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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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 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]

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Defendant, Demetrios A. Boutris, in his official capacity as California Corporations Commissioner ("Commissioner") hereby submits the following points and authorities for the consideration of this Court in support of the attached motion for summary judgment or, alternatively, partial summary judgment. The Commissioner is entitled to judgment as a matter of law because all the documents concurrently filed herewith show there is no triable issue of fact as to plaintiffs' counts for preemption of the California Residential Mortgage Lending Act ("CRMLA") and the California Finance Lenders Law ("CFLL"), preemption of the California per diem statutes, retaliation, or that would give rise to an action under 42 U.S.C. section 1983.

INTRODUCTION

The failure of Plaintiff Wells Fargo Home Mortgage, Inc. ("WFHMI"), as a voluntary licensee under the CRMLA (California Financial Code § 50000 et. seq.), to comply with California laws and its steadfast refusal to comply with the Commissioner's demand it refund overcharges to California consumers gave rise to this lawsuit. WFHMI and its parent corporation, Wells Fargo Bank, N.A. ("Wells Fargo") brought suit against the Commissioner in an attempt to wrest jurisdiction for consumer protection statutes from state control, claiming federal preemption and retaliation by the Commissioner against his licensee, and that such actions were in violation of 42 U.S.C. § 1983.

Plaintiffs cannot establish that federal preemption is appropriate. WFHMI is not a national bank and therefore is not subject to the exclusive visitorial powers of the Office of the Comptroller of the Currency ("OCC") as plaintiffs claim. Plaintiffs cannot 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. The case now before this court presents only the following issues of law.

1. That the National Bank Act ("NBA") does not expressly preempt the CRMLA and the CFLL.

2. That the NBA does not grant exclusive visitorial powers over WFHMI to the OCC.

3. That the OCC exceeded its authority in promulgating 12 C.F.R. section 5.34 and 12 C.F.R. section 7.4006 without express Constitutional or Congressional authority.

4. That DIDMCA does not preempt California Financial Code section 50204(o) or California Civil Code section 2948.5.

5. That the Commissioner's statutory and constitutional obligation to enforce the law prohibits a finding of retaliation.

6. That plaintiff's improperly brought this lawsuit under 42 U.S.C. section 1983.

7. That even if this Court determines the OCC now has exclusive visitorial powers over WFHMI, such powers did not begin prior to August 1, 2001 when the OCC enacted 12 C.F.R. section 7.4006.

8. That Wells Fargo has not suffered a violation of its statutory or constitutional rights and, therefore, lacks standing to bring this action.

Therefore, the Commissioner moves for summary judgment, or in the alternative partial summary judgment, against plaintiffs.

STATEMENT OF FACTS

The Commissioner is the state official charged with enforcing the CRMLA and the CFLL including California Financial Code section 50204(o) against CRMLA licensees. Statement of Undisputed Facts (hereinafter "SUF") No. 6. WFHMI has been licensed by the Commissioner under both the CRMLA and CFLL since at least 1996. SUF No. 5. The Commissioner has asserted regulatory, supervisory, examination and enforcement authority over WFHMI as a licensee under both the CRMLA and CFLL. SUF No. 6.

Following several regulatory examinations, to which WFHMI submitted as a licensee pursuant to California law, the Commissioner demanded on December 4, 2002, that WFHMI conduct an audit of its residential mortgage loans made in California during 2001 and 2002. SUF Nos. 16-18. The audit was demanded in order to identify all loans on which per diem interest was charged by WFHMI in excess of that allowed under California Financial Code section 50204(o)[1], to

[1] California Financial Code section 50204(o) prohibits lenders licensed under the CRMLA from charging 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

identify those consumers entitled to a refund, and also to identify instances of understating finance charges in violation of TILA and California Financial Code section 50204, subdivisions (i), (j) and (k). *Id.*

Despite being voluntarily licensed under the CRMLA and the CFLL since 1996, and previously complying with all licensing, regulatory, supervisory, examination and enforcement provisions of these statutes, WFHMI, through its letter of January 22, 2003, refused to correct the identified deficiencies and to conduct the self audit demanded by the Commissioner. SUF No. 20. Thereafter, on January 27, 2003, plaintiffs initiated this lawsuit. *See* Complaint.

The California Constitution mandates that the laws of this state be enforced until they are stayed by an appellate court decision. *See* Cal. Const. art. III, § 3.5.[2] Accordingly, on February 4, 2003, the Commissioner instituted proceedings to revoke the CRMLA and CFLL licenses of WFHMI. SUF No. 23. The revocation action was based on WFHMI's violations of the CRMLA, and WFHMI's stated intent to not abide by requirements of the CRMLA and the CFLL as set forth in its January 22, 2003, letter and this lawsuit. SUF Nos. 20, 21 and 23. A necessary predicate to maintaining CRMLA and CFLL licenses under these consumer protection statutes is compliance. SUF No. 7.

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recorded the same day as the loan proceeds are disbursed for the borrowers' use ("loan close"), with loan proceeds being sent by the lender to title and/or the settlement agent the day before closing. The settlement agents and/or title company cause the deed of trust to be recorded and take instructions directly from the lender as to the recording. Burns Decl., paragraph 11. Financial Code section 50204(o) does contain an exception when the borrower affirmatively requests, and the lender agrees to, funding on a Friday or a day prior to a holiday, and specific disclosures are given. In those instances, a lender may charge interest from the business day prior to recording.

[2] The California Constitution, Article III, Section 3.5 states:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

WFHMI has never made application to the Commissioner for a ruling that it is exempt from the CRMLA under California Financial Code section 50003[3] or the CFLL under California Code section 22050-22054.[4] SUF Nos. 9 and 10. Through the date of the filing of this lawsuit, WFHMI has never attempted to surrender its licenses.[5] SUF No. 13.

Since the promulgation of 12 C.F.R. section 7.4006 by the OCC and which became effective August 1, 2001, the Commissioner has conducted one examination of WFHMI under the CRMLA without any objection whatsoever from WFHMI. SUF No. 16. The Commissioner has commenced at least four regulatory examinations of WFHMI under the CFLL. SUF No. 17.

In addition to submitting to the Commissioner's jurisdiction under both the CRMLA and the CFLL, WFHMI continued to advertise its licensure to potential and existing California consumers. WFHMI advertised through mailings and a website, claiming that it was licensed under the CRMLA. SUF No. 15.

There is no dispute that Wells Fargo Bank, N.A. ("Wells Fargo") is a national banking association organized and existing under the NBA. SUF No. 1; *see also* Plaintiffs' First Amended Complaint (hereinafter "FAC"), ¶ 7. Likewise, there is no dispute that the Commissioner's regulatory authority has been directed solely at the state-charted corporate entity of WFHMI, not of the subsidiary's parent, Wells Fargo Bank. SUF Nos. 1 and 2; *see also* FAC, ¶ 7. Since at least 1996, WFHMI has been engaged in the residential mortgage business in California. SUF No. 4.

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

[4] 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.

[5] The surrender provisions for CRMLA licensees are contained in Financial Code § 50123 (b) which provides in relevant part: [t]he licensee shall file a plan for the withdrawal from regulated business, including a timetable for the disposition of the business and a closing audit performed by an independent certified public accountant. Upon receipt of the written notice and plan, the commissioner shall review the plan and, if satisfactory to the commissioner, shall accept surrender of the license. A license is not surrendered until tender is accepted in writing by the commissioner after a review, and a finding has been made on the licensee's plan required to be filed by this section, and a determination has been made that there is no violation of law."

The surrender provisions for CFLL licensees are contained in Financial Code § 22700(b) which provides "[s]urrender of a license becomes effective 30 days after receipt of an application to surrender the license or within a shorter period of time that the commissioner may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions is instituted within 30 days after the

WFHMI makes residential mortgages and other loans that are secured by first liens on residential real property. *Id.* WFHMI is a "creditor" under TILA, 15 U.S.C. § 1602(f), and makes or invests in residential real estate loans aggregating more than $1 million per year. *Id.*

The Commissioner hereby moves for summary judgment or, in the alternative, partial summary judgment, on these undisputed facts.

ARGUMENT

I. THE COMMISSIONER HAS MET THE STANDARDS FOR OBTAINING SUMMARY JUDGMENT

The factual issues are uncontroverted, thus leaving this case a question of law as evidenced by the Statement of Undisputed Facts filed herewith. As such, there are no genuine issues as to any material facts in this action, and as will be fully demonstrated below, the Commissioner is entitled to judgment as a matter of law.

Further, plaintiffs' declarations filed in this action fail to establish essential elements of their theories, especially as to the claims that DIDMCA preempts the California per diem interest statute, the NBA preempts the CRMLA and the CFLL as to WFHMI, that the Commissioner's license revocation actions constituted retaliation against WFHMI because the plaintiffs' filed this action and that Wells Fargo has standing to bring this lawsuit.

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 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).

An issue of fact is not "genuine" for the purposes of summary judgment unless it is of such a nature that a reasonable jury could return a verdict in favor of the non-moving party. Summary

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application is filed. If a proceeding is pending or instituted, surrender of a license becomes effective at the time and upon the conditions that the commissioner determines.

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).

A "material" fact is one that might affect the outcome of the case. "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As established in the Commissioner's Statement of Undisputed Facts, there are no material facts in dispute that can affect the outcome of this case and any factual disputes that do exist are irrelevant to the ultimate legal issues that this court is being asked to decide.

Accordingly, when the non-moving parties, like the plaintiffs here, have made an insufficient showing of an essential element of their case on 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).

The Commissioner has met his initial burden of persuasion to demonstrate to the court the absence of a genuine issue as to a material fact as set forth in Sections II-VIII herein, including references to sources of evidence. The Commissioner is not required to submit affidavits negating Plaintiffs' claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323. 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. As previously stated, plaintiffs will be unable to demonstrate that there are any genuine issues for trial.

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). In *Edwards*, the Supreme Court affirmed the grant of summary judgment brought to challenge the constitutionality of the Louisiana Creation Act, even though the defendants argued that they had created a genuine issue of fact by their submission of five expert witness affidavits. The Court held that summary judgment was nonetheless proper because the uncontroverted affidavits did not raise a genuine issue of material fact, and were not relevant to the issue. The court

was left with purely legal issues, and some uncontroverted facts, which were enough to decide the case. *Id.* at 595-596.

In *Institute of Governmental Advocates v. Fair Political Practices Commission,* the Eastern District considered cross summary judgment motions and upheld a lobbyist contribution provision of the California Political Reform Act that had been constitutionally challenged by the plaintiffs. Deciding the case under Federal Rule of Civil Procedure 56(c), the court observed:

> "Summary judgment is appropriate when the historical facts controlling the application of a rule of law are undisputed and the complaint raises only a question of law for the court to decide . . . . In particular, a facial challenge to the constitutionality of a statute is ripe for resolution by summary judgment."

Institute of Governmental Advocates, 164 F. Supp.2d 1183, 1188 (citations omitted).

If this court determines that there are genuine issues of fact that preclude it from granting the Commissioner summary judgment, pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, the court has the authority, to ". . . make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just." *Williams v. Sinclair,* 529 F. 2d 1383, 1390 (9th Cir. 1975). The Commissioner requests that the court make an order in accordance with Rule 56(d) in the event that the court decides to deny the Commissioner's request for summary judgment.

II. AN OPERATING SUBSIDIARY IS *NOT* A NATIONAL BANK

An operating subsidiary is *not* a national bank and should not be granted all the rights and privileges of a national bank. National banks are federally created entities that must enter into articles of association designating themselves as national banks and certifying that they intend to avail themselves of the advantages of the NBA. 12 U.S.C. §§ 21 and 22. Whereas operating subsidiaries are state-chartered entities. *Cf.* 12 U.S.C. § 21; *but see* 12 C.F.R. § 5.34. No law grants the exclusive regulatory authority over state created entities such as WFHMI to the OCC, the agency responsible for overseeing national banks. *See* 12 U.S.C. §§ 1, et seq.

If Congress had intended 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 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. A court must give meaning to all statutory provisions and to interpret the statute consistently with the structure, legislative history and motivating policies, so as to not make ineffective other provisions of the statute. *See*; *United States v. Nordic Village, Inc.,* 503 U.S. 30, 36 (1992) *Bifulco v. United States,* 447 U.S. 381, 387 (1980); *United States v. Fisher,* 58 F.3d 96, 99 (4th Cir. 1995).

WFHMI is a state-chartered corporation and has held such corporate status in California since 1964 (formerly known as Norwest Mortgage, Inc.). SUF No. 3. As a separate corporate entity, WFHMI has its own identity, assets, liabilities, and regulatory responsibilities, separate and distinct from those of its parent corporation. Therefore, Wells Fargo and WFHMI are insulated from each other's liabilities and responsibilities because "[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 (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.") It is undisputed that WFHMI is not a bank; it is not a state or federally authorized bank. It is a state-authorized corporate citizen who engages in residential lending transactions. SUF Nos. 3 and 4.

Nowhere has Congress expressed in the federal banking laws that such a state-created legal entity is the equivalent of a nationally organized bank. *See* 12 U.S.C. §§ 1, et seq.; 12 U.S.C. § 21, 12 U.S.C. § 24 (Seventh). Yet plaintiffs are asking this court to rule WFHMI is entitled to the same benefits, protections and exclusive oversight as the bank. This interpretation is not supported by any Congressional mandate authorizing an "operating subsidiary" as a separate legal entity distinct from a national bank to be treated the same as a national bank for purposes of regulation.

In fact, at least one other District Court concluded that a mortgage company operating subsidiary of Fleet National Bank was not a "bank" under Section 133 of the Gramm-Leach-Bliley Act (codified at 12 U.S.C. § 1816), 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." *Id.* at 999. The court rejected the arguments by both Fleet National Bank and the OCC 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 1001.

Fleet Mortgage analyzed the issues now before this Court, and (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 FDIA [Federal Deposit Insurance Act]. *Id.* at 999-1002.

WFHMI is not chartered or organized as a national bank. *See* 12 U.S.C. §§ 21 et seq. WFHMI is a wholly owned subsidiary of Wells Fargo. SUF No. 2. Accordingly, where there is no express Congressional authorization to do so, these two separate and distinct entities should not be treated as identical under the NBA.

Finally, as a state chartered corporation conducting business in California, WFHMI is availing itself of the rights and privileges of a California corporation, yet claiming not to be subject to California's laws by way of the OCC's exclusive regulatory authority over operating subsidiaries. To treat WFHMI the same as a national bank would be to place WFHMI in a unique position, giving it an unfair advantage in the marketplace against other mortgage lenders in California not affiliated with national banks and, therefore, subject to California's laws. As a general policy, this result would be inherently unfair to California businesses and affect a result not contemplated or sanctioned by Congress.

As has been succinctly stated by the district court for the Eastern District of Pennsylvania, "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 is not such a national bank.

III. THE OCC LACKS AUTHORITY TO ADOPT REGULATIONS GIVING IT EXCLUSIVE REGULATORY POWERS OVER OPERATING SUBSIDIARIES

By promulgating regulations seeking to regulate operating subsidiaries of national banks to the exclusion of the states, the OCC is interfering with California's constitutional sovereignty under the Tenth Amendment and taking away the state's powers to regulate and enforce its laws against state-chartered corporations such as WFHMI.

"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 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, 953 (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 (D.C. CT 1999).

In *First Union*, the Connecticut District Court was presented with the 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. The 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). However, as set forth above, WFHMI is not a national bank, but rather a corporate citizen of the state of California. Accordingly, neither Congress nor the OCC as the regulatory agency responsible for application of the NBA, have the power to establish and regulate operating subsidiaries of national banks to the exclusion of the states. *See 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).

Further, the OCC has exceeded its constitutional and statutory authority in promulgating 12 C.F.R. § 7.4006 which, in essence, seeks to preempt state laws as they apply to operating subsidiaries of national banks.

The first question that must be answered in any preemption analysis is whether Congress intended that federal law or regulation would supersede state law. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). As to preemption of state law, the OCC regulations may only preempt state law " . . . when and if it is acting within the scope of its congressionally delegated authority . . . . An 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." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The OCC can point to no express delegation authority.

Congress has not defined an "operating subsidiary" in the NBA or the Gramm-Leach-Bliley Act ("GLBA"). *See generally*, 12 U.S.C. § 21 et seq. & § 24(a). Congress has not expressly granted national banks the authority to own or establish operating subsidiaries in the NBA or the GLBA. **T**he OCC has interpreted Title 12 U.S.C. Section 24 (Seventh) as giving the OCC 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.

There is a long-standing rule designed to aid courts in statutory construction: ". . . 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). The failure of the 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 fact, 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 promulgated its regulation giving national banks the right to establish operating subsidiaries in 1966,

waited until after passage of the GLBA to attempt to expand its exclusive visitorial authority. 12 C.F.R. § 5.34; 31 Fed.Reg. 11,459 (Aug. 31, 1966).

Absent express Congressional authorization for its actions, the OCC has exceeded its authority in promulgating regulations governing "operating subsidiaries" and purporting to preempt the licensing and visitorial provisions of state law such as the CRMLA and the CFLL. *See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. The OCC's General Rulemaking Authority Does Not Support Its Promulgation Of Regulations Exclusively Governing Operating Subsidiaries

The OCC's general rulemaking authority under 12 U.S.C. Section 93a is insufficient to support its promulgation of regulations that seek to give the OCC exclusive regulatory authority over operating subsidiaries, especially where as here, the entity is a state-chartered corporation. Title 12 U.S.C. Section 1 establishes the OCC as the federal agency responsible for overseeing national banks established pursuant to the NBA.[6] The 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. While 12 U.S.C. § 93a recognizes and codifies the OCC's authority to regulate in the area of national banking, it does not recognize or codify the OCC's authority to regulate

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[6] 12 U.S.C. § 1 provides:

> There shall be in the Department of the Treasury a bureau charged 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)(b)(3)] . . .

operating subsidiaries of national banks. To regulate operating subsidiaries the OCC must have express Congressional authorization. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

In *Motion Picture Association of America, Inc. v. Federal Communications Commission,* 309 F.3d 796, 801 (D.C. Cir. 2002), the Court of Appeals specifically addressed the issue of an agency's general grant of authority and found such authority insufficient to support the FCC's promulgation of regulations regarding video description rules that impacted television program content.[7] *Id.* at 805. In *Motion Picture Association of America,* the FCC attempted to rely on a similar grant of authority as the OCC claims in this case. The FCC was expressly authorized to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." *Id.* at 802-803 (quoting § 1 of the Communications Act, *codified at* 47 U.S.C. § 154(i)). The agency was further directed to "ensure that all people of the United States, without discrimination, have access to wire and radio communication transmissions." *Id.* at 804 (summarizing § 1 of the Communications Act).

The court found that the general rulemaking authority of the FCC did not expressly address the content of television programs. *Motion Picture Association of America,* 309 F.3d 796, 804. Accordingly, the FCC exceeded its authority when it promulgated regulations which had the effect of governing such content. *Id.* This is analogous to the situation presented by the OCC in promulgating regulations governing operating subsidiaries of national banks.

The NBA does not expressly address operating subsidiaries. *See* 12 U.S.C. §§ 1, et seq. Further, nothing in the NBA indicates an intent by Congress for the OCC to issue regulations giving it exclusive regulatory authority over operating subsidiaries.

Even the FCC, which had a much broader grant of authority than the OCC may

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[7] The Motion Picture Association of America, Inc., also put before the court arguments intending to show that another section of the statute (47 U.S.C. § 613) by its express terms denied the FCC the authority to promulgate the regulations at issue. However, the court principally rested its decision that the promulgation of the regulation was improper on the agency's claim of general rulemaking authority. *Motion Picture Association of America, Inc. v. Federal Communications Commission,* 309 F.3d 796, 801, (D.C. Cir. 2002).

claim here, was restrained by the appellate court. The court found that the regulations the FCC had promulgated significantly impacted programming content, which was a result not contemplated by Congress. *Id.* While finding that the FCC's authority under the statute was broad, the court held it was "not without limits." *Motion Picture Association of America,* at 804. Here, while the OCC's general rulemaking authority is broad as it applies to national banks, it must be restrained where it seeks to expand its limited delegated Congressional authority.[8] Congress has never expressly extended the rulemaking authority of the OCC to operating subsidiaries. *Cf.* 12 U.S.C. §24a(a)(5) (directing the OCC to promulgate regulations regarding financial subsidiaries).

To find that the OCC's general rulemaking authority vests in the agency the power to regulate operating subsidiaries of national banks, to the exclusion of the states, would be to grant the OCC unlimited authority not contemplated and not yet authorized by Congress. 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.

B. The OCC's Interpretation Of 12 U.S.C. 24 (Seventh) Does Not Support Its Promulgation Of Regulations Exclusively Governing Operating Subsidiaries

Title 12 U.S.C. § 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 § 24 (Seventh) gives *national banks* the ancillary authority to establish operating subsidiaries, this section in no way acts as express Congressional authority for the *OCC* to regulate such 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*

[8] *See Independent Insurance Agents of America, Inc. v. Hawke,* 211 F.3d 638, 645-646 (D.C. Dist. 2000) (finding that the Comptroller of the Currency exceeded his congressionally delegated authority when he promulgated regulations

banks, not the regulatory body.

Further, nothing within § 24 (Seventh) expressly grants to the OCC the authority to regulate all "such incidental powers" in which the 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 N.C., N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251 (1996).

While several cases have impliedly recognized a national bank's ability to conduct banking activities through operating subsidiaries, no case has directly dealt with the issue of the OCC's exclusive regulatory authority over operating subsidiaries. In *M & M Leasing Corp. v. Seattle First Nat'l Bank*, 563 F.2d 1377 (9th Cir. 1977), the issue before the court was whether the "business of banking" authorized by 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 that an operating subsidiary was the equivalent of a national bank or subject to the OCC's exclusive regulatory authority. *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 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).

Moreover, 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

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pursuant to 12 U.S.C. 24 (Seventh) allowing national banks to sell crop insurance).

withheld such power. *See Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

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 Stat. 2338 (Sept. 29, 1994) *codified at* 12 U.S.C. § 36.[9] 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 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 addressing the application of state law, or 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[10] owned by a national bank that the OCC exercises over the parent national bank. *See* 12 U.S.C. § 1818.[11] The Bank Service Company Act specifically provides that the performance of those acts

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[9] 12 U.S.C. §36(l) 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.

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

> . . . (2) any corporation-- (i) which is organized to perform services authorized by this Act [12 USCS §§ 1861 et seq.] (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.

[11] 12 U.S.C. § 1818 sets forth the OCC's general enforcement authority over national banks.

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). In the case of a bank service company owned or operated by a national bank, the OCC is the appropriate federal agency responsible for such supervision and enforcement. 12 U.S.C. § 1818; 12 U.S.C. §§ 1861-1867.

However, Congress has never enacted similar legislation granting the OCC authority to preempt state laws applicable to such state-chartered entities such as WFHMI.

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 Gramm-Leach-Bliley Act (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).

Title 15 U.S.C. section 6701 of the GLBA expressly limits the preemption of state laws as they apply to financial subsidiaries of national banks. Preemption of a state law is specifically prohibited if: (A) the state law does not relate to or regulate insurance sales, solicitations, or cross marketing activities; (B) the state law does not relate to or regulate the business of insurance activities; (C) the state law does not relate to certain securities investigations or enforcement actions; and (D) the state law does not treat depository institutions and their affiliates differently than other persons engaged in the same activities, does not prevent a depository institution or affiliate from engaging in activities authorized by the GLBA and does not conflict with the intent of the GLBA. 15 U.S.C. § 6701(d)(4)(i) to (iv).

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, not implicitly.

The assertions by plaintiffs and the OCC in the preliminary injunction briefing 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 645. 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.

C. The GLBA Does Not Delegate To The OCC Authority To Promulgate Regulations Exclusively Governing Operating Subsidiaries

In promulgating 12 C.F.R. § 7.4006, the OCC cited only the GLBA as its statutory authority to expand its exclusive regulatory authority to operating subsidiaries. *See* 66 Fed.Reg. 34784, 34788, n.15. However, Congress did not recognize operating subsidiaries in the GLBA or expressly authorize the OCC to promulgate regulations governing such entities to the exclusion of the states. *See generally* 12 U.S.C. § 24a.

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). Title 12 U.S.C. section 24a, subsection (g)(3)(A), to which the OCC cites as its authorizing power, is a definition of a "financial subsidiary," not an "operating subsidiary". The term "financial subsidiary" 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).

It has been the plaintiffs' and the OCC's contention that this definition impliedly recognizes operating subsidiaries. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction, p. 11 However, this argument is without merit. Under the maxim *expressio unius est exclusio alterius,* 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). That is, "[a] statute listing the things it does cover exempts, by omission, the things it does not list. As to the items omitted, it is a mistake to say that Congress has been silent. Congress has spoken – these matters are outside the scope of the statute." *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999). Congress did not expressly recognize operating subsidiaries or grant to the OCC the authority to promulgate regulations governing operating subsidiaries in the GLBA. Accordingly, operating subsidiaries and their regulation are outside the scope of the GLBA.

Further, subsection (a)(5) of 12 U.S.C. § 24a explicitly directs the Comptroller of the Currency to enact regulations prescribing the procedures to implement the purposes and provisions of the Act, namely national banks' ability to conduct certain operations through "financial subsidiaries." Despite making the most recent pronouncement on banking law in the GLBA in 1999, Congress gave no similar direction or grant of authority to the Comptroller to promulgate regulations regarding "operating subsidiaries."

Thus, the GLBA is not the express, and cannot be the implied, Congressional authority required to support the OCC's promulgation of 12 C.F.R. § 7.4006, whereby the OCC purports to restrict the application of state laws to operating subsidiaries of national banks. *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). Neither plaintiffs nor the OCC provide this Court with any other Congressional authority for the OCC's action.

D. Absent A Delegation Of Authority From Congress, The OCC's Regulations Are Not Entitled To Deference

Absent direct Congressional authority to regulate operating subsidiaries of national banks, the OCC's regulations regarding operating subsidiaries are not entitled to deference. *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 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, that is the end of the Court's inquiry 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 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, 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) (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, 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.

E. The OCC's Assertion Of Exclusive Authority Over Operating Subsidiaries Is Unreasonable

The OCC's promulgation of regulations giving it exclusive regulatory authority over operating subsidiaries cannot be a reasonable interpretation of the statute when 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. Federal Communications Commission,* 309 F.3d 796, 801 (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.

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 currency for the whole country, financing commerce and acting as private depositories. *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954).

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) (first case recognizing applicability of state laws to national banks). In *National Bank*, 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.

The Supreme Court in *McClellan v. Chipman*, 164 U.S. 347 (1896) held a state statute to be applicable to a national bank even when federal law expressly addressed the subject matter of the state law. *McClellan*, 164 U.S. 347, 358. The federal law permitted national banks to take real estate for given purposes, including security for debt or in satisfaction of debts, while Massachusetts law forbade certain real estate transfers by insolvent transferees. *Id.* at 357-358.

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

The Court rejected the proposition that any limitation by a state on the making of contracts is a restraint upon the power of a national bank, and indicated that the proper issue was whether the state law violated the act of Congress, noting:

> "As long since settled in the cases already referred to, the purpose and object of Congress in enacting the national bank law was to leave such banks as to their contracts in general under the operation of the state law, and thereby invest them as Federal agencies with local strength, whilst, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States."

McClellan, 164 U.S. 347, at 359.

Similarly, 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*, 2002 U.S. Dist. LEXIS 24521 (E.D. Cal. Dec. 2002) (*quoting Lewis v. Fidelity & Deposit Co. of Maryland*, 292 U.S. 559, 566 (1934)).

Further, as stated in *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980) "[w]hatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the National Bank Act in 1863. . . .[U]nquestionably, as in other businesses, federal presence in the banking fields has grown in recent times. But congressional support remains for dual regulation. In only a few instances has Congress expressly preempted state regulation of national banks." *Id.* at 985.

The California statutes at issue in this case in no way interfere with the purposes of the NBA or the operation of national banks. Accordingly, the OCC's interpretation of the National Bank Act as giving it exclusive regulatory authority over operating subsidiaries, which are not national banks, is not reasonable.

IV. PREEMPTION WOULD ONLY APPLY TO LENDING ACTIVITY AFTER AUGUST 1, 2001.

Without conceding the foregoing arguments, if this Court were to find preemption appropriate, it should be applied prospectively from the date of the enactment of the OCC's regulation, August 1, 2001. There is a presumption against applying preemption retroactively. *See Scott v. Boos*, 215 F.3d 940, 943 (9th Cir. 2000) citing *Landgraf v. USI Film*, 511 U.S. 244 (1994).

"[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf*, 511 U.S. at 272 (cite omitted).

The operating subsidiary preemption rule, 12 C.F.R. section 7.4006, was not promulgated by the OCC until July 2, 2001, and had an express effective date of August 1, 2001. Thus, under the rules of statutory construction set forth in *Landgraf*, federal preemption of the CRMLA and the CFLL, if found by this court, would only apply from August 1, 2001 forward because 12 C.F.R. section 7.4006 has no retroactive application. [12]

The *Landgraf* case states that "when a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, there is no need to resort to judicial default rules. If the statute has no express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such result." *Id.* at 280.

Because the OCC specifically prescribed the preemption rule become effective August 1, 2001 there is no need to look at the second prong in *Landgraf* to determine that the rule is not to be applied retroactively.

Accordingly, were the court to find in favor of plaintiffs at trial based upon federal preemption of the CRMLA and the CFLL, it should have no effect on the conduct of WFHMI prior to August 1, 2002. 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.

V. THE DIDMCA DOES NOT PREEMPT CALIFORNIA LAW

Plaintiffs cannot demonstrate that preemption exists such that the California per diem interest

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[12] The rule of statutory construction set forth in *Landgraf* to determine whether a statute should be applied retroactively was followed by the Eastern District in *Mannat v. United States*, 951 F. Supp. 172 (E.D. CA 1996).

statutes, which regulate when a lender may begin charging interest, should be invalidated in whole or part. The DIDMCA does not compel preemption of the per diem interest provisions, insofar as the state statutes do not expressly limit the rate or amount of interest plaintiff may charge and they do not frustrate or impair the goals and intent of the federal act.

A. The California Per Diem Statutes Are Not Preempted By DIDMCA.

Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, federal law may preempt state law "either by express provision, by implication, or by a conflict between federal and state law. (Citations omitted)." *Shin v. Encore Mortgage Servs*., 96 F. Supp. 2d 419, 423 (D. N.J. 2000) *citing New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 654 (1995). In addition, in areas traditionally regulated by the states, such as consumer protection, there is a 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 (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*, 116 S. Ct. 145 (1995).

There is no clear and manifest intent of Congress to preempt California statutes concerning when the lender may begin to charge interest. Furthermore, to the extent potential conflict preemption is alleged, compliance 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.

The first issue regarding DIDMCA before this court is whether the California Corporations Commissioner may enforce the per diem limitation provision of subdivision (o) of California Financial Code section 50204. This section 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).

Also at issue is whether the Commissioner may enforce an earlier version of California Civil Code § 2948.5[13] (subsequently amended) that read in pertinent part as follows:

> "interest on the principal obligation of a promissory note secured by a mortgage or deed of trust on real property improved with one-to-four residential dwelling units shall not commence to accrue prior to close of escrow if the loan proceeds are paid into escrow or, if there was no escrow, the date upon which the loan proceeds have been made available for withdrawal as a matter of right, as specified in subdivision (d) of Section 12413.1 of the Insurance Code."

For purposes of this motion, the Commissioner's arguments apply equally to the former Civil Code section, which will not be discussed separately. Plaintiffs' contention that these statutes are preempted fails to take into account the express language of DIDMCA or the etiology of the Act.

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). Subdivision (o) of California Financial Code section 50204 does not fall within the type of activities preempted by DIDMCA because it does not *expressly limit* interest rates or amounts. Rather, the state statute establishes the date upon which the per diem interest may be assessed upon a borrower.

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

[13] 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.

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. . . ."

Smith at 12 (emphasis added).

While this goal of promoting the American dream of home ownership is certainly laudable, the California statutory provisions challenged by WFHMI are unrelated to the very type of laws DIDMCA was enacted to preempt: state usury statutes. Yet, WFHMI seeks to don the cloak of federal preemption to avoid a California provision that does not impair that statutory scheme in any way.

Subdivision (o) is not a usury statute.[14] The per diem interest provisions do nothing more than compel a close relationship between the date interest charges begin and the date of recordation of the deed of trust. The purpose of the California law is to protect the consumer from paying interest on money that has not yet bought him the benefit of his bargain. It does absolutely nothing to frustrate the broad goals of DIDMCA. It does not limit the rate of interest WFHMI can charge. It does not limit the total amount of interest WFHMI can collect, as the rate of interest charged remains within the control of the WFHMI and may be bargained with the consumer. The

[14] California's usury law is found in the California Constitution, Article XV, sec. 1.

state law merely encourages lenders to be assiduous in providing borrowers with recorded title and trust deeds by preventing them from charging interest in excess of an allowable one day time period until the documents are recorded.

B. Unlike State Usury Laws, The "Per Diem" Statute Does Not Impose Any Limitations Or Barriers Upon The Loan Market.

Plaintiffs reliance on *Shelton v. Mutual Savings and Loan*, 738 F.Supp. 1050 (E.D. Mich. 1990) for the proposition that if a state law that prohibits charging of interest before loan funds are disbursed is preempted then California's per diem statutes must also be preempted is misplaced. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction, p. 18-19. Although *Shelton* did find preemption,[15] it dealt in pertinent part with a Michigan statute that read as follows:

> "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.)

While the 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 did expressly refer to "a rate of interest." The district court ultimately found it too ambiguous to interpret, and held that it is "not within the province of a federal court to attempt to read the minds of state legislators. . . ." *Shelton* at 1058.

Therefore, it is simply not accurate to say the *Shelton* case holds that a per diem statute like the one at issue here is preempted by DIDMCA. Indeed, that federal court said, ". . . if the state legislature had intended to prohibit lenders from charging interest on undisbursed funds, it could have done so clearly and unambiguously." *Id.* at 1058. Therefore, it remains an open question as to how the *Shelton* court would have ruled on a statute, such as California Financial Code section 50204(o), that does not expressly affect the rate of interest. While the *Shelton* court could not interpret the Michigan statute, it apparently concluded the Michigan law was a usury statute. *See*

[15] Commissioner's Opposition to the Amicus Curiae of the Office of Controller of the Currency was mistaken when it stated that the *Shelton* court did not reach the issue of preemption. Defendant apologizes to the court for the error.

Shelton at 1057. However, the per diem statutes are unrelated to the California Usury Law. *Compare* Cal. Const. Art. XV, §. 1 *with* Cal. Fin. Code § 50204(o).

The Commissioner invites the Court to review the express language and the underlying intent of DIDMCA expressed by Congress, to address the limitations imposed by the usury laws when they impede the loan market. The per diem interest statutes do not seek to impose such limitations. However, the statutes most certainly are "designed to protect borrowers," a goal which the DIDMCA drafting committee thought could peacefully coexist with the goals of the federal statute, and which the Office of Thrift Supervision ("OTS")[16] recognizes as permissible pursuant to its own regulations. *See* 12 C.F.R. 590.3 (c) ("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.)).

C. DIDMCA Does Not Preempt Laws, Such As The Per Diem Statute, That Are Designed To Protect Consumers.

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 (SIS). The court failed to find any congressional intent that would allow DIDMCA to preempt the SIS and determined that no express interest rate limitations existed in the SIS.

The *Grunbeck* court emphasized the interpretive importance of the language from Section 501 of DIDMCA "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 where Congress, as relates to credit cards, preempted all state legislation "with respect to interest rates." *Grunbeck* at 338. The court recognized that Congress was acutely aware that its choice of the distinctive terminology -- "expressly limiting" - would be a primary interpretive tool. *Id.* 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 state statutes, like the

California per diem interest statutes or the New Hampshire simple interest statutes, would not be preempted.

Plaintiffs contend that "there is no basis for the Commissioner's argument that an analogy may be drawn between [the] California [per diem restriction] and the simple interest statute (SIS) which is not preempted by DIDMCA according to the appellate court in *Grunbeck."* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction, at page 19. Plaintiffs argument seeks to avoid the clear and simple holding of *Grunbeck* because the SIS, like per diem, 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.

It is undisputed by plaintiffs that the per diem statutes of California do not have any perceptible impact on the supply of home-loan mortgages. Therefore, the purpose for which DIDMCA was enacted is not at issue here.

Like the simple interest statutes in *Grunbeck*, the per diem statutes are consumer protection statutes. By placing the responsibility for any delays between funding and recording the deed on the lender, the California statutes protect the consumer from an "unseen" cost, in much the same way as did the simple interest statute in *Grunbeck.* Despite plaintiffs' contention that " the parties cannot contract around the per diem interest restriction as they could with the simple interest statute in *Grunbeck*" (Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction, at page 19), nothing in the per diem interest 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 and which would be fully

[16] The Federal Home Loan Bank Board and its successor, the OTS, are authorized to issue rules and regulations governing the implementation of DIDMCA pursuant to 12 U.S.C. § 1735 f-7a(f).

disclosed to the borrower.

Additional guidance may be found in *Larsen v. Countrywide Home Loans, Inc.*, 2001 U.S. Dist. LEXIS 10023 (Ill. 2001). There, the plaintiffs were homeowners who paid off their mortgage early, on August 18, 2000. The lender, however, charged them interest for the entire month of August. The Larsens sued, alleging violation of an Illinois statute prohibiting lenders from charging interest for any period after payment of the principal. The 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 to *any* state law that has an effect on how much interest a borrower must pay. *Larsen* at 3. Yet, that is precisely the gist of plaintiff's argument. *See* Plaintiff's Memorandum in Support of Plaintiff's Motion for Preliminary Injunction at 15. As in *Grunbeck* and as followed in *Larsen,* such an argument must be rejected.

D. DIDMCA Also Provides An Exception For "Other Charges"

Alternatively, the very statute so relied on by WFHMI does in fact contain an exception under which this court may conclude that California's per diem statute could qualify. Subsection (b)(4) of 12 U.S.C. § 1735f-7a (of DIDMCA) provides as follows:

> "At any time after the date of enactment of this Act (enacted March 31, 1980), any state may adopt a provision of law placing limitations on discount points or *such other charges* on any loan, mortgage, credit sale, or advance described in subsection (a)(1)." (emphasis added)

Whether the per diem charges governed by subdivision (o) of section 50204 of the California statute may be considered "other charges" under DIDMCA, such that California may limit them, is a question of first impression for this Court. Because the moneys charged to the borrower are before he has yet to receive the benefit of his bargain, they may be classified as charges rather than interest.

Plaintiff's claim that the California per diem statute is preempted by DIDMCA must, therefore, fail. The plaintiff provides scant case authority in the face of the well-reasoned *Grunbeck*

appellate case. The plain reading of the California statute 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.

Although plaintiffs will seek to convince the court that DIDMCA preempts California per diem interest statutes, in reality there is no case law anywhere in the nation that so holds. The statutes at issue do not encroach on the narrow field that DIDMCA preempts, and there is no legitimate policy need for this court to erase from California books a statute that the state legislature considered appropriate for the protection of consumer/borrowers.

VI. PLAINTIFFS' CLAIM OF RETALIATION IS SPECIOUS

The Commissioner's decision to institute administrative proceedings to revoke WFHMI's CRMLA and CFLL licenses is mandated under California law and is not in retaliation for filing this action. *See* Cal. Const. art. III, § 3.5; SUF No. 8. As set forth below, plaintiffs' retaliation claim must fail as a matter of law.

The filing of a lawsuit and the right of access to the courts is subsumed under the First Amendment right to petition the government for redress of grievances. (citations) *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989); *American Civil Liberties Union of Maryland, Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993). The United States Supreme Court has set forth a well-established framework for analyzing retaliation claims based on First Amendment rights. In order to show a First Amendment violation, the burden is initially on the plaintiff to show conduct was constitutionally protected and that this protected conduct was a "substantial" or "motivating" factor in the defendant's decisions. If the plaintiff carries this burden, the burden then shifts to the defendant to establish that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). The Ninth Circuit has consistently used the *Mt. Healthy* analysis in cases of First Amendment retaliation claims. *See Allen v. Iranon*, 283 F.3d 1070, 1074 (9th Cir. 2002).

The undisputed facts reveal that plaintiffs' cannot meet their initial burden to show that the filing of this action was a "substantial" or "motivating" factor in the Commissioner's decision to

revoke WFHMI's CRMLA and CFLL licenses. It is undisputed that plaintiffs filed this lawsuit on January 27, 2003, and on February 4, 2003, the Commissioner instituted two administrative proceedings to revoke WFHMI's CRMLA and CFLL licenses. SUF Nos. 21 and 23. However, this mere sequence of events does not create even a weak inference of a retaliatory motive.

The Ninth Circuit rejects any bright line rule about the timing of retaliation stating "[T]here is no set time beyond which acts cannot support an inference of retaliation, and there is no set time within which acts necessarily support an inference of retaliation." *Coszalter v. City of Salem*, 320 F.3d 968; 2003 U.S. App. LEXIS 2907, 25; 2003 Cal. Daily Op. Service 1424; 2003 Daily Journal DAR 1851 (9th Cir. Or. Feb. 18, 2003). Whether an action is intended to be retaliatory is a question of fact to be decided on a case by case basis considering the timing and the surrounding circumstances. *Id*.

The uncontroverted evidence shows that Plaintiffs knew the Commissioner intended to initiate enforcement proceedings against WFHMI if WFHMI did not comply with the Commissioner's demands to perform audits and comply with the CRMLA. SUF Nos. 18 and 22. Plaintiffs filed this lawsuit as a preemptive strike to block the Commissioner from exercising his statutory authority and constitutional mandate to enforce the CRMLA and the CFLL against WFHMI.

On December 4, 2002, the Commissioner demanded that WFHMI conduct an audit of its residential mortgage loans made in California during 2001 and 2002 to identify all loans and make appropriate refunds to borrowers where WFHMI charged excess per diem interest in violation of California Financial Code section 50204(o). SUF No. 18. The Commissioner also demanded that WFHMI identify all instances of understating finance charges in violation of the Truth in Lending Act and California Financial Code sections 50204 (i), (j) and (k). *Id.* The Commissioner specifically reserved the right to proceed with all statutory remedies contained in the CRMLA if compliance was not forthcoming. *Id.*

On January 17, 2003, the Commissioner sent a letter to WFHMI's counsel setting a deadline of no later than January 23, 2003 for WFHMI to provide the Department with a plan to conduct the audit and make refunds in compliance with the Commissioner's demand. SUF No. 19.

On January 22, 2003, WFHMI sent a letter to the Commissioner stating that WFHMI did not agree with the Commissioner and would not comply with the Commissioner's demand. SUF No. 20.

On January 27, 2003, WFHMI filed a complaint initiating this federal lawsuit, seeking an injunction and declaratory relief because WFHMI was not obligated to comply with California Financial Code section 50204(o), the CRMLA, the CFLL, or the Commissioner's demands. SUF No. 21. In its complaint, Plaintiffs' explicitly acknowledged that WFHMI's failure to comply with the Commissioner's demand and the provisions of state law would result in an enforcement action being taken by the Commissioner. SUF No. 22; *see also* FAC, page 2, lines 21-25. (stating "[T]he Commissioner has demanded that WFHMI conduct . . . a complete manual audit. . . with the understanding that its failure to do so, as well as to comply with the per diem restriction and the Commissioner's interpretation of the federal TILA, will result in an enforcement action.").

Based on the refusal set forth in the January 22, 2003, letter the Commissioner was on notice that a licensee was refusing to comply with the laws under which it had voluntarily sought licensure. The January 27, 2003, complaint further confirmed to the Commissioner in a public document that WFHMI had no intention of complying with the state laws under which it maintained licenses. The Commissioner's decision to institute license revocation proceedings against WFHMI was because WFHMI refused to comply with state law at the same time it continued to hold itself out to the public through advertisements as a licensee of the Department of Corporations. Sufficient grounds for revocation existed as of the January 22, 2003, refusal to comply with the law; the federal court action further confirmed that WFHMI had no intention of complying with the state laws and that action was required in order to protect the public from misconceptions it might have that licensees were complying with the law.

In *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, a case similar to this matter, the Ninth Circuit provides guidance in applying the *Mt. Healthy* test. Plaintiffs brought an action under 42 U.S.C. section 1983 against the County of Stanislaus and its Air Pollution Control District ("APCD"). Soranno's Gasco, Inc. ("Gasco") was in the business of selling and distributing petroleum products and operated under permits issued by the APCD. One of the plaintiffs' allegations was that the defendants suspended Gasco's petroleum bulk plant permits and discouraged

customers from doing business with Gasco in retaliation for a previous lawsuit brought by Gasco against the APCD challenging certain regulations and exemptions. Some time after this previous litigation, the APCD requested Gasco to furnish information concerning "bob-tail" delivery. Gasco refused to comply with this request. Three months later, the APCD again demanded this information and advised Gasco that its permits would be suspended if it did not comply. Two weeks later, the APCD suspended the permits pursuant to statutory authority. Approximately two weeks later, on the same day that Gasco's counsel informed the APCD that Gasco would provide the requested information, the defendants sent letters to Gasco's customers informing them that the permits were suspended and discouraging them from doing business with Gasco.

The Ninth Circuit, applying the *Mt. Healthy* analysis, cited several facts asserted by the plaintiffs from which a fact finder could infer a retaliatory motive, none of which are present in or analogous to the case here. The timing of this lawsuit and the initiation of the administrative proceedings are the only facts that WFHMI can assert to establish a retaliatory motive. This is not sufficient to demonstrate a retaliatory motive by the Commissioner. *Soranno's Gasco, Inc.* 874 F.2d at 1315-1316.

Even were this Court to find that plaintiffs have met their initial burden of showing that the filing of this lawsuit was a "substantial" or "motivating" factor in the Commissioner's decision to institute revocation proceedings, there is no First Amendment violation because the Commissioner can establish by a preponderance of the evidence that he would have reached the same decision even if WFHMI had not filed this lawsuit. *Mt. Healthy City School District Board of Education*, 429 U.S. at 287.

In this matter, the Commissioner demanded that WFHMI perform audits and comply with the CRMLA months before this federal action was filed, and the Commissioner informed WFHMI that there would be consequences for its failure to comply. *See* SUF Nos. 18, 19 and 22. Further, WFHMI told the Commissioner by letter on January 22, 2003 and by filing this lawsuit on January 27, 2003, that it would not comply with the provisions of the CRMLA and the CFLL because of its claim of federal preemption. SUF Nos. 20 and 21.

Even if a claim of federal preemption were made, Article III, Section 3.5 of the California Constitution mandates that the Commissioner enforce the laws under his jurisdiction until an appellate court has made a determination that the enforcement of the law is prohibited by federal law or federal regulation.

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); Tit. 10, Cal. Code Regs. § 1422. When WFHMI informed the Commissioner it would not comply with the CRMLA and the CFLL, the Commissioner had sufficient grounds to revoke WFHMI's CRMLA and CFLL licenses. WFHMI cannot be allowed to continue to maintain CRMLA and CFLL licenses and yet claim it is not subject to the provisions of these laws. Therefore, the administrative revocation proceedings would have been appropriately instituted even if plaintiffs had not filed the federal court action. Accordingly, there has been no violation of WFHMI's First Amendment rights and the claim of retaliation must fail as a matter of law.

Plaintiffs' further allegation that the Commissioner violated their constitutional rights and therefore have a cause of action under 42 U.S.C. section 1983 also fails. To prevail in a 42 U.S.C. section 1983 action, the plaintiff must plead and prove that a proper defendant (1) acted under color of state law and (2) deprived plaintiffs of rights secured by the Constitution or federal statutes. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). As discussed above, as a matter of law, there is no violation of plaintiffs' First Amendment rights. Moreover, section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights elsewhere conferred. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Therefore, plaintiffs cannot maintain their cause of action under 42 U.S.C. section 1983.

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

Plaintiffs claims as set forth in counts I-III of the FAC are not actionable under 42 U.S.C. section 1983 in that the counts are based solely upon assertions that the CRMLA, the CFLL, California Financial Code section 50204(o), and Civil Code section 2948.5 are preempted either by the NBA or the DIDMCA and the Supremacy Clause of the United States Constitution. FAC ¶¶ 33-

51.

The instant case is similar to *White Mountain Apache Tribe v. Williams*, 810 F.2d 844 (9th Cir. 1985). In *White Mountain*, plaintiff native american tribe sued the State of Arizona for declaratory and injunctive relief under 42 U.S.C. section 1983 alleging that its rights under the Supremacy Clause and federal laws had been violated because the State of Arizona's assessment of taxes on their logging business was preempted by a comprehensive federal scheme regulating the harvesting and sale of tribal timber.

Plaintiffs' argument in the instant case is essentially the same; the State of California, by and through the Commissioner, is violating their rights under federal law and the Supremacy Clause by the Commissioner's assertion of regulatory, supervisory, examination, and enforcement authority over plaintiffs under the CRMLA and the CFLL because the CRMLA, the CFLL, California Financial Code section 50204(o) and Civil Code section 2948.5 are preempted by a comprehensive federal scheme in the form of the NBA and the DIDMCA.

The Ninth Circuit Court of Appeals in *White Mountain* found that 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).

Thus, as counts I – III are premised solely upon preemption, plaintiffs are unable to establish the essential element of a section 1983 action; a violation of an individual right. Accordingly, plaintiffs' first three counts fail as a matter of law with respect to having been brought under 42 U.S.C. section 1983 as does their request for attorney's fees under section 1988.

VIII. WELLS FARGO HAS FAILED TO SHOW ANY VIOLATION OF ITS RIGHTS

In addition to the other arguments set forth herein, the Commissioner is entitled to summary judgment against plaintiff Wells Fargo because of its failure to show that any of its constitutional or statutory rights have been violated. Wells Fargo bases its attack on the statutes in question -- the CRMLA, the CFLL, Civil Code Section 2948.5 -- on the premise that they are unconstitutional *as*

applied to it. FAC, ¶ 40, 45. Although Wells Fargo complains that it makes some residential mortgage loans directly, not through the separate corporate identity of WFHMI, the Commissioner has never attempted to enforce any California laws relating to Wells Fargo. *See* FAC, ¶ ¶7, 31. The only administrative actions in question brought by the Commissioner were solely against WFHMI, not against Wells Fargo. FAC ¶ 31.

Plaintiff's failure to show any attempt by the Commissioner to enforce the laws as to Wells Fargo demonstrates that Wells Fargo lacks standing to bring this action. In *San Diego Gun Rights Committee v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996), the court affirmed the dismissal of an action where plaintiffs had not been charged with any violations of the 1994 amendment to the federal Gun Control Act, yet alleged that they wished and intended to engage in conduct prohibited by the Act. Id. at 1124.

Drawing heavily on the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the court noted the following requirements for standing to sue in federal actions:

> "[P]laintiffs bear the burden of establishing their standing to sue. . . . To do so, they must demonstrate three elements which constitute the "irreducible constitutional minimum" of Article III standing. . . . First, plaintiffs must have suffered an "injury-in-fact" to a legally protected interest that is both "concrete and particularized" and "actual and imminent," as opposed to "'conjectural' or "hypothetical.'" Second, there must be a causal connection between their injury and conduct complained of. Third, it must be "likely"—not merely "speculative"—that their injury will be "redressed by a favorable decision. (quotations as in original, citations omitted.) *San Diego Gun Rights Committee* at 1126.

Wells Fargo cannot demonstrate that it has suffered an "injury-in-fact" to a legally protected interest. The only action taken by the Commissioner was as against WFHMI, a separate and distinct legal entity that had sought licensure with him and was failing to comply with the California law. Although Wells Fargo is the parent corporation, as set forth more fully in Section II above, it is isolated from any regulatory liabilities incurred by WFHMI by settled principals of corporate law relating to parents and their subsidiaries. Second, there is no injury to Wells Fargo other than the alleged injury claimed by WFHMI. FAC ¶ 31 Finally, because there is no injury to Wells Fargo, there is no redress that this Court could provide even in a favorable decision to WFHMI. Because standing issues may be properly raised at any time, including during motions for summary judgment

the Commissioner's motion for summary judgment as to Wells Fargo should be granted. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

CONCLUSION

The Commissioner submits that summary judgment against plaintiffs should be granted because the NBA does not expressly preempt the CRMLA and the CFLL nor grant to the OCC exclusive visitorial powers over WFHMI, federal regulations12 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 4, 2003

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