

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

8 Attorneys for Defendant

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 WELLS FARGO BANK, N.A., and WELLS)
13 FARGO HOME MORTGAGE, INC.,)

14 Plaintiffs,)

15 vs.)

16 DEMETRIOS A. BOUTRIS, in his official)
17 capacity as Commissioner of the California)
18 Department of Corporations,)

19 Defendant.)

Civil Action No. S-03-0157 GEB JFM

) DEFENDANT’S MEMORANDUM OF
) POINTS AND AUTHORITIES IN
) OPPOSITION TO *AMICUS CURIAE* OF THE
) OFFICE OF THE COMPTROLLER OF THE
) CURRENCY

) Hearing Date: March 10, 2003
) Time: 9:00 a.m.
) Location: Courtroom 10

) **Hearing Requested**
) [30 minutes each side]

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22 Defendant, Demetrios A. Boutris, in his official capacity as California Corporations
23 Commissioner (“Commissioner”) hereby submits his Opposition to the *Amicus Curiae* brief
24 submitted by the Office of the Comptroller of the Currency in support of plaintiffs’ motion for a
25 Preliminary Injunction.

26 **INTRODUCTION**

27 Congress has not defined an “operating subsidiary” in the National Bank Act (“NBA”) or the
28 Gramm-Leach-Bliley Act (“GLBA”). Congress has not granted national banks the authority to own

1 or establish operating subsidiaries in the NBA or the GLBA. Congress has not vested in the Office
2 of the Comptroller of the Currency (“OCC”), to the exclusion of the states, the power to control or
3 regulate operating subsidiaries of national banks created under the NBA.

4 Despite this lack of Congressional authority, the OCC contends that Wells Fargo Bank, N.A.
5 (Wells Fargo) and Wells Fargo Home Mortgage Co., Inc. (WFHMI) are both subject to the OCC’s
6 exclusive licensing and visitorial powers under the NBA and the regulations promulgated thereunder
7 by the OCC.¹ The only support for the OCC’s argument that it has exclusive jurisdiction over an
8 operating subsidiary, such as WFHMI, a California chartered corporation affiliated with a national
9 bank and which engages in the business of real estate financing in California, are the regulations it
10 created and the definition of a “financial subsidiary” found in the GLBA.

11 Nowhere in the NBA is an “operating subsidiary” defined. *See generally* 12 U.S.C. § 21 et
12 seq. Nowhere in the GLBA, the only Congressional authority relied upon by the OCC for expanding
13 its jurisdiction in this area, is an “operating subsidiary” discussed or defined. *See generally* 12
14 U.S.C. § 24a. Nowhere has Congress given the OCC express authority to promulgate regulations
15 governing “operating subsidiaries.” Finally, there is no evidentiary support for the OCC’s
16 contention that WFHMI is, in fact, an “operating subsidiary” of Wells Fargo.

17 Absent express Congressional authorization for its actions, the OCC has exceeded its
18 authority in promulgating regulations governing “operating subsidiaries” and purporting to preempt
19 the licensing and visitorial provisions of state law such as the California Residential Mortgage
20 Lending Act (CRMLA) and the California Finance Lenders Law (CFLA). *See generally United*
21 *States v. Mead*, 533 U.S. 218 (2001).

22 The OCC’s assertions and analysis regarding DIDMCA and the preemption of California’s
23 per diem statute are without merit. DIDMCA does not preempt California Financial Code §
24 50204(o), as that section does not expressly restrict or limit the annual percentage rate or amount of
25 interest that may be charged by Plaintiffs. Section 50204(o) affects only *when* interest may
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28 ¹ It is undisputed that the OCC has exclusive regulatory authority over Wells Fargo, a national bank.

1 commence. As such, it is a consumer protection statute that falls outside the preemption provisions
2 of DIDMCA.

3 In analyzing this case, this Court must first determine the extent of the authority, or lack
4 thereof, granted to the OCC to regulate operating subsidiaries. Only if that analysis demonstrates
5 appropriate Congressional authority, may the Court address the issue of whether preemption is
6 present, and if so, to what extent it applies to state law. There is no express preemption of the
7 CRMLA or the CFLL, no field preemption and no direct conflict between state and federal law.

8 Similarly, the Court must employ the same analysis with regard to the DIDMCA issue. As
9 set forth more fully below, DIDMCA does not preempt the per diem statute. Thus, if preemption
10 were found, it would only act to limit the Commissioner's visitorial powers, and would not preempt
11 the entire statutory scheme. The result would be dual regulation whereby the per diem statute
12 remains valid and enforceable, with the visitorial powers continuing to rest with the OCC.

13 The OCC's support of Wells Fargo's position regarding the issuance of a Preliminary
14 Injunction is without merit and plaintiffs' request to issue such an order should be denied.

15 ARGUMENT

16 I. CONGRESS HAS NOT EXPRESSLY AUTHORIZED THE OCC TO 17 PROMULGATE REGULATIONS GOVERNING OPERATING SUBSIDIARIES

18 The OCC erroneously relies on the NBA and the GLBA for its authority in promulgating 12
19 C.F.R. § 5.34 (setting forth the rules and policies regarding operating subsidiaries and outlining the
20 procedures for a national bank to establish an operating subsidiary) and 12 C.F.R. § 7.4006 (stating
21 that state laws apply to national bank operating subsidiaries to the same extent those laws apply to
22 the parent national bank). In neither the NBA nor the GLBA has Congress defined an "operating
23 subsidiary", granted national banks the authority to own or establish operating subsidiaries, or
24 indicated that activities conducted by operating subsidiaries be controlled and regulated by the OCC
25 to the exclusion of the states.

26 Absent such express Congressional authority, the actions of the OCC in promulgating
27 regulations governing operating subsidiaries and preempting state law are suspect and should be
28 given little, or no, deference. *United States v. Mead*, 533 U.S. 218, 226 (2001); *Chevron U.S.A. v.*

1 *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S.
2 140 (1944). Further, as to preemption of state law, the OCC may only preempt state law “. . . when
3 and if it is acting within the scope of its congressionally delegated authority. . . . An agency literally
4 has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless . . .
5 Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).
6 Accordingly, the OCC has exceeded its authority.

7 **A. The National Bank Act Does Not Authorize The OCC’s Expansion Of**
8 **Jurisdiction Over Operating Subsidiaries**

9 The NBA is a statutory scheme that authorizes the establishment of national banks
10 and grants national banks, such as Wells Fargo, the authority to engage in various banking activities,
11 including making, arranging, and dealing in loans secured by interests in real property. *See*
12 *generally*, 12 U.S.C. § 21 et seq.; 12 U.S.C. § 24(Seventh). The NBA also established the OCC as
13 the governmental arm responsible for supervising all national banks, as well as all federal branches
14 and agencies of foreign banks in the United States. 12 U.S.C. §§ 1 et seq.; 12 U.S.C. §§ 21 et seq.
15 What the NBA does not speak to, however, is operating subsidiaries of national banks, such as
16 WFHMI, a state-chartered corporation affiliated with a national bank.

17 There is a long-standing rule designed to aid courts in statutory construction: “. . .
18 courts must presume that the legislature says in a statute what it means and means in a statute what it
19 says there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The failure of the
20 Congress to define the term “operating subsidiary” or include operating subsidiaries in the statutory
21 scheme covering national banks must be presumed to be intentional in the absence of language to the
22 contrary. Further, as there is nothing in the NBA regarding operating subsidiaries, there can be no
23 express authority for the OCC to regulate such entities and promulgate regulations allegedly
24 governing them. *See United States v. Mead*, 533 U.S. 218, at 226 (2001).

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1 **B. The Gramm-Leach-Bliley Act Does Not Authorize The OCC's Expansion Of**
 2 **Jurisdiction Over Operating Subsidiaries**

3 Despite the OCC's assertions to the contrary, Congress did not recognize operating
 4 subsidiaries in the GLBA. *See generally* 12 U.S.C. § 24a. The GLBA was enacted to increase
 5 competition in the financial services industry by “providing a prudential framework for the
 6 affiliation of banks, securities firms, insurance companies, and other financial service providers. . . .”
 7 S. Rep. No. 44, 106th Cong., 1st Sess. (1999), page 2, attached to the Appendix as Exhibit 4.

8 The GLBA grants national banks the authority to engage in certain activities through
 9 “*financial subsidiaries*,” subject to certain conditions. 12 U.S.C. § 24a(a)(1) and (a)(2) (emphasis
 10 added). Title 12 U.S.C. section 24a, subsection (g)(3)(A), to which the OCC has directed this court
 11 to consider as its authorizing power, is a definition of a “financial subsidiary,” not an “operating
 12 subsidiary”. *See Memorandum Amicus Curiae* of the Office of the Comptroller of the Currency, at
 13 page 13, lines 2-9. The term “financial subsidiary” means “any company that is controlled by 1 or
 14 more insured depository institutions *other than a subsidiary that*—(A) engages solely in activities
 15 that national banks are permitted to engage in directly and are conducted subject to the same terms
 16 and conditions that govern the conduct of such activities by national banks. . . .” 12 U.S.C. §
 17 24a(g)(3)(A) (emphasis added).

18 Thus, the GLBA is not the express Congressional authority required to support the
 19 OCC's promulgation of 12 C.F.R. § 7.4006, whereby the OCC purports to restrict the application of
 20 state laws to operating subsidiaries of national banks. *See United States v. Mead*, 533 U.S. 218
 21 (2001).

22 **C. The GLBA Expressly Prohibits Preemption Of State Law**

23 Even if this Court were to define an “operating subsidiary” the same as a “financial
 24 subsidiary”, 12 C.F.R. § 7.4006 is still invalid as it directly conflicts with Section 104 of the GLBA,
 25 which provides that state laws unrelated to the purpose of the GLBA shall not be preempted. *See*
 26 *generally* Pub. L. No. 106-102, Title I, Subtitle A, § 104, 113 Stat. 1352, *codified at* 15 U.S.C. §
 27 6701. The GLBA was enacted to increase competition in the financial services industry by
 28 expanding the permissible affiliations of national banks, including insurance activities and securities

1 transactions. *See generally*, S. Rep. No. 44, 106th Cong., 1st Sess. (1999), attached to the Appendix
2 as Exhibit 4. Purpose or GLBA.

3 Section 104 of the GLBA expressly limited the application of any preemption as to
4 state law: Preemption of a state law is specifically prohibited if: (A) the state law does not relate to
5 or regulate insurance sales, solicitations, or cross marketing activities; (B) the state law does not
6 relate to or regulate the business of insurance activities; (C) the state law does not relate to certain
7 securities investigations or enforcement actions; and (D) the state law does not treat depository
8 institutions and their affiliates differently than other persons engaged in the same activities, does not
9 prevent a depository institution or affiliate from engaging in activities authorized by the GLBA and
10 does not conflict with the intent of the GLBA. 15 U.S.C. § 6701(d)(4)(i) to (iv).

11 The CRMLA and the CFLL, therefore, are not preempted by 12 C.F.R. § 7.4006 by
12 virtue of their express exclusion from preemption in the GLBA. Specifically, neither the CRMLA
13 nor the CFLL relates to, regulates, or attempts to regulate insurance sales or the business of
14 insurance activities. *See generally*, California Financial Code §§ 50000 et seq. and 22000 et seq.
15 Neither the CRMLA nor the CFLL relates to securities investigations or enforcement actions. *Id.*
16 Further, in their application, both the CRMLA and the CFLL treat all California businesses equally
17 and do not have a disparate impact on depository institutions or affiliates thereof. The CRMLA and
18 the CFLL in no way prevent depository institutions or affiliates thereof from engaging in the
19 activities authorized by the GLBA, namely affiliations between banks, securities firms, insurance
20 companies and other financial service providers. S. Rep. No. 44, 106th Cong., 1st Sess. (1999), page
21 2, attached to the Appendix as Exhibit 4.

22 The OCC’s preemption regulation, 12 C.F.R. § 7.4006 directly conflicts with the
23 GLBA’s provisions regarding preemption as they apply to financial subsidiaries and affiliates of
24 depository institutions. Accordingly, the OCC’s preemption regulation is invalid and cannot be
25 enforced.

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1 **II. THE REGULATORY PROVISIONS OF THE CRMLA AND CFLL ARE NOT**
2 **PREEMPTED BY THE OCC'S REGULATIONS**

3 Notwithstanding the fact that the OCC has exceeded its authority in promulgating regulations
4 governing national bank operating subsidiaries, regulation of WFHMI by the states and the OCC
5 would not create a conflict with federal law. Absent such a conflict, the NBA, the GLBA or the
6 OCC regulations, even if promulgated pursuant to Congressional authority, do not preempt the
7 CRMLA and CFLL.

8 Under well established principles of preemption, the courts characteristically apply the
9 following three tests to ascertain whether a federal statute preempts state law: (1) Whether the
10 federal statute explicitly preempts state law; (2) whether the federal statute implicitly preempts state
11 law because the federal regulation in the particular field is "so pervasive as to make reasonable the
12 inference that Congress left no room for the States to supplement it"; or (3) whether preemption is
13 implied because there is an irreconcilable conflict between state law and the federal law. *Barnett*
14 *Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (citations omitted).

15 For the reasons set forth more fully in Defendant's Memorandum of Points and Authorities in
16 Opposition to Plaintiffs' Motion for Preliminary Injunction, there is no express preemption of the
17 CRMLA and the CFLL by the NBA or the GLBA; field preemption does not apply as Congress has
18 evidenced no intent to occupy the entire field to the exclusion of the states; and the CRMLA and the
19 CFLL do not conflict with the NBA, the GLBA or the OCC regulations to such a degree that
20 preemption is warranted. Defendant's Opposition, pages 19-25.

21 Further, since the inception of national banks, courts have recognized the applicability of
22 state laws to national banks. The first significant case acknowledging the general applicability of
23 state laws to national banks was *National Bank v. Commonwealth*, 76 U.S. (9 Wall) 353 (1870). In
24 *National Bank*, the Supreme Court upheld a Kentucky statute regarding the collection of state taxes
25 directly from national banks. *Id.* The Court found that the NBA was silent on the issue and,
26 therefore the bank was subject to the state law. *Id.* at 361-362.

27 The decision in *McClellan v. Chipman*, 164 U.S. 347 (1896) is particularly instructive.
28 There, the Supreme Court held a state statute to be applicable to a national bank even when federal

1 law expressly addressed the subject matter of the state law. *Id.* The federal law permitted national
2 banks to take real estate for given purposes, including security for debt or in satisfaction of debts,
3 while Massachusetts law forbade certain real estate transfers by insolvent transferees. *Id.* at 357-
4 358.

5 The Supreme Court upheld the Massachusetts statute in the face of a challenge from the
6 national bank that the law improperly interfered with the functions granted by federal law. The
7 Court found no express conflict between the federal law and the Massachusetts law, despite the
8 limitations imposed by the Massachusetts law. *McClellan*, 164 U.S. 347, 358. The Court further
9 noted that no function of national banks is destroyed or hampered by allowing the banks to exercise
10 power to take real estate, subject to the same conditions and restrictions to which all other citizens of
11 the state were subjected. *Id.*

12 The Court rejected the proposition that any limitation by a state on the making of contracts is
13 a restraint upon the power of a national bank, and indicated that the proper issue was whether the
14 state law violated the act of Congress, noting: “As long since settled in the cases already referred to,
15 the purpose and object of Congress in enacting the national bank law was to leave such banks as to
16 their contracts in general under the operation of the state law, and thereby invest them as Federal
17 agencies with local strength, whilst, at the same time, preserving them from undue state interference
18 wherever Congress within the limits of its constitutional authority has expressly so directed, or
19 wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency
20 of the banks to discharge the duties imposed upon them by the law of the United States.” *McClellan*,
21 164 U.S. 347, at 359.

22 Similarly, recent cases affirm the principle that a national bank is subject to state law unless
23 that law “interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with
24 some paramount federal law.” *American Bankers Association v. Lockyer*, 2002 U.S. Dist. LEXIS
25 24521 (E.D. Cal. Dec. 2002) (*quoting Lewis v. Fidelity & Deposit Co. of Maryland*, 292 U.S. 559,
26 566 (1934)).

27 Assuming for the purposes of argument only that the OCC’s actions are determined to be
28 valid and preemption is found, it could not be retroactively applied. *See Scott v. Boos*, 215 F.3d 940,

1 943 (9th Cir. 2000) (*citing Landgraf v. USI Film*, 511 U.S. 244 (1994)). Therefore, federal
2 preemption of the CRMLA and the CFLL, would only apply from August 1, 2001 forward as 12
3 C.F.R. § 7.4006 contained no provision making it retroactively effective. (*See* Defendant's
4 Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary
5 Injunction, at pages 29-30).

6 Further, preemption by the OCC's statutes and regulations would only be applicable to those
7 California laws that directly conflict with the OCC's licensing and visitorial powers pursuant to 12
8 C.F.R. § 5.34. The OCC cites no provision of the NBA or its regulations which directly conflicts
9 with, or would be impaired by, the per diem interest statute specifically, and the CRMLA and the
10 CFLL generally.

11 The California statutes at issue in no way interfere with the purposes of a national bank or
12 even its alleged operating subsidiary, do not destroy the national bank's efficiency and, as
13 established above, do not conflict with any properly promulgated federal law. In fact, WFHMI has
14 voluntarily submitted itself to the regulatory and examination jurisdiction of the Commissioner for
15 several years. Plaintiffs' prior compliance with both regulatory schemes evidences there is no
16 impediment to dual regulation and simultaneous compliance with both state and federal substantive
17 law.

18 **III. CALIFORNIA'S PER DIEM INTEREST STATUTE IS NOT PREEMPTED BY** 19 **DIDMCA**

20 Despite the OCC's arguments to the contrary, DIDMCA does not preempt California
21 Financial Code § 50204(o). Section 501 of DIDMCA, codified at 12 U.S.C. § 1735f-7a, only
22 preempts state laws "expressly limiting the rate or amount of interest, discount points, finance
23 charges, or other charges" that can be assessed on first lien mortgage loans. Paragraph 3(c) of the
24 Federal Home Loan Bank Board regulations promulgated pursuant to Section 501 of DIDMCA
25 further defines the limits of the federal regulatory scheme, providing: "Nothing in this section
26 preempts limitations in state laws on prepayment charges, attorneys' fees, late charges or other
27 provisions designed to protect borrowers." 12 C.F.R. § 590.3(c).

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1 That California’s per diem interest statute is not preempted is further supported by the Senate
2 Report on DIDMCA in which Congress indicated: “In exempting mortgage loans from state usury
3 limitations, the Committee intends to exempt only those limitations that are included in the *annual*
4 *percentage rate*. The Committee does not intend to exempt limitations on prepayment charges,
5 attorney fees, late charges or similar limitations designed to protect borrowers.” *Grunbeck v. Dime*
6 *Savings Bank of New York, FSB*, 74 F.3d 331, 340 (1st Cir. 1996) (*quoting* S. Rep. No. 96-368, 96th
7 Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Admin. News 236, 255 (emphasis added)).

8 As set forth more fully in Defendant’s Memorandum of Points and Authorities in Opposition
9 to Plaintiffs’ Motion for Preliminary Injunction, at pages 11-13, DIDMCA was intended to preempt
10 usury statutes, not consumer protection statutes like California Financial Code § 50204(o). Section
11 50204(o) leaves entirely to the discretion of the lender the annual percentage rate or amount of
12 interest to be exacted from the borrower. Rather, § 50204(o) affects only when interest may
13 commence. Therefore, it does not affect the annual percentage rate that can be charged and in no
14 way conflicts with DIDMCA. Accordingly, California Financial Code § 50204(o) is not preempted
15 by DIDMCA.

16 **CONCLUSION**

17 The OCC lacks the express Congressional authority necessary to promulgate regulations
18 governing operating subsidiaries of national banks. Neither the NBA nor the GLBA contain
19 provisions sufficient to support the OCC’s extension of regulatory authority to operating subsidiaries
20 or its preemption of state licensing and visitorial laws. Further, DIDMCA does not preempt
21 California Financial Code § 50204(o) as that section does not expressly limit the amount or rate of
22 interest that may be charged on a residential mortgage loan.

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For the foregoing reasons, Defendant respectfully suggests that the OCC's Memorandum of *Amicus Curiae* is without merit and fails to support Plaintiffs' Motion for Preliminary Injunction. Accordingly, Plaintiffs' motion should be denied in its entirety.

Dated: March 3, 2003

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

KIMBERLY L. GAUTHIER (CA BAR NO 186012)
320 West 4th Street, Suite 750
Los Angeles, California 90013-2344
Telephone: (916) 327-1626
Facsimile: (916) 445-6985

ATTORNEYS FOR DEFENDANT