VIRGINIA JO DUNLAP (CA BAR NO. 142221)
Assistant Commissioner
ALAN S. WEINGER (CA BAR NO. 86717)
Supervising Counsel
JUDY L. HARTLEY (CA BAR NO. 110628)
Senior Corporations Counsel
KIMBERLY L. GAUTHIER (CA BAR NO. 186012)
Corporations Counsel
Department of Corporations
320 West 4th Street, Suite 750
Los Angeles, California 90013-2344
Telephone: (213) 576-7604
Facsimile: (213) 576-7181

Attorneys for Defendant

State of California - Department of Corporations

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WELLS FARGO BANK, N.A., and WELLS FARGO HOME MORTGAGE, INC., Plaintiffs, vs. DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, Defendant.	Civil Action No. S-03-0157 GEB JFM DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT Hearing Date: May 5, 2003 Time: 9:00 a.m. Location: Courtroom 10 **Hearing Requested** [15 minutes each side]

INTRODUCTION

I. SUMMARY JUDGMENT IN FAVOR OF THE COMMISSIONER IS APPROPRIATE

Rather than provide this Court with logical well-reasoned arguments in opposition to Commissioner Demetrios A. Boutris' Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment, plaintiffs dismiss key federal cases off-handedly, misconstrue legislative intent and cases and even misquote this Court's own ruling. Such a lackadaisical approach to arguing a case of first impression before this Court is not borne of confidence in their own position, but rather of the weakness in the law to support Plaintiffs' contentions.

Plaintiffs have failed to establish a Congressional grant of authority that would allow the Office of the Comptroller of the Currency ("OCC") to expand its limited powers to encompass complete regulation of corporations that are owned at least in part by national banks. Plaintiffs have failed to demonstrate the OCC did not exceed its authority in promulgating and adopting regulations over state-chartered legal entities to the *exclusion* of all state regulation.

Moreover, plaintiffs have failed to establish that the Depository Institutions Deregulation and Monetary Control Act ("DIDMCA") preempts the state per diem interest laws that do not *expressly limit* the amount or rate of interest, but rather determine the date upon which an institution may begin charging interest. Finally, Plaintiffs have failed to establish that the Commissioner has retaliated against Plaintiffs in any manner or that this action is proper under 42 U.S.C. section 1983.

Therefore, the Commissioner respectfully requests this Court grant his motion for Summary Judgment.

ARGUMENT

I. THE OCC DOES NOT HAVE EXCLUSIVE AUTHORITY OVER NATIONAL BANK OPERATING SUBSIDIARIES

A. Plaintiffs Concede There Is No Express Delegation Of Authority From Congress To The OCC Giving The OCC The Authority To Promulgate Regulations Governing Operating Subsidiaries

Plaintiffs have failed to provide this Court with any citation to express delegation of authority from Congress to the OCC, giving the OCC the authority to promulgate regulations that have the

effect of giving the OCC exclusive regulatory authority over operating subsidiaries, thus conceding that no such authority exists. Absent such an express delegation of authority, the OCC regulations are invalid and not entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corporation*, 533 U.S. 218 (2001); *Motion Picture Association of America, Inc. v. Federal Communications Commission*, 309 F.3d 796, 801 (D.C. Cir. 2002).

1. Plaintiffs Concede Key Federal Decisions By Failing To Provide Authority Contrary To These Cases

The *Motion Picture Association of America, Inc. v. Federal Communications Commission*, 309 F.3d 796, 801 (D.C. Cir. 2002) case ("*MPAA*"), is the only federal appellate case that addresses similar issues as are presented for the first time to this Court. Yet, plaintiffs are unable to counter the persuasive rationale of the District of Columbia's Circuit Court of Appeals decision with more than a footnoted dismissal. *MPAA*, which involves an analogous situation of constitutional rights at issue and a federal agency exceeding its general grant of authority, dictates a ruling that the OCC has exceeded its authority in promulgating and adopting regulations that seek to give it regulatory authority over state-chartered operating subsidiaries, to the exclusion of the states. *See* Plaintiffs' Opposition, at page 6, n. 3.

Plaintiffs' attempt to discount *MPAA* by arguing that "[i]n this case, there is no issue of freedom of speech. . ." is unpersuasive. *Id.* There are equally as great, if not greater constitutional implications than freedom of speech presented before this Court, specifically, the Tenth Amendment's acknowledgement of state sovereignty and thus, California's powers to regulate and enforce its laws against a state-chartered corporate citizen such as WFHMI.

Plaintiffs' reference to the Tenth Amendment as a "tautology" is misplaced and misconstrues the Supreme Court's recognition of the amendment as an important rule of constitutional interpretation. Plaintiffs' Opposition, page 9. As the Supreme Court stated in the very case relied on by plaintiffs, the Tenth Amendment ". . . is a mere affirmation of what, upon any just reasoning, is a necessary rule interpreting the constitution. Being an instrument of limited and

enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." *New York v. United States,* 505 U.S. 144, 156 (1992).

Furthermore, plaintiffs' argument that operating subsidiaries such as WFHMI are engaged in interstate commerce, and that this therefore trumps California's Tenth Amendment rights, is not well taken. It has been well-settled by the Supreme Court that certain activities are beyond the reach of Congress and regulation pursuant to the commerce clause. Those activities beyond Congress' reach are those that are completely within a particular State and with which it is not necessary for Congress to interfere for the purpose of executing some general power of the government. *Katzenbach v. McClung*, 379 U.S. 294, 297 (1964). As set forth more fully in the Commissioner's Motion for Summary Judgment, there is no question but that WFHMI is a state-chartered corporation, engaged in business in the State of California. As such, it is subject to state regulation. The Commissioner is in no way seeking to regulate or interfere with national banks or their ability to conduct business in California. Accordingly, there are no interstate commerce issues presented in this case.

In *MPAA* the FCC unsuccessfully argued that its general grant of authority was sufficient to support its promulgation of regulations governing video description in that it gave the agency the authority to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States. . . . a rapid, efficient, Nation-wide, and world-wide wire and communication service. . . ." *Id.* at 800 (summarizing § 1 of the Communications Act). The agency also contended that a specific statutory provision, 47 U.S.C. § 613, did not bar it from promulgating the regulations and, therefore, gave it the implied authority to promulgate them. *Id.* at 806-807.

The appellate court rejected the agency's arguments and found that in adopting regulations requiring video description to provide better access to the blind, the FCC exceeded its authority as the regulations had the effect of governing programming content, which in turn had constitutional implications. *MPAA,* 309 F.3d 796, 804-805. The court found that important issues such as the implication of constitutional rights required more than a general grant of authority; an express grant of authority was needed in order for the FCC to prevail on its claim. *Id.* at 805.

Analogous to the FCC's overreaching in *MPAA*, the plaintiffs are relying on the OCC's attempt to expand its general grant of authority permitting regulation of *national banks* to encompass exclusive regulation of operating subsidiaries, which are state-chartered legal entities and need be only partially owned by national banks. However, like the FCC, the OCC lacks the express Congressional authorization or delegation to expand its jurisdiction in such a manner where a state's sovereignty is implicated. In promulgating 12 C.F.R. § 7.4006, the OCC cites as its authority its general grant of authority, 12 U.S.C. § 93a, and the statute which vests in the OCC visitorial authority over *national banks*, 12 U.S.C. § 484.

Even a casual review of these statutes by plaintiffs would reveal the fallacy in their arguments that the OCC is entitled to exclusive visitorial authority over operating subsidiaries. Neither statute even mentions "operating subsidiaries", nor gives the authority to the OCC to promulgate regulations granting visitorial rights to the OCC over such entities to the exclusion of the states. By contrast, at least the FCC had a colorable argument that it was entitled to promulgate regulations that made programming accessible to all individuals. Even so, the *MPAA* appellate court found the regulations as promulgated affected programming content (i.e. had First Amendment implications), which was not expressly authorized by Congress, and therefore was an impermissible expansion of the FCC's authority. Here, where the OCC's express authority is to ". . . prescribe rules and regulations to carry out the responsibilities of the office", just as the FCC's powers were held in check in *MPAA*, limitations must be placed on the OCC's claimed authority when it implicates a constitutional right.[1]

What plaintiffs fail to address, and what is crucial to this case, is the fact that neither 12 U.S.C. § 93a nor 12 U.S.C. § 24 (Seventh) give the OCC the *express* authority to promulgate regulations interpreting or regulating the "incidental powers" given to *national banks*. In other

[1] The plaintiffs misconstrue the Commissioner's position with regard to the OCC's general grant of authority and the limitations upon that authority. Plaintiffs wrongfully state that the "Commissioner contends that 12 U.S.C. §93a is not broad enough to support the OCC's regulations interpreting national banks' "incidental powers" under 24 (Seventh) to include the power to establish and operate operating subsidiaries." Plaintiffs' Opposition, pages 3-4, n. 2. In point of fact, the Commissioner specifically acknowledges that cases interpreting 24 (Seventh) have found that the OCC has the authority to determine what powers are, in fact, incidental to the business of banking for national banks. Defendant's Points and Authorities in Support of Motion for Summary Judgment, at page 15; *See also NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1995).

words, just because the OCC may be permitted to determine that *national banks* are allowed to establish operating subsidiaries, it does not logically follow that the OCC, therefore, has the exclusive regulatory authority over such operating subsidiaries, which are state-chartered entities.

Furthermore, the general grant of authority upon which the OCC is relying, 12 U.S.C. § 93a, is not nearly as broad as the FCC's general grant of authority in *MPAA*, wherein the court restrained the agency and held that the regulations were not properly promulgated. *Cf.* 12 U.S.C. § 93a; 47 U.S.C. § 154. The court stated that the FCC's authority was broad, but was "not without limits." *MPAA*, at 804. Current FCC Chairman, Michael K. Powell, stated it best in dissenting to the FCC's order: "Were an agency afforded *carte blanche* under such a broad provision, irrespective of subsequent congressional acts that did not squarely prohibit action, it would be able to expand greatly its regulatory reach." *MPAA*, at 806 (quoting former Commissioner Powell's dissent, found at 15 F.C.C.R. 15276) (italics in original).

Finally, contrary to plaintiffs' assertions, *Minnesota v. Fleet Mortgage Corp*., 181 F.Supp.2d 995, is instructive in this case. Plaintiffs' misstate the holding of *Fleet* on page 8 of their opposition. Rather than acknowledge that the *Fleet* court found that although the mortgage company was an operating subsidiary of a national bank, it was not a "bank" for purposes of the statute at issue, plaintiffs, in reliance on an inapplicable footnote, contend that *Fleet* held that "states can regulate national banks' operating subsidiaries when doing so is expressly authorized by federal law." *Compare Id*. at 999 *with* Plaintiffs' Opposition, page 8 (emphasis in original) (citing *Fleet*, at page 1002, n. 10). More importantly, the District Court rejected the OCC's arguments that it must have "exclusive jurisdiction" over such operating subsidiaries, stating that "[t]here is no direct authority establishing exclusive jurisdiction over national banks operating subsidiaries." *Id*. at 1001-1002.

In sum, plaintiffs have failed to distinguish applicable case authority or provide this Court with alternative reliable evidence disputing the Commissioner's position. Therefore, the Commissioner is entitled to summary judgment.

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2. Neither The Implied Reference To Operating Subsidiaries Nor The Senate Report On the GLBA Are Sufficient Authority To Support The OCC's Promulgation Of Regulations Regarding Operating Subsidiaries

As *MPAA* instructs, unless there is an express grant of authority, the OCC has no ability to exercise exclusive visitorial rights over operating subsidiaries. Yet, plaintiffs attempt to rely on the Gramm-Leach-Bliley Act (GLBA), codified at 12 U.S.C. §24a, for the proposition that operating subsidiaries are *impliedly* recognized in the GLBA. Plaintiffs' Opposition, pages 6-7. Even assuming plaintiffs' interpretation of the GLBA is correct; this implied recognition is insufficient to support the OCC's promulgation of regulations. *See United States v. Mead,* 533 U.S. 218 (2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Further, while the Senate Report on the GLBA may have acknowledged national banks' ability to conduct activities through operating subsidiaries, this report in no way acts as express Congressional authorization for the OCC to promulgate regulations giving it exclusive regulatory power over, and preempting state regulation of, operating subsidiaries.[2]

Not disputed by plaintiffs, is that 12 U.S.C. Section 24a permits national banks to establish "financial subsidiaries," which are authorized to engage in limited activities, such as insurance sales and the sale of securities. In defining a "financial subsidiary," Congress explicitly limited the scope of the definition and did not expressly include operating subsidiaries of national banks. 12 U.S.C. §24a(g)(3). Despite Plaintiff's apparent reliance on subsection (g)(3), this is a definitional provision, not one that grants power to regulate. And, more importantly, subsection (g)(3) does not express any intent on the part of Congress to vest in the OCC the authority to regulate operating subsidiaries to the exclusion of the states.

Only by misconstruing the legislative history of the GLBA do plaintiffs try to convince this Court that it contains some support for the alleged grant of authority to the OCC to

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[2] Plaintiffs misstate this Court's Preliminary Injunction Order when they claim "The Court also noted in its preliminary injunction order that the GLBA Conference Report *supports* the OCC's regulation allowing national banks to establish operating subsidiaries." Plaintiffs' Opposition, at page 7 (emphasis added). Rather, this Court acknowledged that the Senate Report "addresses national banks' authority to conduct authorized banking business through operating subsidiaries. . . ." Preliminary Injunction Order, at page 9.

promulgate such regulations.[3] However, the very section of the Senate Report relied on by plaintiffs never mentions the OCC but rather, recognizes that *national banks* have been authorized to invest in operating subsidiaries, which may engage in only those activities that the national bank is permitted to engage in. *See* Preliminary Injunction Order, at page 10 (quoting S. Rep. No. 106-44, at 6 (1999)). Although recognizing that national banks may have operating subsidiaries, there is nothing indicating an intent by Congress, either express or implied, to grant to the OCC the broad-reaching authority they claim in this case over operating subsidiaries.

The Commissioner relied on the maxim *expressio unius est exclusio alterius,* to support his argument that the implied recognition in the GLBA of operating subsidiaries could not be the authority required for the OCC to promulgate its' regulations.[4] Countering this argument, plaintiffs contend that the maxim is disfavored in the administrative setting where an agency is interpreting a statute. Plaintiffs' Opposition, at pages 5-6; *See also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). What plaintiffs fail to realize, however, is that no administrative agency may interpret a statute where Congress has not given them express authority to do so. *Id. at* 843-844. The Commissioner is not relying on the maxim for the proposition that Congress has clearly resolved the issue. *See Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996). Rather, it is the Commissioner's position that any alleged implication in the GLBA is not, and cannot be, the express grant of authority necessary to support the OCC's actions.

Whether relying on the NBA or the GLBA, neither plaintiffs nor the OCC can direct this Court to any express delegation from Congress to the OCC authorizing the promulgation of

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[3] A reference in the Congressional report is insufficient, in any event, to support the OCC's promulgation of regulations as 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 the agency lacks such delegated authority, such as here, there is no need for the Court to engage in the second step of the *Chevron* analysis and inquire whether the regulations are reasonable. *Motion Picture Association of America, Inc. v. Federal Communications Commission,* 309 F.3d 796, 801 (2002); *see also Christensen v. Harris County,* 529 U.S. 576, 596-597 (2000)

[4] The maxim holds that where a statute provides authority for one action, and is silent as to a similar, related action, the law must be interpreted as authorizing only the former and not the latter. *See Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 188 (1978); *Nextwave Personal Communications, Inc. v. FCC,* 254 F.3d 130, 152-153 (D.C. Cir. 2001), *petition for cert granted,* 122 S.Ct. 1202 (U.S. Mar. 4, 2002) (No. 01-657).

regulations giving it exclusive regulatory power over operating subsidiaries of national banks. No such delegation exists. Where the agency lacks delegated authority, there is no need for the Court to inquire whether the regulations promulgated by the agency 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. Federal Communications Commission,* 309 F.3d 796, 801 (2002); *see also Christensen v. Harris County,* 529 U.S. 576, 596-597 (2000).

Accordingly, this Court should grant the Commissioner's motion for summary judgment and rule that the OCC exceeded its delegated authority in promulgating 12 C.F.R. §7.4006.

B. Section 7.4006 Cannot Be Applied Retroactively

There will be an improper retroactive effect if 12 C.F.R. section 7.4006 is applied as requested by plaintiffs. Plaintiffs fail to make this Court aware that the case relied upon in their opposition, *American Mining Congress v. United States Envtl. Prot. Agency*, 965 F.2d 759 (9th Cir. 1992), was decided before the Supreme Court set forth the controlling test *Landgraf v. U.S.I. Film Prods*., 511 U.S. 244 (1994). As such, under *Landgraf,* 12 C.F.R. 7.4006 is to be applied prospectively as the rule states on its face. *Landgraf* at 280. Nonetheless, *American Mining Congress* supports the Commissioner's position that preventing him from exercising authority over WFHMI for at least activity prior to August 1, 2001 will in fact make the application of 12 C.F.R. section 7.4006 retroactive. As stated by the Ninth Circuit in *American Mining Congress,* "a retroactive rule is one that alters the past legal consequences of past action." *Id.* at 769. For the Court to rule as the plaintiffs have requested would alter the legal consequences of WFHMI's past actions by now making the past illegal actions of WFHMI legal. The court in *American Mining Congress* went on to further state that "[a]gencies generally do not have the authority to issue rules having a retroactive effect in the absence of an express Congressional grant of such authority." *Id.* at 769, citing *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204. 208 (1988). Plaintiffs have cited to no such express Congressional grant of authority to the OCC to make their rules regarding operating subsidiaries, let alone to make those rules retroactive. However, this is of no consequence as the OCC specifically stated that this rule would not be effective until August 1, 2001.

A finding of non-retroactivity is further demanded by the facts in this matter. WFHMI chose to be a CRMLA and CFLL licensee, and chose to maintain those licenses despite being acquired by a national bank and the later promulgation of the preemption rule. (SUF NOS. 5 & 9-12). WFHMI must accept the consequences that go along with violating the laws of such licensure. To accept plaintiffs' argument would allow a lender to completely escape liability for its past illegal conduct.

This Court, in its ruling on plaintiffs' request for a temporary restraining order, properly rejected Plaintiffs' arguments at least with respect to the Commissioner moving forward with the revocation proceedings, finding that WFHMI created its own predicament "by its apparent failure to comply with California's licensing requirements" and that "[i]t would be ironic for an injunction to issue in such circumstances since WFHMI could have avoided the harm it contends it will suffer had it chosen to comply with the requirements of the California licenses it possesses." TRO Order at 5. This Court went on to find that "Defendant's showing embraces the California public interest of enforcing California's licensing requirements on entities issued such licenses." TRO Order at 5. This Court again rejected plaintiffs' argument with respect to the revocation proceedings in its preliminary injunction order by exempting the revocation proceedings from the coverage of its order. PI Order at 15-16.

Were the court to find in favor of plaintiffs based upon federal preemption of the CRMLA and the CFLL, it should have no effect on the conduct of WFHMI prior to August 1, 2001. Accordingly, the Commissioner must be allowed to assert his jurisdiction under the CRMLA and the CFLL, including revocation of licenses, for conduct that occurred prior to that date.

II. PLAINTIFFS CONCEDE WELLS FARGO CANNOT DEMONSTRATE ITS STANDING TO BE A PARTY TO THIS ACTION

Plaintiffs, in their opposition, concede that the test for establishing standing is the three part test set forth in *San Diego Gun Rights Committee v. Reno*, 98 F.3d 1121 (9th Cir. 1996). *See* Plaintiffs' Opposition, Section II. Notwithstanding, plaintiffs make no attempt to show the Court how Wells Fargo meets that test, thereby acknowledging that Wells Fargo lacks standing in this matter.

The only assertion made by plaintiffs is that Wells Fargo has suffered an injury-in-fact by virtue of the Commissioner's revocation proceedings commenced against WFHMI, a separate legal entity. Plaintiff's Opposition, page 12, lines 4-6. However, plaintiffs can cite no authority in support of their proposition that an alleged injury against a subsidiary is an injury against the parent. Moreover, except in very limited circumstances, a parent will not be held responsible for the acts of its subsidiary. *Securities Industry Ass'n v. Fed. Home Loan Bank Board,* 588 F.Supp. 749, 754 (D.C. Dist. 1984). Accordingly, in that Wells Fargo would most likely not be held responsible for the illegal and/or harmful acts of WFHMI, it should not be able to enjoy any legal benefits that may possibly befall WFHMI.

III. THE CALIFORNIA PER DIEM INTEREST STATUTE DOES NOT FALL WITHIN THE TERMS OF THE DIDMCA PREEMPTION CLAUSE

No matter how many times plaintiffs assert that the California per diem interest statute falls within the plain meaning of DIDMCA, they do so without giving this Court any authority for that proposition and in contravention of the express statutory language. There is no clear and manifest intent of Congress to preempt California statutes concerning when the lender may begin to charge interest. *See California. v. Arc America Corp.*, 490 U.S. 93, 102 (1989). As plaintiffs admit 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). Plaintiffs' Opposition, page 13. Neither California Financial Code 50204(o) nor California Civil Code 2948.5 expressly limit an interest rate or amount. Rather, these state statutes only establish the date upon which the per diem interest may begin to be assessed upon a borrower.

A. Plaintiffs' Interpretation of Judicial Authority Is Faulty

While dismissing the rationale set forth in the First Circuit Court of Appeals case on point[5], plaintiffs inaccurately contend the Eastern District Court of Michigan may be construed as having

[5] *Grunbeck v. Dime Savings Bank of New York, FSB*, 74 F.3d 331 (1st Cir. 1996)

upheld DIDMCA preemption as to a per diem statute such as is at issue in this matter. However, such an argument fails to recognize the difference in the statutory language.

The Michigan statute, section 438.31c(9) at issue in *Shelton v. Mutual Savings & Loan Association, F.A.*, 738 F.Supp. 1050 (E.D. Mich. 1990) expressly identifies its applicability to a "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.'" *Shelton*, 738 F. Supp. at 1058 (citing Michigan statute section 438.31c(9) (emphasis added.).) In contrast, the California statutes at issue here do not expressly seek to limit a rate or amount of interest but rather provides that a lender may not "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. . . ." Cal. Fin. Code § 50204(o).

The California statutes before this Court do not "***expressly [limit]*** the rate or amount of interest. . . secured by a first lien on residential real property . . ." as prohibited by the DIDMCA in 12 U.S.C. § 1735f-7a(a)(1) (emphasis added). Further, the California per diem interest statutes do not seek to impose limitations to impede the loan market, as do usury laws, which were addressed by the DIDMCA enactment. *Grunbeck v. Dime Savings Bank of New York, FSB*, 74 F.3d 331, 338 n. 7; 339.

The First Circuit Court of Appeals concluded that the simple interest statute ("SIS") of New Hampshire, which states that "any first mortgage home loan . . . shall provide for the computation of interest on a simple interest basis" did not *expressly limit* the rate or amount of interest. *Id*. at 340. Similar to the law at issue here, the simple interest statute placed no restriction on the "rate" or "amount" of interest the borrower could be charged. *Id*. at 337. "Thus, nothing in the SIS prevents a lender from contracting for whatever simple interest rate will exact an interest return equal to or greater than whatever rate and amount of interest would be recoverable through compounding." *Id.*

Further support that the Commissioner properly applied *Grunbeck* can be found in *Larsen v. Countrywide Home Loans, Inc*., 2001 U.S. Dist. LEXIS 10023 (Ill. 2001). The *Larsen* court found that Congress did not mean for DIDMCA to preempt all interest charges since interest charges that constitute prepayment penalties fall outside the scope of the Act. The *Larsen* court noted that other

courts have found that state statutes regulating the computation of interest on federally insured loans are not preempted by federal law, citing *Grunbeck*. The court in *Larsen* specifically declined to interpret the term "rate or amount of interest" so liberally as to preempt any state law that has an effect on how much interest a borrower must pay. *Larsen* at 3. Yet, that is the gist of plaintiffs' argument here. As in *Grunbeck* and *Larsen*, such an argument must be rejected.

B. Plaintiffs' Arguments That DIDMCA Does Preempt California Statutes Are Unpersuasive

In their opposition, plaintiffs resort to a mathematical equation in an attempt to convince this Court that the California per diem statutes "*expressly limit*" the rate or amount of interest charged. Plaintiff's Opposition, page 16. Indeed, plaintiffs' explanation confirms the Commissioner's point: the California statutes do not, on their face, expressly limit the rate or amount of interest.

Further, by inserting actual quantities into the equations provided by plaintiffs, the fallacy of their argument becomes evident: *i (interest) = p (principal)* ($5,000)×*r (rate)* (**7%**)× *t (time)* (1 day) = 350, by adjusting the *r* (rate) charged, *i= p* ($5,000)×*r* (**8%**)×*t* (1 day) = 400 and keeping *time* and *principal* as constants, the *rate of interest* may be varied and the *amount of interest* collected changed. Therefore, contrary to the claim of plaintiffs, WFHMI would have the ability to manipulate the *rate of interest* it charges regardless of whether the amount of time that such interest may be collected remains constant, as required by the California statutes. Despite plaintiffs' contentions, nothing in the per diem statutes would prevent a lender from disclosing to and bargaining with borrowers for additional fees or charges that it might use to cover any alleged lost per diem interest income.

Plaintiffs' claim that the California per diem statute is preempted by DIDMCA must, therefore, fail. Plaintiffs provide scant authority in the face of the well-reasoned *Grunbeck* appellate case. The plain reading of the California statute, confirmed by plaintiffs' mathematical formula, shows no language expressly limiting the amount or rate of interest being charged. And, the legislative aim of DIDMCA (to prevent disruption in the supply of home mortgage loans) is not frustrated by California's application of the per diem statute.

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IV. THE COMMISSIONER IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM OF RETALIATION

The undisputed facts show that the Commissioner is entitled to summary judgment on Count IV of the First Amended Complaint as a matter of law. There is an absence of a genuine issue as to a material fact on plaintiffs' specious retaliation claim. Plaintiffs' have failed to submit any admissible evidence to show that the Commissioner's license revocation actions constituted retaliation against WFHMI because the plaintiffs' filed this action.

Summary judgment should be granted when a party fails to show a genuine issue as to a material fact that the party bears the burden of proof of at trial, and judgment is appropriate against that party as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has met its initial burden, the burden shifts to the non-moving party that bears the burden of proof at trial to show that there is a genuine issue for trial by going beyond the pleadings to its own affidavits or to discovery responses. *Id.* at 324. Summary judgment cannot be defeated by evidence that is not sufficiently probative, or only colorable, it must be such that a reasonable jury could find in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-252 (1986).

It is undisputed that: (1) in December 2002, the Commissioner demanded that WFHMI perform an audit to identify violations and make appropriate refunds of per diem interest overcharges in violation of Financial Code section 50204(o) and identify instances of understating finance charges in violation of the Truth in Lending Act ("TILA"). (SUF No. 18); (2) between December 2002 and January 2003, WFHMI requested and was granted several continuances to respond to the Commissioner's demand. (SUF No. 19); (3) on January 17, 2003, the Commissioner demanded that no later than January 23, 2003, WFHMI provide the Department with a plan to conduct the audit and make the refunds. (SUF No. 19); (4) on January 22, 2003, WFHMI stated in a letter to the Commissioner that it would not comply with the Commissioner's demands. (SUF No. 20); (5) plaintiffs instituted this lawsuit on January 27, 2003 alleging that WFHMI was not obligated to comply with the CRMLA, the CFLL or the Commissioner's demands. (SUF No. 21); (6) compliance with the statutes and applicable regulations is a necessary predicate to maintaining CRMLA and CFLL licenses. (SUF No. 7); (7) WFHMI acknowledged in its complaint that failure

to comply with the Commissioner's demands and state law would result in an enforcement action. (SUF No. 22); and (8) on February 4, 2003, the Commissioner instituted two administrative proceedings to revoke WFHMI's CRMLA and CFLL licenses. (SUF No. 23).

To establish its claim of retaliation, the burden is initially on WFHMI to show that the filing of this lawsuit was a "substantial" or "motivating" factor in the Commissioner's actions to institute the administrative revocation actions. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). As demonstrated by the undisputed facts set forth above, plaintiffs fail to carry this burden. Plaintiffs' argue that the mere timing of the events is sufficient to show the Commissioner's retaliatory motive. However, as plaintiffs' concede, proximity in time, considered without regard to its factual setting, is not enough by itself to justify a grant of summary judgment either for or against the plaintiff. *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003). *See* Plaintiffs' Opposition, page 20, n. 15. Plaintiffs' have failed to submit any other admissible evidence to establish a retaliatory motive.

Plaintiffs' attempt to assert that the Commissioner has not shown that he *would* have instituted revocation actions even if this lawsuit were not filed as required by *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1315 (9th Cir. 1989). Plaintiffs' Opposition, page 22, lines 10 – 11, n. 17. This argument is unavailing. As stated above, unlike *Soranno's Gasco*, plaintiffs have set forth no facts to support an inference of unlawful retaliation. See Defendant's Memorandum of Points and Authorities In Support Of Defendant's Motion For Summary Judgment Or In The Alternative Partial Summary Judgment, page 33, line 23 to page 34, line 15.

Plaintiffs' assert that the only basis for the Commissioner to commence revocation proceedings is the filing of this lawsuit because the Commissioner has never sought to revoke a lender's state license for per diem interest and TILA violations in any other case. Plaintiffs' Opposition, page 21, lines 9 – 16. However, plaintiffs submit no evidence to support this assertion and mere speculation is insufficient to meet their burden.

Next plaintiffs' assert that revocation may have been entirely appropriate if WFHMI had simply announced that it was refusing to comply with state law, however WFHMI continued to comply with all applicable state laws pending a ruling by the court on the preliminary injunction

motion. Plaintiffs' Opposition, page 22, n. 17. WFHMI did comply with some technical provisions of the CRMLA and CFLL such as filing reports, paying assessments and submitting to regulatory examinations. However, WFHMI was violating the per diem interest provisions of the CRMLA and understating finance charges in violation of TILA. It is undisputed that on January 22, 2003, WFHMI stated in a letter to the Commissioner that it was an operating subsidiary of a national bank, and as such, it was subject to the exclusive federal regulation of the OCC and would not comply with his audit and refund demand. (SUF No. 20). In this letter, WFHMI did announce that it would not comply with state law.

Therefore, WFHMI placed the Commissioner on notice that it would not comply with the CRMLA, the CFLL or the Commissioner's demand by letter and by filing this lawsuit. The Commissioner had no choice but to institute revocation actions. It does not matter whether this notice of non-compliance is achieved by filing a federal lawsuit, telling the Commissioner by letter it does not intend comply, or even simply ignoring the Commissioner's demand. The CRMLA and the CFLL require license applicants to agree to comply with the provisions of the law and with any order or rule of the commissioner. Cal. Fin. Code §§ 50124(a)(7); 22101(a); Cal. Code Regs, tit.10, § 1422. The Commissioner is under statutory and constitutional mandates to enforce the laws under his jurisdiction. *See* Cal. Const. art. III, § 3.5.

Moreover, plaintiffs ask this Court not to address their retaliation claim at this stage of the case if the Court reaffirms its preliminary ruling that WFHMI is exclusively regulated by the OCC. Plaintiffs' Opposition, page 18, lines 17 – 20. Plaintiffs' further state that they will not pursue their retaliation claims unless this Court or the Court of Appeals rules that WFHMI is required to have licenses from the state in order to engage in mortgage banking activities in California. Plaintiffs' Opposition, page 18, line 23 to page 19, line 4. It appears that plaintiffs are requesting this Court keep their retaliation claims on hold, perhaps indefinitely, until they get an adverse court ruling. This position is untenable. In essence, plaintiffs want a partial summary judgment in their favor on the preemption and DIDMCA issues and no ruling on the retaliation claim until after appeal. However, since a partial summary judgment is merely an interlocutory order and is subject to revision, it is not immediately appealable without a specific judicial finding. Fed. Rule Civ. P.

54(b). The Commissioner has moved for summary judgment on all counts of the First Amended Complaint and is entitled to a ruling from this Court on all counts, including the retaliation claim. This claim is appropriate and ripe for summary judgment at this time. The undisputed material facts to adjudicate this issue, as stated above, will not change at some uncertain point in the future if plaintiffs' obtain a court ruling they do not like.

Therefore, this Court should grant the Commissioner's motion for summary judgment on the retaliation claim.

V. PREEMPTION DOES NOT ESTABLISH AN ACTIONABLE CLAIM UNDER 42 U.S.C. SECTION 1983

This Court should determine at this time that plaintiffs have no cause of action under 42 U.S.C. section 1983, ruling in favor of the Commissioner on summary judgment, and not delay this issue as requested by plaintiffs in their opposition. Opposition Brief, page 23, lines 13-14. This particular aspect of the case is purely a question of law as there are no factual issues, material or otherwise, and thus, is appropriate for summary judgment. Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment is appropriate where the case presents a pure question of law, such as here, and where there is no dispute as to the historical facts of the case. *Edwards v. Aguillard*, 482 U.S. 578, (1987*); see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment should be granted when a party fails to show a genuine issue as to a material fact that the party bears the burden of proof of at trial, and judgment is appropriate against that party as a matter of law. *Celotex*, at 322.

Further, while citing to *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) as supporting a cause of action under section 1983, plaintiffs readily acknowledge that in *Golden State Transit Corp* preemption claims were found to be cognizable under 42 U.S.C. section 1983 only in certain instances. Plaintiffs make absolutely no attempt to show the Court how they

come within the ambit of *Golden State Transit Corp.*, thus conceding that they are unable to meet the standards set forth in *Golden State Transit Corp.*

Plaintiffs have the burden of establishing every essential element of their case. As plaintiffs have made an insufficient showing on this issue in which they have the burden of proof, the court may grant summary judgment "as a matter of law". *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further, the Commissioner is not required to submit affidavits negating plaintiffs' claims in order for the Court to grant summary judgment. *Id.* at 323.

Plaintiffs' claims as set forth in counts I-III of the First Amended Complaint ("FAC") are based solely upon the issue of preemption. FAC ¶¶ 33-51. As stated by the Ninth Circuit Court of Appeals in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1985), the "Supremacy Clause . . . establishes federal-state priorities; it does not create individual rights, nor does it 'secure' such rights within the meaning of section 1983. *Id.* at 848. Thus, "preemption of state law under the Supremacy Clause . . . will not support an action under § 1983, and will not, therefore, support a claim of attorney's fees under § 1988." *Id.* at 850. *Accord Howard v. Burlingame,* 937 F.2d 1376, 1380 (9th Cir. 1991).

Further, the Ohio district court order cited by plaintiffs in their opposition is just that, a district court order. It has absolutely no precedential value in this action. Furthermore, this action is readily distinguishable from the Ohio case. The Ohio case dealt with a federal statute and the business operations of the national banks themselves, as opposed to this action which only involves a federal rule and an operating subsidiary, which voluntarily submitted to state licensure and maintained those licenses despite passage of 12 C.F.R. § 7.4006. Additionally, as pointed out by the district court at page 13 of the order, there was established case law on the issue (*Barnett Bank of Marion County v. Nelson,* 517 U.S. 25 (1996)). This action is a case of first impression, and also involves a mandate on the Commissioner under the California Constitution to enforce the law until such time as a court of appeals rules that the law is unconstitutional or preempted by federal law. *See* Cal. Const. Art. III, § 3.5.

Accordingly, as plaintiffs have not established that they meet the elements of a section 1983 action, their first three counts must fail as a matter of law with respect to having been brought under

42 U.S.C. section 1983 as must their request for attorney's fees under section 1988.

CONCLUSION

For the foregoing reasons as well as those discussed in the Commissioner memorandum dated April 4, 2003, the Commissioner submits that summary judgment against plaintiffs should be granted because the NBA does not expressly preempt or conflict with the CRMLA and the CFLL, nor grant to the OCC exclusive visitorial powers over WFHMI, federal regulations 12 C.F.R. section 5.34 and 12 C.F.R. section 7.4006 were improperly promulgated by the OCC, DIDMCA does not preempt California Financial Code section 50204(o) or California Civil Code section 2948.5, there has been no retaliation by the Commissioner in bringing the revocation actions, and this action was improperly brought under 42 U.S.C. section 1983. Based thereon, the Commissioner respectfully requests this Court grant his motion for summary judgment. In the alternative, the Commissioner requests the Court enter partial summary judgment as to all issues pertaining to plaintiffs' four causes of action for which the Court considers there to be no triable issues of material fact.

Dated: April 28, 2003

VIRGINIA JO DUNLAP (CA BAR NO. 142221)
Assistant Commissioner
ALAN S. WEINGER (CA BAR NO. 86717)
Supervising Counsel

JUDY L. HARTLEY (CA BAR NO. 110628)
Senior Corporations Counsel
KIMBERLY L. GAUTHIER (CA BAR NO. 186012)
Corporations Counsel
320 West 4th Street, Ste. 750
Los Angeles, California 90013-2344
Telephone: (213) 576-7604
Fax: (213) 576-7181

ATTORNEYS FOR DEFENDANT