Filed October 22, 2003

Nos. 03-16194, 03-16197, 01-16461

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WELLS FARGO BANK, N.A. et al.,

Plaintiffs - Appellees/Cross-Appellants,

v.

DEMETRIOS A . BOUTRIS

Defendant – Appellant/Cross-Appellee,

and

NATIONAL CITY BANK OF INDIANA, et al.,

Plaintiffs – Appellees,

v.

DEMETRIOS A . BOUTRIS

Defendant – Appellant.

On Appeal from the Final Judgments of the
United States District Court for the Eastern District of California
Case Nos. CIV S-03-157 GEB JFM & CIV S-03-655 GEB JFM

APPELLANT/CROSS-APPELLEE'S OPENING BRIEF

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C. § 1291. Appellees, Wells Fargo Bank, N.A., Wells Fargo Home Mortgage Inc. (collectively "Wells Fargo"), National City Bank of Indiana and National City Mortgage Company (collectively "National City") filed suits against Demetrios A. Boutris, in his official capacity as the California Corporations Commissioner ("Commissioner") for declaratory and injunctive relief in the United States District Court for the Eastern District, alleging federal jurisdiction under Title 28 U.S.C. § 1331. Appellees also alleged jurisdiction under Title 28 U.S.C. § 1343(a)(3) claiming deprivation of federal constitutional rights. The final judgment was entered on May 12, 2003, as to Wells Fargo and on July 2, 2003, as to National City. The Commissioner timely filed his respective Notices of Appeal on June 6, 2003 and July 25, 2003. The cases were by order dated August 27, 2003, consolidated by this Court.

ISSUES PRESENTED

1. Whether the district court erred in holding that the National Bank Act preempts the state police power of the Commissioner to regulate separate and legally distinct non-bank state-chartered subsidiaries of national banks as licensees under the California Residential Mortgage Lending Act and the California Finance Lenders Law?

2. Whether the district court erred in holding that the Depository Institutions Deregulation and Monetary Control Act of 1980 preempts state laws that expressly limit the rate or amount of interest on a loan, and extends to state laws that do not expressly limit the rate or amount of interest on a loan?

STATEMENT OF THE CASE

A. Procedural Background

On January 27, 2003, Wells Fargo filed a lawsuit against the Commissioner in the United States District Court for the Eastern District of California. On March 31, 2003, National City also filed against the Commissioner in the same court. Both lawsuits claimed that (i) the Commissioner was preempted from exercising any visitorial powers over operating subsidiaries of national banks as these non-bank state-chartered corporations are regulated exclusively by the Office of the Comptroller of the Currency ("OCC") under the National Bank Act ("NBA") and/or the rules promulgated thereunder; and (ii) subsection (o) of section 50204 of the Financial Code and Civil Code[1] section 2948.5[2] were preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980

[1] All references are to the California Financial Code and the California Civil Code unless otherwise noted.

[2] It should be noted that the Commissioner's authority to enforce the per diem statute is now codified in California Financial Code section 50204(o), and the California Attorney General, who is not a party to this action, retains jurisdiction to enforce the amended Civil Code section 2948.5.

("DIDMCA"). [ERVI 1-3; ERVII 1-15][3] The complaints sought injunctive and declaratory relief, and were based on the legal theories that the California Residential Mortgage Lending Act ("CRMLA") and the California Finance Lenders Law ("CFLL") were preempted by the Supremacy Clause, the NBA and/or the regulations promulgated thereunder; and that subsection (o) of section 50204 of the Financial Code and Civil Code section 2948.5 were preempted by the Supremacy Clause and DIDMCA. [ERVI 2 ¶2; ERVII 2 ¶3]

On February 10, 2003, Wells Fargo amended its complaint to add an additional count of retaliation in response to the February 4, 2003, commencement of license revocation proceedings by the Commissioner against Wells Fargo Home Mortgage, Inc. ("WFHMI"). [ERVI 4]

B. Disposition Below

Following the issuance of preliminary injunctions in both cases, cross-motions for summary judgment were filed in the district court addressing the legal issues of preemption under both the NBA and DIDMCA. The Commissioner also sought summary judgment against Wells Fargo and National City on the issue of retaliation and Title 42 U.S.C. § 1983. By orders dated May 9, 2003 and July 2, 2003, the district court granted summary judgment in favor of Wells Fargo and

[3] References to the Excerpt of Record Volume I (Wells Fargo) are designated as "ERVI [page number]." References to the Excerpt of Record Volume II (National City) are designated as "ERVII [page number]".

National City on the preemption issues, and granted summary judgment in favor of the Commissioner on the issue of Title 42 U.S.C. § 1983 and Wells Fargo's retaliation claim.

The District Court held that the NBA preempts the Commissioner from exercising visitorial powers over WFHMI and National City Mortgage Company ("NCMC"), and that DIDMCA preempts subsection (o) of section 50204 of the Financial Code and Civil Code section 2948.5. The District Court entered a permanent injunction prohibiting the Commissioner from exercising visitorial powers over Wells Fargo and National City and from enforcing subsection (o) of section 50204 of the Financial Code and Civil Code section 2948.5 against Wells Fargo and National City. [ERVI 246; ERVII 148]

The Commissioner timely filed his notice of appeal in the Wells Fargo case on June 6, 2003, and in the National City case on July 25, 2003. [ERVI 278; ERVII 165]

STATEMENT OF FACTS

The Commissioner is the state official charged with enforcing the CRMLA and the CFLL, including Financial Code § 50204(o). The CRMLA (Fin. Code § 50000 et seq.) and the CFLL (Fin. Code § 22000 et seq.) are consumer protection laws, enacted to protect California consumers in the area of lending. By their own

terms, the CRMLA and the CFLL do not apply to national banks. *See* Fin. Code § 50003[4] and Fin. Code §§ 22050-22054.[5]

The Commissioner does not dispute that Wells Fargo Bank, N.A. and National City Bank of Indiana are national banking associations organized and existing under the NBA. [ERVI 172; ERVII 110] The Commissioner's regulatory authority has never been directed at Wells Fargo Bank or National City Bank; rather the Commissioner's regulatory authority has been directed only at their non-bank state-chartered corporate subsidiaries, WFHMI and NCMC. [ERVI 5 ¶2; ERVII 1 ¶1]

In routine examinations that were conducted pursuant to the CRMLA and without protest after the OCC's regulation 12 C.F.R. § 7.4006[6] was issued, the Commissioner discovered that WFHMI, had two kinds of violations in its residential mortgages. [ERVI 81 ¶12] The first was charging per diem interest too early; the second was underestimating settlement fees in excess of the amount

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[4] Examples of exemptions include those granted to national banks; federal savings associations; wholly owned service corporations of national banks and federal savings associations.

[5] Examples of types of exemptions include those granted for any person doing business under any law of this state or of the United States relating to banks, trust companies, and savings and loan associations.

[6] 12 C.F.R. § 7.4006 provides "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."

allowed by the federal Truth in Lending Act. *Id.* Although WFHMI paid refunds to the consumers affected in the small number of cases reviewed by the Commissioner, the company refused to conduct an audit to determine the full number of customers affected as a precursor to refunds. [ERVI 45-46 ¶6] Instead, on January 27, 2003, Wells Fargo filed suit in federal court against the Commissioner, asserting that the per diem law was preempted by federal law and that the OCC was the exclusive regulator of national banks and their operating subsidiaries. [ERVI 1]

Despite finding that WFHMI "held California licenses that subjected it to the Commissioner's visitorial powers to which it refused to submit and yet it fought the Commissioner's attempt to revoke those California licenses," the District Court ruled that the OCC had exclusive authority over the operating subsidiaries of Wells Fargo Bank and that California's per diem laws were preempted. [ERVI 273-274]

Rather than complying with the California law and asking a federal court for declaratory relief, Wells Fargo took a more adversarial position relative to the State than any other licensee had done, claiming retaliation and seeking attorney's fees.[7]

[7] In the 37 previous cases of a lender being asked to make refunds because of per diem overcharges, the lender complied every time. At least one case involved a national bank.

Neither WFHMI nor NCMC attempted to surrender their licenses as allowed under the CRMLA. [ERVI 81 ¶10 and 122 ¶11; ERVII 67-68 ¶8] Neither sought exemption from the CRMLA or CFLL through administrative processes available to them. [ERVI 81 ¶1; ERVII 67-68 ¶2] And, neither WFHMI nor NCMC raised the issue of DIDMCA preemption until after the audits and refunds had been demanded by the Commissioner. [ERVI 92; ERVII 1]

Shortly after the District Court ruled in Wells Fargo, it also ruled on the analogous National City case. [ERVII 148-161] Like WFHMI who was first licensed in 1996, NCMC had been licensed by the Commissioner under the CRMLA since 1997[8] and had never objected to the visitorial powers exercised by the Commissioner until shortly before National City filed action against the Commissioner on March 31, 2003. [ERVII 1] Also, like WFHMI, NCMC was found to be overcharging California customers based on the California per diem law in Financial Code 50204(o).[9] [ERVII 126]

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[8] On April 21, 2003, the Commissioner instituted proceedings to revoke NCMC's CRMLA license. [ERVII 112-133] That matter was submitted to the Administrative Law Judge on October 3, 2003, and the parties are awaiting a decision.

[9] Under Financial Code section 50204, a licensee may not do any of the following:

> (o) Require a borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of the mortgage or deed of trust. Notwithstanding the foregoing, if the borrower affirmatively requests, and the lender agrees, that the recording will occur on Monday, or a day

Financial Code § 50204(o) and Civil Code § 2948.5 [10] prohibit lenders licensed under the CRMLA from charging per diem interest for more than one day prior to the recording of the mortgage or deed of trust. Typically in California, the deed of trust is recorded the same day as the loan proceeds are disbursed for the borrowers' use, with loan proceeds being sent by the lender to title and/or the settlement agent the day before closing. [ERVI 81 ¶11; ERVII 39, ¶4] The settlement agents and/or title companies cause the deed of trust to be recorded and take instructions directly from the lender as to the recording. [ERVI 81 ¶11; ERVII 39 ¶4].

Notwithstanding the promulgation of 12 C.F.R. § 7.4006 by OCC, which became effective August 1, 2001, WFHMI and NCMC continued to submit to the Commissioner's authority under the CRMLA and the CFLL by undergoing

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> immediately following a bank holiday, interest may commence to accrue on the business day immediately preceding the day of recording, provided the following is disclosed to the borrower in writing: (1) the amount of additional per diem interest charged to accommodate recording on Monday or the day following a holiday, as the case may be, and (2) that it may be possible to avoid the additional per diem interest charge by recording the loan or deed of trust on a day immediately following a business day.

[10] Civil Code Section 2948.5 provides in pertinent part as follows:

> A borrower shall not be required to pay interest on a principal obligation under a promissory note secured by a mortgage or deed of trust on real property improved with between one to four residential dwelling units for a period in excess of one day prior to recording of the mortgage or deed of trust if the loan proceeds are paid into escrow.

regulatory examinations, filing reports and paying assessments without any objection. [ERVI 45 ¶5, 81 ¶8, 118 ¶¶6-10, and 122 ¶9; ERVII 39 ¶6 and 67-68 ¶8] As recently as February 18, 2002, WFHMI agreed with the Commissioner that per diem interest had been overcharged and the finance charge understated in various loans reviewed by the Commissioner during the April 2001 regulatory examination. [ERVI 45-46 ¶6]

SUMMARY OF ARGUMENT

The District Court erred as a matter of law in holding that the CRMLA and/or the CFLL are preempted pursuant to the Supremacy Clause. There are no validly enacted statutes or regulations that expressly preempt the CRMLA or the CFLL. The OCC does not occupy the field sufficient to apply principles of field preemption. The CRMLA and the CFLL do not conflict with the NBA or the Gramm-Leach-Bliley Act ("GLBA") and do not frustrate the purposes for which national banks are organized.

The intent of Congress is the cornerstone of any preemption analysis. *Oxygenated Fuels Association Inc. v. Davis,* 331 F.3d 665, 668 (9th Cir. 2003). Congress, in enacting the NBA, intended to create a national banking system. *Marquette National Bank v. First Omaha Service Corp.,* 439 U.S. 299, 314-315 (1978). National banks are instrumentalities of the federal government but have historically been subject to dual regulation by the federal government and the states.

Id. at 308 (*citing Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896); *see also National State Bank v. Long*, 630 F.2d 981, 985 (3rd Cir. 1980). In contrast, operating subsidiaries are non-bank state-chartered corporations. They are not national banks and are not entitled to the same or greater status than federally-chartered national banks.

A review of the NBA and the GLBA reveals that Congress: has never defined the term "operating subsidiary", has never statutorily made reference to "operating subsidiaries", and has never given the OCC exclusive regulatory authority over operating subsidiaries of national banks. Title 12 U.S.C. Section 24 (Seventh) addresses the incidental powers of *national banks*; it does not grant authority to the OCC to regulate non-bank operating subsidiaries. While Title 12 U.S.C. Section 484 grants the OCC visitorial powers over *national banks*, it does not provide for exclusive powers, even over national banks. The GLBA, Title 12 U.S.C. Section 24a, in its definitional provisions, *excludes* operating subsidiaries.

Lacking any reference to operating subsidiaries in the statutory scheme, Congress did not intend to preempt state regulatory authority over operating subsidiaries, which are non-bank state-chartered corporations. Lacking any reference to operating subsidiaries, Congress did not delegate authority to the OCC to promulgate regulations preempting state laws applicable to operating subsidiaries of national banks. An agency, such as the OCC, has only the power conferred upon

it by Congress. *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 374 (1986). The OCC exceeded its congressionally delegated authority in promulgating 12 C.F.R. Section 7.4006. Title 12 C.F.R. Section 7.4006 is, therefore, invalid and cannot be the basis of preemption under the Supremacy Clause.

The District Court further erred in holding that the California per diem statutes are preempted by DIDMCA. Wells Fargo and National City have not met their burden of showing a "clear and manifest intent" on the part of Congress to supplant state authority in an area of traditional state concern, and, thus, fail to overcome the Supreme Court's presumption against preemption. *See Cippollone v. Leggett Group, Inc.*, 505 U.S. 504, 516 (1992).

The legislative history of DIDMCA demonstrates that Congress enacted it with a narrow intent and purpose: to address the extreme highs in home mortgage interest rates. State usury laws, placing a ceiling on interest rates below the market rate of interest, threatened the supply of home mortgage funds, and therefore jeopardized the availability of home mortgages to potential homebuyers. DIDMCA was intended to create a "limited modification in state usury laws." The implementing regulations of the Office of Thrift Supervision expressly seek to avoid preemption of state laws designed to protect borrowers. *See* 12 C.F.R. 590.3 (c).

Finally, the District Court failed to recognize that the per diem statutes are consumer protection statutes that do not impair or frustrate the goals of DIDMCA. Therefore, DIDMCA does not preempt Financial Code section 50204(o) and Civil Code section 2948.5.

For these reasons, and as set forth more fully below, the decision of the District Court should be reversed.

STANDARD OF REVIEW

This Court reviews de novo a district court's granting of summary judgment. *Cal. First Amendment Coalition v. Calderon,* 150 F.3d 976, 980 (9th Cir. 1998). The standard of review is also de novo where the question under review is a question of law, such as the issue of federal preemption of a state law. *Torres-Lopez v. May,* 111 F.3d 633, 638 (9th Cir. 1997); *see, e.g., Contract Services Network, Inc. v. Aubry*, 62 F.3d 294, 297 (9th Cir. 1995).

ARGUMENT

I. UNDER THE FEDERAL BANKING LAWS THE STATES RETAIN THE AUTHORITY TO REGULATE SEPARATE AND LEGALLY DISTINCT STATE-CHARTERED NON-BANK SUBSIDIARIES OF NATIONAL BANKS

A. General Principles Governing Preemption

Pursuant to the Supremacy Clause of the U.S. Constitution, federal law preempts or displaces state law through (1) express preemption; (2) field preemption; or (3) conflict preemption. U.S. Constitution, Art. VI, cl. 2; *see also*

Ting v. AT&T, 319 F.3d 1126, 1135 (9th Cir. 2003) *citing Pac. Gas & Elec. Co. v. Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 204 (1983). Express preemption occurs only when Congress explicitly defines the extent to which its enactments preempt state law. *English v. Gen. Elect. Co.*, 496 U.S. 72, 78-79 (1990). In the absence of such explicit language, preemption may be inferred only when federal regulation in a particular field is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." (citation omitted). *Bank of America v. City & County of San Francisco,* 309 F.3d 551, 558 (9th Cir. 2002).

Finally, where, as here, neither express nor field preemption applies, preemption may only be implied when state law conflicts with federal law, or is such that the state law "stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *English v. Gen. Elect. Co.*, 496 U.S. 72, 79 (1990) *quoting Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *see also Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 31(1996).

No matter which type of preemption is alleged, the courts must look to the intent of Congress in enacting the legislation, as "Congressional purpose is the 'ultimate touchstone' of preemption analysis." *Oxygenated Fuels Association Inc. v. Davis,* 331 F.3d 665, 668 (9th Cir. 2003) *quoting Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992). As this Court recently stated in *Bank of America v. City*

& County of San Francisco, when determining whether federal law preempts state law, the sole task of the court is to "ascertain the intent of Congress." *Id.* at 557-558.

Thus, courts are reluctant to infer preemption, and the party claiming preemption bears the burden of proving that Congress, in fact, intended to preempt state law. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 132 (1978); *New York Dept. of Social Services v. Dublino,* 413 U.S. 405, 413 (1973); *Elsworth v. Beech Aircraft Corp.,* 37 Cal.3d 540, 548 (1984). The courts apply a presumption against preemption in areas traditionally regulated by the states, because "it is assumed that Congress does not cavalierly decide to override state authority." *Oxygenated Fuels Association Inc. v. Davis,* 331 F.3d 665, 668 (9th Cir. 2003). The Supreme Court has "never assumed lightly that Congress has derogated state regulation, but instead ha[s] addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

By imposing a heavy burden against preemption, the Supreme Court gives wide berth to state and local governments to serve as testing grounds for diverse resolutions of public problems. As the Supreme Court recently stated in *Smith v. Robbins,* 528 U.S. 259 (2000), "[W]e will not cavalierly 'impede the States' ability to serve as laboratories for testing solutions to novel legal problems.'" *Id.* at 275,

quoting Arizona v. Evans, 514 U.S. 1, 24 (1995) (GINSBURG, J., dissenting). "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas*, 441 U.S. 418, 431 (1979), *accord Harmelin v. Michigan*, 501 U.S. 957, 990 (1991) ("Diversity not only in policy, but in the means of implementing policy, is the very raison d'être of our federal system").

In particular, this Court has recognized that federal preemption analysis "is guided by two presumptions: such statutes are to be interpreted narrowly in light of federalism concerns; and the purpose of Congress is 'the ultimate touchstone.'" *Brown v. Investors Mortgage Company*, 121 F.3d 472, 475 (9th Cir. 1997), *quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

While the presumption against preemption may not be applicable in cases where there has been a history of significant federal presence that is not the case presented here. *See United States v. Locke*, 529 U.S. 89, 108 (2000); *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). As demonstrated below in Section I. C. a history of significant federal presence is lacking because there is no federal statutory scheme that addresses or regulates non-bank state-chartered operating subsidiaries of national banks. *See generally* 12 U.S.C. §§ 1, et seq. Accordingly, this Court must start its analysis with a

presumption against the claim that state laws are preempted. *Oxygenated Fuels Association Inc. v. Davis*, 331 F.3d at 668.

Members of Congress specifically anticipated that the presumption against preemption would be applied when they enacted the Riegle-Neal Interstate Banking and Efficiency Act of 1994, a law authorizing interstate branches of national banks. The report of the committee on the Act noted: "States have a strong interest in the activities of and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities." H.R. Rep. No. 103-651 (Conf. Rep.), at 53, reprinted in 1994 U.S. Code Cong. & Ad. News 2068, 2074. The House-Senate Conference Committee report further observes that "[c]ourts generally use a rule of construction that avoids finding a conflict between Federal and State law where possible." *Id*.

The Commissioner is not seeking to regulate national banks, an area where this Court has found there is a significant federal presence. Rather, the Commissioner is regulating state-chartered non-bank corporations, a role traditionally left to the states. *Bank of America v. City & County of San Francisco*, 309 F.3d 551 (9th Cir. 2002); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 90-91 (1987). Unlike this case, *Bank of America* involved cities attempting to

regulate national banks rather than non-bank state-chartered corporations. Unlike Bank of America, WFHMI and NCMC are legally separate and distinct from Wells Fargo Bank, N.A. and National City Bank of Indiana, federally-chartered national banks.. *See* Section I.D.1, below.

It has long been recognized that states have an interest in regulating and overseeing the activities of the corporations they charter. *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 89, 91 (1987). For more than 110 years, the Supreme Court has held that "a corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislature which granted that charter." *Oregon Railway & Navigation Co. v. Oregonian Railway Co.,* 130 U.S. 1, 21 (1889).

The NBA lacks any indicia of congressional purpose to preempt the states' historic police power of consumer protection over non-bank state-chartered corporations. The Court, therefore, must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress", and place the burden on appellees to overcome the presumption. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

In summary, neither the NBA nor the GLBA contains any express direction to preempt state laws governing non-bank state-chartered operating subsidiaries.

Therefore, no basis for a finding of express preemption exists. Likewise, field preemption does not apply because there has been an unbroken chain of dual regulation of national banks by the federal government and the states, and the regulation of state-chartered corporate citizens has traditionally rested solely with the states. (*See* Section I. D. 1, below) Further, neither Congress nor the OCC has so pervasively regulated in the field of national banking in general, or as to non-bank state-chartered operating subsidiaries specifically, so as to invoke field preemption. *See Bank of America v. City & County of San Francisco*, 309 F.3d 551, 560 (9th Cir. 2002).

Finally, although federal regulations have no less preemptive effect than federal statutes (*Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. 141, 153 (1982)), the regulations must be promulgated pursuant to an *express* delegation of authority from Congress to be valid and enforceable. *Louisiana Public Service Commission v. FCC,* 476 U.S. 355 (1986) (emphasis added). Regulations promulgated by an agency may only preempt state law " . . . when and if [the agency] is acting within the scope of its congressionally delegated authority . . . . [A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless . . . Congress confers power upon it." *Id.* at 374.

As there is no congressional intent to preempt state laws such as the CRMLA and the CFLL, and because these statutes are not in conflict with the NBA or any other federal statutory provisions, the district court erred in finding that the CRMLA and CFLL are preempted under the NBA.

B. Express Preemption Does Not Apply Because No Validly Enacted Federal Banking Statute Or Regulation Expressly Mandates Preemption Of State Regulatory Authority Over Separate And Legally Distinct Non-Bank State-Chartered Subsidiaries Of National Banks

Congress may, within constitutional limits, preempt state laws or state authority by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). None of the banking statutes at issue in this case, the NBA or the GLBA, expressly define the term "operating subsidiary" or address the regulation of such entities. *See generally,* 12 U.S.C. §§ 21, et seq. and §§ 24a, et seq. Without even a definition or statutory reference, Congress could not have preempted state laws or state authority as to these entities by express mandate.

Also, when acting pursuant to an express delegation of authority from Congress, agencies such as the OCC may adopt regulations that preempt state laws. *Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. at 153. However, without an express delegation of authority from Congress, any such regulations issued by the agency are invalid and cannot be the basis of preemption. *Louisiana Public Service Commission v. FCC*, 476 U.S. at 375.

1. The OCC Exceeded Its Authority In Issuing Regulations Expressly Preempting State Laws Over Non-Bank State-Chartered Subsidiaries In The Absence Of Direct Congressional Authorization

The OCC has exceeded its constitutional and statutory authority in promulgating 12 C.F.R. § 7.4006, which seeks to expressly preempt state laws as they apply to operating subsidiaries of national banks. Regulations adopted by a federal agency preempt state laws only when the agency that promulgated the regulations is "acting within the scope of its congressionally delegated authority." *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986). Congress must confer preemption power upon the agency through a delegation of authority. *Id.* The OCC has no such express delegation of authority.

a. The National Bank Act Limits The OCC's Rulemaking Authority To Address Only Responsibilities Granted By Congress

The OCC's general rulemaking authority, codified in the NBA at Title 12 U.S.C. Section 93a, is insufficient to support its promulgation of regulations that seek to give the agency exclusive regulatory authority over operating subsidiaries, especially where, as here, the entities are non-bank state-chartered corporations.

Title 12 U.S.C. Section 1 establishes the OCC as the federal agency responsible for overseeing national banks established pursuant to the NBA.[11] The

[11] 12 U.S.C. § 1 provides:

There shall be in the Department of the Treasury a bureau charged

general rulemaking authority of the OCC is further defined by 12 U.S.C. § 93a, which provides in part:

> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, *the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities* <u>*of the office*</u>*, . . .*"

12 U.S.C. § 93a (emphasis added).

It is undisputed that the OCC's responsibilities include the oversight and regulation of national banks because the NBA expressly grants the OCC that authority. However, in order to regulate operating subsidiaries, the OCC must have express congressional authorization. *See Louisiana Public Service Commission v. FCC,* 476 U.S. at 374; *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That authority is lacking here.

Congress has never expressly extended the rulemaking authority of the OCC

> with the execution of all laws passed by Congress relating to the issue and regulation of national currency secured by United States bonds . . . , of all Federal Reserve notes, except for the cancellation and destruction, and accounting with respect to such cancellation and destruction, of Federal Reserve notes unfit for circulation, the chief officer of which bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury. The Comptroller of the Currency shall have the same authority over matters within the jurisdiction of the Comptroller as the Director of the Office of Thrift Supervision has over matters within the Director's jurisdiction under section 3(b)(3) of the Home Owners' Loan Act [12 U.S.C. § 1462a(b)(3)] . . .

to operating subsidiaries. *Cf.* 12 U.S.C. §24a(a)(5) (directing the OCC to promulgate regulations regarding financial subsidiaries). As demonstrated below, Congress has not defined an "operating subsidiary" in the NBA or the GLBA, the two comprehensive banking statutes relied on by the District Court to support its conclusion that the OCC has exclusive visitorial authority over national bank operating subsidiaries. *See* 12 U.S.C. §§ 1, et seq.; 12 U.S.C. §24a. [ERVI 246-276; ERVII 148-161]. Further, nothing in these statutes indicates an intention by Congress to permit the OCC to issue regulations giving it exclusive regulatory authority over non-bank state-chartered operating subsidiaries. It is insufficient to argue that Congress, by not acting to rein in the OCC has impliedly granted the agency authority to expand its limited authority over national banks to now also include non-bank state-chartered operating subsidiaries because the OCC has no power to act unless that power has been conferred upon it by Congress. *Louisiana Public Service Commission v. FCC,* 476 U.S. at 374.

The OCC has interpreted Title 12 U.S.C. Section 24 (Seventh) as giving it the authority to promulgate regulations authorizing national banks to establish operating subsidiaries. Title 12 U.S.C. Section 24 (Seventh), however, authorizes incidental powers to national banks, not the OCC. Thus, Section 24 (Seventh) does not constitute an express congressional delegation to the OCC to preempt state regulation of operating subsidiaries of national banks.

The latest comprehensive congressional pronouncement on national banking, the GLBA, makes no explicit reference to operating subsidiaries or the OCC's authority to regulate such entities. *See generally* 12 U.S.C. § 24a; 12 U.S.C. § 24a(g)(3)(A). However, the OCC, which first adopted its regulation giving national banks the right to establish operating subsidiaries in 1966, waited 35 years until after passage of the GLBA to attempt to expand its claim of exclusive visitorial authority. 12 C.F.R. § 5.34; 31 Fed.Reg. 11,459 (Aug. 31, 1966).

Administrative agencies, such as the OCC, are not granted unlimited power. Rather, they are given limited and delegated authority only "to adopt regulations to carry into effect the will of Congress as expressed by . . . statute." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). Congress has not seen fit to express its will with regard to operating subsidiaries and has not enacted legislation recognizing or governing operating subsidiaries of national banks. Therefore, the OCC's promulgation of regulations governing operating subsidiaries is a manifestation of the OCC's will, not the will of Congress. Such regulations are not proper and exceed the OCC's limited delegated authority. Therefore, the OCC must be restrained where it seeks to expand its jurisdiction beyond its limited delegated Congressional authority.

Congress has been clear when it intends to delegate authority to the OCC to address areas significantly implicating or preempting state laws. *See generally* 12

U.S.C. § 36; 12 U.S.C. §§ 1861-1867; 12 U.S.C. § 24a. That Congress has not seen fit to delegate such authority to the OCC in the case of operating subsidiaries is tantamount to a declaration from Congress that it has withheld such power. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184-185 (1978).

For example, in 1994, Congress enacted the Riegle-Neal Interstate Banking Act, which established interstate branches of national banks and codified the conditions upon which a national bank may retain or establish and operate a branch or branches of a national bank. Pub. L. 103-328, 108 2338 (Sept. 29, 1994) *codified at* 12 U.S.C. § 36.[12] Pursuant to this statute, branches of national banks are generally subject to the laws of the host state where the branch is located regarding consumer protection, fair lending, community reinvestment and establishment of interstate branches. 12 U.S.C. § 36(f)(1)(A). This is true, except when federal law *expressly* preempts the application of the state law to a national bank or if the OCC has made a determination that the application of the state law would have a discriminatory impact on the branch. *Id*. The statute further provides that the OCC

[12] 12 U.S.C. § 36(j) defines "branch" as follows:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent. The tern "branch" as used in this section, does not include an automated teller machine or a remote service unit.

is responsible for enforcing all applicable state laws to which the branch of a national bank is subject. 12 U.S.C. § 36(f)(1)(B).

There has been no similar declaration from Congress authorizing preemption of state law applicable to operating subsidiaries of national banks, or authorizing the OCC's exclusive authority over them.

In the Bank Service Company Act, 12 U.S.C. §§ 1861-1867, Congress has expressly given the OCC the same examination and enforcement authority over a bank service company[13] owned by a national bank that the OCC exercises over the parent national bank. *See* 12 U.S.C. § 1818.[14] The Bank Service Company Act specifically provides that the performance of those acts permissible by the bank service company shall be governed and "subject to regulation and examination by such agency to the same extent as if such services were being performed by the bank itself." 12 U.S.C. § 1867(c)(1).

However, Congress has never enacted similar legislation granting the OCC

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[13] A "bank service company" is defined as:

> . . . (A) any corporation-- (i) which is organized to perform services authorized by this Act [12 USCS §§ 1861 et seq.]; and (ii) all of the capital stock of which is owned by 1 or more insured banks; and (B) any limited liability company-- (i) which is organized to perform services authorized by this Act [12 USCS §§ 1861 et seq]; and (ii) all of the members of which are 1 or more insured banks.

[14] 12 U.S.C. § 1818 sets forth the OCC's general enforcement authority over national banks.

authority to preempt state laws applicable to state-chartered entities such as WFHMI and NCMC. Therefore, it must be presumed that Congress has withheld the power to preempt from the OCC in this area. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

Congress also spoke to the issue of the application of state law to national banks and the preemption of state law when it enacted the GLBA. *See generally* 12 U.S.C. §§ 24a et seq; *see also* 15 U.S.C. § 6701. The GLBA grants national banks the authority to engage in certain activities, such as insurance activities and securities transactions, through "financial subsidiaries," subject to certain conditions. 12 U.S.C. § 24a(a)(1) and (a)(2).

The GLBA expressly limits the preemption of state laws as they apply to financial subsidiaries of national banks. 15 U.S.C. § 6701(d)(4)(D)(i) to (iv).

Yet, there has been no similar declaration from Congress regarding the application of state law, or preemption of same, as it applies to operating subsidiaries of national banks, or the OCC's exclusive authority over them. In short, where Congress has intended to preempt state laws and vest all authority in the OCC, it has done so explicitly.

The assertions by Wells Fargo and National City in the District Court that the OCC has plenary authority to adopt regulations governing operating subsidiaries of national banks to the exclusion of the states is, therefore, flawed and to find

otherwise would be to usurp the power of Congress. As the court stated in *Independent Insurance Agents of America, Inc. v. Hawke,* 211 F.3d 638 (D.C. Cir. 2000), such expansive authority would allow national banks and their federal regulatory agency "to constantly expand their field of operations on an incremental basis without congressional action." *Id.* at 646. In this case, an impermissible expansion of the OCC's authority to the exclusive regulation of operating subsidiaries would result in just such an unprecedented and unauthorized expansion of the OCC's power.

b. The OCC's Regulations Are Not Entitled To Deference Because They Exceed The Limits Imposed By The National Bank Act

Because the OCC lacks an express grant of Congressional authority to promulgate regulations over non-bank state-chartered corporations, no deference to the agency's interpretation of those regulations is warranted. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) set forth the deference analysis in two steps. In the first step, the Court must determine if "Congress has directly spoken to the precise question at issue." *Id.* at 842-843. If Congress has spoken to the issue, the Court's inquiry ends because the Court, as well as the agency, "must give effect to the unambiguously expressed intent of Congress." *Id.* If Congress has not spoken

to the exact question and the agency is acting pursuant to an express or implied grant of authority, the Court must employ the second step of the *Chevron* analysis. Under this second step, the Court must determine if the agency's interpretation of the statute is "reasonable" and not otherwise "arbitrary, capricious, or manifestly contrary to the statute." *Id.*

Deference to an agency's action is warranted "only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see also United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001). Where, as here, the agency lacks such delegated authority, there is no need for the Court to engage in the second step of the *Chevron* analysis and inquire whether the regulations are reasonable, as "an agency may not promulgate even reasonable regulations that claim the force of law without delegated authority from Congress." *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002); *see also Christensen v. Harris County*, 529 U.S. 576, 596-597 (2000) (BREYER. J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable").

In this case, as demonstrated above, the OCC lacks the necessary delegated authority from Congress to enact regulations governing operating subsidiaries to the

exclusion of the states. Accordingly, the Court need not engage in the second step of the *Chevron* analysis. However, even if the Court were to do so, the OCC's regulations are not reasonable.

The OCC's promulgation of regulations giving it exclusive regulatory authority over operating subsidiaries, where it lacks such exclusive authority over national banks, cannot be a reasonable interpretation of the statute. There is no express congressional delegation of authority to the OCC to regulate operating subsidiaries. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see also United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001); *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002). Not only is the OCC's statutory authority lacking, but the OCC's interpretation of this alleged statutory authority is unreasonable and conflicts with the purposes of the National Bank Act, as set forth below in Section I. B. 1. b.

The OCC's promulgation of 12 C.F.R. §7.4006 is not an attempt to interpret the language of the NBA or the GLBA, fill in the gaps in the statutory coverage, or explain how the Comptroller will exercise his discretion, as neither statute addresses operating subsidiaries of national banks. Rather, 12 C.F.R. §7.4006 represents an attempt by the OCC to legislate with far-reaching ramifications and effects never contemplated by Congress. To find the regulation valid would be to

radically alter the roles of the states and the federal government in the regulation of national banks and non-bank state-chartered operating subsidiaries of national banks. The OCC's interpretation of the National Bank Act is not reasonable.

C. Field Preemption Does Not Apply Because There Is No Federal Statutory Scheme Governing Non-Bank State-Chartered Corporations And Because There Is A Long-Standing History Of Dual Federal And State Regulation Under The National Bank Act

There is no federal statutory scheme regarding non-bank state-chartered operating subsidiaries of national banks. Further, as set forth above, these state-chartered corporations are subject to the regulation of the states that grant their corporate charters. In addition, there is a long-standing history of dual regulation of national banks. For these reasons, field preemption is inapplicable to this case.

Field preemption is the appropriate analysis when there is a scheme of federal regulations that is so extensive or pervasive that it leaves no room for the states to regulate in the area. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As set forth above, there are no federal banking statutes that address non-bank state-chartered operating subsidiaries of national banks. In the absence of any statutory reference, the federal banking scheme cannot be said to be so pervasive as to occupy the field. Furthermore, field preemption is inapplicable in the area of national banking. In *Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 913 (1985) the California Supreme Court held: "Congress has declined to provide an entire system of federal law to govern every aspect of national bank operations." *Id.* at 937, 475;

see also, Bank of America v. City & County of San Francisco, 309 F.3d 551, 559, n.3 (9th Cir. 2002).

Since the creation of national banks, courts have recognized the applicability of state laws to national banks. *See National Bank v. Commonwealth*, 76 U.S. (9 Wall) 353 (1870); *see also Atherton v. FDIC*, 519 U.S. 213 (1997). In light of this long-standing history of dual regulation of national banks by state and federal agencies, it is incongruous for the District Court to have found that a non-bank state-chartered corporation is subject to the *exclusive* jurisdiction of the OCC when national banks are not even subject to exclusive oversight by the OCC. *See* 12 U.S.C. § 484; *see also* Section I. D. 3., below.

In *National Bank v. Commonwealth*, 76 U.S. (9 Wall) 353 (1870), the Supreme Court upheld a Kentucky statute regarding the collection of state taxes directly from national banks, finding that since the NBA was silent on the issue, the bank was subject to the state law. *Id.* at 361-362.

In analyzing the issue, the Court found that national banks are "subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. . . . It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *Id.* at 362. The Supreme Court in *Atherton v. FDIC*, 519 U.S.

213 (1997) recently cited this same proposition with authority and approval. *Id.* at 222.

In *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25 (1996), a case relied on in the underlying decisions [ERVI 251; ERVII 151], the Court held that when defining the preemptive reach of statutes and regulations granting a power to national banks, the courts normally take the position that "Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. at 33. The Court clarified its holding: "To say this is not to deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Id.*

Recent cases affirm the principle that a national bank is subject to state law unless that law "interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law." *American Bankers Association v. Lockyer,* 239 F.Supp.2d 1000, 1017 (E.D. Cal. 2002) (*quoting Lewis v. Fidelity & Deposit Co. of Maryland,* 292 U.S. 559, 566 (1934)). Accordingly, dual regulation of banks and by extension of the analysis to their operating subsidiaries by the states and the OCC is appropriate unless there is a conflict between the state law and the federal law.

D. Conflict Preemption Is Not Established Because The CRMLA And The CFLL Do Not Conflict With Federal Banking Laws Or Frustrate The Purposes And Objectives Of The Banking Laws

The Supremacy Clause allows for preemption of state laws if they conflict with the federal laws. *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982). However, where no such conflict exists: (1) compliance with both the federal law and the state law is physically possible (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), and (2) the state law does not stand as an obstacle to the purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Applied in the area of national banking, if the state regulation of banking "does not prevent or significantly interfere with the national bank's exercise of its powers," there is no conflict and, therefore no preemption. *Barnette Bank v. Nelson*, 517 U.S. 25, 33 (1996).

As set forth more fully in the following sections, the CRMLA and the CFLL do not conflict with the NBA or the GLBA. *See* 12 U.S.C. §§ 1, et seq. and §§ 24a, et seq. The Commissioner has exercised his authority only over non-bank state-chartered operating subsidiaries. [ERV1 5 ¶2; ERV2 1 ¶1] These entities are not national banks and neither the NBA nor the GLBA references or defines an operating subsidiary of a national bank. Further, neither the NBA nor the GLBA grants the OCC the authority to regulate non-bank state-chartered operating subsidiaries.

Without a reference in the statutes to operating subsidiaries or the granting of authority over such entities to the OCC, there can be no conflict between the federal statutes and the CRMLA and the CFLL. Without a reference in the statutes to operating subsidiaries it is not physically impossible to comply with both the federal and state laws in this case. Accordingly, there is no conflict and a finding of preemption is not appropriate. *See Barnett Bank v. Nelson,* 517 U.S. at 33.

Further, the objective and purpose of Congress in enacting the national banking laws was to establish a national banking system and to protect national banks from intrusive regulation by the states. *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 314-315 (1978). The CRMLA and the CFLL in no way seek to regulate or interfere with national banks or the national banking system. In fact, national banks are expressly exempted from the CRMLA and the CFLL. *See* Fin. Code §§ 50003(g)(1), 22050. As non-bank state-chartered corporations are separate and legally distinct from their parent national banks, regulation of operating subsidiaries does not frustrate the purposes of the national banking laws.

The OCC has interpreted the NBA and promulgated regulations authorizing national banks to organize operating subsidiaries and conduct permissible activities through these non-bank state-chartered corporations. *See* 12 C.F.R. § 5.34. Nothing in the CRMLA or the CFLL impairs the ability of national banks to

organize operating subsidiaries or conduct banking business. If national banks do not wish to comply with non-preempted state laws such as the CRMLA and CFLL they may merge the operating subsidiaries directly into the bank, thereby obviating the necessity to comply with state laws.

1. Non-Bank State-Chartered Entities Do Not Satisfy The Criteria Required Of National Banks To Justify Exclusive Regulation By The OCC

The purpose of the National Bank Act of 1864 was to establish a "national banking system." *Marquette National Bank v. First Omaha Service Corp.*, 439 U.S. 299, 314-315 (1978). National banks were established to perform various functions, including providing a single unified currency for the country, financing commerce and acting as private depositories. *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954).

National banks are federally created entities that: 1) enter into articles of association designating themselves as national banks, 2) meet capitalization requirements, and 3) certify they intend to avail themselves of the advantages of the NBA. 12 U.S.C. §§ 21 and 22. As such, national banks are "instrumentalities of the Federal government, created for a public purpose, and . . . subject to the paramount authority of the United States." *Marquette National Bank v. First Omaha Service Corp.*, 439 U.S. 299, 308 (1978).

WFHMI is a state-chartered corporation and has held such corporate status in California since 1964 (formerly known as Norwest Mortgage, Inc.). [ERVI 172]. NCMC is an Ohio corporation, doing business in California since 1993. [ERVII 135] Neither satisfies the statutory requirements to qualify as a national bank. *See* 12 U.S.C. §§ 21, et seq. As separate corporate entities from their parent national banks, WFHMI and NCMC have their own identities, assets, liabilities, and regulatory responsibilities distinct from those of the banks. Therefore, the national banks and their operating subsidiaries are insulated from each other and "[e]xcept in unusual circumstances, courts will not disregard the separate identity of a parent and its subsidiary, even a wholly-owned subsidiary." *Securities Industry Ass'n v. Fed. Home Loan Bank Board,* 588 F.Supp. 749, 754 (D.C. Dist. 1984) *citing Labadie Coal Co. v. Black,* 672 F.2d 92, 96 (D.C. Cir. 1982) ("the greatest judicial deference normally is accorded to the separate corporate entity.")

WFHMI and NCMC are not authorized by state or federal law to be banks. Rather, they are non-bank state-authorized corporate citizens that elected this status and engaged in residential lending transactions in the State of California under appropriate licenses from Commissioner. [ERVI 80 ¶4; ERVII 67 ¶4]

If Congress had intended non-bank state-chartered operating subsidiaries to be the equivalent of national banks, it would have declared its intention and included an operating subsidiary in the very definition of a "bank" or "national

bank". Title 12 U.S.C. Section 1813 of the NBA defines "bank" as "any national bank, State bank, and District Bank, and any Federal branch and insured branch." But, this definition of "bank" formulated by Congress does not include "operating subsidiaries" of national banks. *Id.* Indeed, the NBA does not define an operating subsidiary. *See* 12. U.S.C. §§ 21, 22, 221, 221a and 1813. ". . . [C]ourts must presume that the legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-254 (1992). The failure of Congress to define the term "operating subsidiary" or include operating subsidiaries in the statutory scheme covering national banks must be presumed to be intentional in the absence of language to the contrary.

In a well-reasoned opinion, the District Court of Minnesota concluded that a mortgage company operating subsidiary of Fleet National Bank, like WFHMI and NCMC in this case, was not a "bank" under Section 133 of the GLBA (codified at 12 U.S.C. § 1813), and thus, was subject to shared enforcement of jurisdiction by the state of Minnesota and Federal Trade Commission regarding telemarketing activities. *Minnesota v. Fleet Mortgage,* 181 F.Supp.2d 995, 1000 (U.S. Dist. Minn. 2001). The court found that although the mortgage company was an "operating subsidiary" of a national bank it was not "a bank" because, analogous to the facts of this case, Fleet National Bank and Fleet Mortgage maintained separate and distinct legal identities. *Id.* at 999. The court rejected the arguments by both

Fleet National Bank and the OCC, who filed an amicus brief, that the subsidiary was "effectively an incorporated department" of a national bank. *Id.* at 1000. The court further held that "[a]llowing the State to enforce the [Telemarketing Sales Rule] against [Fleet Mortgage Company] will in no way 'restrict' the authority of the OCC to regulate national bank operating subsidiaries just as it has done in the past. The OCC's insistence that it must have exclusive jurisdiction over subsidiaries in order to avoid having its authority 'restricted' is not persuasive." *Id.* at 998-1000.

WFHMI and NCMC are non-bank state chartered corporations with their own assets and liabilities. As such, WFHMI is not a department or division of Wells Fargo Bank, N.A. NCMC is not a department or division of National City Bank of Indiana. Neither WFHMI nor NCMC meets the definition of "bank" set forth in the NBA. *See* 12 U.S.C. §§ 221, 221a and 1813.

The *Fleet Mortgage* analysis also is instructive in that the Minnesota District Court (1) recognized the chartering and regulatory differences between a national bank and a state-chartered corporation acting as an operating subsidiary of the bank, (2) rejected the OCC's claim of exclusive regulatory power over operating subsidiaries of national banks, and (3) refused to defer to the OCC's interpretation of the GLBA and the Federal Deposit Insurance Act. *Id.* at 999-1002.

Accordingly, where there is no express congressional authorization to do so, two separate and distinct entities, such as a non-bank state-chartered corporation and a national bank, cannot be afforded equivalent status under the NBA. To do so would be contrary to the plain language of the NBA and the GLBA.

Further, as non-bank state-chartered corporations conducting business in California, WFHMI and NCMC are availing themselves of the rights and privileges of California corporations, yet claiming not to be subject to California's laws by way of the OCC's claim of exclusive regulatory authority over operating subsidiaries. To treat WFHMI and NCMC as national banks would be to place WFHMI and NCMC in unique positions, giving them unfair advantages in the marketplace against other California corporations who must comply with California's laws. This result would be inherently unfair to California businesses and effect a result not contemplated or sanctioned by Congress.

In fact, giving the OCC exclusive regulatory authority over these non-bank state-chartered operating subsidiaries, as the District Court judgment does, exceeds even the regulatory authority the OCC has over national banks. National banks have long been subject to dual regulation by state and federal agencies. *See* Section I. C, below. Visitorial authority over national banks rests with both the OCC and "courts of justice." Title 12 U.S.C. § 484. This provision of the statute has supports lawsuits to enforce state laws against national banks. *See Guthrie v.*

Harkness, 199 U.S. 148, 156 (1905). To allow the OCC to exclusively regulate WFHM and NCM would exceed even the OCC's valid authority over dually regulated national banks.

Further, vesting exclusive jurisdiction over operating subsidiaries such as WFHMI and NCMC with the OCC would interfere with California's constitutional sovereignty under the Tenth Amendment and eliminate California's power to regulate and enforce its laws against non-bank state chartered corporations.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Article I, Section 8 of the U.S. Constitution authorizes Congress to establish national banks and "to enact legislation for the protection, preservation and regulation of such institutions." *Clark v. United States*, 184 F.2d 952, 954 (10th Cir. 1950). Therefore, a federal statutory scheme over federally-created national banks does not violate the Tenth Amendment. *First Union National Bank v. Burke,* 48 F.Supp.2d 132, 149 (D.C. Conn. 1999).

The Connecticut District Court in *First Union* was presented with the similar question of the OCC's exclusive visitorial powers over national banks and the potential violation of the Tenth Amendment such exclusivity presented. *Id.* at 148-149. That court found that the NBA and the OCC's regulations *properly* promulgated thereunder did not violate the Tenth Amendment because the NBA

"has carved out from state control supervisory authority over these *federal instrumentalities*. *Id.* at 148 (emphasis added).

Because WFHMI and NCMC are not national instrumentalities, but rather state corporate citizens, the OCC does not have the power to establish and regulate operating subsidiaries of national banks to the exclusion of the states. *Accord Minnesota v. Fleet Mortgage*, 181 F.Supp.2d 995, 1002 (U.S. Dist. Minn. 2001) (noting that there is no direct authority establishing the OCC's exclusive jurisdiction over operating subsidiaries).

"The National Bank Act, 12 U.S.C. §§ 21 et seq. regulates national banks and only national banks, which can be identified by the word "national" in their name as required by 12 U.S.C. § 22." *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 687 (E.D. PA 1973). WFHMI and NCMC are not such national banks and dual regulation by the states and the OCC can, therefore, in no way frustrate the purposes for which the NBA was enacted.

2. The National Bank Act's Grant Of Incidental Powers To National Banks Fails To Extend The OCC's Visitorial Powers Beyond National Banks To Non-Bank State-Chartered Entities

Title 12 U.S.C. Section 24 (Seventh) authorizes *national banks* to exercise ". . . all such incidental powers as shall be necessary to carry on the business of banking; . . ." Conceding for purposes of argument that Title 12 U.S.C. § 24 (Seventh) gives *national banks* the ancillary authority to establish operating

subsidiaries, this section in no way expresses Congressional intent for the OCC to regulate such non-bank state-chartered operating subsidiaries to the exclusion of the states. Section 24 (Seventh) makes no mention of operating subsidiaries. Rather, it is a broad grant of authority directly to *national banking associations*, not the regulatory body governing such associations. *See* 12 U.S.C. § 24 (Seventh).

While several cases have impliedly recognized a national bank's ability to conduct banking activities through operating subsidiaries, no case has held the OCC has exclusive regulatory authority over operating subsidiaries. *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977). For example, the issue before the Court in *M & M Leasing Corp.* was whether the "business of banking" authorized by Title 12 U.S.C. § 24 (Seventh) included the leasing of personal property. *Id.* at 1380. Contrary to the case at bar, the Court was never asked to reach the issue of whether an operating subsidiary was the equivalent of a national bank or was subject to the OCC's exclusive regulatory authority.[15]

[15] *See also NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995) (whether national banks may serve as agents in the sale of annuities); *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) (whether the Comptroller of the Currency exceeded his authority when he approved the application of national banks for the establishment of discount brokerage subsidiaries); *Marquette National Bank of Minneapolis v. First Omaha Service Corp.*, 439 U.S. 299 (1978) (whether the NBA authorized a national bank located in

Section 24 (Seventh) does not expressly grant to the OCC the authority to regulate all "such incidental powers" in which national banks are permitted to exercise or engage. At best, 12 U.S.C. § 24 (Seventh) gives the OCC the authority to determine what powers are, in fact, incidental to the business of banking. *See NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995). Absent a specific Congressional grant of authority, regulation of non-bank state-chartered operating subsidiaries of national banks by the states in which they are incorporated does not conflict with the NBA.

3. The National Bank Act Vests Visitorial Powers With The OCC Only For Federally-Chartered National Banks, Not Non-Bank State-Chartered Subsidiaries

Like Title 12 U.S.C. Section 24 (Seventh), Title 12 U.S.C. Section 484 addresses only *national banks* and the permissible visitorial authority over such entities. There is no mention of operating subsidiaries or affiliates of national banks in the statute. *Compare* 12 U.S.C. § 484 *with* 12 U.S.C. § 481. Section 484(A) provides:

> No *national bank* shall be subject to any visitorial powers except as authorized by Federal law, vested in the *courts of justice* or such as shall be, or have been exercised or directed by Congress

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one state to charge an interest rate allowed by its home state, when that interest rate is greater than the rate permitted by the bank's nonresident customers); *American Insurance Association v. Clarke*, 865 F.2d 278 (D.C. Cir 1988) (whether the formation of a national bank subsidiary to offer municipal bond insurance was permissible under the NBA).

> or by either House or by any committee of Congress or of either House duly authorized. (Emphasis added).

Therefore, no conflict exists between federal law and the state laws that give the Commissioner visitorial authority only over non-bank state-chartered operating subsidiaries.

At least one District Court has analyzed this grant of authority over national banks, concluding exclusive authority has not been given to the OCC. *See First Union National Bank v. Burke,* 48 F.Supp.2d 132, 144 (D. Conn. 1999). Furthermore, the plain language of the statute undermines the OCC's assertion that it acts as an exclusive grant of authority over national banks, or operating subsidiaries. Courts must presume that the legislature says in a statute what it means and means in a statute what it says there. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992).

This Court must give meaning to all statutory provisions and interpret statutes so as not to make ineffective other provisions of the statute or statutory scheme. *See generally, United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Bifulco v. United States,* 447 U.S. 381, 387 (1980). Therefore, Section 484 must be read in conjunction with the remaining provisions of the NBA, such as the definitional provisions of 12 U.S.C. §§ 221, 221a and 1813. These provisions define the terms "national bank" and "bank" and make clear that such definitions

are not broad enough to encompass a state-created entity, such as an operating subsidiary of a national bank.[16]

The failure of Congress to define the term "operating subsidiary" or include operating subsidiaries in the statute regarding visitorial powers over national banks must be presumed to be intentional in the absence of language to the contrary.

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[16] As required members of the Federal Reserve System and insured of the Federal Deposit Insurance Corporation (FDIC), national banks are subject to the Federal Reserve Act (12 U.S.C. §§ 221-530), and the FDIC Act (12 U.S.C. § 1811 et seq.).

12 U.S.C. Section 221 provides in pertinent part:

> Wherever the word "bank" is used in this Act, the word shall be held to include State bank, banking association, and trust company except where national banks or Federal reserve banks are specifically referred to.
>
> The terms "national bank" and "national banking association" used in this Act shall be held to be synonymous and interchangeable. The term "member bank" shall be held to mean any national bank, State bank, or bank or trust company which has become a member of one of the reserve banks created by this Act.

12 U.S.C. Section 221a provides additional definitions as follows:

> . . . (a) The terms "banks", "national bank", "national banking association", "member bank". . . shall have the meanings assigned to them in section 1 of the Federal Reserve Act, as amended [12 U.S.C. § 221].

12 U.S.C. Section 1813 provides:

> (a) Definitions of bank and related terms.
> (1) Bank. The term "bank" –

Further, while Section 484 does grant visitorial powers over national banks "as authorized by Federal law," this same section also expressly recognizes and vests in the "courts of justice" the same visitorial power. Pursuant to this provision of the statute, courts have recognized the exercise of visitorial authority and the enforcement of state laws against national banks by states and private parties. *See, e.g., Guthrie v. Harkness*, 199 U.S. 148, 156 (1905). As Section 484 only addresses visitorial powers over national banks, there is no conflict with the CRMLA or the CFLL, which vests visitorial authority over licensees that are non-bank state-chartered operating subsidiaries with the Commissioner.

4. The Gramm-Leach-Bliley Act's Amendments To The National Bank Act Do Not Grant The OCC Visitorial Powers Over Non-Bank State Chartered Entities

The GLBA grants national banks the authority to engage in certain activities through "*financial subsidiaries*," subject to certain conditions. 12 U.S.C. § 24a(a)(1) and (a)(2) (emphasis added). Although, in Title 12 U.S.C. section 24a, subsection (g)(3)(A) Congress defined the term "financial subsidiary," nowhere in the GLBA has Congress defined the term "operating subsidiary." Nor has Congress stated that the GLBA gives the OCC jurisdiction over such non-bank state-chartered corporations.

> (A) means any national bank, State bank, and District bank, and any Federal branch and insured branch; . . .

An "operating subsidiary" is expressly excluded from the very definition of a "financial subsidiary," which means "any company that is controlled by 1 or more insured depository institutions *other than a subsidiary that* – (A) engages solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks. . ." 12 U.S.C. §24a(g)(3)(A) (emphasis added). Accordingly, the GLBA shows no congressional intent to preempt state laws as they apply to non-bank state-chartered operating subsidiaries of national banks and no conflict exists between the federal banking laws and the state lending laws. As Congress did not intend to preempt with the enactment of the GLBA, the exercise of jurisdiction by the Commissioner under the CRMLA and CFLL does not frustrate the purposes and objectives of Congress in enacting this amendment to the NBA.

II. DIDMCA PREEMPTS ONLY STATE LAWS THAT EXPRESSLY LIMIT THE RATE OR AMOUNT OF INTEREST ON A LOAN, AND THUS, DOES NOT PREEMPT THE CRMLA, WHICH LIMITSONLY THE TIME WHEN INTEREST BEGINS TO ACCRUE

A. Congress Enacted The DIDMCA To Remove Mortgage-Ceiling Rates Imposed By State Usury Laws

The DIDMCA statutory scheme was born at the end of the 1970s, in a period of extreme highs in home mortgage interest rates. *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907 (3d Cir. 1989) offers an analysis of historical context and legislative intent:

> "DIDMCA was passed at a time when inflation and interest rates were soaring; in this context, *state usury laws* decreased the availability of home mortgage loans and hindered the ability of financial institutions to pay market rates of interest to depositors since usury laws limited them to lending at rates well below those that the market would have dictated. Thus, the Senate Report that accompanied the bill containing what became § 501 of DIDMCA found:
>
> that where *state usury laws* require mortgage rates below market levels of interest, mortgage funds in those states will not be readily available and those funds will flow to other states where market yields are readily available. This artificial disruption of funds availability not only is harmful to potential homebuyers in states with such usury laws, it also frustrates national housing policies and programs. . . .
>
> The committee believes *that this limited modification in state usury laws* will enhance the stability and viability of our Nation's financial system and is needed to facilitate a national housing policy and the functioning of a national secondary market in mortgage lending.
>
> In addition to the adverse effects of usury ceilings on credit availability, *mortgage rate ceilings* must be removed if savings and loan institutions, as directed by other provisions of [the Act], are to begin to pay market rates of interest on savings deposits. Without enhancing the ability of institutions to achieve market rates on both sides of their balance sheets, the stability and continued viability of our nation's financial system would not be assured. Thus, Federal preemption of State *usury ceilings* would not only promote national home financing objectives but would provide the resources with which savers could be paid more interest on their savings accounts."

Smith v. Fidelity Consumer Discount Co., 898 F.2d at 911 (All emphases added).

The Office of Thrift Supervision ("OTS") is authorized to issue rules and regulations governing the implementation of DIDMCA pursuant to 12 U.S.C. §

1735 f-7a(f). One of the resulting regulations, 12 C.F.R. 590.3 (c), states: "Nothing in this section preempts limitations in state laws on prepayment charges, attorneys fees, late charges or *other provisions designed to protect borrowers*." (Emphasis added.)

B. The CRMLA Prescribes The Time Interest Begins To Accrue On A Loan; It Is Not A Usury Law That Limits The Rate Or Amount Of Interest On A Mortgage Loan

Read as a whole, the CRMLA is designed to regulate the California lending industry and to protect the public from unscrupulous practices. (*See* Fin. Code § 50000 et seq.) While WFHMI and NCMC may contend they are being penalized by the per diem statutes for delay typically caused by others: the settlement agents, the escrow company, and the county clerk who records the mortgage, that argument glosses over the reality of a real estate transaction in California. When the lender funds a loan, the money is paid into escrow or to a settlement agent, not directly to the borrower/consumer. The borrower does not derive any benefit from the loan unless and until all conditions of the sales contract and lending agreements have been satisfied, all conveyance documents have been executed, and the escrow agent disburses deposit moneys, loan funds, realtor commissions, etc. Only then does escrow close, and the borrower receives the benefit of the bargain, i.e. the home or the payoff of an existing loan on a refinance. Until that occurs, the borrower has incurred the obligation of a loan, but has received no benefit.

It is with regard to the timing of these events that California's per diem statutes serve to protect the consumer. Because recordation is the last thing to occur, it is an appropriate bright line by which to time the permitted commencement of interest. It is, after all, in the interest of the lender to record title, to protect its mortgage interest. In the unlikely event of a significant delay between the funding of a loan and the recordation of the grant and trust deeds, it should not be the borrower who pays the price. Or at least, so the California legislature determined. The per diem statutes assign the burden of such a risk to the lender, WFHMI and NCMC in this case, rather than to the borrower, who the California legislature sought to protect.

Financial Code Section 50204(o) was a 2000 amendment to a portion of the CRMLA, enacted in 1994. In the Comments section to the Bill Analysis submitted on June 28, 1994, it is noted that S&L's [savings and loan associations] have been withdrawing from the home mortgage credit market, and that mortgage bankers have greatly increased their activity in the field. Assembly Com. on Banking and Finance, Analysis on Sen. Bill 1978 (1993-94 Reg. Sess. Bill Committee Print 07/12/94). The California Mortgage Bankers Association ("CMBA") sponsored the CRMLA to address perceived inadequacies in existing real estate licensing laws and their effects on mortgage bankers. *Id.*

The Bill Analysis provides the following background on the regulatory nature of the Act:

> The DOC (Department of Corporations) is "officially neutral" on this bill. . . . [I]n addition to providing express regulatory and enforcement authority to the Commissioner, the regulations in this bill would enable licensees to understand their rights and obligations under the law, would preserve the integrity of the industry, and would protect the borrowers and investors who would be affected by any violations of the law. The sponsor [CMBA] has no objection to the regulatory scheme in this bill. (Emphasis added.)

Assembly Com. on Banking and Finance, Analysis on Sen. Bill 1978 (1993-94 Reg. Sess. Bill Committee Print 07/12/94).

In short, there is no doubt that borrower protection, i.e. consumer protection, has been one of the goals of the entire regulatory scheme under which mortgage bankers such as WFHMI and NCMC have elected to do business in California.

The California legislature had good reason to conclude that one day of pre-recordation interest is a fair allocation of one of the burdens of economic life. The lender can decide and control when to fund. It has the power to determine from the escrow agent whether or not the escrow has progressed sufficiently that recordation can occur very shortly after funding. In a real estate escrow, once the borrower has performed his/her obligations under the sales contract, he/she is at the mercy of the other parties to the sales contract and at the mercy of the other party to the loan agreement. It then remains for an escrow agent to communicate with a lender as to when the loan is "ready" for funding, i.e., when there are no more steps remaining

that will impede the close of escrow. A lender can then disburse the loan funds at a time that reduces to a bare minimum any possible delay between funding and recordation.

If a delay in recordation is caused by any act or omission on the part of the escrow agent, or any other party to the transaction, the lender has recourse against that party, either at law or under the terms of the loan agreement. But, as between the borrower/consumer and the lender, the California legislature has made a rational decision as to which party is better able to bear the burden of the occasional delay between funding and recordation. This allocation of risks and burdens is a classic example of consumer protection legislation.

C. Case Law In This Field Does Not Support Preemption

Where preemption of state laws is concerned, principles of federalism are paramount. Because the states are "independent sovereigns" in our federal system, "'[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" *Building & Constr. Trades Council of the Metropolitan Dist. v. Associated Builders & Contractors of Mass./Rhode Island, Inc.*, 507 U.S. 218, 224 (1993) (citations omitted).

In areas traditionally regulated by the states, such as consumer protection, there is an added presumption against finding preemption of state law. *California v. Arc America Corp*., 490 U.S. 93, 101 (1989). "When Congress legislates in a

field traditionally occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' (Citations omitted)." *Id*. at 101. In *Smiley v. Citibank (S.D.), N.A.*, 11 Cal.4th 138 (1995), the California Supreme Court found that "historic police powers of the States" extend to banking. *Id*. at 148.

If a statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

If the statutory language is ambiguous, *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987), or would work an unreasonable result, the courts may consult relevant legislative history, *Cabral v. INS*, 15 F.3d 193, 194 (1st Cir. 1994), to confirm an interpretation indicated by the plain language. *Strickland v. Commissioner, Maine Dep't of Human Servs.*, 48 F.3d 12, 17 (1st Cir. 1996), *cert. denied*, 516 U.S. 850 (1995).

There is no clear and manifest intent of Congress that DIDMCA preempt California statutes that identify when interest may begin to accrue. Indeed, as the Senate Report confirms, DIDMCA was enacted to address the conflict between the painfully high price of money in the late 1970s, and the "ceilings" created by state

usury laws. *Smith v. Robbins,* 528 U.S. at 275. The per diem statutes do absolutely nothing to frustrate the broad goals of DIDMCA. They do not limit the rate of interest WFHMI and NCMC can charge. They do not limit the total amount of interest WFHMI and NCMC can collect, as the rate of interest charged remains within the control of the WFHMI and NCMC and may be bargained with the consumer in light of all laws and circumstances. The state laws merely encourage lenders to fund loans at the most appropriate time in the escrow process, by preventing them from charging interest in excess of an allowable one day time period prior to recordation.

Furthermore, to the extent potential conflict preemption is alleged, compliance by lenders with both state and federal law is possible, thus obviating the need for federal preemption of the state statute. *See Arc America Corp.*, 490 U.S. at 94.

Section 501 (a) of DIDMCA only preempts state laws "*expressly limiting* the rate or amount of interest, discount points, finance charges, or other charges . . . secured by a first lien on residential real property. . . ." 12 U.S.C. § 1735f-7a(a)(1) (emphasis added). The per diem statutes do not fall within the type of activities preempted by DIDMCA because they do not *expressly limit* interest rates or amounts. Rather, the state statutes establish the date upon which the per diem interest may be assessed upon a borrower.

Reliance on the analysis in the Michigan District Court's *Shelton v. Mutual Savings and Loan* case is inappropriate. 738 F. Supp. 1050, E.D. Michigan (1990)) Although *Shelton* did find preemption, the Michigan statute specifically limited the rate of interest:

> "A mortgage loan or a land contract made under this Act shall not provide for *a rate of interest* added or deducted in advance, and interest on the mortgage loan or land contract shall be computed from time to time only on the basis of unpaid balances." (Emphasis added)

Mich. Comp. Laws § 445.903(1)(o), (s), (cc).

The California statutes at issue differ markedly. Both Financial Code Section 50204 (o) and Civil Code Section 2948.5 required a borrower to pay interest on the mortgage loan for a period that does not exceed one day prior to the recording of the mortgage.

While the *Shelton* court struggled with the meaning of the state statutory language, and found at least three possible interpretations, including those urged by both parties to the suit, the *Shelton* court, unlike this Court, was faced with a statute that expressly referred to "a rate of interest."

Shelton, therefore, is distinguishable. Here, Financial Code section 50204(o), *does not expressly limit the rate of interest*. The per diem statutes at issue here have nothing to do with any usury ceiling on rates of interest, and in fact nothing to do with rates of interest at all.

Grunbeck v. Dime Savings Bank of New York, FSB, 74 F.3d 331 (1st Cir. 1996) considered whether DIDMCA preempted New Hampshire's simple interest statute. The court failed to find any congressional intent that would allow DIDMCA to preempt the simple interest statute and determined that no express interest rate limitations existed in the statute.

The *Grunbeck* court emphasized the interpretive importance of the language from Section 501 of DIDMCA (12 U.S.C. § 1735f-7a) "expressly limiting the rate or amount of interest," the same issue under consideration in this case. The court contrasted this language with that contained in companion Section 521 (12 U.S.C. § 1831(d)(a)) where Congress, as relates to credit cards, preempted all state legislation "with respect to interest rates." *Grunbeck* at 338; *see* 12 U.S.C. § 1831(d)(a). The court recognized that Congress was acutely aware that its choice of the distinctive terminology -- "expressly limiting" - would be a primary interpretive tool. *Grunbeck* at 338. In other words, this is evidence that if Congress had intended to preempt all state laws relating to interest rates, it could have done so as it did in Section 521. By preempting only those state statutes that "expressly limit" the amount or rate of interest, Congress contemplated some state statutes, like the California per diem interest statutes or the New Hampshire simple interest statutes, would not be preempted.

WFHMI and NCMC cannot avoid the clear and simple holding of *Grunbeck* because the simple interest statute, like the per diem laws, does not *expressly limit* the amount of interest. In analyzing the preemption issue, the *Grunbeck* court looked to the legislative history and to the reason Section 501 of DIDMCA was enacted:

> "The legislative aim in enacting section 501 focused on "state usury ceilings," [Citations] with particular emphasis on state usury laws which restrict interest rates to below-market levels and result in artificial disruptions in the supply of home-loan mortgage funds."

Grunbeck, *supra*, at 339.

Accordingly, the DIDMCA does not preempt the Financial Code section 50402(o) or Civil Code section 2948.5 and the District Court's decision must be reversed.

CONCLUSION

For the foregoing reasons, the California Corporations Commissioner Demetrios A. Boutris respectfully requests this Court reverse the judgment entered by the Eastern District of California and order judgment in his favor.

Dated: October 21, 2003

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Circuit Rule 32-1, and this Court's Order dated August 27, 2003, counsel certifies that Appellant's Opening Brief filed herewith is proportionately spaced, has a typeface of 14 points, and contains 13,734 words.

Executed on October 21, 2003 at Sacramento, California.

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Kimberly L. Gauthier

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Counsel for Appellant/Cross-Appellee, Demetrios A. Boutris, states that pursuant to this Court's Order dated August 27, 2003, the cases of Wells Fargo Bank, N.A., et al. v. Demetrios A. Boutris (Case Nos. 03-16194 and 03-16197) and National City Bank of Indiana, et al. v. Demetrios A. Boutris (Case No. 03-16461) were consolidated. Appellant/Cross-Appellee is not aware of any other related cases in this Court or any other court of appeals.

Executed on October 21, 2003 at Sacramento, California.

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Kimberly L. Gauthier