Filing # 161733504 E-Filed 11/22/2022 01:06:52 PM

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2022 CA 002073

DIVISION:

CAPITAL ONE, N.A,
a foreign corporation,

Plaintiff,

v.

STATE OF FLORIDA DEPARTMENT OF REVENUE, an agency of the State of Florida,

Defendant.
_____/

COMPLAINT

Plaintiff, Capital One, N.A. ("CONA"), by and through counsel, sues the State of Florida Department of Revenue, and alleges as follows:

The Parties

1. CONA is a foreign corporation chartered pursuant to the National Bank Act and authorized to conduct business in the State of Florida.

2. Defendant, the State of Florida Department of Revenue (the "Department"), is an agency established under the laws of the State of Florida.

Jurisdiction and Venue

3. This is an action to contest a determination made by the Department in a Notice of Proposed Assessment dated July 25, 2022, issued to CONA relating to

bank franchise taxes pursuant to Chapter 220, Florida Statutes (the "NOPA"). A true and correct copy of the NOPA is attached hereto as **Exhibit A**.

4. CONA's Complaint is timely filed and any and all jurisdictional requirements under Fla. Stat. § 72.011 have been met or are otherwise reserved as provided herein.

5. CONA has filed simultaneously herewith a Motion for Alternative Security Arrangement as permitted by Fla. Stat. § 72.011(3)(b)2 reserving the jurisdiction of this Court with respect to the security requirements of Fla. Stat. § 72.011(3).

6. Venue is proper in this Court pursuant to Fla. Stat. § 72.011(4)(b).

Nature of the Controversy

7. This action seeks to resolve a current controversy between CONA and the Department concerning an assessment issued by the Department to CONA for Florida bank franchise tax under Chapter 220, Florida Statutes.

8. The Department audited CONA for bank franchise taxes for the tax years ending December 31, 2017 through December 31, 2019 (the "Audit Period").

9. Following the audit of CONA for bank franchise taxes for the Audit Period, the Department issued the NOPA notifying CONA of an assessment of additional bank franchise tax and interest (the "Assessment"). This appeal followed.

Factual and Legal Allegations

10. All factual allegations below are true and correct for all periods during the Audit Period.

11. CONA, a foreign corporation chartered pursuant to the National Bank Act, is a subsidiary of Capital One Financial Corporation, a public company trading on the New York Stock Exchange.

12. CONA offers an array of financial products and services to consumers throughout the United States, including Florida.

13. During the Audit Period, CONA offered and issued credit card loans to customers located in Florida (the "Florida Credit Customers").

14. CONA earned revenue during the Audit Period from interest on credit card receivables (the "Credit Card Interest") of the Florida Credit Customers.

15. The Florida Credit Customers made credit card payments to CONA in one of three ways: (1) by mail; (2) electronically; or (3) in person at a physical location.

16. CONA received mailed-in credit card payments from the Florida Credit Customers outside Florida. CONA did not have a mailing address or a lockbox located in Florida for purposes of receiving credit card payments from the Florida Credit Customers. CONA did not receive mailed-in credit card payments from the Florida Credit Customers in Florida.

17. CONA received electronically-remitted credit card payments from the Florida Credit Customers in a bank account located outside Florida. CONA did not

receive electronically-remitted credit card payments from the Florida Credit Customers in a bank account located in Florida.

18. Other than five (5) Capital One Cafés located in Florida, CONA did not have an office or other location in Florida that was capable of receiving in person credit card payments from the Florida Credit Customers. During the Audit Period, beginning in mid-2019, CONA did receive a very small number of credit card payments at ATMs located within Capital One Cafés in Florida (the "Café Payments").[1]

19. Other than the Café Payments, CONA did not receive credit card payments in Florida from the Florida Credit Customers during the Audit Period.

20. For Florida bank franchise tax purposes, CONA treated the receipt of Credit Card Interest from Florida Credit Customers as interest received outside Florida.

21. During the Audit Period, CONA, as an "issuing bank", earned interchange income relating to credit card transactions entered into by its customers (the "Interchange Income").

22. CONA earned Interchange Income when a credit card transaction in which it was the issuing bank was processed by VISA or Mastercard. CONA earned Interchange Income through a daily net settlement process with an acquiring bank, which was also affiliated with VISA or Mastercard. Both CONA and the acquiring

[1] The Credit Card Interest received by CONA from the limited number of Café Payments during the Audit Period is a distant fraction of 1% of all the Credit Card Interest received by CONA from Florida Credit Customers.

bank had a contractual relationship with VISA or Mastercard during the Audit Period that determined the amount of Interchange Income CONA would earn for each credit card transaction. CONA did not have a contractual relationship with Florida Merchants ("Florida Merchants") in its role as an issuing bank during the Audit Period. Instead, the acquiring bank had a direct contractual relationship with the Florida Merchants that permitted the merchants to accept payments with VISA or Mastercard credit cards, including those issued by CONA. For each credit card transaction, CONA transferred to the acquiring bank, from its bank accounts outside Florida, an amount equal to CONA's customer's credit card purchase, less Interchange Income. These funds were then transferred by the acquiring bank to the Florida Merchants. CONA never directly received Interchange Income from the acquiring bank, VISA or Mastercard, or the Florida Merchants relating to transactions taking place at Florida Merchants, but instead recognized receipt of Interchange Income in its bank accounts outside of Florida at the time of the daily net settlement transactions.

23. The Interchange Income is not received directly from Florida Merchants. There is no privity of contract between CONA and the Florida Merchants regarding the payment of Interchange Income. Rather, CONA received the Interchange Income in its non-Florida bank accounts through the daily credit card net settlement process involving CONA and the acquiring banks affiliated with VISA or Mastercard.

24. In a typical transaction, a cardholder presents his/her card to the merchant in payment for goods or services. The merchant swipes the cardholder's card in a credit card terminal (which is typically provided by the acquiring bank), and data flows from the merchant to the acquiring bank and then from the acquiring bank through VISA or Mastercard to CONA. CONA approves or denies the transaction and the flow of information goes back through VISA or Mastercard to the acquiring bank and to the merchant. VISA or Mastercard then processes the transfer of the payment (less CONA's Interchange Income) from CONA to the acquiring bank.

25. For Florida bank franchise tax purposes, CONA treated the receipt of Interchange Income as gross income resulting from its operation as a financial organization outside Florida.

26. CONA is classified as a "bank" for bank franchise tax purposes under Fla. Stat. § 220.63, and as a "financial organization" for Florida apportionment purposes under Fla. Stat. § 220.15(6).

27. Because CONA is classified as a "financial organization," special rules apply regarding what sales receipts are attributable to Florida for Florida corporate income tax purposes.

28. Fla. Stat. § 220.15(5)(c)3 states in part that "interest received in this state, other than interest on loans secured by mortgages, deeds of trust, or other liens upon real or tangible personal property located without this state[,]" is

considered a Florida sale and, therefore, such receipts are attributable to Florida for Florida bank franchise tax purposes.

29. Fla. Admin. Code 12C-1.0155(1)(f)1, states in part that "where the income producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income producing activity occurs in Florida, in the numerator of the sales factor as well."

30. In support of the Assessment, the Department contends that (1) the situs of the related asset - the credit card loan – is the location where the credit card holder resides, (2) the related Credit Card Interest from Florida Credit Customers was therefore received by CONA in Florida, and (3) pursuant to Fla. Stat. § 220.15(5)(c), such receipts were attributable to Florida for Florida bank franchise tax purposes.

31. In support of the Assessment, the Department contends that the "income producing activity" responsible for CONA's receipt of Credit Card Interest occurred in Florida and, pursuant to Fla. Admin. Code 12C-1.0155(1)(f)1, such receipts were attributable to Florida for Florida bank franchise tax purposes.

32. Fla. Stat. § 220.15(5)(c)1 provides that "fees, commissions, or other compensation for financial services rendered within this state" received by a "financial organization" are attributable to Florida for Florida bank franchise tax purposes.

33. In support of the Assessment, the Department contends that CONA received the Interchange Income directly from the Florida Merchants, and thus, CONA performed the related financial services in Florida and, pursuant to Fla. Stat. § 220.15(5)(c)1, such receipts were attributable to Florida for Florida bank franchise tax purposes.

34. In the Assessment, the Department also determined that certain "other" interest ("Other Interest") received by CONA was attributable to Florida for Florida bank franchise tax purposes.

COUNT ONE

THE CREDIT CARD INTEREST IS NOT ATTRIBUTABLE TO FLORIDA BECAUSE CONA DID NOT RECEIVE THE CREDIT CARD INTEREST IN FLORIDA AS REQUIRED BY FLA. STAT. § 220.15(5)(c)3

35. CONA realleges and reincorporates the allegations of paragraphs 1 through 34 as if fully set forth herein.

36. Fla. Stat. § 220.15(5)(c)3 provides that only "interest *received in this state*" (emphasis added) is treated as a Florida sale for Florida bank franchise tax purposes.

37. During the Audit Period, CONA received Credit Card Interest from Florida Credit Customers in one of three ways: (1) by mail; (2) electronically; or (3) payments made in person.

38. Payments of Credit Card Interest made by Florida Credit Customers by mail were received by CONA outside Florida. During the Audit Period, CONA did not receive any payment of Credit Card Interest by mail from Florida Credit Customers in Florida.

39. Payments of Credit Card Interest made by Florida Credit Customers electronically are received by CONA in a bank account located outside Florida. During the Audit Period, CONA did not receive any electronically made payments of Credit Card Interest in Florida from Florida Credit Customers.

40. Other than with respect to the very limited number of Café Payments,[2] payments of Credit Card Interest made by Florida Credit Customers in person at physical locations were made at physical locations outside Florida.

41. Because the Credit Card Interest, other than with respect to the very limited number of Café Payments, received by CONA from Florida Credit Customers was not received by CONA "in this state" as contemplated by Fla. Stat. § 220.15(5)(c), the Department erred by relying on Fla. Stat. § 220.15(5)(c) in support of the Assessment.

COUNT TWO

THE DEPARTMENT'S RELIANCE ON FLA. ADMIN. CODE 12C-1.0155(1)(f)1 IS MISPLACED BECAUSE IT IS INCONSISTENT WITH FLORIDA LAW

42. CONA realleges and reincorporates the allegations of paragraphs 1 through 34 as if fully set forth herein.

---

[2] CONA believes that there is an argument that the Credit Card Interest received with respect to Café Payments was not received by CONA in Florida. However, concurrently with the filing of this Complaint, CONA has made a good faith electronic payment to the Department in an amount more than sufficient to cover any resulting tax liability as if the Credit Card Interest attributable to the Café Payments were received in Florida. *See* Fla. Stat. § 72.011(3)(a). CONA is still in the process of quantifying the exact amount of Credit Card Interest received with respect to Café Payments, but believes such amount to be *de minimis*.

43. Fla. Stat. § 220.15(5)(c)3 states in part that "interest received within this state, other than interest from loans secured by mortgages, deeds of trust, or other liens upon real or tangible personal property located without this state[,]" is considered a Florida sale and, therefore, such receipts are attributable to Florida for Florida bank franchise tax purposes.

44. The intent of the Florida legislature is clear that only "interest received in this state" can be considered a Florida sale by a financial organization.

45. The language of the Department's own administrative rule – Fla. Admin. Code 12C-1.0155(1)(f)1 – is inconsistent with this clear expression of legislative intent.

46. According to the Department, a "financial organization" such as CONA is required to treat interest income as attributable to Florida under Fla. Admin. Code 12C-1.0155(1)(f)1 if the "income producing activity" responsible for generating that income is in Florida.

47. The Department's "income producing activity" test for sourcing interest directly conflicts with the "interest received in this state" approach mandated by Fla. Stat. § 220.15(5)(c).

48. Because Fla. Admin. Code 12C-1.0155(1)(f)1 is inconsistent with Fla. Stat. § 220.15(5)(c), the Department's reliance on its own administrative rule must be rejected.

COUNT THREE

THE CREDIT CARD INTEREST IS NOT ATTRIBUTABLE TO FLORIDA UNDER FLA. ADMIN. CODE 12C-1.0155(1)(f)1

49. CONA realleges and reincorporates the allegations of paragraphs 1 through 34 as if fully set forth herein.

50. Fla. Admin. Code 12C-1.0155(1)(f)1, states that if the taxpayer receives business income from intangible personal property, and the associated "income producing activity" is engaged in by the taxpayer in Florida, such income is attributable to Florida for Florida bank franchise tax purposes.

51. Other than the *de minimis* solicitation activity taking place at the five (5) Capital One Cafés in Florida, all business activity of CONA relating to the solicitation and issuance of credit cards to Florida Credit Customers originates from CONA office locations outside Florida.

52. Because all business activity, other than the *de minimis* solicitation activity taking place at the five (5) Capital One Cafés in Florida, of CONA relating to the solicitation and issuance of credit cards to Florida Credit Customers originates from CONA office locations outside Florida, Fla. Admin. Code 12C-1.0155(1)(f)1 is inapplicable.

53. In support of the Assessment, the Department argues that the situs of the credit card debt is in Florida where the Florida Credit Customers reside. Because the debt has its situs in Florida, the Department reasons, the Credit Card Interest earned by CONA from that debt must be attributable to Florida. As an initial matter, the Department cites to no Florida statute, administrative rule, or decided case for its "situs of the debt" rule. In addition, this argument lacks any connection to the verbiage of Fla. Admin. Code 12C-1.0155(1)(f)1 requiring a link

between interest income and an "income producing activity" engaged in by the taxpayer. The Department's "situs of the debt" argument has no basis in Florida law and must be rejected as inconsistent with its own administrative rule.

54. Because the Credit Card Interest received by CONA from Florida Credit Customers was not derived from an "income producing activity" conducted by CONA in Florida as contemplated by Fla. Admin. Code 12C-1.0155(1)(f)1, the Department erred by relying on Fla. Admin. Code 12C-1.0155(1)(f)1 in support of the Assessment.

COUNT FOUR

THE INTERCHANGE INCOME RECEIVED BY CONA IS NOT ATTRIBUTABLE TO FLORIDA BECAUSE IT IS NOT "INTEREST RECEIVED WITHIN THIS STATE" BY CONA UNDER FLA. STAT. § 220.15(5)(c)3

55. CONA realleges and reincorporates the allegations of paragraphs 1 through 34 as if fully set forth herein.

56. In the Notice of Intent, the Department classified the Interchange Income as "fees" under Fla. Stat. § 220.15(5)(c)1.

57. The Department's classification of the Interchange Income as "fees" under Fla. Stat. § 220.15(5)(c)1 is incorrect. For federal income tax purposes, it is well understood that the Interchange Income received by CONA in this case is properly treated as interest – not fees. *See Capital One Fin. Corp. v. Comm'r*, 133 T.C. 136 (2009), acq., I.R.S. Chief Counsel Notice CC-2010-018 (Sept. 27, 2010). This characterization of the Interchange Income as interest has been accepted by

state courts as well. *See Bank of America Consumer Card Holdings v. Div. of Taxation*, No. 0121945 (N.J. Tax Ct. 2016).

58. Fla. Stat. § 220.15(5)(c)3 provides that only "interest *received in this state*" (emphasis added) is treated as a Florida sale for Florida bank franchise tax purposes.

59. The Interchange Income was earned by CONA outside of Florida through the net settlement process with various acquiring banks, which entailed payments to the acquiring banks from CONA's bank accounts outside of Florida and the recognition of Interchange Income upon completion of the payment. As a result, the Interchange Income was received by CONA in its bank accounts outside of Florida after the completion of the daily net settlement process.

60. Because the Interchange Income is correctly classified as interest and received by CONA outside Florida, the Interchange Income is not attributable to Florida under Fla. Stat. § 220.15(5)(c)3.

COUNT FIVE

THE INTERCHANGE INCOME RECEIVED BY CONA IS NOT ATTRIBUTABLE TO FLORIDA BECAUSE IT DOES NOT REPRESENT "FEES" EARNED BY CONA FROM FINANCIAL SERVICES PERFORMED IN FLORIDA BY CONA UNDER FLA. STAT. § 220.15(5)(c)1

61. CONA realleges and reincorporates the allegations of paragraphs 1 through 34 as if fully set forth herein.

62. In the event this Court agrees with the Department that the Interchange Income is classified as "fees" under Fla. Stat. § 220.15(5)(c)1, such

Interchange Income is not attributable to Florida because CONA did not earn that income from the rendering of financial services in Florida.

63. Fla. Stat. § 220.15(5)(c)1 provides that "fees, commissions, or other compensation for financial services rendered within this state" received by a "financial organization" are attributable to Florida for Florida bank franchise tax purposes.

64. The Department maintains that because the Interchange Income is received directly from Florida Merchants as a fee for processing credit card transactions, CONA is providing financial services at the location of each Florida Merchant and, therefore, the Interchange Income is taxable under Fla. Stat. § 220.15(5)(c)1.

65. The Interchange Income is not received directly from Florida Merchants. There is no privity of contract between CONA and the Florida Merchants regarding the payment of Interchange Income. Rather, CONA received the Interchange Income in its non-Florida bank accounts through the daily credit card net settlement process involving CONA and the acquiring banks affiliated with VISA or Mastercard.

66. In a typical transaction, a cardholder presents his/her card to the merchant in payment for goods or services. The merchant swipes the cardholder's card in a credit card terminal (which is typically provided by the acquiring bank), and data flows from the merchant to the acquiring bank and then from the acquiring bank through VISA or Mastercard to CONA. CONA approves or denies

the transaction and the flow of information goes back through VISA or Mastercard to the acquiring bank and to the merchant. VISA or Mastercard then processes the transfer of the payment (less CONA's Interchange Income) from CONA to the acquiring bank.

67. Because CONA provides the financial services of accepting, processing, and authorizing credit card transactions from outside Florida, the Interchange Income received by CONA is not attributable to Florida for Florida bank franchise tax purposes.

COUNT SIX

THE DEPARTMENT ERRED BY DETERMINING THAT THE OTHER INTEREST RECEIVED BY CONA WAS ATTRIBUTABLE TO FLORIDA

68. CONA realleges and reincorporates the allegations of paragraphs 1 through 34 as if fully set forth herein.

69. In the Assessment, the Department also determined that Other Interest received by CONA was attributable to Florida for Florida bank franchise tax purposes. For the tax year ending December 31, 2017, the Department determined Other Interest in the amount of $2,139,095 was received by CONA and attributable to Florida. For the tax year ending December 31, 2018, the Department determined Other Interest in the amount of $2,304,212 was received by CONA and attributable to Florida. For the tax year ending December 31, 2019, the Department determined Other Interest in the amount of $2,630,856 was received by CONA and attributable to Florida.

70. CONA is without knowledge regarding how the Department determined the amounts of Other Interest attributable to Florida during the Audit Period.

71. The NOPA does not explain the Department's factual or legal basis for concluding that Other Interest received by CONA during the Audit Period was attributable to Florida for Florida bank franchise tax purposes.

72. The Department's Form DR-1215 (Notice of Intent to Make Audit Changes) (the "Notice of Intent") issued to CONA also fails to explain the Department's factual or legal basis for concluding that Other Interest received by CONA during the Audit Period was attributable to Florida for Florida bank franchise tax purposes. Rather, the Notice of Intent merely includes the Other Interest – labeled "Interest (Other)" in the Notice of Intent – in a supporting schedule for its calculated sales factor numerator.

73. The Department's conclusion that Other Interest received by CONA during the Audit Period is attributable to Florida must be rejected because it is without any factual or legal justification.

74. On information and belief, there is no factual or legal basis for treating Other Interest received by CONA as attributable to Florida.

WHEREFORE, CONA respectfully requests that judgment be entered against the Department and in favor of CONA:

a. invalidating the Assessment relating to the Credit Card Interest because such amounts were not receipts attributable to Florida under Fla. Stat. § 220.15(5)(c)3;

b. in the alternative, invalidating the Assessment relating to the Credit Card Interest because Fla. Admin. Code 12C-1.0155(1)(f)1 is inconsistent with Fla. Stat. § 220.15(5)(c)3;

c. in the alternative, invalidating the Assessment relating to the Credit Card Interest because under Fla. Admin. Code 12C-1.0155(1)(f)1 the Credit Card Interest received by CONA from Florida Credit Customers was not derived from an "income producing activity" conducted by CONA in Florida;

d. invalidating the Assessment relating to the Interchange Income under Fla. Stat. § 220.15(5)(c)3 because CONA received such amounts outside Florida;

e. in the alternative, invalidating the Assessment relating to the Interchange Income under Fla. Stat. § 220.15(5)(c)1 because CONA received such amounts for rendering financial services from outside Florida;

f. invalidating the Assessment relating to the Other Interest because there is no factual or legal basis for same; and

g. Such other relief as is just and equitable.

DATED this 22nd day of November, 2022

AKERMAN LLP

By: */s/ Michael J. Bowen*

Michael J. Bowen
Florida Bar No. 0071527
Aleksas A. Barauskas
Florida Bar No. 0068175
50 North Laura Street, Suite 3100
Jacksonville, FL 32202
Phone: (904) 798-3700
Fax: (904) 798-3730
Michael.Bowen@akerman.com
Aleksas.Barauskas@akerman.com

Attorneys for Capital One, N.A.