

RICHARD C. DARWIN (State Bar No. 161245)
COVINGTON & BURLING
One Front Street
San Francisco, California 94111
Telephone: (415) 591-6000
Fax: (415) 591-6091

E. EDWARD BRUCE (*pro hac vice* pending)
STUART C. STOCK (*pro hac vice* pending)
ROBERT A. LONG, Jr. (*pro hac vice* pending)
KEITH A. NOREIKA (*pro hac vice* pending)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Fax: (202) 662-6291

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV.S-03-0655 LKK DAD

NATIONAL CITY BANK OF INDIANA, and
NATIONAL CITY MORTGAGE CO.,

Civil Action No.

Plaintiffs,

versus

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

Defendant.

COMPLAINT FOR
DECLARATORY RELIEF,
TEMPORARY RESTRAINING
ORDER, PRELIMINARY
INJUNCTION, AND PERMANENT
INJUNCTION

BY FAX

1. Pursuant to state law, the California Department of Corporations ("DOC"), through Defendant Commissioner, has asserted that National City Mortgage Co. ("NCMC") must be licensed by the Commissioner, and be subject to the Commissioner's regulatory, supervisory, examination, and enforcement jurisdiction, in order to make and service residential mortgage loans in California. The Commissioner further has asserted that NCMC has violated a California state law, known as the California "per diem" restriction, that bars the charging of any interest on residential first mortgages for more than one day prior to the recording of a mortgage deed. On February 27, 2003, the Commissioner sent NCMC a letter

- 1 -

MAR 31 2003 11:26

+4155916091

PAGE.02

APR 02 2003 15:15 1609165591 01 11122446211 TO 14155916091 MAR 31 2003 16:18 FR FAX8FILE/SACRAMENT #3 916446211 TO 14155916091

+4155916091

PAGE.03

Filed By
Fax & File

1 requiring NCMC to comply with that state requirement by reporting to him its plan to undertake
2 an audit of all of its California mortgage loan files since August 2, 2000. Thus, the
3 Commissioner has demanded that NCMC submit to his supervisory authority and that NCMC
4 conduct, at a cost of several million dollars, an audit of more than 150,000 mortgage loan files,
5 with the understanding that its failure to do so will result in an enforcement action.

6 2. This complaint accordingly seeks declaratory and injunctive relief on
7 behalf of National City Bank of Indiana ("National City Bank"), a federally chartered national
8 bank, and its wholly owned operating subsidiary, NCMC, an operating subsidiary which
9 National City Bank owns pursuant to the National Bank Act and regulations promulgated under
10 that Act by the OCC. This case is very similar to *Wells Fargo Bank, N.A. v. Boutris*, Civ. No. S
11 03-0157 GEB JFM, in which this Court held, on March 10, 2003, that "the Commissioner is
12 preliminarily enjoined from exercising visitorial powers over Plaintiffs or otherwise preventing
13 [national bank operating subsidiary Wells Fargo Home Mortgage, Inc.] from operating in
14 California." *Wells Fargo* PI Order, at 15.

15 3. As this Court discussed in *Wells Fargo*, the OCC is the federal agency
16 responsible for interpreting and applying the National Bank Act, and has exclusive licensing,
17 regulatory, supervisory, examination, and enforcement authority under that Act and OCC
18 regulations over both National City Bank and NCMC. *Wells Fargo* PI Order, at 12-13.
19 Accordingly, the OCC can, and does, regulate and regularly examine both National City Bank
20 and NCMC to enforce their compliance with both federal and non-preempted state laws.
21 Moreover, in the Depository Institutions Deregulation and Monetary Control Act of 1980
22 ("DIDMCA"), Congress expressly preempted any state law "limiting the rate or the amount of
23 interest, discount points, finance charges, or other charges which may be charged, taken,
24 received, or reserved" on any mortgages or loans secured by a first lien on residential real
25 property, including those mortgages and loans covered by the California per diem restriction.
26 12 U.S.C. § 1735f-7a(a)(1). National City Bank and NCMC, faced with the Commissioner's
27 demand that NCMC comply with the preempted California per diem restriction in violation of
28 the OCC's exclusive federal supervisory jurisdiction, brings this suit against the Commissioner

1 of the DOC for declaratory and injunctive relief to vindicate the federal rights of both National
2 City Bank and NCMC under the Supremacy Clause, the National Bank Act and implementing
3 OCC regulations, and DIDMCA.

4 Jurisdiction and Venue

5 4. This action is brought under the National Bank Act, DIDMCA, the
6 Supremacy Clause of the United States Constitution, and 42 U.S.C. § 1983. The Court has
7 jurisdiction over this action pursuant to 28 U.S.C. § 1331, because it arises under the
8 Constitution and laws of the United States. In addition, jurisdiction is proper under 28 U.S.C.
9 § 1343(a)(3), because Defendant, under color of state law, seeks to deprive Plaintiffs of their
10 federal constitutional rights. This Court is authorized to issue a declaratory judgment pursuant
11 to 28 U.S.C. §§ 2201 and 2202.

12 5. Venue in this district is proper under 28 U.S.C. § 1391(b)(1), because the
13 Defendant resides in this district.

14 6. Pursuant to Local Rule 3-120(b), this action should be assigned to the
15 Sacramento division of this Court because the actions that give rise to this case occurred, and
16 the Defendant resides, in the counties of the Sacramento division.

17 7. This case is related to *Wells Fargo Bank, N.A. v. Boutris*, Civ. No. S 03-
18 0157 GEB JFM (filed January 27, 2003), because it presents the same legal issues, and nearly
19 identical factual issues, as those presented in that case. This case is also related to *Quicken*
20 *Loans, Inc. v. Boutris*, Civ. No. S 03-0256 GEB JFM (filed February 11, 2003), as it presents
21 the same DIDMCA preemption issue as the one presented in Count III of this Complaint.

22 The Parties

23 8. National City Bank is a national banking association organized and
24 existing under the National Bank Act, 12 U.S.C. § 21 *et seq.*, which maintains its main office
25 and principal place of business in Indianapolis, Indiana. National City Bank has no branches in
26 California. Pursuant to the National Bank Act and implementing OCC regulations, National
27
28

1 City Bank has established, wholly owns, and operates NCMC as an operating subsidiary to
2 conduct the majority of the Bank's residential mortgage lending.

3 9. NCMC is organized as an operating subsidiary of National City Bank
4 pursuant to OCC regulations issued under the National Bank Act. NCMC provides residential
5 mortgages in California to which the California per diem restriction by its terms purportedly
6 applies. NCMC makes mortgages and other loans that are secured by first liens on residential
7 real property. These mortgages have been made after March 31, 1980. NCMC is a "creditor"
8 under the Truth In Lending Act, 15 U.S.C. § 1602(f), and makes or invests in residential real
9 estate loans aggregating more than \$1 million per year. NCMC has its principal place of
10 business in Miamisburg, Ohio, and has offices and does residential mortgage lending and
11 servicing business throughout the United States, including California.

12 10. Defendant Demetrios A. Boutris is the Commissioner of the DOC
13 ("Commissioner"). As such, he is the state official charged under California law with enforcing
14 the state statutes providing for the licensing, regulation, supervision, examination, and
15 enforcement of applicable laws against California residential mortgage lenders that are subject
16 to California's mortgage licensing laws. *E.g.*, Cal. Fin. Code § 50002. The Commissioner is
17 also the state official charged with enforcing the California per diem restriction against
18 California residential mortgage lenders subject to California law. *See, e.g.*, Cal. Fin. Code
19 §§ 50321, 50324.

20 The National Bank Act and OCC Regulations

21 11. National banks are federally-chartered institutions created under and
22 governed by the National Bank Act, 12 U.S.C. § 21 *et seq.*

23 12. Under the National Bank Act and other federal banking laws, the OCC
24 has exclusive licensing, regulatory, supervisory, examination, and enforcement authority with
25 respect to national banks' compliance with both federal and non-preempted state laws. *See* 12
26 U.S.C. §§ 24(Seventh), 484(a), 1818(b). *See also* 12 C.F.R. §7.4000. Under federal law,
27 national banks are not required to obtain a license issued by a state before doing business in that
28

1 state. *E.g.*, *First Nat'l Bank of Eastern Ark. v. Taylor*, 907 F.2d 775, 776 n.6, 778 (8th Cir.
2 1990); *Bank of America, Nat'l Trust & Sav. Ass'n v. Lima*, 103 F. Supp. 916, 917-18 (D. Mass.
3 1952).

4 13. Congress has authorized national banks to receive deposits, loan money,
5 and to exercise "all such incidental powers as shall be necessary to carry on the business of
6 banking." 12 U.S.C. § 24(Seventh). These incidental powers under 12 U.S.C. § 24(Seventh)
7 include the authority to provide banking services through operating subsidiaries.

8 14. Under an OCC notice-and-comment regulation interpreting and
9 implementing § 24(Seventh), 12 C.F.R. § 5.34, national banks are expressly authorized to
10 establish and own operating subsidiaries, which may conduct only activities that are lawful
11 activities for the parent national bank itself. 12 C.F.R. § 5.34(d)(1). The OCC's operating-
12 subsidiary regulation further provides for prior licensing application and OCC approval before
13 an operating subsidiary is established and acquired by a national bank. *See, e.g., id.*
14 § 5.34(e)(5). The OCC's operating-subsidary regulation also makes clear that operating
15 subsidiaries are subject to the OCC's ongoing supervision, regulation, examination, and
16 enforcement authority. *See id.* § 5.34(e)(3).

17 15. Given that operating subsidiaries conduct only national bank-authorized
18 activities, and therefore act as separately incorporated divisions or departments of the national
19 bank itself, and because they are subject to ongoing licensing, regulation, supervision,
20 examination, and enforcement by the OCC, the OCC's notice-and-comment regulations further
21 provide that, "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply
22 to national bank operating subsidiaries to the same extent that those laws apply to the parent
23 national bank." 12 C.F.R. § 7.4006.

24 16. Under 12 U.S.C. § 484(a), "[n]o national bank shall be subject to any
25 visitorial powers except as authorized by Federal law, vested in the courts of justice or such as
26 shall be, or have been exercised or directed by Congress or by either House thereof or by any
27 committee of Congress or of either House duly authorized." Section 484(b) provides a limited
28 exemption to this exclusive federal regulatory, supervisory, and examination jurisdiction of

1 national banks but only "to ensure compliance with applicable State unclaimed property or
2 escheat laws upon reasonable cause to believe that the bank has failed to comply with such
3 laws." 12 U.S.C. § 484(b).

4 17. Interpreting § 484, the OCC's notice-and-comment regulations provide
5 that "[o]nly the OCC or an authorized representative of the OCC may exercise visitorial powers
6 with respect to national banks, except as provided [in the regulation interpreting 12 U.S.C.
7 § 484(b)]. State officials may not exercise visitorial powers with respect to national banks, such
8 as conducting examinations, inspecting or requiring the production of books or records of
9 national banks, or prosecuting enforcement actions, except in limited circumstances authorized
10 by federal law." 12 C.F.R. § 7.4000(a)(1). The OCC's regulation further defines "visitorial
11 powers" to include "[e]xamination of a bank"; "[i]nspection of a bank's books and records";
12 "[r]egulation and supervision of activities authorized or permitted pursuant to federal banking
13 law"; and "[e]nforcing compliance with any applicable federal or state laws concerning those
14 activities." *Id.* § 7.4000(a)(2). Further, by virtue of 12 C.F.R. § 7.4006, the protections
15 afforded to national banks from state licensing, regulation, supervision, examination, and
16 enforcement apply as well to operating subsidiaries of national banks.

17 18. On February 11, 2003, the First Senior Deputy Comptroller and Chief
18 Counsel of the OCC sent a letter to the Commissioner confirming that "pursuant to 12 U.S.C.
19 § 484, and 12 C.F.R. §§ 5.34(e)(3) and 7.4006, the OCC has exclusive visitorial authority over
20 national banks and their operating subsidiaries except where *Federal* law provides otherwise."
21 Ex. 1 hereto, p. 2. The OCC's letter continued: "As a result, States are precluded from
22 examining or requiring information from national banks or their operating subsidiaries." *Id.*
23 The OCC explained that "it is well established that a State may not condition a national bank's
24 exercise of a permissible Federal power on obtaining the State's prior approval, including the
25 imposition of State licensing requirements as a predicate to the exercise of that power. The
26 result is the same whether the national bank exercises the power directly, or through an
27 operating subsidiary that has been licensed by the OCC. In both cases, the bank, or the
28

1 operating subsidiary, has obtained a *Federal* license to conduct its business.” *Id.* at 6. This
2 letter follows earlier letters issued by the OCC to the same effect.

3 19. The OCC thereafter filed a brief *amicus curiae* in *Wells Fargo Bank, N.A.*
4 *v. Boutris*, Civ. No. S 03-0157 GEB JFM, confirming that operating subsidiaries of national
5 banks are subject to the exclusive visitorial powers of the OCC and states cannot exercise any
6 licensing, regulatory, supervisory, or enforcement authority over such entities. Accordingly, the
7 OCC argued in its brief, the Commissioner’s attempted exercise of visitorial powers, and
8 interference with operating subsidiaries’ business operations in California, are preempted.

9 **The Federal Depository Institutions Deregulation and Monetary Control Act of 1980**

10 20. Under DIDMCA, “[t]he provisions of the constitution or laws of any
11 State expressly limiting the rate or amount of interest, discount points, finance charges, or other
12 charges which may be charged, taken, received, or reserved shall not apply to any loan,
13 mortgage, credit sale, or advance which is” (a) “secured by a first lien on residential real
14 property”; (b) “made after March 31, 1980”; and (c) a “federally related mortgage loan,” *i.e.*, a
15 loan that is secured by residential real property and is made by a party who qualifies as a
16 “creditor” under the Truth In Lending Act, 15 U.S.C. § 1602(f), and who makes or invests in
17 residential real estate loans aggregating more than \$1 million per year. 12 U.S.C. §§ 1735f-
18 7a(a)(1); 1735f-5(b)(1) and (2)(D).

19 21. DIDMCA allowed the states to override this express preemption of state
20 limits on residential mortgage interest and fees, but a state had to exercise this authority prior to
21 April 1, 1983, and it had to do so by making explicit reference to 12 U.S.C. § 1735f-7a(a)(1).
22 California did not explicitly opt out of this provision of DIDMCA within the specified time
23 period.

24 **California Residential Mortgage Lending Act**

25 22. Under the California Residential Mortgage Lending Act (“California
26 RMLA”), Cal. Fin. Code § 50002 *et seq.*, “[n]o person shall engage in the business of making
27 residential mortgage loans or servicing residential mortgage loans, in this state, without first
28

1 obtaining a license from the commissioner [of the DOC],” *id.* § 50002. Although banks,
2 including national banks, are expressly exempt from this licensing requirement under the
3 California RMLA, Cal. Fin. Code § 50003(g), national bank operating subsidiaries that engage
4 in residential mortgage lending, such as NCMC, are not.

5 23. Under the California RMLA, “[a]s often as the commissioner deems
6 necessary and appropriate, but at least once every 48 months, the commissioner shall examine
7 the affairs of each licensee for compliance with this division” of the California Financial Code.
8 Cal. Fin. Code § 50302(a). Entities required to hold a license under the California RMLA must
9 also submit to reporting requirements under the California RMLA.

10 24. Failure to hold a valid license or a licensee’s violation of any provision of
11 any law, including the California RMLA, or any rule or order adopted by the Commissioner
12 may result in criminal prosecution, revocation of a license and/or prohibition on further business
13 activities, censure or suspension of officers of a licensee, administrative cease and desist orders,
14 or injunctions and/or restraining orders. Cal. Fin. Code §§ 50315, 50318, 50320, 50321, 50322,
15 50323, 50324, & 50325.

16 25. Under § 50204(o) of the California RMLA, entities required to hold a
17 license may not “[r]equire a borrower to pay interest on [a] mortgage loan for a period in excess
18 of one day prior to recording of the mortgage or deed of trust.” This California per diem
19 restriction limits the interest that any residential mortgage lender in California may charge to
20 only one day prior to the recording of the mortgage even if the time between the disbursement
21 of the mortgage funds to the consumer and the date that the mortgage is actually recorded is
22 longer than one day. A similar per diem restriction is imposed not only on entities required to
23 hold licenses but on all residential mortgage lenders under California Civil Code § 2948.5.

24 The Present Controversy

25 26. National City Bank owns an operating subsidiary, NCMC, to undertake
26 the majority of the Bank’s residential mortgage lending business throughout the United States,
27 including California. In doing so, the Bank exercised its federal authority under 12 U.S.C.
28

1 § 24(Seventh), and OCC regulations interpreting that statute, 12 C.F.R. § 5.34, to apply for, and
2 receive, the OCC's permission through its application and licensing process to establish,
3 acquire, and operate NCMC.

4 27. NCMC functions as a separately incorporated department or a division of
5 the Bank, and, just like National City Bank itself, is subject to ongoing licensing, regulation,
6 supervision, and enforcement by the OCC, and has been examined by the OCC on multiple
7 occasions, with respect to its compliance with both federal and non-preempted state laws.

8 28. The Commissioner takes the position that NCMC is nonetheless required
9 to hold a license under the California RMLA, Cal. Fin. Code § 50002, in order to engage in the
10 residential mortgage business in the state. NCMC presently holds such a license, and the
11 Commissioner has asserted full regulatory, supervisory, examination, and enforcement authority
12 over NCMC as an entity required to hold a license under the California RMLA. He has
13 conducted audits and examinations of NCMC and required NCMC to submit periodic reports on
14 its condition to him or his designated official at the DOC. After the most recent audit and
15 examination under the California RMLA, the Commissioner asserted that NCMC violated the
16 California per diem restriction set forth in California Financial Code § 50204(o) and California
17 Civil Code § 2948.5 by charging interest on mortgage loans in excess of one day prior to the
18 recording of the mortgage. The Commissioner is now demanding that NCMC comply with the
19 state's per diem interest restriction both prospectively and retroactively by forcing NCMC to
20 undertake a manual audit of more than 150,000 individual files for residential mortgage loans
21 made in California since August 2000, which will cost in excess of \$4 million. In this respect,
22 the Commissioner's actions are identical to those he took in *Wells Fargo*, which resulted in this
23 Court's grant of a preliminary injunction.

24 29. A case or controversy between the parties exists requiring resolution by
25 this Court.
26
27
28

1 **Claims for Relief**

2 **Count I – Declaratory and Injunctive Relief:**

3 **Preemption of the California RMLA –**

4 **12 U.S.C. § 484**

5 30. Plaintiffs incorporate and reallege each and every allegation contained in
6 paragraphs 1 - 29 of this Complaint as though fully set forth herein.

7 31. Under the National Bank Act and other federal banking laws as well as
8 OCC regulations interpreting those laws, the OCC has exclusive licensing, regulatory,
9 supervisory, examination, and enforcement authority with respect to national banks' compliance
10 with both federal and non-preempted state laws. See 12 U.S.C. §§ 24(Seventh), 484(a),
11 1818(b); 12 C.F.R. § 7.4000. National banks are not required to obtain or hold state licenses in
12 order to do business in any state.

13 32. Under OCC regulation 12 C.F.R. § 5.34, national banks may establish,
14 own, and operate operating subsidiaries to undertake only those activities that are authorized for
15 a national bank itself. This regulation provides that an operating subsidiary is also subject to
16 ongoing licensing, regulatory, supervisory, examination, and enforcement authority by the OCC
17 with respect to such subsidiary's compliance with both federal and non-preempted state laws.

18 33. Another OCC regulation further prescribes that "[u]nless otherwise
19 provided by Federal law or OCC regulation, State laws apply to national bank operating
20 subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R.
21 § 7.4006.

22 34. The OCC has recently confirmed in interpretive letters and a brief *amicus*
23 *curiae* to this Court in *Wells Fargo*, that, under 12 C.F.R. § 7.4006, an operating subsidiary is
24 subject to the exclusive regulatory, supervisory, examination, and enforcement authority of the
25 OCC, with respect to its compliance with both federal and non-preempted state laws, and is
26 therefore not subject to such licensing, regulation, supervision, examination, and enforcement
27 authority of a state regulator like the Commissioner.
28

1 35. In *Wells Fargo*, this Court has found that "[t]he OCC's amicus brief and
2 interpretive letter appear to be 'both persuasive and consistent with the National Bank Act and
3 OCC regulations and thus at least 'entitled to respect.'" *Wells Fargo* PI Order, at 12 (quoting
4 *Bank of America v. City and County of San Francisco*, 309 F.3d 551, 563 n.7 (9th Cir. 2002),
5 *cert. pending*, No. 02-1404 (filed Mar. 20, 2003)).

6 36. The California RMLA, which subjects national banks' operating
7 subsidiaries like NCMC to ongoing licensing, regulation, supervision, examination, and
8 enforcement by the Commissioner, is preempted by the exclusive federal licensing, regulatory,
9 supervisory, examination, and enforcement powers of the OCC.

10 37. Under federal law, the OCC is the exclusive enforcer of all laws against
11 national banks as well as their operating subsidiaries, and NCMC, as an operating subsidiary of
12 a national bank, need not hold a license under the California RMLA in order to engage in the
13 residential mortgage lending and servicing business in California. NCMC holds a federal
14 license granted under 12 C.F.R. § 5.34 to conduct those activities.

15 38. The California RMLA, Cal. Fin. Code § 50002 *et seq.*, as applied to
16 national banks' operating subsidiaries, for purposes of empowering the Commissioner to
17 regulate, supervise, or act as an enforcement official is preempted under Article VI of the United
18 States Constitution, by the National Bank Act, 12 U.S.C. § 484, and by other provisions of the
19 federal banking laws and OCC implementing regulations, because the OCC has exclusive
20 licensing, regulatory, supervisory, examination, and enforcement authority over national banks'
21 operating subsidiaries.

22 **Count II – Declaratory and Injunctive Relief:**

23 **Preemption of the California RMLA –**

24 **12 U.S.C. § 24(Seventh)**

25 39. Plaintiffs incorporate and reallege each and every allegation contained in
26 paragraphs 1 - 29 of this Complaint as though fully set forth herein.
27
28

1 40. National banks have authority under the National Bank Act to receive
2 deposits, loan money, and to exercise "all such incidental powers as shall be necessary to carry
3 on the business of banking." 12 U.S.C. § 24(Seventh).

4 41. The OCC's regulations implementing the National Bank Act provide that
5 national banks are expressly authorized to establish and own operating subsidiaries, which can
6 conduct only activities that are lawful activities for the parent national bank itself. 12 C.F.R.
7 § 5.34(d)(1). The OCC's regulations further provide that a national bank's operating subsidiary
8 may exercise the parent national bank's enumerated federal lending and incidental powers to
9 engage in the "business of banking" under 12 U.S.C. § 24(Seventh) on the same basis as the
10 parent bank. *See* 12 C.F.R. §§ 5.34(e)(1), 7.4006. This interpretation was confirmed in recent
11 OCC interpretive letters and an *amicus* brief to this Court in *Wells Fargo*.

12 42. The California RMLA subjects national banks' operating subsidiaries to
13 ongoing state licensing, regulation, supervision, examination, and enforcement authority by the
14 Commissioner in the face of the OCC's exclusive licensing, regulation, supervision,
15 examination, and enforcement authority regarding such subsidiaries. By seeking to subject
16 national banks' operating subsidiaries to such additional, ongoing state licensing, regulation,
17 supervision, examination, and enforcement authority, the California RMLA directly conflicts
18 with national banks' ability to conduct their activities through federally licensed operating
19 subsidiaries, including such banks' lending activities, as authorized by the National Bank Act
20 and OCC regulations adopted pursuant to that Act.

21 43. The California RMLA, Cal. Fin. Code § 50002 *et seq.*, as applied to
22 national banks' conduct of their federally authorized activities through operating subsidiaries,
23 therefore is preempted under Article VI of the United States Constitution and by 12 U.S.C.
24 § 24(Seventh) and other provisions of the National Bank Act and federal banking laws, as they
25 are implemented by the OCC's regulations, including 12 C.F.R. §§ 5.34 and 7.4006.

1 **Count III – Declaratory and Injunctive Relief:**

2 **Preemption of the California Per Diem Interest Restrictions**

3 44. Plaintiffs incorporate and reallege each and every allegation contained in
4 paragraphs 1 - 29 of this complaint as fully set forth herein.

5 45. Under DIDMCA, "[t]he provisions of the constitution or laws of any
6 State expressly limiting the rate or amount of interest, discount points, finance charges, or other
7 charges which may be charged, taken, received, or reserved shall not apply to any loan,
8 mortgage, credit sale, or advance which is" (a) "secured by a first lien on residential real
9 property"; (b) "made after March 31, 1980," and (c) a "federally related mortgage loan," i.e., a
10 loan that is secured by residential real property and is made by a party who qualifies as a
11 "creditor" under the Truth In Lending Act, 15 U.S.C. § 1602(f), and who makes or invests in
12 residential real estate loans aggregating more than \$1 million per year. 12 U.S.C. § 1735f-
13 7a(a)(1).

14 46. Although DIDMCA gave states a limited opportunity (until April 1,
15 1983) to opt out of this express preemption through enactment of a statute explicitly referring to
16 this provision of DIDMCA, California did not do so.

17 47. NCMC makes mortgage and other loans in California secured by first
18 liens on residential real property that are "federally related mortgage loans."

19 48. In conflict with the express terms of 12 U.S.C. § 1735f-7a(a)(1), the
20 California per diem restriction of California Financial Code § 50204(o), and California Civil
21 Code § 2948.5, limits the rate or amount of interest, discount points, finance charges, or other
22 charges that NCMC may charge, take, receive, or reserve on loans, mortgages, credit sales, or
23 advances that are secured by a first lien on residential real property, that are made after March
24 31, 1980, and that are "federally related mortgage loans."

25 49. The California per diem restriction of California Financial Code
26 § 50204(o) and California Civil Code § 2948.5 is therefore expressly preempted by DIDMCA
27 and as a result is invalid under Article VI of the United States Constitution.
28

Prayer for Relief

WHEREFORE, Plaintiffs pray that this Court:

A. Enter a judgment declaring that the California Residential Mortgage Lending Act, California Financial Code § 50002 *et seq.*, as applied to national banks' operating subsidiaries, and as applied to national banks' conduct of their federally authorized activities through such subsidiaries, is null and void and unenforceable because it is preempted under Article VI of the United States Constitution, by the National Bank Act, and by implementing OCC regulations;

B. Enter a judgment declaring that the California per diem restriction, California Financial Code § 50204(o) and California Civil Code § 2948.5, is null and void and unenforceable because it is expressly preempted under Article VI of the United States Constitution by the Depository Institutions Deregulation and Monetary Control Act of 1980;

C. Enter a permanent injunction, Plaintiffs having no adequate remedy at law and suffering irreparable injury as a result of these unconstitutional state laws, enjoining Defendant and his agents from enforcing or taking any action to enforce the California Residential Mortgage Lending Act, California Financial Code § 50002 *et seq.* (including § 50204(o)), and California Civil Code § 2948.5, against Plaintiffs; from taking any action to prevent or interfere with, both directly and indirectly, Plaintiffs' business operations in California (including taking any actions to penalize Plaintiffs); and from otherwise exercising visitatorial powers over Plaintiffs;

D. Enter a preliminary injunction pending final resolution of this action, Plaintiffs having no adequate remedy at law and suffering irreparable injury as a result of these unconstitutional state laws, enjoining Defendant and his agents from enforcing or taking any action to enforce the California Residential Mortgage Lending Act, California Financial Code § 50002 *et seq.* (including § 50204(o)), and California Civil Code § 2948.5, against Plaintiffs; from taking any action to prevent or interfere with, both directly and indirectly, Plaintiffs' business operations in California (including taking any actions to penalize Plaintiffs); and from otherwise exercising visitatorial powers over Plaintiffs;

1 E. Enter a temporary restraining order pending a hearing on Plaintiffs'
2 motion for preliminary injunction, Plaintiffs having no adequate remedy at law and suffering
3 immediate, irreparable injury as a result of these unconstitutional state laws, enjoining
4 Defendant and his agents from enforcing or taking any action to enforce the California
5 Residential Mortgage Lending Act, California Financial Code § 50002 *et seq.* (including
6 § 50204(o)), and California Civil Code § 2948.5, against Plaintiffs; from taking any action to
7 prevent or interfere with, both directly and indirectly, Plaintiffs' business operations in
8 California (including taking any actions to penalize Plaintiffs); and from otherwise exercising
9 visitatorial powers over Plaintiffs;

10 F. Award Plaintiffs their reasonable attorneys' fees pursuant to 42 U.S.C.
11 § 1988; and

12 G. Grant Plaintiffs such other and further relief, including costs, as the Court
13 may deem just and proper.

14 Respectfully submitted,

15
16 RICHARD C. DARWIN (State Bar No. 161245)
17 COVINGTON & BURLING
18 One Front Street
19 San Francisco, California 94111
20 Telephone: (415) 591-6000
21 Fax: (415) 591-6091

22 E. EDWARD BRUCE (*pro hac vice* pending)
23 STUART C. STOCK (*pro hac vice* pending)
24 ROBERT A. LONG, Jr. (*pro hac vice* pending)
25 KEITH A. NOREIKA (*pro hac vice* pending)
26 COVINGTON & BURLING
27 1201 Pennsylvania Avenue, N.W.
28 Washington, D.C. 20044
Telephone: (202) 662-6000
Fax: (202) 662-6291

ATTORNEYS FOR PLAINTIFFS

Dated: March 31, 2003

EXHIBIT 1



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

February 11, 2003

Demetrios A. Boutris
Commissioner
California Department of Corporations
1515 K Street, Suite 200
Sacramento, California 95814-4052

Dear Mr. Boutris:

It has come to the attention of the Office of the Comptroller of the Currency ("OCC") that the California Department of Corporations ("Department") has sent its agents into one of the offices of Wells Fargo Home Mortgage, Incorporated ("WFHMI"), in order to conduct an examination of its mortgage operations. For the reasons set forth below, I urge you to suspend these efforts so that we may constructively discuss the status of, and OCC's authority with respect to, WFHMI.

It appears that the examination is being conducted pursuant to licensing provisions under California's Residential Mortgage Lending Act ("California Act") and other provisions of California law. Such an examination violates Federal law.¹ WFHMI is a wholly-owned operating subsidiary of Wells Fargo Bank, N.A. ("Bank"), a national bank chartered by the OCC. Pursuant to federal regulations, the OCC has authorized the Bank to conduct the mortgage banking business through WFHMI and has licensed WFHMI as an operating subsidiary of the Bank for that purpose. As an operating subsidiary of a national bank, WFHMI is subject to ongoing supervision and examination by the OCC in the same manner and to the same extent as the Bank.²

¹ Wells Fargo Bank, N.A., and WFHMI recently filed suit in the United States District Court for the Eastern District of California to obtain a judicial determination confirming that WFHMI is not subject to licensing by the Department or to the Department's supervisory, regulatory or enforcement authority and seeking injunctive relief. That case is *Wells Fargo Bank, N.A. v. Demetrios A. Boutris*, No. S 03-0157 GEB JFM, filed January 27, 2003.

² Twelve C.F.R. § 5.34(c)(3) provides that -

[a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank. If, upon examination, the OCC determines that the operating subsidiary is operating in violation of law, regulation, or written condition, or in an unsafe or unsound manner or otherwise threatens the safety or soundness of the bank, the OCC will direct the bank or operating subsidiary to take appropriate remedial action, which may include requiring the bank to divest or liquidate the operating subsidiary, or discontinue specified activities. OCC authority

As discussed in detail below, pursuant to 12 U.S.C. § 484, and 12 C.F.R. §§ 5.34(e)(3) and 7.4006, the OCC has exclusive visitorial authority over national banks and their operating subsidiaries except where *Federal* law provides otherwise. This authority pertains to activities expressly authorized or recognized as permissible for national banks under Federal law or regulation, or by OCC issuance or interpretation, including the content of those activities and the manner in which, and standards whereby, those activities are conducted. As a result, States are precluded from examining or requiring information³ from national banks or their operating subsidiaries or otherwise seeking to exercise visitorial powers with respect to national banks or their operating subsidiaries in those respects. Thus, Federal law precludes examination of WFHMI by the Department. Moreover, for the reasons discussed below, operating subsidiaries – like their parent national banks – need not obtain the approval of a State to engage in an activity that they have been licensed to conduct under Federal law. Accordingly, any State licensing requirements upon which the Department relies to assert jurisdiction do not apply to the Bank or WFHMI.⁴

Background

The OCC's exclusive visitorial authority over national bank operations is established by 12 U.S.C. § 484.⁵ Paragraph (a) of that section states that –

[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been

under this paragraph is subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act [GLBA] (12 U.S.C. 1820a).

The provisions of the Federal Deposit Insurance Act and the GLBA referenced in the regulation pertain to the functional regulation of securities, insurance, and commodities firms. These provisions are not relevant to mortgage lending and servicing activities conducted by WFHMI.

³ The OCC currently maintains information sharing agreements with 48 States, the District of Columbia, and Puerto Rico. These agreements provide a mechanism through which State regulators may seek and obtain supervisory information from the OCC. Typically, the OCC will make confidential bank examination information available to State bank regulatory agencies if they demonstrate a specific regulatory need for the examination information (e.g., in connection with a merger of a national bank into a State bank, where the State bank regulator must approve the transaction), and if the State agency has entered into an appropriate information sharing/confidentiality agreement with the OCC governing the use of the information. In OCC Advisory Letter 2002-9 (Nov. 25, 2002) ("AL 2002-9"), the OCC outlined a procedure to address circumstances when State officials raise issues concerning potential violations of laws by national banks, including when State officials may seek information from a national bank about its compliance with any law or for other purposes. The advisory letter is available on the OCC's website at www.occ.treas.gov/stp/advisor/2002%2D9.txt.

⁴ We note that the California Act already contains an exemption from State licensing requirements for national banks, Cal. Fin. Code § 50003(g), but fails to recognize the status of national bank operating subsidiaries as entities through which national banks operate pursuant to a federal license granted by the OCC.

⁵ "Visitorial powers" generally refers to the power to "visit" a national bank to examine the conduct of its business and to enforce its observance of applicable laws. See, e.g., *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (the word "visitation" means "inspection; superintendence; direction; regulation") (internal quotations omitted).

exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

Paragraph (b) of the statute then permits lawfully authorized State auditors or examiners to review a national bank's records "solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."

This provision, enacted with the creation of the national banking system in 1863, is integral to the design and structure of the national banking system and fundamental to the character of national banks. Congress enacted the National Currency Act ("Currency Act") in 1863 and the National Bank Act the year after for the purpose of establishing a new national banking system that would operate distinctly and separately from the existing system of State banks. At that time, both proponents and opponents of the new national banking system expected that it would supersede the existing system of State banks.⁶ Given this anticipated impact on State banks and the resulting diminution of control by the States over banking in general,⁷ proponents of the national banking system were concerned that States would attempt to undermine it.

The allocation of any supervisory responsibility for the new national banking system to the States would have been inconsistent with the need to protect national banks from State interference. Congress, accordingly, established a Federal supervisory regime and created a Federal agency within the Department of Treasury—the OCC—to carry it out. Congress granted the OCC the broad authority "to make a thorough examination of all the affairs of [a national] bank,"⁸ and solidified this Federal supervisory authority by vesting the OCC with exclusive

⁶ Representative Samuel Hooper, who reported the bill to the House, stated in support of the legislation that one of its purposes was "to render the law [i.e., the Currency Act] so perfect that the State banks may be induced to organize under it, in preference to continuing under their State charters." Cong. Globe, 38th Cong. 1st Sess. 1256 (March 23, 1864). Opponents of the legislation believed that it was intended to "take from the States . . . all authority whatsoever over their own State banks, and to vest that authority . . . in Washington . . ." Cong. Globe, 38th Cong., 1st Sess. 1267 (March 24, 1864) (statement of Rep. Brooks). See also statement of Rep. Pruyn (stating that the legislation would "be the greatest blow yet inflicted upon the States . . .") Cong. Globe, 38th Cong., 1st Sess. 1271 (March 24, 1864); statement of Sen. Sumner ("Clearly, the [national] bank must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions.") Cong. Globe, 38th Cong., 1st Sess., at 1693 (April 27, 1864).

⁷ See, e.g., *Tiffany v. National Bank of the State of Missouri*, 85 U.S. 409, 412-413 (1874) ("It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition National banks have been national favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the states, or to ruinous competition with state banks."). See also B. Hammond, *Banks and Politics in America from the Revolution to the Civil War*, 725-34 (1957); P. Studenski & H. Krooss, *Financial History of the United States*, 155 (1st ed. 1952).

⁸ Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. § 481.

visitatorial powers over national banks. These provisions assured, among other things, that the OCC would have comprehensive authority to examine all the affairs of a national bank and protected national banks from potential State action by establishing that the authority to examine and supervise national banks is vested *only* in the OCC, unless otherwise provided by *Federal law*.⁹

In *Guthrie v. Harkness*, 199 U.S. 148 (1905), the Supreme Court recognized how the National Bank Act was designed to operate:

Congress had in mind, in passing this section [i.e., section 484] that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitatorial power.

Id. at 159. The Supreme Court also has recognized the clear intent on the part of Congress to limit the authority of States over national banks precisely so that the nationwide system of banking that was created in the Currency Act could develop and flourish. For instance, in *Easton v. Iowa*, 188 U.S. 220 (1903), the Court stated that Federal legislation affecting national banks—

has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute [W]e are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and *confusion would necessarily result from control possessed and exercised by two independent authorities*.

Id. at 229, 231-232 (emphasis added). The Court in *Farmers' and Mechanics' Bank*, 91 U.S. 29 (1875), after observing that national banks are means to aid the government, stated—

⁹ Writing shortly after the Currency Act and National Bank Act were enacted, then-Secretary of the Treasury, and formerly the first Comptroller of the Currency, Hugh McCulloch observed that "Congress has assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments" Cong. Globe, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (April 23, 1866).

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is "an abuse, because it is the usurpation of power which a single State cannot give."

Id. at 34 (citation omitted).

Congress recently affirmed the OCC's exclusive visitatorial powers with respect to national banks operating on an interstate basis in the Riegle-Neal Interstate Banking Act of 1994 ("Riegle-Neal").¹⁰ Riegle-Neal makes interstate operations of national banks subject to specified types of laws of a "host" State in which the bank has an interstate branch to the same extent as a branch of a State bank of that State, *unless* the State law is preempted by Federal law. For those State laws that are not preempted, the statute makes clear that the authority to enforce the law is vested in the OCC. See 12 U.S.C. § 36(f)(1)(B) ("The provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency."). This approach is another, and very recent, recognition of the broad scope of the OCC's exclusive visitatorial powers with respect to national banks.

Application of Federal Law to the Operating Subsidiaries

In section 121 of the Gramm-Leach-Bliley Act ("GLBA"), Congress expressly acknowledged that national banks may own subsidiaries that engage "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."¹¹

Consistent with section 121, the OCC regulations state that "[a]n operating subsidiary conducts activities authorized under [12 C.F.R. § 5.34] pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."¹² Addressing this point in the context of State laws, section 7.4006 of our regulations specifically states that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."¹³

In order for a subsidiary to operate in the manner contemplated by section 121 of GLBA, the subsidiary must be subject to the same regulation and supervision as is its parent national bank. As described at the outset of this letter, our regulations at § 5.34(e)(3) require that result, which

¹⁰ Pub. L. 103-328, 108 Stat. 2338 (Sept. 29, 1994).

¹¹ Pub. L. No. 106-102, § 121, 113 Stat. at 1378, *codified at* 12 U.S.C. § 24a(g)(3).

¹² 12 C.F.R. § 5.34(e)(3).

¹³ 12 C.F.R. § 7.4006.

is entirely consistent with the concept of an operating subsidiary as an OCC-licensed entity through which national banks conduct bank-permissible activities. The terms and conditions governing the conduct of activities in an operating subsidiary include being subject to the same visitatorial powers as are exercised with respect to the parent. Accordingly, just as 12 U.S.C. § 484 prevents the Department from exercising visitatorial powers over the Bank, so too do section 484 and OCC regulations prevent the Department from exercising visitatorial powers over WFHMI, an OCC-licensed operating subsidiary through which the Bank conducts authorized mortgage banking activities.

It is important in this context to understand that while the Department may not examine and supervise WFHMI, the operating subsidiary is subject to an extensive regime of Federal law and regulations and the Bank and WFHMI are subject to comprehensive and continuous supervision by the OCC. The Bank is part of the OCC's Large Bank Program. This means that its activities and those of its subsidiaries are examined on a continuous basis by teams of examiners specifically assigned to, and in most cases physically present at the facilities of, the Bank and its subsidiaries.

With regard to the application of State licensing requirements, it is well established that a State may not condition a national bank's exercise of a permissible Federal power on obtaining the State's prior approval, including the imposition of State licensing requirements as a predicate to the exercise of that power.¹⁴ The result is the same whether the national bank exercises the power directly, or through an operating subsidiary that has been licensed by the OCC. In both cases, the bank, or the operating subsidiary, has obtained a *Federal* license to conduct its business.

When the OCC charters a national bank, it grants the bank a license to commence the banking business under 12 U.S.C. § 27. When a national bank acquires or establishes an operating subsidiary through which the bank will conduct bank-permissible activities, the OCC grants a license for the operating subsidiary to conduct those activities pursuant to 12 C.F.R. § 5.34. Requirements for establishing or acquiring an operating subsidiary are expressly described in OCC regulations as "Licensing requirements."¹⁵ Accordingly, when WFHMI was established as an operating subsidiary of the Bank and was licensed by the OCC as an entity through which the Bank was authorized to conduct its mortgage lending business, WFHMI did not then, and does

¹⁴ See *First National Bank of Eastern Arkansas v. Tylor*, 907 F.2d 775, 780 (8th Cir. 1990) (the National Bank Act precludes a State regulator from prohibiting a national bank, through either enforcement action or a license requirement, from conducting an activity that the Comptroller has reasonably determined is authorized by the National Bank Act); *Ass'n. of Banks in Insurance, Inc. v. Dwyer*, 55 F. Supp. 2d 799, 812 (S.D. Ohio 1999), *aff'd*, 270 F.3d 397 (6th Cir. 2001) (even the most limited aspects of State licensing requirements such as the payment of a licensing fee are preempted because they "constitute impermissible conditions upon the authority of a national bank to do business within the state"). The OCC also has opined previously that State laws purporting to require the licensing of activities authorized for national banks under Federal law are preempted. See OCC Interpr. Ltr. No. 749 (Sept. 13, 1996) reprinted in [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-114 (State law requiring national banks to be licensed by the State to sell annuities would be preempted); OCC Interpr. Ltr. No. 644 (March 24, 1994), reprinted in [1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,553 (State registration and fee requirements imposed on mortgage lenders would be preempted).

¹⁵ 12 C.F.R. § 5.34(b).

not now, also need a State-issued license to do that business. Just as the Bank has a Federal license to conduct the banking business and needs no additional State license, so too does WFHMI have a federal license for the Bank to conduct its mortgage lending business through WFHMI and needs no additional State-granted permit to do so. Section 7.4006 similarly confirms that State licensing requirements are equally inapplicable to Federally-authorized activities conducted by a national bank directly or through a federally-licensed operating subsidiary. In practical effect, therefore, your actions would have the effect of depriving the Bank and WFHMI of the right to conduct a mortgage lending business they have been authorized to conduct under a license issued under Federal law.

I must also note that these conclusions that the OCC's exclusive visitatorial powers preclude the Department from examining and asserting supervisory authority over, or applying state licensing requirements to WFHMI are not intended to imply that any of the substantive provisions of the California Act apply to WFHMI. Instead, under Federal law¹⁶ and principles of preemption established by the courts,¹⁷ provisions of the California Act may well be preempted. This letter, however, addresses only the issues of whether the Department may conduct an examination of WFHMI and whether WFHMI is required to obtain a State license in order to conduct mortgage banking activities that it is authorized to conduct under a Federally-granted license.

I hope the foregoing helps to clarify our concerns with regard to the Department's recent actions. I urge you to suspend the Department's efforts to examine and regulate WFHMI so that we may the opportunity to have a more constructive discussion of our relative roles.

If you have any questions regarding this letter, please do not hesitate to contact Horace G. Sneed, Assistant Director, Litigation Division, at (202) 874-5280.

Sincerely,

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

Cc: Stanley S. Stroup, Executive Vice President, General Counsel

¹⁶ See, e.g., 12 U.S.C. §§ 371, 1735f-7, 1735f-7a, and 3801 *et. seq.*

¹⁷ See, e.g., the cases cited in note 12, *supra*.