petitioner asks the court to interpret—the FAA—has been expressly held *not* to supply federal jurisdiction, *Moses H. Cone*, 460 U.S. at 25 n.32). Indeed, this illustrates why the Fourth

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[7] Facing this absence of a federal interest to support its decision, the Fourth Circuit attempted to fashion one by referencing this Court's statements that Congress has declared "a liberal federal policy favoring arbitration agreements," App., *infra*, 70a (quoting *Moses H. Cone*, 460 U.S. at 24); that "as a matter of federal law, any doubts concerning the scope of arbitratible [sic] issues should be resolved in favor of arbitration," *ibid.* (quoting, ultimately, *Moses H. Cone*, 460 U.S. at 24-25); and that the FAA "plac[es] arbitration agreements upon the same footing as other contracts," *id.* at 71a (alteration in original) (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). But each step is unavailing. The liberal policy favoring arbitration and the concomitant obligation to err in favor of arbitration apply once a federal court has taken jurisdiction and must decide which issues to send to arbitration. Such a thumb on the scale when deciding whether jurisdiction exists, however, would be inconsistent with the federal courts' role as courts of limited jurisdiction. See *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Strong*, 485 F.3d at 628 (Marcus, J., concurring). Similarly, because "[a]ctions to specifically enforce contracts, generally speaking, do not raise federal questions," the "equal footing" policy is disserved by holding that "an otherwise ordinary contract enforcement action raises a federal question on the basis of some other cause of action that may be brought before an arbitrator." *Ibid.*

Circuit's analogy to declaratory judgments, App, *infra*, 68a-70a, is fundamentally inapt: to the extent that the well-pleaded complaint rule is relaxed for such actions, it is precisely because the question the federal court is asked to decide is undeniably one of federal law. Moreover, an expansion of federal jurisdiction cannot be justified by any perceived hostility to federal claims on the part of state courts, because—if a federal forum is denied—the disappointed Section 4 petitioner's alternative would not be to have a state court decide the federal issue, but would instead be to ask the state court to have *someone else*—the arbitrator—decide the claim. [8]

Even worse, the look-through approach also promises to produce wasteful litigation on the threshold question of subject matter jurisdiction and to introduce friction between state and federal courts, concerns rendered all the more pressing "in view of Congress's clear intent * * * to move the parties to an arbitrable dispute out of court and into arbitration as quickly and as easily as possible." *Moses H. Cone*, 460 U.S. at 22. In this case, for example, five

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[8] Nor can the rule be understood as premised on state courts' presumed hostility to arbitration. That would be a profoundly ahistorical view of the FAA—which was an effort to bring federal courts into line with state practice—and it would prove far too much, as the Fourth Circuit's rule only extends federal jurisdiction to petitions in which the underlying dispute contains a federal question. There is no reason to think that a state court would be more (or less) hostile to arbitration in these cases, so any hostility to arbitration in the state courts would thus argue for federal jurisdiction to enforce *all* arbitration agreements, a result that is incompatible with the FAA's acknowledged requirement of an independent basis for federal jurisdiction.

different federal judges have considered jurisdiction in five separate opinions over four years of litigation, and the joint appendix in *Vaden II* ran some 846 pages. The Fourth Circuit was forced to examine complex, fact-intensive issues that closely track the merits of the underlying dispute, such as whether Ms. Vaden's state-law claims were completely preempted, see App., *infra*, 18a-25a, and whether Discover Bank was a "real party in interest" in the underlying state-court suit, see *id.* at 12a-18a. "An interpretation of the FAA that requires the district court to strongly suggest an answer to the merits of the parties' underlying dispute"—at great cost to the litigants and the courts—"merely as a means of determining whether it has subject matter jurisdiction to enforce a contractual agreement to send that dispute to the *arbitrator* for resolution, can only be described as odd." *Strong*, 485 F.3d at 634 (Marcus, J., concurring).

2. Of course, this surpassingly "odd" result would be unavoidable if Congress had clearly intended Section 4 to expand federal courts' subject matter jurisdiction. But it did not. The text, structure, and history of Section 4 establish that, like a number of other provisions of the FAA, it was enacted to address questions of remedy and procedure for arbitration disputes arising in cases that independently cleared the subject-matter-jurisdiction threshold, not to create subject matter jurisdiction—and the textual clues identified by *Vaden I* hardly compel a contrary result.[9]

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[9] Congress unmistakably knows how to overturn the well-pleaded complaint rule when it intends to do so, as it did in

Contrary to the Fourth Circuit's argument, the well-pleaded petition rule does not "rewrite the statute" by "[s]iphoning off federal question jurisdiction from Title 28." App., *infra*, 66a. Rather, under the well-pleaded petition rule, federal jurisdiction over a petition to compel arbitration can be based on a number of sources, such as diversity of citizenship, see 28 U.S.C. § 1332; admiralty, see *id.* § 1333, when the arbitration clause at issue is part of a maritime contract; or supplemental jurisdiction, see *id.* § 1367, when a party brings a federal cause of action so that the state-law claim to compel arbitration is within the court's pendent claim jurisdiction. See *Strong*, 485 F.3d at 626-627 (Marcus, J., concurring). Indeed, an action to compel arbitration can also state a federal question sufficient to confer jurisdiction under 28 U.S.C. § 1331 "when the agreement to arbitrate itself arises under federal law," such as employee benefit agreements under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* *Strong*, 485 F.3d at 627 (Marcus, J., concurring). It is thus "altogether natural for Congress to have referred to Title 28 generally, rather than to its various independent components." *Ibid.*

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expanding federal jurisdiction over arbitration cases under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201 *et seq.* See *id.* § 203 (providing that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States"); *id.* § 205 (providing that the well-pleaded complaint rule does not apply to removal of suits relating to an arbitration agreement or award governed by the Convention).

Similarly, Section 4's reference to "the controversy between the parties" does not mean that Congress intended the federal courts to mine "the overall substantive conflict between the parties," App., *infra*, 66a, to find a federal question. In explaining its rule, the Fourth Circuit suggested that "[l]itigants do not come to court solely to resolve the collateral issue of whether or not they have an agreement to arbitrate." *Ibid.* But, in fact, a party petitioning to compel arbitration under Section 4 does exactly that. The sole issue presented by a petition to compel is whether an arbitration agreement exists—the federal court *is not asked* to decide the parties' "real-life conflict[]," *ibid.*, and, indeed, it is precluded from doing so, cf. *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649-650 (1986).

Nor does Section 4's "save for such agreement" language require the Fourth Circuit's jurisdiction-expanding rule. As noted above, a number of courts have concluded that the "save for such agreement" language carries independent significance without requiring federal courts to resolve disputes that do not plead—or even present—any important federal question. See, *e.g.*, *Prudential-Bache*, 966 F.2d at 987-989; *Westmoreland*, 100 F.3d at 268; *Strong*, 485 F.3d at 632-633 (Marcus, J., concurring). Consistent with the statute's overall aims, the language can be read as clearing the way for a particular kind of suit—one that seeks only specific performance of an agreement to arbitrate—that federal courts would have previously refused to entertain. See, *e.g.*, *Atlantic Fruit Co.* v. *Red Cross Line*, 5 F.2d 218, 220-221 (2d Cir. 1924). Indeed, such an understanding of Section 4 has the virtue of not only historical accuracy but also coherence. It brings the provision

into alignment with the other provisions of the FAA with which it was enacted.

* * *

In sum, the decision below reflects a split between, on the one hand, three circuits that permit look-through jurisdiction and, on the other, four that hold that such jurisdiction violates 28 U.S.C. § 1331. The confusion in the lower courts, moreover, extends far beyond this circuit split. The rule adopted below also impermissibly privileges arbitration agreements and leads to wasteful litigation on the threshold question of subject matter jurisdiction, frustrating Congress's intent to create a system that efficiently enforces arbitration agreements on an even footing with other contracts—all in the absence of any countervailing federal interest to justify the distortion of long-standing jurisdictional principles. This Court's review is necessary to resolve the split and ease the confusion in the lower courts.

II. The Second Decision Below Conflicts With This Court's Decision In *Holmes Group* And The Fundamental Principles Of Federal Jurisdiction On Which It Rests While Distorting The FAA's Fundamental Purpose

Having rejected the well-pleaded petition rule, the Fourth Circuit instructed the lower court to determine whether the underlying dispute presented a federal question. App., *infra*, 73a. On remand, the lower court held that Ms. Vaden's state-law counterclaims provided federal question jurisdiction over the case because they were "completely

preempt[ed]"—a ruling the Fourth Circuit affirmed in *Vaden II*. *Id.* at 28a, 48a.

Even if it were appropriate to tie a federal court's jurisdiction over a Section 4 petition to whether it would have had jurisdiction over a suit on the underlying dispute (and it is not, see pp. 19-26, *supra*), *Vaden II* would still work an unwarranted expansion of federal jurisdiction. *Vaden I*, by its terms, instructs a federal court to look through the petition and ask whether "subject matter jurisdiction over the case would otherwise exist by virtue of a properly invoked federal question in the underlying dispute," App., *infra*, 29a, *i.e.*, whether the federal court would have jurisdiction in the absence of the arbitration agreement. Here, however, the Fourth Circuit looked to Ms. Vaden's state-court *counter*claims, which, as this Court's decision in *Holmes Group* makes clear, could not supply jurisdiction over the underlying dispute. Thus unmoored from basic jurisdictional rules (and the clarity that they bring), *Vaden II* plucked (part of) a state-court dispute into a federal court that it otherwise could never have reached, leading to inefficient, piecemeal litigation and further privileging arbitration agreements over other contractual obligations. In addition to illustrating the problems posed by the Fourth Circuit's wrong turn in *Vaden I*, *Vaden II* is also independently wrong and therefore worthy of this Court's review.

Valid federal question jurisdiction requires that a federal issue be present on the face of the plaintiff's well-pleaded complaint, *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152-154 (1908), a rule this Court reaffirmed in *Holmes Group,* 535 U.S. at 830.

There, the Court rejected the argument "that the well-pleaded-complaint rule, properly understood, allows a counterclaim to serve as the basis for a district court's 'arising under' jurisdiction." *Id.* at 830. Allowing counterclaims to establish "arising under" jurisdiction, *Holmes Group* explained, would "contravene the * * * policies underlying [this Court's] precedents," *id.* at 831, and "transform the longstanding well-pleaded-complaint rule into the 'well-pleaded-complaint-*or-counterclaim* rule,'" *id.* at 832.

Holmes Group thus made clear that the well-pleaded complaint rule does not permit a court to base federal question jurisdiction solely on a *counterclaim* arising under federal law. The result reached by the majority in *Vaden II*, however, makes an end run around this well-established rule. DFS's complaint in the underlying dispute presents no issue of federal law, App., *infra*, 59a, and diversity jurisdiction is not present in this case, *id.* at 8a n.2. Rather, as the dissenting judge noted below, "federal jurisdiction is purportedly based upon defendant's state court *counterclaim* alleging illegal late fees and interest rates." *Id.* at 32a. Because no independent basis for federal jurisdiction exists on the face of DFS's state-court complaint, this case should have been resolved by a routine application of *Holmes Group*. But rather than ask whether federal jurisdiction was present in the underlying state-court case, the majority—relying on the supposed "unique procedural posture" created by petitions to compel arbitration, *id.* at 8a n.3—seemed content to find a

federal issue *anywhere* in the underlying dispute. See *ibid*.[10]

This reliance on state-law *counterclaims* for arising under jurisdiction undermines the policies served by the well-pleaded complaint rule. Under the majority's rule, the plaintiff can force piecemeal, inefficient litigation of a dispute in different court systems. When, as here, a defendant in a state-court suit asserts a purportedly completely preempted state-law counterclaim arguably subject to arbitration, the plaintiff can force litigation over its arbitrability into the federal court system, thereby

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[10] The majority's conclusion that Ms. Vaden's counterclaims were completely preempted provides no support for this free-ranging inquiry into her counterclaims in search of a federal question, contrary to the majority's apparent suggestion, App., *infra*, 9a, 10a & n.4. The complete preemption doctrine recharacterizes as federal claims those that—though purportedly based on state law—necessarily sound in federal law. *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 393 (1987). But because, as *Holmes Group* makes clear, counterclaims that *expressly* arise under federal law cannot supply federal question jurisdiction, it follows *a fortiori* that counterclaims recharacterized as federal by the complete preemption doctrine cannot supply such jurisdiction. Indeed, prior to *Vaden II*, every federal court to have addressed the issue had concluded that a completely preempted state-law counterclaim cannot confer federal question jurisdiction. See, *e.g.*, *Aetna Health* v. *Kirshner*, 415 F. Supp. 2d 109, 114 (D. Conn. 2006) (seeing "no reason why the well-pleaded complaint rule should apply differently to a counterclaim allegedly preempted by ERISA"); *Cross Country Bank* v. *McGraw*, 321 F. Supp. 2d 816, 821 (S.D. W. Va. 2004) ("[N]either the Supreme Court nor any other court * * * has expanded the complete preemption doctrine to include claims stated for the first time in a responsive pleading filed by a defendant.").

suspending state proceedings and requiring the federal courts to consider aspects of the dispute the state courts may have already evaluated. Also, as a result of *Vaden II*, the well-pleaded complaint rule no longer operates as a "'quick rule of thumb' for resolving jurisdictional conflicts." *Holmes Group*, 535 U.S. at 832 (quoting *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 11 (1983)). Courts asked to compel arbitration will be unable to efficiently discern whether arising under jurisdiction exists solely by reference to the plaintiff's complaint. Instead, within the Fourth Circuit, they must examine responsive pleadings and often determine complex legal and factual issues, a practice that plainly "undermine[s] the clarity and ease of administration of the well-pleaded complaint doctrine." *Id.* at 832. And what is more, these difficulties (and those posed by *Vaden I*, see pp. 19-23, *supra*) would arise in an expanded number of cases—after all, many more cases involve federal issues at some point (and therefore can reach federal court through a petition to compel arbitration under *Vaden II*) than present a federal issue on the face of the plaintiff's complaint. Expanding federal jurisdiction in this manner would, in effect, "radically expand the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments'" that this Court's cases mandate, *Holmes Group*, 535 U.S. at 832 (alteration in original) (quoting *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 109 (1941)).[11]

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[11] Indeed, the arguments against federal subject matter jurisdiction here go far beyond those supporting the decision in *Holmes Group*, which involved the allocation of

By extending the complete preemption doctrine to counterclaims based on the "unique procedural posture," App., *infra*, 8a n.3., created by its own *sui generis* approach to arbitration agreements, *Vaden II* further privileges arbitration disputes over other state-law claims. *Vaden I*, for its part, instructs the federal courts to jettison traditional jurisdictional rules by looking through the pleading filed in federal court to examine the underlying dispute between the parties. *Vaden II* goes even further, instructing the federal courts to ignore these traditional rules once more as they examine the underlying dispute, permitting them to ground jurisdiction on any federal issue they find, even one that could not otherwise have brought the dispute to federal court. Expanding federal jurisdiction to include suits to enforce an arbitration obligation even when the underlying dispute could never have reached federal court thus creates a second layer of privilege that is even more fundamentally inconsistent with the FAA's basic premise that arbitration agreements are "as enforceable as other contracts, *but not more so*." *Prima Paint*, 388 U.S. at 404 n.12 (emphasis added).

And finally, as a practical matter, *Vaden II* compounds the potential for costly, complicated, and time-consuming litigation that *Vaden I*'s look-through theory invites. The "unique procedural posture" created by looking through opens the door to novel jurisdictional theories, causing confusion and

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responsibility between two federal courts (the Federal Circuit and the regional courts of appeals). This case directly presents the federalism concerns that were muted in *Holmes Group* but which ordinarily drive limitations on federal subject matter jurisdiction.

instability for parties pursuing an arbitration remedy, as well as unnecessary burdens on the federal courts. Here, for example, Discover and Ms. Vaden have spent over four years litigating the threshold question of whether a federal court has the power to hear Discover's motion to compel, all in a case in which the federal court was not asked—nor authorized—to decide the merits of an underlying dispute that could never have reached the federal courts on its own. A great deal of wasted time and judicial resources would have been spared by correctly applying *Holmes Group* to the underlying dispute.

Because the majority's opinion in *Vaden II* greatly expands the reach of the federal courts in a manner contrary to binding precedent of this Court and the policies it promotes, while further privileging arbitration disputes over other state-law disputes and contributing to wasteful litigation, certiorari should be granted with respect to the second question presented.

III. This Case Presents An Issue Of Substantial Importance For Federal And State Courts And Arbitration Cases Nationwide Through A Particularly Strong Vehicle—One That Poses Two Central And Interconnected Jurisdictional Questions

Allowing look-through jurisdiction under Section 4 of the FAA will affect many arbitration cases nationwide with potentially substantial systemic consequences for the federal courts. Expanding federal question jurisdiction in this way provides an additional means for parties to compel arbitration

under state-law arbitration agreements at the great expense of increasing the number of state-law contract cases in federal court. Most federal courts of appeals and district courts reject look-through jurisdiction for good reason: By giving parties the additional option to compel arbitration in federal court, it threatens to dramatically expand the federal docket and trample on state courts' rights to develop their own substantive law of contract enforcement.

The sheer number of cases arbitrated each year previews the impact look-through jurisdiction could have on federal courts. The Arbitration Administration Association (AAA), for example, just one of many alternative dispute resolution providers in the United States, reported approximately 142,000 cases filed with it in 2005.[12] To put this number in context, the number of cases the AAA alone processed was one third of the number of *total* cases filed in federal district court (330,721) and more than double the number of cases filed in federal circuit court (68,473) for roughly the same time period.[13] The AAA's consumer cases from California alone totaled 13,712 from January 2003 through September 2007,[14] and the Financial Industry Regulatory Authority

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[12] Letter and Financial Statements from William K. State II, President, American Arbitration Association 8 (2005), http://www.adr.org/si.asp?id=4301.

[13] Federal Court Management Statistics, 2005 Judicial Caseload Profile, http://www.uscourts.gov/cgi-bin/cmsd2005.pl (district courts), http://www.uscourts.gov/cgi-bin/cmsa2005.pl (courts of appeals) (click on "Generate" option) (capturing filings on a 12-month cycle ending September 30).

[14] American Arbitration Association, *CCP Section 1281.96 Data Collection Requirements*, http://www.adr.org/si.asp?id=4702 (last visited Dec. 1, 2007).

(FINRA), operator of one of the largest securities dispute resolution services in the world—an area of law in which federal questions pervade—reported 2,642 new arbitration cases filed just from January through October 2007.[15] With the option of look-through jurisdiction, parties in at least some of these cases could now first petition federal courts to enforce their state-law arbitration agreements.

As these numbers suggest, look-through jurisdiction could absorb significant federal court resources. Not only would more cases be filed in federal court, but parties would have to litigate and federal courts determine whether the underlying dispute actually raised a federal question. This can be difficult and time-consuming. See pp. 22-23, *supra*. This Court clearly recognized the danger complicated jurisdictional questions pose in *Holmes Group*, where it noted the well-pleaded complaint rule's essential role "as a 'quick rule of thumb' for resolving jurisdictional conflicts." *Holmes Group*, 535 U.S. at 832 (quoting *Franchise Tax Bd.*, 463 U.S. at 11). With the well-pleaded complaint rule comes "clarity and ease" in resolving jurisdictional questions. *Ibid.*

By granting this petition, the Court has the opportunity to cabin this expansion of federal question jurisdiction through a strong vehicle—one that presents two important and interconnected jurisdictional questions in the context of one concrete dispute. Resolving the propriety of look-through jurisdiction is alone sufficient reason to grant

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[15] FINRA, *Dispute Resolution Statistics*, http://www.finra.org/ArbitrationMediation/FINRADisputeResolution/Statistics/index.htm (last visited Dec. 1, 2007).

certiorari in this case, considering the conflict among the circuits and its implications for the FAA. The combination of *Vaden I* and *II*, however, makes this case even more important to resolve. Allowing a court to look through an arbitration agreement to the underlying dispute only begs the question: How far can the court look? As in *Vaden II*, courts asked to compel arbitration will be forced to consider what aspects of the underlying dispute are relevant to determining federal question jurisdiction. This case presents both of these logically related issues: whether a federal court asked to compel arbitration may look through to the underlying dispute to determine jurisdiction *and, if so*, whether the court may premise jurisdiction on allegations contained in the defendant's responsive pleadings. The second of these issues follows directly from the first and both are present in this case, making it an ideal vehicle for resolving these jurisdictional questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2007

APPENDIX

APPENDIX A

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INCORPORATED,
Plaintiffs-Appellees,
v.

BETTY E. VADEN,
Defendant-Appellant,

v. No.06-1221

FEDERAL DEPOSIT INSURANCE CORPORATION,
Amicus Curiae.

JOHN R. KUCAN, JR.; TERRY COATES,
Amici Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William D. Quarles, Jr., District Judge.
(1:03-cv-3224-WDQ)

Argued: November 29, 2006

Decided: June 13, 2007

Before WILKINSON and DUNCAN, Circuit Judges, and Joseph R. GOODWIN, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Duncan wrote the majority opinion, in which Judge Wilkinson concurred. Judge Goodwin wrote a dissenting opinion.

COUNSEL

ARGUED: John Andrew Mattingly, Jr., BALDWIN, BRISCOE & MATTINGLY, CHTD., Lexington Park, Maryland, for Appellant. Martin C. Bryce, Jr., BALLARD, SPAHR, ANDREWS & INGERSOLL, Philadelphia, Pennsylvania, for Appellees. **ON BRIEF:** Joseph W. Hovermill, Matthew T. Wagman, John C. Celeste, MILES & STOCKBRIDGE, P.C., Baltimore, Maryland; Alan S. Kaplinsky, BALLARD, SPAHR, ANDREWS & INGERSOLL, Philadelphia, Pennsylvania, for Appellees. Sara A. Kelsey, General Counsel, Richard J. Osterman, Jr., Assistant General Counsel, Colleen J. Boles, Senior Counsel, Kathleen V. Gunning, Counsel, FEDERAL DEPOSIT INSURANCE CORPORATION, Arlington, Virginia, for Amicus Curiae Federal Deposit Insurance Corporation. F. Paul Bland, Jr., TRIAL LAWYERS FOR PUBLIC JUSTICE, Washington, D.C.; J. Jerome Hartzell, HARTZELL & WHITEMAN, L.L.P., Raleigh, North Carolina; Carlene McNulty, NORTH CAROLINA JUSTICE CENTER, Raleigh, North Carolina, for Amici Curiae John R. Kucan, Jr., and Terry Coates.

OPINION

DUNCAN, Circuit Judge:

For the second time, we hear an appeal in a dispute between Appellees Discover Bank and Discover Financial Services, Inc., a servicing affiliate of Discover Bank ("DFS," and, together with Discover Bank, "Discover"), and Appellant Betty E. Vaden ("Vaden"). This case arises from Vaden's failure to pay a credit card balance and DFS's resulting suit against her in state court. Vaden responded with several class-action counterclaims against DFS. Discover Bank then filed suit in federal district court under § 4 of the Federal Arbitration Act ("FAA"), seeking to compel arbitration of Vaden's counterclaims.

In the first appeal, we decided as a threshold matter that the federal courts possess subject matter jurisdiction under § 4 of the FAA if the underlying dispute presents a federal question. On remand, we directed the district court to decide whether such a federal question exists here. More specifically, we asked the district court to determine whether Discover Bank or DFS was the real party in interest with respect to Vaden's state court counterclaims. If Discover Bank were found to be the real party in interest, then the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1811 et seq., would be implicated because Discover Bank is a state-chartered, federally insured bank. In that event, we asked the district court to determine whether the

FDIA completely preempted Vaden's state law usury claims. If the district court found that the claims were completely preempted and therefore a federal question existed, it then had to determine whether there was a genuine issue of material fact regarding the existence of an arbitration agreement between Vaden and Discover Bank.

The district court found that this case presented a federal question and accordingly denied Vaden's motion to dismiss for lack of subject-matter jurisdiction and stayed her state-court counterclaims pending arbitration. We agree that a federal question exists here and that the district court properly compelled arbitration. Therefore, we affirm.

I.

In 1990, Vaden obtained a Discover credit card. The card was issued by Discover Bank, a Delaware-chartered, federally insured bank. DFS is a servicing affiliate of Discover Bank. According to the servicing agreement between DFS and Discover Bank, DFS performs such functions as marketing and servicing Discover Bank loan products and collecting on accounts pursuant to instructions from Discover Bank. J.A. 531-38. In June 1999, Discover mailed Vaden a new Platinum Discover Card. Discover claims that Vaden's account was automatically converted to Platinum status at this time. Vaden's "Cardmember" statements, however, identified her as a regular Cardmember until September 1999. In July 1999, Discover mailed Vaden a "Notice of Amendment to Discover Platinum Cardmember Agreement" (the "Notice of Amendment"). J.A. 33.

This notice, which applied only to Platinum Cardmembers, included a provision requiring arbitration of disputes.

In July 2003, on behalf of Discover Bank, DFS sued Vaden in Maryland state court for nonpayment of a card balance in excess of $10,000. Vaden then filed class-action counterclaims based solely on Maryland law against DFS. These counterclaims include a breach-of-contract claim and claims that certain fees and interest rates were charged in violation of applicable Maryland statutes that regulate finance charges, late fees, and compounding of interest on consumer credit accounts. In that proceeding, DFS was identified as "Discover Financial Services, Inc. (Discover), SVC Affiliate of Discover Bank, F/K/A Greenwood Trust Co., a DE chartered state bank and issuer of the Discover Card."

Shortly after Vaden filed these counterclaims, Discover filed a petition in federal court seeking to compel arbitration of Vaden's state-court counterclaims based on the arbitration provision in the Notice of Amendment. Discover had made no previous requests to Vaden for arbitration. The district court granted Discover's motion to compel arbitration.

Vaden timely appealed and this court heard argument on that appeal in December 2004. In January 2005, we considered the issue of whether subject-matter jurisdiction existed. *See Discover Bank v. Vaden*, 396 F.3d 366, 367 (4th Cir. 2005) ("*Vaden I*"). We held in *Vaden I* that "when a party comes to

federal court seeking to compel arbitration, the presence of a federal question in the underlying dispute is sufficient to support subject-matter jurisdiction." *Id.* at 367. We declined to decide whether such an underlying federal question existed in this case. *Id.* On remand, we directed the district court to determine whether a federal question existed and guided it to examine whether Discover Bank was the real party in interest with respect to Vaden's state-court claims and whether these claims were completely preempted by the FDIA.[1]

Answering these questions, the district court found that Discover Bank was the real party in interest and that Vaden's state court usury claims were completely preempted. Also, the district court found that there was no issue of material fact regarding the existence of an arbitration agreement between Vaden and Discover Bank, and accordingly granted Discover's request for arbitration.

Vaden again timely appealed the district court's ruling, which appeal is before us now. Vaden argues that DFS is the real party of interest, and thus the FDIA is not implicated and the federal court is without subject-matter jurisdiction over the dispute. Vaden also contends that compelling arbitration was improper for two reasons: (1) Discover lacks standing because it failed to satisfy the relevant statutory requirements for compelling arbitration, and (2) there was not a valid arbitration agreement between Vaden and Discover Bank.

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[1]Much of the dissent's discussion explicates its dissatisfaction with *Vaden I*. The holding in *Vaden I* is, of course, the law of the case, and beyond the reach of this appeal.

II.

We turn first to the question of whether the federal courts have subject-matter jurisdiction over Discover Bank's § 4 petition for arbitration under the FAA.

Under § 4 of the FAA, a district court may issue an order compelling arbitration if the court would otherwise "have jurisdiction under Title 28, in a civil action . . . *of the subject matter of a suit arising out of the controversy* between the parties." 9 U.S.C. § 4 (2000) (emphasis added). Section 4 does not require a party to actually file suit regarding the underlying controversy; the FAA requires only that a party be aggrieved by another party's failure to arbitrate a controversy, "the subject matter of which would fall within the jurisdiction of this Court, were an actual suit to arise out of the controversy." *Reynolds & Reynolds Co. v. Image Software, Inc.*, 254 F. Supp. 2d 761, 765 (S.D. Ohio 2003); *see Vaden I*, 396 F.3d at 369 ("We thus hold that a federal court possesses subject-matter jurisdiction over a case when the controversy underlying the arbitration agreement presents a federal question."); *id.* at 370 ("The text of § 4 requires us to consider jurisdiction as it arises out of the whole controversy between the parties."); *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999) (suggesting that "it is appropriate to look through the arbitration request to assess whether the underlying dispute between the parties is grounded in federal law). Thus, a § 4 petition to compel arbitration is properly in federal court if the underlying dispute presents a federal

question.[2] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983); *Vaden I*, 396 F.3d at 367. A court must therefore look through the arbitration claim and examine the underlying state-court action. The Supreme Court has explained that even when a complaint alleges only violations of state law, the case may nevertheless center on a federal question, and therefore be removable,[3] if

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[2]Were diversity jurisdiction to exist, this alone would be sufficient to confer federal jurisdiction. Here, however, diversity jurisdiction is not present. *See* 28 U.S.C. § 1332.

[3]The dissent argues that complete preemption is purely a removal doctrine and therefore that we improperly invoke it upon the unique procedural posture of this case. Although complete preemption did originate in the removal context, we conclude that it also applies to the unique procedural posture of this case. Complete preemption creates an exception to the well-pleaded complaint rule: "On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). The doctrine, therefore, does not flow from the procedural act of removal, but from the dominance of federal law over the preempted state law. Thus, it is not a logical leap to apply this principle to the instant case. To hold otherwise would have the perverse result of returning to state court otherwise completely preempted federal claims because of the unanticipated nature of a defendant's counterclaims.

Moreover, the question of whether complete preemption is a "removal doctrine," *see* Dissenting Op. at 20, is irrelevant. The point is simply whether Discover Bank's arbitration petition presents a federal question. *See* 9 U.S.C. § 4 (2000) (district court may order arbitration if the court

federal law completely preempts the state law claims. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). This is the "complete preemption doctrine." *Id.* *Caterpillar* explains that "[o]nce 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." *Id.*

Complete preemption is an exception to the well-pleaded complaint rule. Although generally a case may not "be removed to federal court solely because of a defense or counterclaim arising under federal law," *Topeka Hous. Auth. v. Johnson*, 404 F.3d 1245, 1247 (10th Cir. 2005), *complete* preemption is an exception to this rule and so federal jurisdiction is proper, even though the preemption is only raised as a defense. *See Caterpillar*, 482 U.S. at 393; *see also Topeka Hous. Auth.*, 404 F.3d at 1247 (noting that complete preemption is an exception to the general rule barring removal based on counterclaims) (citing 14B Charles Alan Wright, Arthur R. Miller & Edward

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would otherwise "have jurisdiction under Title 28, in a civil action . . . of the subject matter of a suit arising out of the controversy between the parties."). We held as much in *Vaden I*, stating "the plain text of § 4 requires us to ask whether any basis for subject matter jurisdiction would exist for the case in the absence of the arbitration agreement," *Discover Bank v. Vaden (Vaden I)*, 396 F.3d 366, 373 (4th Cir. 2005), and holding "the presence of a federal question in the underlying dispute is sufficient to support subject-matter jurisdiction," *id.* at 367. The *Vaden I* panel was unanimous on this point, and other courts have also refused to unduly restrict federal jurisdiction over Section 4 petitions. *See, e.g., Tamiami Partners, Ltd. v. Miccosukee Tribe*, 177 F.3d 1212, 1223 n.11 (11th Cir. 1999).

H. Cooper, *Federal Practice & Procedure* § 3722.1, at 508 (3d ed. 1998)).[4]

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[4]The Supreme Court's holding in *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002), relied upon by Vaden and cited by the dissent, is not to the contrary. The Court reaffirmed "the principle that federal jurisdiction generally exists 'only when a federal question is presented on the face of the [plaintiff's] properly pleaded complaint.'" *Id.* at 831 (quoting *Caterpillar*, 482 U.S. at 392). *Holmes Group* did not, however, involve complete preemption. Moreover, the Court grounded its holding in policies underlying the well-pleaded complaint rule, noting that, under the federal patent statute at issue in that case, federal jurisdiction could not obtain based solely upon defendant's answer. *Id.* at 831. In complete preemption cases, however, "claims are so 'necessarily federal' that they will always permit removal to federal court, even if they are raised only by way of defense." Wright, Miller, & Cooper, *supra*, § 3722.1 at 508. As such, "the complete-preemption doctrine overrides such fundamental cornerstones of federal subject-matter jurisdiction as the well-pleaded complaint rule and the principle that the plaintiff is master of the complaint." *Id.*

The *Holmes* court was also concerned about allowing a defendant to evade a plaintiff's choice of state forum and the well-pleaded complaint rule by asserting federal counterclaims: this is the *opposite* of the facts here. In this case, the only claims advanced by Vaden's counterclaims purport to be state law claims. There is no danger that defendant Vaden might frustrate plaintiff Discover Bank's choice of state forum. To the contrary, it is Discover who filed the arbitration complaint in federal court and Vaden who is resisting federal jurisdiction.

Moreover, the whole point of the complete preemption doctrine is that plaintiff's choice of forum is not given preference, but must instead yield to Congress' intent that some claims, even those cloaked in state-law trappigs [sic], are really federal causes of action. In this, complete

In misapprehending that complete preemption is a narrow exception to the general rule that federal jurisdiction must appear on the face of the complaint, the dissent fails to appreciate the fundamental distinction between *complete* and *ordinary* preemption. Its interpretation would deny Discover Bank a federal forum even if Discover were a nationally—as opposed to state—chartered bank operating under a federal law the Supreme Court has expressly held to completely preempt state law. *See infra* Part II.B. The fallacy inherent in the dissent's view is patent: it would render the concept of complete preemption a nullity.

For subject-matter jurisdiction to exist in this case, then, two requirements must be satisfied: (1) a federal law other than the FAA must be invoked; and (2) said federal law must completely preempt the state law claims in question. The district court, at our direction, found that there was a federal question in the underlying dispute because Discover Bank was the real party in interest in the state-court proceedings, thereby implicating the FDIA, and that the FDIA completely preempted Vaden's state-court usury claims against Discover Bank. We now consider its determinations, discussing each in turn. We review questions of subject-matter jurisdiction de novo, *Lontz v. Tharp*, 413 F.3d 435, 438 (4th Cir. 2005).

A.

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preemption is an exception to the well-pleaded complaint rule: when complete preemption obtains, a plaintiff may not avoid a federal forum by asserting only state claims.

First, we look to whether a federal law is invoked by the underlying state court dispute. *See Caterpillar*, 482 U.S. at 393. To resolve this question we must answer another: whether Discover Bank, as opposed to DFS, is the real party in interest with respect to Vaden's counterclaims.[5] On the face of the pleadings, DFS, not Discover Bank, is the party to the state-court dispute. If Discover Bank is *not* the real party in interest with respect to the counterclaims, the FDIA does not apply because DFS is not a bank,[6] and

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[5]The dissent calls this inquiry an "unnecessary detour," citing Federal Rule of Civil Procedure 17(a). *See* Dissenting Op. at 23 n. 4. It is mistaken. To begin with, Discover Bank is not a defendant in the federal action, but a *petitioner* filing a "verified complaint in the nature of a petition to compel arbitration and enjoin defendant's prosecution of her state court counterclaim." In any case, as the FDIC's amicus brief demonstrates, courts must routinely determine whether a bank, rather than one of its business partners, may resort to the preemptive scope of the NBA or the FDIA. To avoid this analysis would allow a plaintiff to artfully plead state law claims against a non-bank defendant and thus frustrate Congress' intent that certain causes of action are always federal. *See, e.g.*, *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000) (finding complete preemption under National Bank Act although bank extending credit was not a party to the state court action). The real-party-in-interest analysis is also necessary to prevent a defendant from falsely asserting that it is a bank and thus preempting large swaths of state law which Congress did not intend to displace. *See, e.g.*, *In re Community Bank of Northern Va.*, 418 F.3d 277, 297 (3d Cir. 2005) (finding complete preemption inapplicable because the loans at issue were made by a non-depository institution).

[6]It is uncontested that DFS is not a bank, state-chartered or otherwise, and therefore neither the National Banking Act nor the FDIA applies to it.

therefore the counterclaims implicate no federal law. The parties' styling of the pleadings does not control our analysis, however; we must decide whether Vaden's state-court counterclaims are really directed at Discover Bank rather than DFS. *See Vaden I*, 396 F.3d at 372 n.3. The district court found that Discover Bank was the real party of interest with respect to Vaden's counterclaims, and we agree.

One of our most fundamental procedural rules is that an action must be brought by the party that has the right to enforce the claim and has a significant interest in the litigation. *See Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973) (citing Fed. R. Civ. P. 17(a)). The identity of the "real" party may not always be apparent from the face of pleadings; it may be necessary to look beyond the pleadings to the facts of the dispute. *See Vaden I*, 396 F.3d at 373 n.3; *see also Phipps v. FDIC*, 417 F.3d 1006, 1011 (8th Cir. 2005) ("[W]e are required to look beyond the plaintiffs' artful attempts to characterize their claims to avoid federal jurisdiction."). Such is the case here.

The need to look carefully at the facts to determine the real party in interest is particularly compelling in this instance because of the unique and complex relationships among the parties through the various phases of this litigation.[7] The instant suit

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[7]At our request, the Federal Deposit Insurance Corporation submitted an amicus brief assessing the issue of whether Discover Bank was the real party in interest on these facts. We find its analysis of the record helpful in parsing the various agreements and documents that delineate the

began when DFS, identified as "Discover Financial Services, Inc. (Discover), SVC Affiliate of Discover Bank, F/K/A Greenwood Trust Co., a DE chartered state bank and issuer of the Discover Card," sued Vaden in Maryland state court for an unpaid credit card balance. Vaden counterclaimed against DFS, alleging damages based upon improper assessment of fees and interest charges: "[T]hus, her claims were directed against the entity that extended her credit, charged her interest and had a right to bring the collection action—the lender." Amicus Br., FDIC, at 2. Vaden would have us simply accept DFS as the lender, and thus real party in interest, and deny Discover Bank's role as originator of her Cardmember account. The facts, however, show that Discover Bank was the lender here and therefore the real party in interest.

There are several pieces of evidence we find instructive in construing the relationship between Vaden and Discover Bank. The Cardmember agreements issued to Vaden are of particular significance. These agreements conclusively demonstrate that Discover Bank was the entity that extended Vaden credit and set the interest and fees of which Vaden complains.[8] *See e.g.*, J.A. 26-27, 29-31, 206-07. The agreements allow Discover Bank to levy periodic finance charges and late fees, as well as to change the rate of finance charge with thirty days' notice. *Id.* In addition, the arbitration agreement in

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relationship among Discover Bank, DFS, and a cardmember such as Vaden.

[8]Some of these documents reference Greenwood Trust Company, which was Discover Bank's predecessor.

question was between Discover Bank and Vaden only, as they were the only two parties to the original Cardmember agreement. *See* J.A. 33-34, 499. The servicing agreement between Discover Bank and DFS also supports our finding that Discover Bank is the real party in interest here. That agreement provides that DFS will service certain Discover Bank "loan products," J.A. 531-38, and DFS must perform all marketing and collection services under instructions from Discover Bank, J.A. 532-33. One of the service activities DFS performed was mailing monthly bills to cardmembers. Nothing on the statements that DFS mailed to Vaden identified DFS as the lender. To the contrary, mailing billing statements is consistent with DFS's admitted role as a servicing agent. DFS also brings collection actions pursuant to the servicing agreement, as it did here in suing Vaden for her unpaid balance on Discover Bank's behalf. *See* J.A. 533.

In addition, as the FDIC points out, the servicing agreement specifies that:

> DFS will not be responsible for violations of federal or state law, including usury laws, fee restrictions or privacy laws, to the extent that DFS acts consistently with directions or supervision received from [Discover Bank] or its agents. . . . *[Discover Bank] will be solely responsible for establishing the annual percentage yields and rates, insurance premiums, and other charges and fees for its credit cards*, deposit accounts and other products and for ensuring that such yields, rates, premiums,

> charges or fees are in compliance with state and federal laws.

J.A. 531-32 (emphasis added). The agreement establishes a clear division of authority between DFS and Discover Bank, designating Discover Bank as the party in charge of setting the terms and conditions of lending money through its credit cards. DFS, although it could evaluate consumer credit applications, could only do so under guidelines set forth by Discover Bank. *Id.*

Importantly, the servicing agreement also provides that Discover Bank will indemnify DFS for any damages caused by Discover Bank. J.A. 536. This includes any potential judgment from Vaden's state court counterclaims against DFS. Discover Bank acknowledges that it would be bound by any judgment resulting from the state-court litigation, even though it was not officially a party to it, because DFS was acting on its behalf. Appellee's Br. at 24 n.7. Nor would DFS be permitted to keep any funds collected from a Cardmember in its own name: it must immediately deposit all such funds in Discover Bank's accounts. J.A. 534.

A final source of support for the conclusion that Discover Bank is the real party in interest is found in Discover Bank's financial statement and prospectuses for the sale of interests in credit card receivables through securitizations. Discover Bank's independently-audited financial statement explains that credit-card loans make up the majority of the bank's consumer loans and are assets of the bank. J.A. 511, 519. The bank's prospectuses identify

Discover Bank as the issuer of the Discover credit card and owner of the Discover Card account. J.A. 543, 619-622. These same prospectuses reaffirm Discover Bank's right to set the terms for essential aspects of a cardholder's account: the rate for periodic finance charges, late fees, credit limits, minimum monthly payments, credit-worthiness criteria, charge-off policies, and collection practices. J.A. 613, 619, 621, 623. Service and operating tasks are delegated to DFS. J.A. 620, 622.

This evidence notwithstanding, Vaden argues that DFS, and not Discover Bank, is the real party in interest with respect to her state-law counterclaims. She points to several items in the record for support, including the pleadings themselves, Morgan Stanley's Annual report on Discover, and press releases from DFS. In particular, Vaden proffers certain press releases stating that DFS operates the Discover Card brand as evidence that DFS is the real party in interest. The functions attributed to DFS in these press releases, however, are consistent with its role as a servicing entity and do not establish it as a lender. Importantly, Vaden herself does not contest the fact that it is Discover Bank and not DFS that set the interest rate on her account. None of these documents suggest that DFS operated as a lender or had any authority to alter or set vital terms of Vaden's Cardmember account. Moreover, these documents are secondary sources of information, rather than primary sources such as the servicing agreement and Discover Bank's prospectus. We are unpersuaded by Vaden's arguments, as we find the evidence she proffers to be consistent with the

conclusion that Discover Bank is the real party in interest.

On these facts, we hold that Discover Bank is the real party in interest with respect to Vaden's state court counterclaims. Because Discover Bank is a state-chartered, federally insured bank, the FDIA is implicated by these claims against the bank.[9]

B.

We turn next to the question of whether § 27 of the FDIA "completely preempts" state law usury claims against a state-chartered, federally insured bank that is the real party in interest of a state court dispute.[10]

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[9]In finding Discover Bank to be the real party in interest here, we emphasize the heavily fact-dependent nature of our analysis and its consequent parameters. Clearly, a state-chartered, federally insured bank will not always be the real party in interest for purposes of invoking the FDIA. For example, in *Goleta National Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 718-19(E.D.N.C. 2002), a payday lender had "leased" an association with the Goleta National Bank in order to avoid state usury laws. The *Lingerfelt* court held that the non-bank payday lender, rather than Goleta National Bank, was the real lender and therefore the complete preemption doctrine did not apply. *Id.; see also Flowers v. EZPawn Okla., Inc.*, 308 F. Supp. 2d 1191, 1196 (N.D. Ok. 2003) (finding that EZPawn—not the affiliated bank—was the real lender and therefore no subject-matter jurisdiction existed). Such cases are distinguishable from the facts here.

[10]Because Vaden "conceded" that the FDIA completely preempted her state-law claims, the district court's analysis of this issue was cursory. We note, however, that a party

In interpreting any statute, we turn first to the text of the statute itself. Section 27(a) of the FDIA provides in part:

> In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates . . . such State bank[s] . . . may, *notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section*, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest . . . at the rate allowed by the laws of the State . . . where the bank is located.

12 U.S.C. § 1831d(a)(emphasis added). The statute's express preemption provision indicates that at the very least, Congress contemplated ordinary express preemption when drafting this statute.

However, to decide the more specific question of whether Congress intended *complete* preemption of state-court usury claims, as distinguished from ordinary express preemption, we look beyond the text, to Congress's intentions in enacting the statute. The legislative history of the FDIA is instructive in this regard. It tells us that Congress intended to "allow[] competitive equity among financial institutions, and reaffirm[] the principle that institutions offering similar products should be

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may not create jurisdiction by concession and thus address this issue directly.

subject to similar rules." 126 Cong. Rec. 6,908 (1980) (Statement of Sen. Bumpers). The FDIA was enacted in part to "provide[] parity, or competitive equality, between national banks and State chartered depository institutions. . . ." 126 Cong. Rec. 6,900 (1980) (Statement of Sen. Proxmire).

Keeping in mind the purpose underlying the FDIA's enactment, we turn to the question of whether Congress intended the FDIA to completely preempt state-law usury claims against state-chartered banks. Although this is an issue of first impression in this court, we are not wholly without guidance as far as federal banking laws are concerned. The Supreme Court has addressed the issue within the context of the National Bank Act ("NBA"), 12 U.S.C. §§ 1 et seq., which is to national banks as section 27 of the FDIA is to state-chartered banks.[11] In *Beneficial*, the Supreme Court held that the NBA completely preempts state-court usury claims against national banks. 539 U.S. at 11. The Court explained that "[b]ecause §§ 85 and 86 provide

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[11] The Supreme Court's recent decision of *Watters v. Wachovia* ___ U.S. ___, 127 S. Ct. 1559 (2007), is instructive, though not precisely on point. In *Watters*, the court held that a national bank's "mortgage business, whether conducted by the bank itself or through the bank's operating subsidiary" is subject to federal, and not state, regulatory oversight. *Id.* at 11. Although neither the FDIA nor state court usury claims were at issue, the Court's holding did reaffirm the basic principle elucidated in *Beneficial National Bank v. Anderson*, 539 U.S. 1, 11 (2003), that federal banking laws preempt state law. "[T]he States can exercise no control over national banks, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Watters*, 127 S.Ct. at 6.

the exclusive cause of action" for usury claims, there is "no such thing as a state-law claim of usury against a national bank." *Id.* As a result, even though the plaintiff's complaint did not mention federal law, his cause of action arose under federal law and defendant National Bank's removal to federal court based on complete preemption under the NBA was proper. *Id.* at 10-11.

One of our sister circuits has compared the NBA to the FDIA and found that both statutes completely preempt state-law usury claims.[12] The Third Circuit has held that the NBA and FDIA are interpreted in para materia and therefore the doctrine of complete preemption applies to the FDIA as well. In *In re Community Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005), the court found that Section 1831d(a) "completely preempts any state law attempting to limit the amount of interest and fees a federally insured, state-chartered bank can charge." Indeed, not only does the FDIA contain an express preemption clause—"notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section"—but it also "incorporates verbatim the language of § 85 of the NBA." *Id.* at 295. "When Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts ordinarily should be interpreted the same way." *Id.* at 295-96.

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[12]In contrast, one federal court has held that the FDIA does not contemplate complete preemption. *See Saxton v. Capital One Bank*, 392 F. Supp. 2d 772, 780-84 (S.D. Miss. 2005) (distinguishing *Beneficial Nat'l Bank* as being grounded in the federal interest that protects national banks from state taxation). For the reasons above, we disagree.

Therefore, complete preemption was held to apply to state usury claims against state-chartered, federally insured banks, just as it does to claims against national banks.

The First Circuit has also compared the NBA and FDIA, although not in the context of complete preemption. The dispute in *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 821 (1st Cir. 1992), arose when the Commonwealth of Massachusetts notified Greenwood that its late-fee policy violated state law. Greenwood reacted to the threat of potential litigation from the state by filing for declaratory and injunctive relief in federal court on the grounds that the FDIA[13] expressly preempted state law usury claims. In assessing whether the FDIA *expressly*—not completely—preempted state usury laws, the court explained that Congress enacted the FDIA to level the playing field between national and state banks regarding the levying of interest rates. *Greenwood Trust*, 971 F.2d at 826. "The historical record clearly requires a court to read the parallel provisions of [the FDIA] and the Bank Act in pari materia." *Id.* (emphasis omitted).[14]

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[13]*Greenwood* refers to the FDIA as the "DIDA," but the statutory provision at issue is the same, 12 U.S.C. § 1831d(a). 971 F.2d at 827.

[14]There is one difference between the relevant provisions of the NBA and the FDIA that we must pause to consider. The NBA states that an action must be "commenced within two years from the time the usurious transaction occurred," 12 U.S.C. § 86, while the FDIA states that a person aggrieved "may recover in a civil action commenced *in a court of appropriate jurisdiction* not later than two years after the date of such payment." 12 U.S.C. § 1831d(b) (emphasis

We find the logic of our sister circuits compelling. We note as well that the FDIC further supports our finding of complete preemption.[15] The agency has "uniformly construed Section 1831d in pari materia with Sections 85 and 86 [of the NBA]." Amicus Br., FDIC, at 10 (emphasis omitted). "[U]nder Section 1831d(a), state banks were provided interest rate authority comparable to that of national banks. Interest charges include not only the numerical percentage rate assigned to a loan but also late payment fees, over the limit fees and other similar charges." *Id.* (citing 12 C.F.R. § 7.4001(a)) (footnote

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added). As both statutes speak to the creation of a federal cause of action, we do not read the phrase "a court of appropriate jurisdiction" as inconsistent with the complete preemption doctrine. Rather, we agree with the First Circuit that the differences in the statutes are an insufficient basis upon which to distinguish them: "[a]lthough there are niggling variations, the key phraseology is substantially identical." *Greenwood Trust*, 971 F.2d at 827. Indeed, it would be anomalous to interpret the inclusion of a general forum-selection provision such as the one in the FDIA as precluding complete preemption.

[15] The FDIC's interpretation of § 1831d is entitled to only limited deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1994). In its brief, the agency points to no regulation or other formal statement of its policy that was adopted with notice-and-comment rulemaking or through formal adjudication. Therefore, "we defer to the agency's interpretation only to the extent that the interpretation has the power to persuade." *U.S. Dep't of Labor v. N.C. Growers Ass'n*, 377 F.3d 345, 354 (4th Cir. 2004) (citing *Skidmore*, 323 U.S. at 134). We defer only to the extent that we are persuaded by the FDIC's interpretation. *See Skidmore*, 323 U.S. at 140.

omitted). In arguing that the FDIA completely preempts state-law usury claims, the FDIC relies on *Beneficial National Bank*, agreeing with the First and Third Circuits, that in § 1831d, "Congress created a federal cause of action that entirely replaced . . . the analogous area of state law." *Id.* at 13.

We find the analyses of the FDIC and our sister circuits persuasive. Given the express preemption language of the FDIA, the statute's legislative history affirming Congress' intent to provide competitive equality between national and state-chartered banks, the virtual identity of the preemption language in the NBA and that of the FDIA, and the Supreme Court's finding of complete preemption under the NBA, we are hard-pressed to conclude other than that Congress intended complete preemption of state-court usury claims under the FDIA. As the final step in our analysis, we turn to a consideration of whether Vaden's state law counterclaims fall into this completely preempted category.

Vaden's state court counterclaims challenge certain fees and interest rates charged on her Discover card account.[16] She argues that these fees

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[16]We recognize that not all of Vaden's claims fall into the state-court usury claim category. The scope of the arbitration agreement, however, subsumes all of Vaden's various counterclaims, including her breach of contract claims asserting fraud and violations of good faith and fair dealing as well as her claims of "unfair and deceptive trade practices." While those non-usury claims arguably fall outside the preemptive scope of the FDIA, *see Saxton v. Capital One Bank*, 392 F. Supp. 2d 772, 783 (S.D. Miss. 2005)

and interest rates were in violation of Maryland laws regulating finance charges, late fees, and compounding of interest on consumer credit accounts. *See* Md. Code Ann., Comm. Law §§ 12-502, -506, -506.2 (2005).[17] Vaden's complaints regarding the fees and interest charged on her cardmember account fall squarely within the FDIC's definition of "usury" charges. *See* 12 C.F.R. § 7.4001(a) (defining usury charges as the numerical periodic rate, late payment fees, overlimit fees, and other charges). We therefore conclude that Vaden's claims are completely preempted by the FDIA.[18] We emphasize again that our holding only extends so far as a state-chartered, federally insured bank is the real party of interest with respect to the preempted state-court claims.

III.

Lastly, we turn to the issue of whether an arbitration agreement binds Vaden and Discover Bank so as to make compelling arbitration proper.

(collecting cases), complete preemption of any one of Vaden's counterclaims should suffice to provide a federal forum under the complete preemption doctrine.

[17]In contrast, Delaware's commercial laws, governing Discover Bank, allow banks to charge late fees, interest, and compound interest according to the cardholder agreement. *See* Del. Code Ann. tit. 5, §§ 941(8), 943, 945, 950, 952 (2005).

[18]To find otherwise would undermine the statute's purpose, which is to provide state banks parity with national banks: if we found no complete preemption here, we would be treating state banks differently under the FDIA than national banks are treated under the NBA. Such a result clearly cuts against Congress's intentions in grafting language from the NBA to the FDIA.

Pursuant to our instructions in *Vaden I*, the district court also examined "whether there was a question of material fact about the existence of an arbitration agreement." 396 F.3d at 373 n. 4. Vaden appeals the district court's findings that an arbitration agreement existed between the parties and that her claims are subject to arbitration because she failed to opt out of that agreement. *Discover Bank v. Vaden*, 409 F. Supp. 2d 632, 639 (D. Md. 2006) (citing *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 634 (4th Cir. 2002), for the proposition that a "court must order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored"); *see* 9 U.S.C. § 4.

Significantly, under both Delaware and Maryland law, Vaden bears the burden of rebutting the presumption of receiving the arbitration agreement, which was included in a Notice of Amendment to the Cardmember agreement.[19] *See Graham v. Commercial Credit Co.*, 194 A.2d 863, 865 (Del. Ch. 1963) (holding "that mail which is properly addressed and posted . . . is presumed to be duly received by the addressee"); *Marsheck v. Bd. of Trustees of the Fire & Police Employee's Ret. Sys. of the City of Balt.*, 749 A.2d 774, 785 (2000) (explaining the presumption of receipt arising from proper mailing). Vaden's only evidence to support her claim that she did not receive it is her own statement that she did not, and mere denial is insufficient to rebut the presumption of receipt. We find no error in the district court's

[19]We agree with the district court's conclusion that Discover satisfied the requirements for the presumption of receipt, as it provided unrebutted affidavits detailing the procedures and practices for mailing the Notice of Amendment.

analysis of this issue and so affirm based on the reasoning of the district court.[20]

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[20]Vaden also attempts to escape arbitration by arguing that Discover fails to satisfy the relevant statutory standing requirements for compelling arbitration. We cannot agree.

Intriguingly, the alleged defect in standing Vaden points to is her own failure to "unequivocally refuse" a request for arbitration. *See* Appellant's Br. at 43. The FAA, under which Discover brings suit, states that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for . . . arbitration." 9 U.S.C. § 4. Vaden contends that, because Discover did not request arbitration with her before filing suit, she never refused arbitration and therefore Discover is not "[a] party aggrieved by [her] failure . . . to arbitrate." *Id.* Accordingly, she argues, Discover has not met the requirement for filing a petition. *See* Appellant's Br. at 41-44. One sister circuit has held that an action to compel arbitration is proper when the party against whom the motion to compel is made has commenced litigation that is the subject matter of the parties' arbitration agreement. *See, e.g. PaineWebber Inc. v. Faragalli*, 61 F.3d 1063, 1066 (3d Cir. 1995) (finding that an action to compel arbitration is proper when the other party refuses to arbitrate by "unambiguously manifesting an intention not to arbitrate the subject matter of the dispute").

Although Vaden did not initiate the original suit, she counterclaimed in state court and has litigated extensively—to the tune of not one, but two appeals before this court—to avoid arbitration of her claims. To agree with Vaden's arguments that she has not refused a request for arbitration in the meaning of the statute would create an absurd result: reversing a motion to compel arbitration against a party who argues that she never refused to arbitrate in the first place. Neither common sense nor precedent countenances such a result, and so we find no defect of standing here.

IV.

For the foregoing reasons, we affirm the district court's finding that Discover Bank is the real party in interest with respect to Vaden's state-court counterclaims, and we hold that the FDIA completely preempts state-court usury claims against a state-chartered, federally insured bank to the extent that the bank is the real party in interest with respect to those claims. We also affirm the district court's finding that there was no issue of material fact with respect to the existence of an arbitration agreement between Vaden and Discover and therefore affirm the district court's grant of Discover's motion to compel arbitration.

AFFIRMED

GOODWIN, District Judge, dissenting:

The district court and the majority inexplicably use the removal doctrine of complete preemption to recharacterize a *counterclaim* in a state court civil action as federal. From that process, they pluck an "independent" basis for federal subject matter jurisdiction to support this action to compel arbitration. As I find no independent basis for federal court jurisdiction exists, I respectfully dissent.

In *Vaden I*, the court heard an appeal from a case brought under the FAA, which did not have an independent jurisdictional basis on its face.[1] The

[1]It is well established that the FAA standing alone does not provide a basis for federal jurisdiction. *See Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *Moses H. Cone*

panel found that "[a] federal court may . . . hear a § 4 petition to compel arbitration if, but for the arbitration agreement, subject matter jurisdiction over the case would otherwise exist by virtue of a *properly invoked federal question* in the underlying dispute." *Discover Bank v. Vaden (Vaden I)*, 396 F.3d 366, 373 (4th Cir. 2005) (emphasis added). The court in *Vaden I* remanded the case to the district court with instructions to determine whether "such a federal question exists in this case." *See id.* at 373. The *Vaden I* panel hypothesized that Ms. Vaden's *counterclaims* alleging illegal interest rates and late fees might present issues of such substantial federal interest as to be, in effect, federal claims under the FDIA. *See Vaden I*, 396 F.3d at 373 n.3. The panel suggested to the district court that if it found that Discover Bank, "as opposed to merely Discover Financial Services, is a party of interest in the state law suit," then a federal question may be presented.[2]

Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983) ("The Arbitration Act is something of an anomaly in the field of federal court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction."). Therefore, before a district court may entertain a petition under the FAA, there must be an independent basis of jurisdiction. *Owens Ill., Inc. v. Meade*, 186 F.3d 435, 439-40 (4th Cir. 1999) ("Section 4 of the FAA confers jurisdiction in the district court over petitions to compel arbitration only to the extent that the federal court would otherwise have jurisdiction over the case. On that basis, this case must include another independent basis to establish federal jurisdiction.").

[2]I do not know what it is to be "a party of interest" in a lawsuit, and the panel in *Vaden I* gave no explanation. The

Id. at 373 n.3. Upon remand, the district court found that Discover Bank was the real party in interest with respect to the counterclaims and on that basis bootstrapped an additional party into the case to defend the counterclaims. *Discover Bank v. Vaden*, 409 F. Supp. 632, 637 (D. Md. 2006).

My disagreement with the majority opinion centers on its finding of "arising under" jurisdiction in a counterclaim. Federal question jurisdiction cannot be predicated on federal issues that may arise later in an action by way of defense or counterclaim. Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 Tex. L. Rev. 1781, 1783 (1998) (citing *Takeda v. Northwestern Nat. Life Ins. Co.*, 765 F.2d 815, 821-22 (9th Cir. 1998)).

My conclusion that there is no properly invoked federal question in the underlying case relies on basic principles of "arising under" jurisdiction. Federal courts are courts of limited jurisdiction. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts . . . possess only that power authorized by the Constitution and statute, which is not to be expanded by judicial decree."). Article III of the Constitution gives federal courts the power to hear cases "arising under" the Constitution, laws, and treaties of the United States. U.S. Const.

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district court, parties, and apparently now the majority have treated this as an inquiry into who "the real party in interest" is in Ms. Vaden's counterclaims. The majority states, "[m]ore specifically, we asked the district court to determine whether Discover Bank or DFS was the real party in interest with respect to Vaden's state court counterclaims." *Op.* at 3.

art. III, § 2, cl. 1. This grant of power is not self-executing. Congress did not give the federal courts general federal question jurisdiction until the Judiciary Act of 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (1994)). Although the language of § 1331 tracks Article III's arising under language, the Supreme Court has given § 1331 a limiting construction. Miller, 76 Tex. L. Rev. at 1782. "One of the keystones of this limiting construction is the 'well-pleaded complaint rule' articulated by the Supreme Court in *Louisville & Nashville R.R. v. Mottley* and constantly reaffirmed by the federal judiciary." *Id.* For the Court to have jurisdiction under § 1331, it must be clear from the face of a well-pleaded complaint that there is a federal question; the federal issue must exist as part of the plaintiff's cause of action. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152-54 (1908). A federal right must be an essential element of the plaintiff's claim; "the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-13 (1936). This rule also serves the essential administrative function of establishing the existence of a federal question at the onset of litigation. Miller, 76 Tex. L. Rev. at 1783. The well-pleaded complaint rule applies equally to original and removal jurisdiction and has prevented federal courts from asserting jurisdiction over many cases in which federal issues have actually been raised. *Id.* "This bright-line rule prevents the disruption, to both the system and the litigants, of shifting a case between state and federal [sic] for a in the middle of an action as federal issues arise or fall out." *Id.*

State courts, on the other hand, are courts of general jurisdiction. The Supreme Court has held that not only do state courts have the ability to hear federal claims, but that in all but the most exceptional circumstances they *must* hear federal claims. *See generally Testa v. Katt*, 330 U.S. 386 (1947) (establishing that state courts have a general obligation to hear federal claims). This ability and obligation of state courts to hear federal claims and enforce federal law is derived from the Supremacy Clause of the U.S. Constitution.[3]

In the case before this court seeking to compel arbitration, federal jurisdiction is purportedly based upon defendant's state court *counterclaim* alleging illegal late fees and interest rates. There was no diversity jurisdiction and no federal question appeared on the face of the complaint. In affirming the district court, the majority undertook an examination of the state counterclaims using novel understandings of procedural rules as to parties[4] and

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[3]The Supremacy Clause provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[4]The "party of interest" inquiry suggested in *Vaden I* was but another unnecessary detour which resulted in the parties, the district court, and the majority becoming procedurally lost. *Federal Rule of Civil Procedure* 17(a) states in pertinent part "[e]very action shall be prosecuted in the name of the real party in interest." I am puzzled by the majority's "real party in interest" analysis, which appears to be backward. A defendant can never be a real party in interest.

a completely puzzling view of the doctrine of complete preemption. This process led the majority of this panel to agree with the district court that Ms. Vaden's *counterclaims* provided federal subject matter jurisdiction over the underlying case, and therefore an independent jurisdictional basis existed to permit the court to decide the petition to compel arbitration under the FAA. This was error. There was no "properly invoked federal question" in the underlying state case.

The Court in *Holmes Group, Inc. v. Vornado Air Circulation Systems*, 535 U.S. 826, 830 (2002), addressed the question of whether a counterclaim can serve as the basis for arising under jurisdiction. The Court held that it could not. The Court noted that the well-pleaded complaint rule has long governed whether a case "arises under" federal law for purposes of § 1331. *Holmes Group, Inc.*, 535 U.S. at 830 (citing *Phillips Petroleum Co. v. Texaco Inc.*, 415 U.S. 125, 127-128, (1974) (per curiam)). The Court stated, "a counterclaim — which appears as part of the defendant's answer, not as part of the plaintiff's

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By its very nature, Rule 17(a) applies only to those who are *asserting* a claim. 6A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice & Procedure* § 1543 (2d ed. 1987) (emphasis added). The real party in interest requirement is not limited to original plaintiffs but must also be satisfied for purposes of *asserting* a counterclaim. *Id.* (emphasis added). Here the counterclaimant was Ms. Vaden. No part of Rule 17(a) suggests an inquiry into whether an entity might be a proper defendant. Quite generally people can and do sue whomever they intend. If Discover Financial Services believed it was not the proper party to be sued it could have filed a motion for summary judgment.

complaint — cannot serve as the basis for 'arising under' jurisdiction." *Holmes Group, Inc.*, 535 U.S. at 831 (citing In re *Adams*, 809 F.2d 1187, 1188 n.1 (5th Cir. 1987); *FDIC v. Elefant*, 790 F.2d 661, 667 (7th Cir. 1986); *Takeda v. Northwestern National Life Ins. Co.*, 765 F.2d 815, 822 (9th Cir. 1985); 14B C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3722, pp. 402-414 (3d ed. 1998)). The Court concluded, "[f]or these reasons, we decline to transform the longstanding well-pleaded-complaint rule into the 'well-pleaded-complaint-*or-counterclaim* rule' urged by respondent." *Holmes Group*, 535 U.S. at 832 (emphasis in original).

The majority attempts to evade the clear holding in *Holmes Group* by misapplying the doctrine of complete preemption to counterclaims. The majority fails to recognize that complete preemption is solely a removal doctrine that is analytically applied to recharacterize allegations made in a plaintiff's *complaint*. The majority sets about its explication of its novel jurisdictional construct in footnotes two and three. *Op.* at 5, 6. An examination of these footnotes exposes the erroneous legal formulation upon which the majority opinion depends.

In footnote three, the majority acknowledges that complete preemption is a removal doctrine, stating, "[a]lthough complete preemption did originate in the removal context, we conclude that it also applies to the unique procedural posture of this case." *Op.* at 6 n.3. The majority offers as support for this proposition the following quote from *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987):

> On occasion, the Court has concluded that a preemptive force of a statute is so extraordinary that it converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.

Contrary to the majority's apparent understanding, that passage makes plain that the doctrine of complete preemption has but one purpose — that is, the recharacterization of a *plaintiff's* state *complaint* so that it may be considered federal for the purposes of the well-pleaded complaint rule. The well-pleaded complaint rule states that, "a defendant may not remove a case to federal court unless the *plaintiff's complaint* establishes that the case 'arises under' federal law." *Franchise Tax Bd.*, 463 U.S. at 10 (footnote omitted; emphasis added). The complete preemption doctrine thus works to treat a plaintiff's state *complaint* as federal from its inception, thus permitting removal. "In the case of complete preemption . . . Congress 'so completely preempt[s] a particular area that any *civil complaint* raising this select group of claims is necessarily federal in character.'" *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 187 (4th Cir. 2002) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987)) (emphasis added).

The majority's holding results in the adoption of a "*well-pleaded counterclaim rule*," rejected by the Court in *Holmes Group* as it would leave the acceptance or rejection of the state forum to the counterclaimant. "It would allow a defendant to remove a case brought in state court under state law,

thereby defeating plaintiff's choice of forum, simply by raising a federal counterclaim." *Holmes Group*, 535 U.S. at 831. Or in the case of a dispute requiring arbitration, it would deprive the state court of its concurrent jurisdiction to enforce the FAA. *See Moses H. Cone*, 460 U.S. at 25, 25 n.32 (noting that "enforcement of the [FAA] is left in large part to the state courts").

Footnote three in the majority opinion concludes: "To hold otherwise would have the perverse result of returning to state court otherwise completely preempted federal claims because of the unanticipated nature of a defendant's counterclaims." *Op.* at 6 n.3. Not to quibble, but the counterclaims never left state court, as the case was not removed or removable. No accepted theory of federal jurisdiction would put this claim properly before a federal court. In any event, what the majority characterizes as a perverse result is an accurate description of our legal system and the overlapping jurisdiction of state and federal courts. Federal counterclaims are adjudicated in state court every day. (*See, e.g.*, *City & County of Honolulu v. Sherman*, 129 P.3d 542 (Haw. 2006) (adjudicating counterclaims based on the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)); *Villas West II of Willowridge v. McGlothin*, 841 N.E. 2d 854 (Ind. App. 2006) (adjudicating at trial Fair Housing Act counterclaim); *Salon Enterprises, Inc. v. Langford*, 31 P.3d 290 (Kan. App. 2000) (adjudicating FLSA counterclaims); *Wash. Suburban Sanitary Comm'n v. CAE-Lin Corp.*, 622 A.2d 745 (Md. 1993) (granting summary judgment as to § 1983 counterclaims)).

I completely disagree with the majority's conclusion in footnote three. I believe *Holmes Group* is controlling here. In an attempt to support its contention that *Holmes Group* does not contradict its conclusion, the majority misinterprets the text of Wright & Miller. The majority in footnote three, selectively quotes Wright & Miller. A key portions [sic] is omitted. The omission substantially distorts the textual discussion. In context this section of the treatise states (omitted portion in bold):

> In contrast, under the complete-preemption doctrine, which has been invoked in a significant—and ever-increasing—number of cases and contexts, a narrow class of claims are so "necessarily federal" that they always will permit removal to federal court. In these cases, federal law "not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting congress's intent to permit removal." **Thus, if a plaintiff files suit in state court based upon a state cause of action, and the defendant removes the case on the basis of complete preemption, the federal district court will recharacterize the plaintiff's state cause of action as a federal claim for relief, making the removal proper on the basis of federal question jurisdiction**. **In this sense**, the complete-preemption doctrine overrides such fundamental cornerstones of federal

> subject matter jurisdiction as the well-pleaded complaint rule and the principle that the plaintiff is master of the complaint.

14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3722.1 at 508, 511 (3d ed. 1998) (emphasis added). Without omissions, the referenced passage makes clear that the doctrine of complete preemption is exclusively focused on claims in a *plaintiff's complaint* and offers no support for the majority's jurisdictional theory.

Finally, I am constrained to say that I am troubled by the court's use of the FAA as a make weight for jurisdiction. The FAA was designed to make arbitration agreements as enforceable as other contracts, *but not more so*. *Prima Paint*, 388 U.S. 395, 404 n.12 (1967). It did not intend "to elevate [them] over other forms of contract." *Id.* The Supreme Court has made clear that the plain language of § 4 forbids federal courts from adjudicating the merits of the dispute to be arbitrated. Yet, this court interprets § 4 to require the district courts to address the underlying dispute carefully enough to determine whether it states a federal question. The federal court does this, not so that it can resolve any of the parties' rights or remedies under federal law, but simply so it can take subject matter jurisdiction of a § 4 FAA action that is often nothing more than an ordinary contract action. *Cmty. State Bank v. Strong*, ___ F.3d ___, 2007 WL 1225343, *13 (11th Cir. 2007) (J. Marcus concurring).

With respect, I believe the approach taken by the majority here, and the panel in *Vaden I*, is mistaken. *Vaden I* puts this court at odds with at least four of our sister circuits. *See Westmoreland Corp. v. Findlay*, 100 F.3d 263, 267-69 (2d. Cir. 1996); *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 986-88 (5th Cir. 1992); *Smith Barney, Inc. v. Sarver*, 108 F.3d 92, 94 (6th Cir. 1997); *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 659 (7th Cir. 2006). The clear weight of authority is that § 4 does not make federal question jurisdiction over a petition to compel arbitration dependent on the nature of the underlying dispute to be arbitrated. *Community State Bank*, 2007 WL 1225343 at *12. Actions are regularly filed under the FAA, and the approach adopted by this court, finding federal question jurisdiction where the court is asked only to enforce a private contract, considerably, and in my view unjustifiably, expands federal court jurisdiction. *Community State Bank*, 2007 WL 1225343 at *12. I do not believe we should look beyond the face of the arbitration petition to determine jurisdiction.

The district court erred in determining it had subject matter jurisdiction. There is no properly invoked federal question in the underlying case. Therefore there is no independent basis for jurisdiction over the suit seeking enforcement under the FAA. I would remand to the district court with instructions to dismiss the case for lack of subject matter jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

	*	
DISCOVER BANK, et al.,	*	
Plaintiffs,		
v.	*	CIVIL NO.: WDQ-03-3224
BETTY E. VADEN,	*	
Defendant.	*	

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MEMORANDUM OPINION AND ORDER

Discover Bank and Discover Financial Services, Inc. ("DFS") (collectively, "Discover") moved to compel arbitration of Vaden's counterclaims under the Federal Arbitration Act ("FAA")[1]. By Memorandum Opinion and Order dated June 21, 2004 ("June 2004 Opinion"), this Court granted Discover's motion and stayed prosecution of Vaden's counterclaims pending arbitration. Vaden appealed to the United States Court of Appeals for the Fourth Circuit. *See Discover Bank v. Vaden*, 396 F.3d 366 (4th Cir. 2005). In her appeal, Vaden challenged the Court's subject matter jurisdiction. The case was vacated and remanded for the determination of

[1] 9 U.S.C. § 1 *et seq.* (2005).

whether subject matter jurisdiction exists. *Id.* at 373. If the Court found that jurisdiction existed, the Fourth Circuit ordered the Court to reexamine whether Vaden's counterclaims were subject to arbitration. *Id.* at 373 n.4.

Pending is Vaden's motion to dismiss for lack of subject matter jurisdiction. For the reasons discussed below, Vaden's motion to dismiss will be denied and Vaden's counterclaims will be stayed pending arbitration.

BACKGROUND

On June 23, 2003, DFS sued Vaden in the Circuit Court for Baltimore City, Maryland for nonpayment of over $10,000 that was past due on Vaden's credit card. *See* Mem. in Support of Pls.' Mot. to Compel at p. 2. DFS is the servicing affiliate of Discover Bank, a Delaware federally insured bank. *See* Verified Complaint at ¶2. Vaden then filed class action counterclaims against DFS. *See* Mem. in Support of Pls.' Mot. to Compel at p. 2. The counterclaims allege illegal assessment of finance charges, late fees, and interest rates and breach of contract in violation of Maryland law. *See* Counterclaim at ¶¶ 41, 47, 52, 58, 67, 75, 81, 93.

On November 12, 2003, Discover filed a petition with this Court to compel arbitration of Vaden's counterclaims.[2] *See* Verified Complaint.

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[2] Vaden also filed a motion to dismiss and a motion for summary judgment on December 15, 2003 and January 12, 2004, respectively. In its June 2004 Opinion, the Court denied both motions.

Discover alleged that a mandatory arbitration provision was added to Vaden's Cardmember Agreement in 1999. *See id.* at ¶20. The Court granted Discover's motion. *See* June 2004 Opinion at p. 13.

The Fourth Circuit held that the Court's authority to grant Discover's motion depends upon whether the Court has subject matter jurisdiction over the parties' underlying dispute. *See Discover Bank*, 396 F.3d at 368. Vaden maintains that the Court lacks jurisdiction because her counterclaims are based solely upon Maryland law and no federal question is implicated. Discover counters that a federal question exists because Vaden's counterclaims are completely preempted by the Federal Deposit Insurance Act[3] ("FDIA").

On January 28, 2005, the Court ordered the parties to submit supplemental briefs addressing the Court's subject matter jurisdiction over the parties' underlying dispute. On April 4, 2005, Vaden moved to dismiss for lack of subject jurisdiction.

ANALYSIS

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

When subject matter jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)(1), the plaintiff has the burden of proving that subject matter jurisdiction exists. *Evans v. B.F. Perkins Co.*,

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[3] 12 U.S.C. §1831d(a) (2005).

166 F.3d 642, 647 (4th Cir. 1999) (*citing Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). In determining whether jurisdiction exists, "the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac*, 945 F.2d at 768 (*citing Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987)). The district court should apply the standard used for motions for summary judgment, whereby the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Id.* (*citing Trentacosta*, 813 F.2d at 1559). "The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (*citing Trentacosta*, 813 F.2d at 1558).

1. Federal Question Jurisdiction and Complete Preemption

Although a district court may compel arbitration pursuant to Section 4 of the FAA, the FAA, alone, does not confer subject matter jurisdiction. *See Discover Bank*, 396 F.3d at 368. The court's jurisdiction, therefore, must lie within the underlying dispute allegedly subject to arbitration. *See id.* at 369. Discover contends that the Court has subject matter jurisdiction based upon Section 27(a) of the FDIA. Specifically, Discover argues that the

FDIA completely preempts Vaden's state counterclaims.

Under the doctrine of complete preemption, a complaint that alleges only state law causes of action may be removed when the state claims necessarily invoke a federal law. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). The complete preemption doctrine rests on the notion that "on occasion . . . the preemptive force of a statute is so extraordinary that it converts an ordinary state common law complaint into one stating a federal claim . . ." [sic] *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir. 2000).

Vaden's counterclaims are based upon fees and interest rates charged on her Discover account and breach of contract. In regard to her illegal fees and interest rate claims, Vaden alleges violations of sections 12-502, 12-506 and 12-506.2 of the Commercial Law Article of the Maryland Annotated Code. *See* Counterclaim at ¶¶ 41, 47, 52. These sections regulate the assessment of finance charges and late fees and the compounding of interest upon a consumer credit card account. *See* MD CODE ANN., COM. LAW §§12-502, 12-506, 12-506.2 (2005). These provisions, however, are in stark contrast with the laws of Delaware, the state in which Discover was organized. *See* DEL. CODE ANN. tit. 5, §§ 941(8), 943, 945, 950, 952 (2005) (permits bank to charge late fees, interest and compound interest in accordance with the cardholder agreement).

Section 27(a) of the FDIA provides in pertinent part:

> In order to prevent discrimination against state-chartered insured depository institutions . . . with respect to interest rates . . . such state bank[s] . . . may, notwithstanding any state constitution or statute which is hereby preempted for purposes of this section, take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other, evidence of debt, interest . . . . [sic] at the rate allowed by the laws of the state . . . where the bank is located.

12 U.S.C. §1831d(a).

The United States Supreme Court has determined that sections 85 and 86 of the National Bank Act, 12 U.S.C. §§ 85, 86 (2005), completely preempt state law usury claims against national banks. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003). Section 27(a) is the counterpart to sections 85 and 86. *Cross-Country Bank v. Klussman*, No. C-0l-4190, 2004 U.S. Dist. LEXIS 7835, at *15 (N.D. Cal. Apr. 30, 2004). Courts, therefore, have held that Section 27(a) should be construed in *pari materia* with sections 85 and 86. *Hill v. Chemical Bank*, 799 F. Supp. 948, 951-52 (D. Minn. 1992) ("Generally, similar language should be interpreted in the same way, unless context requires a different interpretation."). It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the

same way. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826 (1st Cir. 1992) (citing *Morales v. TWA*, 504 U.S. 374, 384 (1992)).

Vaden concedes that the FDIA completely preempts any state claims against a federally insured bank such as Discover Bank. Vaden, however, argues that because she filed counterclaims against DFS, a non-bank, the FDIA is not implicated. Looking solely at the face of Vaden's counterclaims, it appears that she is correct--Vaden's counterclaims address DFS only. However, as the Fourth Circuit noted, a determination as to whether Discover Bank, as opposed to merely DFS is a party of interest in the state law suit is dispositive. *See Discover Bank*, 396 F.3d at 373, n.3.

Vaden's counterclaims allege damages based upon improper assessment of fees and interest charges. Although Vaden's claims are against DFS only, the record clearly demonstrates that Discover Bank is the real party in interest. Vaden and Discover Bank are the sole parties to the Cardmember Agreement. *See* Ex. 1 to Pls. Opp. Mot. Dism.[4] ("Roberts Decl. [sic]) at ¶¶4, 5. Discover Bank, not DFS, issues credit, establishes the terms of credit, including the interest rate and fees. *See id.* at ¶¶13, 14; *See* [sic] *also* Ex. 2 to Pls. Opp. Mot. Dism. ("Panzarino Decl." at ¶¶3-5. DFS is merely a servicing affiliate of Discover Bank. *See* Ex. 1 to Pls. Opp. Mot. Dism. ("Roberts Decl. [sic]) at ¶14. As the servicing affiliate, DFS performs certain services for

[4] All references to exhibits attached to Pls. Opp. refer to the Opposition filed in response to Vaden's 1/12/2004 motion to dismiss.

Discover Bank, including, but not limited to, marketing, customer service and collection services. *See* Ex. C to Roberts Decl. ("First Revised Service Agreement").

Despite this evidence, Vaden maintains that whether Discover Bank is the real party in interest is irrelevant. *See* Mot. Dism. at p. 7. She suggests that as the counter-plaintiff, she may sue a party even if her claim ultimately fails. *See id.* This argument, however, is unpersuasive. The Court must look beyond Vaden's attempts to characterize her claims to avoid federal jurisdiction. *Phipps v. FDIC*, 417 F.3d 1006, 1011 (8th Cir. 2005) (*quoting M. Nahas & Co. Inc. v. First Nat'l Bank*, 930 F.2d 608, 611-12 (8th Cir. 1991)). Complete preemption applies when a party seeks recovery for excessive fees and interest of loans that were made by a national bank, even if the bank is not named as a party. *Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000).

In urging the Court not to apply the complete preemption doctrine, Vaden cites cases finding complete preemption inapplicable to claims asserted against non-banks. These cases, however, are wholly inapposite. In all these cases, the Court either found that the bank was not the true lender or the allegations were not directed at the specific terms of the loan. *See Flowers v. EZPawn Okla., Inc.*, 307 F. Supp. 2d 1191, 1205-06 (N.D. Okla. 2004) (factual dispute regarding whether national bank was true lender); *Carson v. H & R Block, Inc.*, 250 F. Supp. 2d 669, 674 (S.D. Miss. 2003) (complete preemption doctrine inapplicable because plaintiff's allegations did not relate to any usurious interest rate charge,

excessive fee or other alleged national bank violation); *Goleta Nat'l Bank v. Lingerfelt*, 211 F. Supp. 2d 711, 717 (E.D.N.C. 2002) ("a sharp factual issue is presented as to whether Goleta is the real lender at issue"); *Green v H & R Block*, 981 F. Supp. 951, 955 (D.Md. 1997) ("gravamen of all plaintiff's claims is the alleged fiduciary duty owed by defendants to plaintiff, not usury claims").

Here, it is clear that Discover Bank, not DFS, is the true lender and that Vaden's counterclaims are directed against the alleged unlawful terms of the loan, not DFS' servicing of the loan. The complete preemption doctrine, therefore, applies.

Accordingly, the Court has subject matter jurisdiction over Discover's motion to compel.[5]

B. Motion to Compel Arbitration

The Fourth Circuit also directed the Court to reexamine whether there was a "question of material fact about the existence of an arbitration agreement". *Discover Bank*, 396 F.3d at 373, n.4. Specifically, the Court must consider whether Discover's financial records, viewed in the light most favorable to Vaden, could successfully rebut the presumption that she was subject to the amended agreement during the relevant time period. *See id.*

The Cardmember Agreement that Vaden received when she obtained credit with the Plaintiffs in 1990 provided that Discover could:

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[5] The Court will also exercise supplemental jurisdiction over Counts IV-VIII. *See* 28 U.S.C. §1367(a) (2005).

> change any term or part of this Agreement, including any Finance charge rate, fee or method of computing any balance upon which the Finance Charge rate is assessed, by sending you a written notice at least 30 days before the change is to become effective. Your express written agreement to any such change or the use of your Account or the Card on or after the effective date of the change means that you accept and agree to the change. We may apply any such change to the outstanding balance of your Account on the effective date of the change of terms and to new charges made after that date.

See Ex. 1 to Verified Complaint. ("Cardmember Agreement"). The agreement is "governed by the laws of the State of Delaware and applicable federal laws." *Id.*

In 1999, an arbitration clause was added to the Cardmember Agreement. *See* Verified Complaint at ¶¶ 18-26. The arbitration clause stated that:

> In the event of any past, present or future claim or dispute . . . between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the

Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.

IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. . . . Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit, and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision.

If you do not agree to the changes, you must notify us in writing by September 15, 1999. . . . If you notify us, we will close your Account and you will pay us the balance that you owe us under the current terms of the Agreement. If you do not notify us, the changes set forth in this notice will be effective and will apply to your Account for billing[] periods beginning after September 1, 1999. Use of your Account on or after October 1, 1999, means that you accept the new terms, even if you previously notified us that you did not agree to the changes.

See Ex. C to Verified Complaint ("The 1999 Amendment").

In July 1999, the 1999 Amendment was sent to all eligible Platinum cardmembers. *See* Ex. 1 to Pls. Supp. Brf. ("Loeger Supp. Decl."). Thereafter, a virtually identical amendment was also sent to all "new, converted and reissued cardmembers" whose accounts were processed between July 1, 1999 and September 30, 1999 ("Fulfillment Kit Notice of Amendment"). *See id.* at ¶¶ 8-9. For those members whose accounts were converted to Platinum status, they received a Fulfillment Kit which included their Discover Platinum card, the Discover Platinum Cardmember Agreement, a form cover letter notifying them of the conversion and a notice of amendment to the Discover Platinum Cardmember Agreement adding the arbitration provision. *See id.* at ¶9.

According to Discover's records, in June 1999, Vaden received a Discover Platinum Card and notification of upgrade. *See id.* at ¶3. Discover maintains that in July 1999, Vaden received the 1999 Amendment along with her regular monthly billing statements. *See id.* at ¶4. Discover contends that Vaden did not opt-out of the 1999 Amendment. *See* Verified Complaint at ¶28. Instead, Vaden used her card until 2001, when her privileges were suspended for nonpayment. *See* Ex. D to Verified Complaint (Vaden's Monthly Discover Card Statements for July 1999 - April 2001).

Vaden, however, argues that she is not subject to the 1999 Amendment, because she was not a Platinum Cardmember in July 1999. *See* Def. Supp.

Brf. at pp. 21-25. She claims that she would have not received the 1999 Amendment as a non-Platinum Cardmember. *See id.* Furthermore, she maintains that even if she received the 1999 Amendment, she was not bound by its terms. *See id.* Even assuming that Vaden's assertions are correct, Vaden's claims are subject to arbitration.

Vaden bases her argument that she is not subject to the arbitration agreement upon alleged inaccuracies in Discover's financial records. *See id.* Vaden maintains that her card was not upgraded to Platinum status until September 1999. *See id.* at pp. 22,23. In support, she notes that her monthly statements did not contain the "Platinum" brand until her October 1999 statement. *See id.* She also notes that Discover's records are inaccurate because they also incorrectly note that her credit limit was increased in June 1999, rather than in May 1999. *See id.* at p. 26. She, therefore, argues that any reliance upon Discover's financial records which indicate that she was a Platinum holder prior to September 1999 is misplaced.

Vaden, however, ignores the uncontroverted evidence that Discover also amended its Cardmember Agreement, incorporating the arbitration provision, by providing Fulfillment Kits to eligible cardmembers after July 1999. If Vaden became a Platinum Cardmember in September 1999, she would have received a Fulfillment Kit containing the arbitration agreement. Discover adduces evidence that appropriate measures were taken to ensure that all eligible cardmembers received their Fulfillment Kits. *See* Ex. A to Pls. Supp. Brf. ("Loeger Suppl. Decl.") at

¶¶11-12. For example, Discover ensured that the Fulfillment Kits and all of the required materials were sent to all eligible cardmembers' billing addresses. *See id.* As the Court stated in its June 2004 Opinion, "evidence that a notice of amendment was properly mailed gives rise to a rebuttable presumption of receipt." *See* 2004 Opinion at p. 9 (*citing Kurz v. Chase-Manhattan Bank USA, N.A.*, No. 03-5678, 2004 U.S. Dist. LEXIS 9711, at *14 (S.D.N.Y. 2004) [sic]. Vaden does not contend that she never received her Discover Platinum card, rather she argues that she never received the arbitration agreement. If the Platinum card was properly delivered in September 1999, then it is highly likely that Vaden would have also received the arbitration agreement.

Although Vaden submits that she did not receive an arbitration agreement, she adduces no evidence -- other than her denial -- to rebut this presumption. *See Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734-35 (7th Cir. 2002) (enforcing an arbitration agreement against an employee who claimed that she did not receive it). As the Court is satisfied that an arbitration agreement existed between the parties and Vaden failed to exercise her right to opt-out, her claims are subject to arbitration. Accordingly, the Court will order arbitration of Vaden's counterclaims. *See Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 634 (4th Cir. 2002) (court must order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored).

CONCLUSION

For the reasons discussed above, the Defendant's motion to dismiss will be denied and the Plaintiffs' motion to compel arbitration will be granted.

January 18, 2006 /s/
Date William D. Quarles, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

	*	
DISCOVER BANK, et al.,	*	
Plaintiffs,		
v.	*	CIVIL NO.: WDQ-03-3224
BETTY E. VADEN,	*	
Defendant.	*	

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ORDER

For the reasons discussed in the accompanying Memorandum Opinion, it is, this 18th day of January 2006, ORDERED that:

1. The Defendant's motion to dismiss BE, and HEREBY IS, DENIED;

2. The Plaintiffs' motion to compel arbitration BE, and HEREBY IS, GRANTED;

3. The Defendant's prosecution of her counterclaims in state court BE, and HEREBY IS, STAYED pending the outcome of arbitration;

4. This case be CLOSED; and

5. The Clerk of the Court shall send copies of this memorandum opinion and Order to counsel for the parties.

/s/
William D. Quarles, Jr.
United States District Judge

APPENDIX D

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INCORPORATED,
Plaintiffs-Appellees,

v. No. 04-1848

BETTY E. VADEN,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William D. Quarles, Jr., District Judge.
(CA-03-3224-1-WDQ)

Argued: December 1, 2004

Decided: January 24, 2005

Before WILKINSON, TRAXLER, and DUNCAN,
Circuit Judges.

Vacated and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Traxler and Judge Duncan joined.

COUNSEL

ARGUED: John Andrew Mattingly, Jr., BALDWIN, BRISCOE & MATTINGLY, CHTD., Lexington Park, Maryland, for Appellant. Christopher Landau, KIRKLAND & ELLIS, L.L.P., Washington, D.C. for Appellees. **ON BRIEF:** Joseph W. Hovermill, Matthew T. Wagman, John C. Celeste, II, MILES & STOCKBRIDGE, P.C., Baltimore, Maryland; Alan S. Kaplinsky, Martin C. Bryce, Jr., BALLARD, SPAHR, ANDREWS & INGERSOLL, L.L.P., Philadelphia, Pennsylvania, for Appellees.

OPINION

WILKINSON, Circuit Judge:

Betty Vaden, a Discover card holder, was sued in state court by Discover Financial Services, an affiliate of Discover Bank, for her unpaid credit card balance. In response, she instituted several class action counterclaims against Discover Financial Services based on state law. Discover then filed suit in federal district court under § 4 of the Federal Arbitration Act, seeking to compel Ms. Vaden to submit her counterclaims to arbitration. The district court ordered arbitration.

On appeal, this court was presented with a host of issues, including the threshold question of whether the federal district court had subject matter jurisdiction to hear the case. We remand most of these issues for the district court to consider in the

first instance. However, we do hold that when a party comes to federal court seeking to compel arbitration, the presence of a federal question in the underlying dispute is sufficient to support subject matter jurisdiction. Whether such a question exists here is a matter we reserve for the district court on remand.

I.

Discover Bank issued Betty Vaden a credit card in October 1990. Discover Financial Services ("DFS") is the servicing affiliate of the bank. On June 23, 2003, DFS sued Ms. Vaden in Maryland state court for the nonpayment of over $10,000 in credit card bills. Ms. Vaden responded by filing several class action counterclaims against DFS on behalf of herself and other Maryland residents. All of these counter-claims — most involving breach of contract allegations as to increased interest rates and late fees — were based on Maryland law. It is Discover's position that these state law claims are completely preempted by the Federal Deposit Insurance Act.

On November 12, 2003, Discover filed a petition in the United States District Court for the District of Maryland seeking to compel arbitration of Ms. Vaden's counterclaims. According to Discover, Ms. Vaden's credit card agreement was amended in July 1999 to include a provision requiring arbitration in the event of a dispute. Thus, Discover asked the federal court to compel arbitration, invoking § 4 of the Federal Arbitration Act. 9 U.S.C. § 4 (2000).

Whether or not a valid arbitration agreement exists between the parties is a matter of some

controversy. Ms. Vaden has never signed such an agreement. However, Discover points to language in the original credit agreement which specifies that it can be amended by written notice and that "the use of your Account or the Card on or after the effective date of the change means that you accept and agree to the change." Discover claims it mailed Ms. Vaden a notice in July 1999 explaining that her credit card agreement was being amended to include an arbitration provision. By continuing to use her card after receiving this notice, Discover says Ms. Vaden consented to the new terms of her agreement.

Ms. Vaden argues, however, that this notice of amendment was addressed only to Discover card members who held a Discover Platinum card. She claims — supported by evidence from Discover's own business records — that she was not a Discover Platinum card holder until September 1999. Thus, she says, the amendment notice allegedly sent in July did not apply to her.[1]

In any event, on December 15, 2003, and on January 12, 2004, Ms. Vaden filed a motion to dismiss and a motion for summary judgment with the district court. She asked the court to dismiss Discover's suit compelling arbitration for two main reasons. First, Ms. Vaden claimed that Discover Bank lacked standing to sue for arbitration since the class action counterclaims were filed against Discover

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[1] Discover counters this argument by explaining that Ms. Vaden's account was "automatically" upgraded to a Discover Platinum account in June of 1999. Ms. Vaden contends, though, that she was not asked to write her check to Discover Platinum until November of 1999.

Financial Services, and not Discover Bank. Second, Ms. Vaden argued that she had never validly entered into an arbitration agreement with Discover.

On June 21, 2004, the district court rejected Ms. Vaden's arguments and granted Discover's request to compel arbitration. It ordered that Ms. Vaden's counterclaims in state court be stayed pending the outcome of the arbitration. With the exception of the standing issue, the district court did not have the opportunity to address any of the issues relating to its subject matter jurisdiction which are now before this court on appeal.

II.

We must first address the question of whether the district court had subject matter jurisdiction over the present case. Discover asserts that its suit is properly in federal court by virtue of 28 U.S.C. § 1331 (2000) because it presents a federal question. Since neither party pressed this issue in the court below, it is before us for the first time on appeal.

Discover invokes § 4 of the Federal Arbitration Act ("FAA") to support its view that federal question jurisdiction exists. This part of the FAA states that a petition to compel arbitration can be filed in "any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties. . . ." 9 U.S.C. § 4.

No one contends that this statute in and of itself constitutes a federal question. Indeed, such an understanding is inconsistent with the language of the statute and has been foreclosed by the Supreme Court. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25, n.32, (1983). However, the courts of appeals are in disagreement as to whether — in a suit to compel arbitration authorized by § 4 — a district court has subject matter jurisdiction of a case when the underlying dispute between the parties raises a federal question. Compare *Westmoreland Capital Corp. v. Findlay*, 100 F.3d 263 (2d Cir. 1996) *with Tamiami Partners, Ltd. v. Miccosukee Tribe*, 177 F.3d 1212 (11th Cir. 1999).

There are two approaches to this issue, which respectively narrow and broaden the instances in which a federal court can properly assume jurisdiction of a suit under § 4 of the FAA. The narrower view has come to be known as the *Westmoreland* doctrine. *See Blue Cross v. Anesthesia Care Assocs. Med. Group*, 187 F.3d 1045, 1050, n.5 (9th Cir. 1999). This doctrine holds that for a district court to have federal question jurisdiction over a suit compelling arbitration, the federal question must be evident on the face of the arbitration petition itself. Perhaps realizing that such a possibility is highly unlikely, the *Westmoreland* line of cases concludes that federal question jurisdiction will never form the basis for a court's subject matter jurisdiction to hear a § 4 petition. *Westmoreland*, 100 F.3d at 268. Under this view, jurisdiction will lie only when "some other basis for federal jurisdiction exists, such as diversity of citizenship or assertion of a claim in admiralty," but will not lie simply because the underlying

controversy between the parties "raises a federal question." *Id.*

By contrast, the broader view permits a federal court to examine the underlying dispute between the parties to determine if a federal question is present. On this understanding, a district court is permitted to "look through" the arbitration request to assess whether the overall controversy between the parties is grounded in federal law. *Tamiami Partners*, 177 F.3d at 1223, n.11.

After examining the text of § 4 and the relevant precedent, we are persuaded by the broader view outlined above. We thus hold that a federal court possesses subject matter jurisdiction over a case when the controversy underlying the arbitration agreement presents a federal question.

A.

It is fundamental that "[w]hen interpreting statutes we start with the plain language." *U.S. Dep't of Labor v. North Carolina Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004). In fact, "where the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *U.S. ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245, 247 (4th Cir. 2004)(internal quotation omitted).

Section 4 of the FAA states:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate

> under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties . . .

9 U.S.C. § 4. We are convinced that this language directs courts to look through the arbitration agreement so to assess questions of subject matter jurisdiction. There are three specific components of the text which lead us to this conclusion.

First, there is the phrase "save for such agreement" in the text of § 4. It is a classic canon of statutory construction that courts must "give effect to every provision and word in a statute and avoid any interpretation that may render statutory terms meaningless or superfluous." *United States v. Ryan-Webster*, 353 F.3d 353, 366 (4th Cir. 2003)(internal quotation omitted). When interpreting these words, we must give them their "common and ordinary meaning." *Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999).

The common understanding of the phrase "save for" means "but for" or "notwithstanding." Used in this context, "save for such agreement" must mean that the district court would have jurisdiction of the case even if the agreement had never existed. We thus read this phrase as an instruction to set aside the arbitration agreement and then consider the grounds for federal jurisdiction independently. Indeed, we can think of no other reason why

Congress would have chosen to include the "save for" language.[2]

Second, we find significant the decision of Congress to reference "Title 28" generally in the text of § 4. The statute reads that a party can petition a district court which "save for such agreement, would have jurisdiction under Title 28 . . ." 9 U.S.C. § 4. Congress could have decided to parse Title 28 into its component parts. It could, for instance, have specifically referred to either § 1332 (diversity) or § 1331 (federal question jurisdiction). There are indeed examples in the United States Code where Congress has been so specific. *See*, *e.g.*, 42 U.S.C. § 9613(h) (2000); 22 U.S.C. § 6082(c)(1) (2000). But Congress chose not to do so in the FAA. And "where Congress knows how to say something but chooses not to, its

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[2] We are unpersuaded by the argument adopted by some courts that the "save for" language was included by Congress for the purpose of responding to an "antiquated and arcane principal of the common law" where a claim for specific performance of an arbitration agreement would oust the court of jurisdiction. *Drexel Burnham Lambert, Inc. v. Valenzuela Bock*, 696 F.Supp. 957, 961-62 (S.D.N.Y. 1988).

As the authors of a respected federal arbitration treatise explain, this theory is historically inaccurate. See 1 MacNeil, Speidel & Stipanowich, *Federal Arbitration Law* § 9.2.3 (1995). For, the "save for" language is found only in the FAA, not in any of the state arbitration reform acts upon which the FAA was based. Those states suffered from the same common law ouster problem. Had the "save for" language been meant to solve the ouster problem, "similar language would have been found in the 1920 New York Act, the 1923 New Jersey Act, and the old UAA, all drafted by the same reformers who drafted the FAA." *Id.* at 9:18.

silence is controlling." *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000)(internal quotation omitted).

This general reference to "Title 28" means a party may petition a district court to compel arbitration if the district court would have subject matter jurisdiction of the underlying suit by virtue of any provision in Title 28. Siphoning off federal question jurisdiction from Title 28 would rewrite the statute.

The third section of the statutory text we find significant is the phrase "controversy between the parties." Section 4 specifies that one can seek to compel arbitration in a district court when that court would have jurisdiction "under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties. . . ." 9 U.S.C. § 4. Those urging adoption of the *Westmoreland* doctrine would interpret the phrase "controversy between the parties" to encompass only the discrete dispute about whether there is a valid arbitration agreement. We think the more natural reading of the phrase is as a reference to the overall substantive conflict between the parties.

Litigants do not come to court solely to resolve the collateral issue of whether or not they have an agreement to arbitrate. Instead, parties incurring the expense and burdens of litigation are motivated to resolve their real-life conflicts and move on. In this case, for example, the question of the arbitration agreement's existence only arose because one party thought it was owed $10,000. That alleged debt is the source of the "controversy between the parties." The "controversy between the parties," as that term is

used in 9 U.S.C. § 4, is the underlying one, and it is that controversy that must arise under federal law.

This common understanding of the word "controversy" must govern our interpretation unless Congress chooses to narrow the term. The text of § 4 requires us to consider jurisdiction as it arises out of the whole controversy between the parties. This necessarily entails looking beyond the arbitration petition alone.

B.

Two further aspects of the *Westmoreland* doctrine reinforce our conclusion that it is not consistent with the statute.

1.

The courts which have adopted the *Westmoreland* doctrine were moved by an understandable allegiance to the well-pleaded complaint rule. *See*, *e.g.*, *Westmoreland*, 100 F.3d at 268-69; *Prudential-Bache Secs., Inc. v. Fitch*, 966 F.2d 981, 988 (5th Cir. 1992). These cases rightly point out that, "[t]he usual rules for determining federal question jurisdiction provide that a complaint will not avail a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Prudential-Bache*, 966 F.2d at 988, citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936).

According to these courts, a federal question will never properly arise under a § 4 arbitration petition

because such a petition never invokes a federal question on its face. Thus, they reason, if the FAA "is construed to provide for a federal forum whenever the underlying dispute involves a federal question, it must be seen as overturning the well-established rule that § 1331 federal question jurisdiction must be determined based on the face of a well-pleaded complaint." *Valenzuela Bock*, 696 F. Supp. at 963. This result, they conclude, is unacceptable because "[t]here is no indication that Congress in enacting the FAA . . . intended to change the rules for determining federal jurisdiction over a complaint." *Prudential-Bache*, 966 F.2d at 988. *See also Westmoreland*, 100 F.3d at 269.

We respect this argument, but we do not find it persuasive. For it is not true that a fair reading of § 4 "changes the rules" of the well-pleaded complaint doctrine. Indeed, the rules of the well-pleaded complaint doctrine, while strict, are not as rigid as the *Westmoreland* court suggests.

Under the Declaratory Judgment Act, for example, a party which traditionally would be a defendant can bring a preemptive suit in federal court, thus accelerating the claim against it. This creates a wrinkle in the traditional well-pleaded complaint rule. A would-be *plaintiff* — who might well have a federal cause of action — is transformed into a declaratory-judgment *defendant*, incapable of invoking a federal question on the face of a well-pleaded complaint. *See generally* 10B Charles Alan Wright, et al., Federal Practice and Procedure § 2767 (3d ed. 1998).

The Supreme Court has resolved this by simply directing federal courts to hypothesize what a well-pleaded complaint in a traditional case would look like. "*Skelly Oil* has come to stand for the proposition that if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 16 (1983)(internal quotation omitted). Alternatively, "[f]ederal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question." *Id.* at 19. Just as the real controversy for purposes of *Skelly Oil* and *Franchise Tax Board* was the prospect of a federal question suit which prompted the declaratory judgment action, so the real controversy in cases like the present one is whether a federal action prompted the motion to compel arbitration.

None of this, of course, expands federal question jurisdiction. Often, as in *Franchise Tax Board*, the conclusion reached will be that no properly invoked federal question exists in the underlying controversy. But this is not the inevitable conclusion; if it were, the entire reasoning process would be an exercise in futility and a waste of time. The same is true of the instructions in § 4 of the FAA. As explained above, the text of the FAA quite explicitly directs the federal courts to put aside the arbitration agreement, and determine if the court "would have jurisdiction under Title 28" without it. 9 U.S.C. § 4. By looking to the dispute underlying an arbitration petition — as the

text of § 4 requires us to do — we are not "changing the rules" of federal question jurisdiction. We are just applying the rules in the context of the FAA's procedural posture, just as the Supreme Court did with the Declaratory Judgment Act in *Franchise Tax Board*.

2.

There is a second aspect of the *Westmoreland* doctrine that concerns us. Were we to follow that line of cases, we would greatly restrict the ability of federal courts to hear cases under § 4 of the FAA. Indeed, the *Westmoreland* court admits that its view forecloses the possibility that federal question jurisdiction could ever form the basis for subject matter jurisdiction of a § 4 petition. *Westmoreland*, 100 F.3d at 268. This means that, for all practical purposes, a federal court could never hear a suit to compel arbitration unless the parties happen to be diverse. *Id.* ("A petition under FAA § 4 to compel or stay arbitration must be brought in state court unless some other basis for federal jurisdiction exists, such as diversity of citizenship or a claim in admiralty.").

We find this consequence of the *Westmoreland* doctrine inconsistent with the "congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses Cone*, 460 U.S. at 24. As we have explained, "[t]he Federal Arbitration Act embodies a federal policy favoring arbitration. Thus, 'as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 350 (4th Cir. 2001)

(quoting *Moses Cone*, 460 U.S. at 24-25). *See also Whiteside v. Teltech Corp.*, 940 F.2d 99, 101 (4th Cir. 1991).

Were we to follow *Westmoreland* and eliminate the ability of a federal court to hear a § 4 petition in which federal question jurisdiction exists over the actual dispute, we would be mangling the congressional intent behind the FAA that "plac[es] arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Of course state courts are capable of applying federal law, including a petition to compel arbitration under the FAA. But the disfavor to arbitration lies in limiting § 1331 in these cases to such an extent that the real controversy between the parties cannot reach federal court even when the plaintiff's complaint emphatically presents a federal question.

To be clear, we do not imply that arbitration agreements should receive preferential treatment. No doors to federal court are open to those claims that are closed to others. We agree that in passing the FAA Congress did not intend to create federal jurisdiction, *see Moses Cone*, 460 U.S. at 25, n.32, but we are likewise persuaded that Congress did not mean to unduly restrict federal jurisdiction either. We thus decline to eliminate § 1331 as a possible basis for federal jurisdiction over a petition to compel arbitration under § 4 of the FAA.

C.

In addition to the statutory text, our own precedent requires us to reject the *Westmoreland* doctrine.

In *Gibraltar, Inc. v. Otoki Group, Inc.*, this court faced a trademark ownership dispute. 104 F.3d 616 (4th Cir. 1997). Gibraltar filed suit in federal court, under § 4 of the FAA, asking that Otoki be compelled to arbitrate. *Id.* at 619. We agreed with the district court that it lacked subject matter jurisdiction since no properly invoked federal question existed. *Id.* Gibraltar had not alleged a violation of the Lanham Act, and we refused to hold that a federal question existed merely because the subject of the contract dispute was a federally-created property interest. *Id.* Significantly, however, we reached this conclusion only *after* examining the underlying controversy between the parties. *Id.* at 619.

Adhering to the *Westmoreland* doctrine would mean stopping the *Gibraltar* analysis after a realization that the parties were neither diverse nor making a claim in admiralty. This we cannot do. *Gibraltar* indicates, therefore, that we assume the plain text of § 4 requires us to ask whether any basis for subject matter jurisdiction would exist for the case in the absence of the arbitration agreement.

III.

A federal court may therefore hear a § 4 petition to compel arbitration if, but for the arbitration agreement, subject matter jurisdiction over the case would otherwise exist by virtue of a properly invoked federal question in the underlying dispute. The

question remains, however, whether such a federal question exists in this case. We reserve the resolution of that question for the district court.

We recognize that challenges to a federal court's subject matter jurisdiction can be brought at any stage in litigation. *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). However, this case presents several legally complex and partially fact-bound inquiries which must be answered prior to resolving the subject matter jurisdiction question.[3] We therefore think it prudent to remand these issues to the lower court, so that it can decide them in the first instance.[4]

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[3] Several such inquiries suggest themselves. First, in order to decide if a federal question exists, the court must decide whether Ms. Vaden's state law counterclaims are completely preempted by the Federal Deposit Insurance Act. *See* 12 U.S.C. § 1831d(a) (2000). This decision may be affected by the court's determination as to whether Discover Bank — as opposed to merely Discover Financial Services — is a party of interest in the state law suit.

Second, if the court finds that a federal question has not been properly stated, it will need to consider the pending motion to amend and, if granting it, ascertain whether the parties are diverse and whether the other requirements of § 1332 are properly met.

[4] In the event the lower court concludes it does have subject matter jurisdiction over this case, it should reexamine whether there was a question of material fact about the existence of an arbitration agreement between these particular parties. Specifically, the district court should consider whether Discover's own financial records — viewed in the light most favorable to Vaden — could successfully

VACATED AND REMANDED

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rebut the presumption that she was subject to the amended agreement during the relevant time period.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

	*	
DISCOVER BANK, et al.,	*	
Plaintiffs,		
v.	*	CIVIL NO.: WDQ-03-3224
BETTY E. VADEN,	*	
Defendant.	*	

* * * * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

Discover Bank and Discover Financial Services, Inc. ("DFS") (collectively, "Discover") have moved to compel arbitration under the Federal Arbitration Act ("FAA")[1] and to enjoin Betty E. Vaden from prosecution of a counterclaim that she filed in state court. In response, Vaden has filed a motion to dismiss against Discover Bank for lack of jurisdiction, a motion for summary judgment, and a motion to strike several of the exhibits submitted by Discover in response to her motion for summary judgment. For the reasons discussed below, Discover's motion to compel arbitration will be granted, and Vaden's

[1] 9 U.S.C. § 1 *et seq*. (2004)

motions to dismiss, for summary judgment, and to strike exhibits will be denied.

BACKGROUND

On June 23, 2003, DFS sued Vaden in the Circuit Court for Baltimore City, Maryland for nonpayment of over $10,000 that was past due on Vaden's credit card. Mem. in Support of Pls.' Mot. to Compel 2. Vaden then filed class action counterclaims against DFS. *Id.*

The Cardmember Agreement that Vaden received when she obtained credit with the Plaintiffs in 1990 provided that Discover could:

> change any term or part of this Agreement, including any Finance charge rate, fee or method of computing any balance upon which the Finance Charge rate is assessed, by sending you a written notice at least 30 days before the change is to become effective. Your express written agreement to any such change or the use of your Account or the Card on or after the effective date of the change means that you accept and agree to the change. We may apply any such change to the outstanding balance of your Account on the effective date of the change of terms and to new charges made after that date.

Def.'s Ex. 1 to Mot. to Strike (Cardmember Agreement). The agreement is "governed by the laws of the State of Delaware and applicable federal laws." *Id.*

In 1999, an arbitration clause was added to the Cardmember Agreement. *Id.* ¶¶ 18-26. The arbitration clause stated that:

> In the event of any past, present or future claim or dispute. . . between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.
>
> IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. . . . Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit, and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision.
>
> If you do not agree to the changes, you must notify us in writing by September 15, 1999. . . . If you notify us, we will close your Account and you will pay us the balance that you owe us under the current terms of the Agreement. If you do not notify us, the changes set forth in this notice will be effective and will apply to

> your Account for billing[] periods beginning after September 1, 1999. Use of your Account on or after October 1, 1999, means that you accept the new terms, even if you previously notified us that you did not agree to the changes.

Pls.' Ex. C (Arbitration Amendment).

Vaden used her card continuously from 1990 to 2001, when her privileges were suspended for nonpayment. Mem. in Support of Pls.' Mot. to Compel 3.

ANALYSIS

A. Motion to Dismiss Against Plaintiff Discover Bank

When subject matter jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)1, the plaintiff has the burden of proving that subject matter jurisdiction exists. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (*citing Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). In determining whether jurisdiction exists, "the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac*, 945 F.2d at 768 (*citing Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Trentacosta v. Frontier Pac. Aircraft Indus.*, 813 F.2d 1553, 1558 (9th Cir. 1987)). The district court should apply the

standard used for motions for summary judgment, whereby the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists. *Id.* (*citing Trentacosta*, 813 F.2d at 1559). "The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* (*citing Trentacosta*, 813 F.2d at 1558).

Vaden argues that because she filed counterclaims against DFS, rather than Discover Bank, Discover Bank lacks standing to sue to compel arbitration. Def.'s Mot. to Dismiss 3-10.

Parties to an arbitration agreement, however, have standing to sue to compel arbitration under the FAA. *See*, *e.g.*, *Adkins v. Labor Ready*, 303 F.3d 496 (4th Cir. 2002); *Hightower v. GMRI, Inc.*, 272 F.3d 239 (4th Cir. 2001).

Discover Bank and Vaden are both parties to the Cardmember Agreement and Arbitration Amendment that governs Vaden's account. Pls.' Ex. A to Mot. to Compel(Cardmember Agreement); Pls.' Ex. 1 to Opp'n to Def.'s Mot. to Dismiss ¶¶ 4, 7 (Roberts Dec.); Pls.' Ex. 2 to Opp'n to Def.'s Mot. to Dismiss at ¶ 3 (Panzarino Dec.).

Vaden also asserts that Discover Bank lacks standing because it did not satisfy the statutory prerequisites to compel arbitration under the FAA. Def.'s Mot. to Dismiss 6-7. Specifically, Vaden asserts that Discover Bank is not an aggrieved party and

that it failed to provide her with the notice required by the statute. *Id.*

The FAA provides that:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default.

9 U.S.C. § 4 (2004).

The filing of a petition for an Order to compel arbitration satisfies the notice requirement of the FAA. *Unionmutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 774 F.2d 524, 526 (1st Cir. 1985); *All Saint's Brands, Inc. v. Brewery Group Denmark, A/S*, 57 F. Supp. 2d 825, 828 (D. Minn. 1999) (*citing Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 725 F.2d 192, 196 (2d Cir. 1984) (Mansfield, J., concurring)). Because Discover Bank has filed a Complaint seeking an order to compel arbitration, it has provided Vaden with sufficient notice. Moreover, as Vaden has opposed its request for an Order to compel arbitration, Discover Bank is an aggrieved party. *See Hartford Accident & Indem. Co. v. Equitas Reinsurance Ltd.*, 200 F. Supp. 2d 102, 108 (D. Conn. 2002) (once an adverse party refuses to arbitrate, the plaintiff is aggrieved under the FAA).

Vaden claims that Discover Bank is judicially estopped from claiming that it was a party to her Cardmember Agreement because DFS, in responding to Vaden's requests for admissions in the case between Vaden and DFS in state court, explained that "*DFS* adhered to its policies and procedures when *DFS* extended credit to Vaden." Def.'s Ex. H to Mot. to Dismiss (Pls.' Resp. to Def.'s Request for Admissions) (emphasis added).

The doctrine of judicial estoppel provides that "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (*quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). Judicial estoppel applies when the party advancing an inconsistent position has succeeded in persuading a court to accept its earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first of the second court was misled. *Id.* at 750 (*citing Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)). "Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations.'" *Id.* at 751 (*quoting United States v. C.I.T. Constr. Inc.*, 944 F.2d 253, 259 (5th Cir. 1991)).

The case between DFS and Vaden in the state court has been stayed pending the Court's ruling on Discover's motion to compel arbitration. Pls.' Resp. to Def.'s Mot. to Dismiss 14. Because the state court

proceeding remains unresolved, Discover has not yet been successful in persuading that court of its allegedly inconsistent position. Accordingly, judicial estoppel is not applicable to Discover's stance in this case.

B. Motion for Summary Judgment

1. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to summary judgment as a matter of law. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), the Supreme Court explained that, in considering a motion for summary judgment, "the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Thus, "the judge must ask . . . whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id.* at 252.

In undertaking this inquiry, a court must view the facts and the reasonable inferences drawn therefrom "in the light most favorable to the party opposing the motion," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), but the opponent must produce evidence upon which a reasonable fact finder could rely. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The mere existence of a "scintilla" of

evidence in support of the nonmoving party's case is not sufficient to preclude an order granting summary judgment. *Anderson*, 477 U.S. at 252.

2. Whether Vaden Received Notice of the Arbitration Amendment

Vaden argues that there is no agreement to arbitrate because she never received notice of the arbitration amendment. Def.'s Mot. for Summ. J. 4-9.

Whether the parties agreed to arbitrate is determined using state contract law. *Moody v. PNE Holdings, LLC*, 2002 WL 824637, *3 (W.D.N.C. 2002) (*citing Supak & Sons Mfg. Co., Inc. v. Pervel Indus. Inc.*, 593 F.2d 135 (4th Cir. 1979)).

It is undisputed that the Cardmember Agreement is governed by Delaware law. *See* Def.'s Ex. 1 to Mot. to Strike (Cardmember Agreement). Delaware Code Annotated title 5, § 952(a) provides:

> Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to plan benefits or features, the rate or rates of periodic interest, the manner of

> calculating periodic interest or outstanding unpaid indebtedness, variable schedules or formulas, interest charges, fees, collateral requirements, methods for obtaining or repaying extensions of credit, attorney's fees, plan termination, the manner for amending the terms of the agreement, arbitration or other alternative dispute resolution mechanisms, or other matters of any kind whatsoever. Unless the agreement governing a revolving credit plan otherwise expressly provides, any amendment may, on and after the date upon which it becomes effective as to a particular borrower, apply to all then outstanding unpaid indebtedness in the borrower's account under the plan, including any such indebtedness that arose prior to the effective date of the amendment. . . . Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower.

Cardholders must be permitted to opt out of amendments by sending notice to the bank. Del. Code Ann. tit. 5, § 952(b)(1)-(2) (2004). Use of the card after the time established to provide notice of rejection constitutes acceptance of the amendment, even if the cardholder has provided notice of rejection. § 952(b)(2).

Evidence that a notice of amendment was properly mailed gives rise to a rebuttable presumption of receipt. *Kurz v. Chase-Manhattan Bank USA, N.A.*,

2004 U.S. Dist. LEXIS 9711, *14 (S.D.N.Y. 2004) (*citing Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 918 (N.D. Tex. 2000)). Proof of mailing may be accomplished by presenting circumstantial evidence, including evidence of customary mailing practices used in the sender's business. *Id.* (*citing Marsh*, 103 F. Supp. 2d at 917-18 (crediting testimony of bank's vice president for operations about company's mass mailing process and quality assurance controls); *Fields v. Howe*, 2002 U.S. Dist. LEXIS 4515, *5-*6 S.D. Ind. 2002) (applying Delaware law and crediting vice president's testimony about mailing procedure); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1258 (Del. Super. Ct. 2001) (crediting testimony of bank vice president that amendment was sent to same address as bank statements and that it was not returned to sender as undeliverable)); *see also Pick v. Discover Fin. Servs., Inc.*, 2001 U.S. Dist. LEXIS 15777, *13 (D. Del. 2001) (applying Delaware law and crediting bank's proffer about its standard mailing procedures).

Discover has proffered the Declaration and Verified Complaint of Julie Loeger, Vice-President of DFS's marketing department. Loeger related that DFS mailed a notice informing cardholders of the arbitration amendment between July 1999 and August 1999. Verified Compl. ¶ 18. Notices were inserted into and mailed with the billing statements of all Discover cardholders who had open accounts and were receiving statements. *Id.* According to DFS's records, Vaden was mailed a copy of the notice of amendment on July 26, 1999. Loeger Dec. ¶ 11.

Discover's records do not reflect that Vaden submitted a notice rejecting the amendment, or that her notice of amendment was returned as undeliverable. Loeger Dec. ¶ 11. Vaden continued to use her card after the notice was distributed, and never alleged any unauthorized use of her credit card. *Id.* ¶ 15; Pls.' Ex. D (Vaden's monthly Discover Card Statements for July 1999 - April 2001).

Discover has adduced sufficient circumstantial evidence that it mailed the notice, and is entitled to presumption of receipt. *See Kurz*, 2004 U.S. Dist. LEXIS 9711, at *17.

The FAA establishes a strong federal policy favoring arbitration. *Coots v. Wachovia Sec., Inc.*, 2003 U.S. Dist. LEXIS 24331, *7 (D. Md. 2003) (*citing Moses E. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Accordingly, a federal district court must order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored. *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 634 (4th Cir. 2002).

Because Discover has shown that its arbitration amendment was made in accordance with applicable law and that Vaden received the amendment, the Court is satisfied that an arbitration agreement has been made. As Vaden has refused to submit her counterclaims to arbitration, Discover's motion to compel arbitration will be granted and Vaden's motion for summary judgment will be denied. However, when a district court finds that a controversy is arbitrable under the FAA, the appropriate course of action is stay the proceedings,

not to dismiss them. *See* 9 U.S.C. § 3 (2004); *West v. Merillat Indus., Inc.*, 92 F. Supp. 2d 558, 561 (W.D. Va. 2000). Accordingly, Discover's motion to enjoin Vaden from prosecuting her counterclaims in state court will be denied, and Vaden's counterclaim proceedings will be stayed pending the conclusion of arbitration.

C. Motion to Strike Exhibits

Vaden has moved to strike the exhibits that Discover relied on in opposing her motion for summary judgment. *See generally*, Def.'s Mot. to Strike.

Specifically, Vaden asserts that because Loeger works for DFS, and not Discover Bank, she lacks sufficient personal knowledge to enable her to testify about matters relating to Discover Bank. Def.'s Mot. to Strike 16-17.

Federal Rule of Civil Procedure 56(e) provides that "[s]upporting and opposing affidavits shall be made based on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

DFS, however, is Discover Bank's servicing affiliate and is responsible for "marketing..., credit card and other non-card loan products (including services related to credit approval, credit processing, authorization, customer service, account servicing, payment processing and collection); . . . and various other services in connection with [Discover's] bank

products." Pls.' Ex. C to Opp'n to Def.'s Mot. to Dismiss (service agreement between DFS and Discover Bank). In her capacity as an officer of DFS, therefore, Loeger has sufficient personal knowledge to testify about Discover's notice practices.

Vaden also challenges the validity of the following items of evidence submitted by Discover: (1) Vaden's Cardmember Agreement; (2) the Declaration of Ronald S. Canter; (3) the monthly memo purge list for Vaden's account; (4) the Discover Classic Card notice of amendment; and (5) the Discover Platinum Cardmember Agreement. *See generally*, Def.'s Mot. to Strike. Because the Court did not rely on these items in denying Vaden's motion for summary judgment, her motion to strike them will be denied as moot.

CONCLUSION

For the reasons discussed above, Discover's motion to compel arbitration will be granted and Vaden's motions to dismiss, for summary judgment, and to strike exhibits will be denied.

June 21, 2004
Date

/s/
William D. Quarles, Jr.
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

	*	
DISCOVER BANK, et al.,	*	
Plaintiffs,		
v.	*	CIVIL NO.: WDQ-03-3224
BETTY E. VADEN,	*	
Defendant.	*	

* * * * * * * * * * * * * * * * * *

ORDER

For the reasons discussed in the accompanying Memorandum Opinion, it is, this 21st day of June 2004, ORDERED that:

1. The Plaintiffs' motion to compel arbitration and to enjoin the Defendant from prosecuting her counterclaims in state court BE, and HEREBY IS, GRANTED IN PART AND DENIED IN PART;

2. The Plaintiffs' motion to compel arbitration BE, and HEREBY IS, GRANTED;

3. The Plaintiffs' motion to enjoin the Defendant from prosecuting her counterclaims in state court BE, and HEREBY IS, DENIED;

4. Vaden's prosecution of her counterclaims in state court BE, and HEREBY IS, STAYED pending the outcome of arbitration;

5. The Defendant's motion for summary judgment BE, and HEREBY IS, DENIED;

6. The Defendant's motion to dismiss Plaintiff Discover Bank BE, and HEREBY IS, Denied;

7. The Defendant's motion to strike exhibits BE, and HEREBY IS, DENIED;

8. This case be CLOSED; and

9. The Clerk of the Court shall send copies of this Memorandum Opinion and order to counsel for the parties.

/s/
William D. Quarles, Jr.
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
July 20, 2007

No. 06-1221
1:03-cv-3224-WDQ

DISCOVER BANK; DISCOVER FINANCIAL SERVICES, INCORPORATED

Plaintiffs – Appellees

v.

BETTY E. VADEN

Defendant – Apellant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

Amicus Curiae

- -

JOHN R. KUCAN, JR.; TERRY COATES

Amici Curiae

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On Petition for Rehearing and Rehearing En Banc

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The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Duncan, and Judge Goodwin.

For the Court

/s/ Patricia S. Connor

_____

CLERK