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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs - Appellees/Cross-Appellants,

v.

DEMETRIOS A . BOUTRIS

Defendant – Appellant/Cross-Appellee,

and

NATIONAL CITY BANK OF INDIANA, et al.,

Plaintiffs – Appellees,

v.

DEMETRIOS A . BOUTRIS

Defendant – Appellant.

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

APPELLANT/CROSS-APPELLEE'S REPLY/ANSWERING BRIEF

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ISSUES PRESENTED BY THE COMMISSIONER'S APPEAL

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

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

ISSUES PRESENTED BY WELLS FARGO'S CONDITIONAL CROSS-APPEAL

1. Whether the district court correctly held that there are no facts to support Wells Fargo's claim that the Commissioner engaged in retaliation against Wells Fargo by commencing revocation proceedings against Wells Fargo Home Mortgage, Inc. ("WFHMI") because Wells Fargo was unable to evidence that the federal lawsuit played a role or was a motivating factor in the Commissioner's revocation action?

SUMMARY OF ARGUMENT - COMMISSIONER'S APPEAL

1. The District Court Erred As A Matter Of Law In Holding That The State Lending Laws Are Preempted Pursuant To The Supremacy Clause

There are no validly enacted statutes or regulations that expressly preempt the California Residential Mortgage Lending Act ("CRMLA") or the California Finance Lenders Law ("CFLL"). The Office of the Comptroller of the Currency ("OCC") does not occupy the field sufficient to apply principles of field preemption. The CRMLA and the CFLL do not conflict with the National Bank Act ("NBA") or the Gramm-Leach-Bliley Act ("GLBA") and do not frustrate the purposes for which national banks are organized.

Congress, in enacting the NBA, intended to create a national banking system where national banks are instrumentalities of the federal government but have historically been subject to dual regulation by the federal government and the states. *Marquette National Bank v. First of Omaha Service Corp.,* 439 U.S. 299, 308, 314-315 (1978 (*citing Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896) *see also National State Bank v. Long,* 630 F.2d 981, 985 (3rd Cir. 1980). In contrast, operating subsidiaries, even if wholly owned by a national bank, are corporations organized under state laws, not national banks. They are not entitled to the same or greater status than federally-chartered national banks.

Congress has never defined the term "operating subsidiary". Congress has never statutorily made reference to "operating subsidiaries". And, Congress has never given the OCC exclusive regulatory authority over operating subsidiaries of national banks. In fact, the GLBA, Title 12 U.S.C. Section 24a, in its definitional provisions, functionally *excludes* operating subsidiaries. While Congress has expressly granted the OCC visitorial powers over *national banks*, such powers are not exclusive, even over national banks. Yet, Wells Fargo, National City and the OCC would have this court grant exclusive visitorial powers to the OCC over non-bank state-chartered operating subsidiaries such as WFHMI and National City Mortgage Company ("NCMC").

Congress did not intend to preempt state regulatory authority over operating subsidiaries, which are non-bank state-chartered corporations. Congress did not delegate authority to the OCC to promulgate regulations preempting state laws applicable to operating subsidiaries of national banks. Since an agency, such as the OCC, has only the power conferred upon it by Congress, the OCC exceeded its congressionally delegated authority in promulgating 12 C.F.R. Section 7.4006 and, therefore, the regulation is invalid and cannot be the basis of preemption under the Supremacy Clause. *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 374 (1986).

2. The District Court Erred In Holding That The California Per Diem Statutes Are Preempted

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

The legislative history of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") demonstrates that Congress enacted it with a narrow intent and purpose: to address the extreme highs in home mortgage interest rates. State usury laws, placing a ceiling on interest rates below the market rate of interest, threatened the supply of home mortgage funds, and therefore jeopardized the availability of home mortgages to potential homebuyers. DIDMCA was intended to create a "limited modification in state usury laws." The implementing regulations of the Office of Thrift Supervision expressly seek to avoid preemption of state laws designed to protect borrowers. *See* 12 C.F.R. 590.3 (c). Therefore, DIDMCA does not preempt Financial Code section 50204(o) and Civil Code section 2948.5.

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

SUMMARY OF ARGUMENT – WELLS FARGO'S CONDITIONAL CROSS APPEAL

1. The District Court Correctly Held There Were No Facts To Support Wells Fargo's Claim That The Commissioner Engaged In Retaliation Against Wells Fargo By Commencing Revocation Proceedings Against WFHMI

Under the governing legal standard, Wells Fargo was required to show more than just the filing of the revocation proceedings in order to prevail on the issue of retaliation or to shift the burden of proof to the Commissioner. Wells Fargo offered nothing more than the actual filing of the revocation proceedings to support its claim of retaliation, while the record is rife with evidence that the revocation proceedings were motivated by numerous and continuing violations of the law by WFHMI and its refusal to abide with the requirements for maintaining licenses under the CRMLA and the CFLL.

2. The District Court Correctly Held Wells Fargo's Claims In Counts I – III Of Their Complaint (Preemption Claims) Were Not Actionable And Thus Could Not Support A Claim For Attorney's Fees

Wells Fargo, while stating that it was appealing this holding in its Notice of Appeal [ERVI 281], has offered no argument against the District Court's holding on this issue in its answering/opening brief. Therefore, Wells Fargo has waived its appeal on this issue (*Walls v. Wells Fargo Bank, N.A.,* 276 F.3d 502, 511 (9th Cir. 2002) citing *Ceja v. Stewart,* 97 F.3d 1246, 1252 (9th Cir. 1996), and this Court

must uphold the District Court's ruling. Accordingly, the Commissioner will not be addressing this issue further.

For these reasons, and as set forth more fully below, the decision of the District Court, with respect to the issues of retaliation and Title 42 U.S.C. §§ 1983 and 1988, should be upheld.

ARGUMENT

I. CONGRESS HAS NEITHER EXPRESSED AN INTENT TO PREEMPT STATE LAWS APPLICABLE TO NON-BANK STATE-CHARTERED OPERATING SUBSIDIARIES, NOR DELEGATED THE AUTHORITY TO THE OCC TO PROMULGATE REGULATIONS PREEMPTING STATE LAWS

Wells Fargo, National City and the OCC repeatedly seek to distract this Court from the core issue in this case by referencing national banks and "federally licensed" operating subsidiaries, implying that these entities are equal, with the terms "national bank" and "operating subsidiary" being synonymous. Congress has not so defined these terms, despite Wells Fargo and National City's attempts to mislead and mischaracterize these distinct concepts. Adopting appellees' terms as equivalents will result in interference with core concepts of federalism, sanction agency action not contemplated by Congress and greatly expand the authority of the OCC well beyond that authorized by the federal banking laws. These laws make no reference to operating subsidiaries of national banks and do not grant any

authority to the OCC to regulate in the area of non-bank state-chartered corporations.

A. Wells Fargo And National City Concede There Is No Evidence Of Congressional Intent To Preempt State Laws Applicable To Operating Subsidiaries

Wells Fargo and National City provide no evidence of Congressional intent to preempt state laws applicable to non-bank state-chartered corporations acting as operating subsidiaries of national banks, thereby conceding the inapplicability of the NBA, the GLBA and the Riegle-Neal Interstate Branching and Bank Efficiency Act

While the briefs are replete with references to these statutory schemes governing national banks, and cases interpreting the NBA (as relate to "national banks", not "operating subsidiaries"), they provide no evidence that Congress intended to regulate operating subsidiaries of national banks or to preempt state laws applicable to these non-bank state-chartered corporations.

There is nothing in the statutory history or congressional record that supports any inference that Congress intended to preempt state laws applicable to non-bank state-chartered operating subsidiaries of national banks. In fact, none of the statutes relied on by Wells Fargo, National City or the OCC specifically reference operating subsidiaries of national banks or the regulation of such entities. *See* 12 U.S.C. §§ 1, et seq.; 12 U.S.C. §§ 24a, et seq; 12 U.S.C. § 484. Accordingly, there

is no conflict between these federal statutes and the CRMLA and the CFLL that would give rise to a claim of express federal preemption.

Despite the absence of any statutory reference to non-bank state-chartered operating subsidiaries, Wells Fargo, National City and the OCC seek to establish a link between the statutes that regulate "national banks" and the OCC's assertion of exclusive regulatory authority over non-bank state-chartered "operating subsidiaries". However, as set forth more fully in the Commissioner's Opening Brief, and for the reasons below, the link proposed by Wells Fargo, National City and the OCC is too tenuous to support preemption.

B. The CRMLA And The CFLL Do Not Conflict With Any Validly Enacted Federal Banking Laws

The incidental powers provision of the NBA, 12 U.S.C. § 24 (Seventh) is insufficient to support the OCC's assertion of exclusive regulatory authority over non-bank state-chartered operating subsidiaries of national banks. This is also true of 12 U.S.C. § 484, which sets forth the visitorial powers *national banks* are subject to and 12 U.S.C. § 24a, which establishes the statutory framework national banks must comply with in order to conduct banking business through *financial subsidiaries.*

Title 12 U.S.C. Section 24 (Seventh) provides that *national banks* may exercise all such incidental powers as are necessary to carry on the business of banking. The OCC has interpreted this statute as permitting national banks to

conduct banking activities through operating subsidiaries. 12 C.F.R. § 5.34. In the absence of any direct reference to operating subsidiaries in 12 U.S.C. § 24 (Seventh), it lacks credibility for the OCC to assert that this statute supports preemption of all state laws applicable to non-bank state chartered corporations such as WFHMI and NCMC.

Similarly, the provision of the NBA that sets forth visitorial authority over national banks, 12 U.S.C. § 484, makes no mention of operating subsidiaries. In its amicus brief, the OCC states, "Because the Commissioner can cite no federal statutory or regulatory exception that permits him to exercise visitorial authority over the banking business of national banks, his attempt to exercise audit, examination and enforcement authority over WFHMI and NCMC is in direct conflict with this statutory provision . . ." OCCAmBr p.14.[1] What the OCC fails to acknowledge, and what is crucial to this case, is that the Commissioner is not seeking to exercise "audit, examination and enforcement authority" over a *national bank*. Rather, the Commissioner's regulatory authority is only being directed at

[1] "Ans/OpBr" refers to the Brief of Appellees/Cross-Appellants, Wells Fargo National Bank, N.A., Wells Fargo Home Mortgage, Inc., National City Bank of Indiana and National City Mortgage Company. "OCCAmBr" refers to the Amicus Curiae Brief Submitted by the Office of the Comptroller of the Currency. "CommOpBr" refers to the Opening Brief of Appellant, California Corporations Commissioner Demetrios A. Boutris.

non-bank state-chartered corporations, entities that are separate and distinct legal entities from their parent national banks.[2]

Title 12 U.S.C. Section 484 makes no reference to non-bank state-chartered operating subsidiaries of national banks. It does not grant to the OCC, either explicitly or impliedly, the authority to promulgate regulations governing non-bank state-chartered operating subsidiaries. Title 12 U.S.C. Section 484 does not support the OCC's assertion of exclusive regulatory authority over WFHMI and NCMC.[3]

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[2] An operating subsidiary in which a national bank may invest includes a corporation, limited liability company, or similar entity if the parent bank owns 50% or more of the voting interest or otherwise controls the operating subsidiary when no other party controls more than 50% of the voting interest. 12 C.F.R. §5.34(e)(2).

[3] Wells Fargo and National City misinterpret the Commissioner's arguments regarding the non-exclusivity of the visitorial powers granted by 12 U.S.C. § 484 in their brief wherein they contend that "The Commissioner argues for the first time on appeal that the "courts of justice" language in § 484(a) allows him to exercise visitorial powers over operating subsidiaries through court actions." Ans/OpBr p. 40-41. The Commissioner contends that the "courts of justice" language present in § 484 is further evidence of the non-exclusivity of the OCC's visitorial power over even national banks, and has historically been interpreted to "support lawsuits to enforce state laws against national banks." CommOpBr p. 40-41. The Commissioner does not contend that this clause was the basis of his exercise of visitorial power over WFHMI or NCMC. Rather, the Commissioner's visitorial powers over these entities stemmed, at the time, from their licensure by the Commissioner under the CRMLA and CFLL, which both WFHMI and NCMC voluntarily obtained before they asserted preemption. *See* CommOpBr p. 6-7.

Wells Fargo, National City and the OCC's reliance on the GLBA is likewise misplaced. As set forth below in Section I.C.1, the Senate Report is the only place "operating subsidiaries" are even mentioned. *See* S. Rep. No. 106-44, at 6 (1999).

The OCC's exercise of exclusive regulatory authority over non-bank state-chartered corporations, which also happen to be operating subsidiaries of national banks, is without support in either the federal banking laws or the legislative history. In the absence of any support, the OCC's regulations are invalid and cannot support a finding of preemption.

1. The License Issued By the OCC To A National Bank To Engage In Activities Through An Operating Subsidiary Is Not Equivalent To A National Bank Charter And Does Not Make The Operating Subsidiary An Instrumentality Of The Federal Government

Regardless of the label or characterization Wells Fargo, National City and the OCC place on non-bank state-chartered operating subsidiaries, they are not equivalent to national banks and are not "instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896). To the contrary, operating subsidiaries are state-chartered corporations, presumably created for the purpose of sheltering the national bank from liability. *See Securities Industry Ass'n v. Fed. Home Loan Bank Board,* 588 F.Supp. 749, 754 (D.C. Dist. 1984) (holding that "[e]xcept in unusual

circumstances, courts will not disregard the separate identity of a parent and its subsidiary, even a wholly-owned subsidiary.”).

The fact that WFHMI and NCMC are state-chartered corporations is not, and has never been, disputed by Wells Fargo, National City or the OCC. *See* Ans/OpBr p.31. These non-bank state-chartered corporations retain their identity separate and apart from their parent national banks. They have not met and are not required to meet, minimum qualifying standards to be recognized as national banking associations. *See* 12 U.S.C. §§ 21, et seq.

Wells Fargo, National City and the OCC would have this court believe that merely by their association or affiliation with national banks, operating subsidiaries become “federal” to the extent that they are subject only to federal jurisdiction. Ans/OpBr p.21; OCCAmBr p.10-11. This assertion is without merit and is not supported by the statutes or regulations governing national banks.

Title 12 C.F.R. Section 5.34, the operating subsidiary regulation upon which Wells Fargo, National City and the OCC rely, makes only a passing reference to the “license” issued by the OCC regarding operating subsidiaries. Other than the section title, there is no further reference to the supposed “license” issued by the OCC anywhere in the regulation. This regulation confirms that *national banks* are granted the authority by the OCC to engage in activities through operating subsidiaries. But, in no way is the operating subsidiary “licensed” by the OCC.

Further, Title 12 C.F.R. Section 5.34 confirms that the alleged "license" upon which Wells Fargo, National City and the OCC place such import is nothing more than an acknowledgement or silent acceptance by the OCC of the national bank's acquisition or establishment of an operating subsidiary. *See* 12 C.F.R. § 5.34(b) and (e); *see also* ERVI 170 (letter from the Deputy Comptroller Timothy W. Long to WFHMI acknowledging WFHMI as an operating subsidiary of Wells Fargo).[4] Indeed, the notice requirement may, in many circumstances, be met by the national bank's filing of an after-the-fact *notice* with the OCC. 12 C.F.R. § 5.34(e)(5)(iv) and (v). When such a notice procedure is utilized, there is no requirement that the OCC do anything further. In essence, the OCC accepts as true the national bank's representations in the notice and silently acquiesces to the bank's conducting business through an operating subsidiary.

Moreover, the fact that 12 C.F.R. § 5.34 authorizes national banks to conduct through operating subsidiaries only those activities which are permissible

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[4] This letter from Deputy Comptroller Timothy W. Long is the only evidence presented by Wells Fargo Bank and WFHMI in the lower court in support of their motion for summary judgment, which evidence was presented to prove WFHMI's status as an operating subsidiary of Wells Fargo Bank. Interestingly, this acknowledgement by the OCC of WFHMI's status as an operating subsidiary also states that the OCC will supervise and regulate the activities of WFHMI "to the extent permitted under the *Gramm-Leach-Bliley Act of 1999*." ERVI 170 (emphasis added). The letter makes no reference to the NBA or the OCC's alleged exclusive regulatory/visitorial authority over operating subsidiaries. However, the GLBA does not recognize operating subsidiaries or the OCC's alleged exclusive authority to regulate them *See also* Sections I.B and I.C.1 infra.

for the national bank itself does not establish the operating subsidiary as a department or division of the national bank, so as to support exclusive regulation by the OCC. *See* 12 C.F.R. § 5.34(e); OCCAmBr p. 9. As set forth above, the reality is that the national bank and its non-bank state-chartered operating subsidiary maintain separate identities and each has its own assets and liabilities, regardless of the activities they are permitted to engage in. Non-bank state-chartered operating subsidiaries are no more a department or division of their parent national banks than any other state-chartered subsidiary is of its parent corporation. They are separate legal entities.

Operating subsidiaries are not granted a "federal license". Rather, the non-bank operating subsidiary continues to lawfully conduct business pursuant to its corporate charter from the state that issued that charter. *See generally Oregon Railway & Navigation Co. v. Oregonian Railway Co.,* 130 U.S. 1 (1889). The OCC's acknowledgement to the *national bank* of the status of the non-bank state-chartered corporation as an operating subsidiary in no way changes that charter to a federal charter and in no way converts a non-bank state-chartered corporation into a federal instrumentality. *Compare* 12 U.S.C. §§ 21, et seq. (setting forth the requirements and procedures by which a bank qualifies for status as a national bank).

As non-bank state-chartered operating subsidiaries are not federal instruments, they are not subject to the exclusive regulatory authority of the OCC.

C. The OCC's Regulations Preempting State Laws Are Not Statutorily Authorized And Exceed The Agency's Congressionally Delegated Authority

Wells Fargo, National City and the OCC's reliance on regulations promulgated by the OCC for the proposition that there is a conflict between the CRMLA, the CFLL and federal law is without support. Congress has not delegated authority to the OCC to regulate in the area of non-bank state-chartered corporations that also happen to be operating subsidiaries of national banks. Because there can be no conflict if an agency has exceeded its legitimate authority, the CRMLA and CFLL are not preempted.

In order for federal regulations to preempt state laws, the regulatory agency must show that it is acting responsibly and *within its regulatory authority*. *Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. 141, 153-154 (1982) (*Fidelity*) (emphasis added). While Wells Fargo, National City and the OCC all cite *Fidelity* for the proposition that federal regulations have no less preemptive effect than federal statutes, they fail to provide this Court with a threshold analysis that the agency was acting within the confines of its delegated authority when it promulgated the subject regulations. *Id.; See also City of New*

York v. FCC, 486 U.S. 57, 63 (1988); *Louisiana Public Service Commission v. FCC,* 476 U.S. 355, 369 (1986); Ans/OpBr p.22, 28;OCCAmBr p.6, 25-26.

In *City of New York*, the Supreme Court identified the two-part analysis that must be employed when considering whether agency preemption is permissible. First, the court must look to see if the agency intended to preempt the state law in question. Then, the court must analyze "whether the [agency] is legally authorized to pre-empt state and local" law or regulation. *City of New York,* 486 U.S. at 65-66; *see also Fidelity*, 458 U.S. at 154. In defining the parameters of this inquiry and analysis, the Supreme Court in the *City of New York* emphasized:

> "First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Louisiana Public Service Commission,* 476 U.S. at 374.

City of New York, 486 U.S. at 66. Thus, where no congressional intent exists, such as here, to grant the OCC the authority to displace state laws as to non-bank state-chartered corporations, preemption by agency regulations is prohibited.

1. Neither The Statutes Nor The Legislative History Supports The OCC's Exercise of Preemption Power

The general grant of authority to the OCC to regulate national banks, 12 U.S.C. § 93a, is insufficient to support the OCC's regulations regarding non-bank

state-chartered operating subsidiaries for the reasons set forth more fully in the Commissioner's Opening Brief at pages 20-21. Conducting the same analysis as that applied by the Supreme Court in *Fidelity* leads to the conclusion that the OCC exceeded its authority in promulgating the preemptive regulations at issue.

In *Fidelity* California homeowners challenged efforts by Fidelity Federal Savings and Loan to enforce due-on-sale clauses. Plaintiffs contended that a state statute forbade the use of a due-on-sale clause in their particular situations. *Fidelity,* 458 U.S. 148-149. In defense, Fidelity relied on a 1976 regulation issued by the Federal Home Loan Bank Board (FHLBB), which stated that federal savings and loan associations had the authority to issue mortgages with due-on-sale clauses. *Id.* at 148. Although the Supreme Court ruled in favor of Fidelity and found that the FHLBB's regulations preempted the conflicting state law, such a result is not mandated in this case.

The Supreme Court analyzed the legislative history of the Home Owner's Loan Act (HOLA), as well as the statutory language, because there was no express statement in HOLA that mandated administrative preemption. *Fidelity,* 458 U.S. at 159-162; 12 U.S.C. §§ 1461-1470.

In reaching the conclusion that the FHLBB was delegated the authority to preempt, the Court noted that Congress had directed the FHLBB in its general grant of authority to consider "the best practices of *local* mutual thrift and home-

financing institutions in the United States." *Fidelity,* 458 U.S. at 161-162 (emphasis added).

Title 12 U.S.C. Section 93a, governing this case, is not nearly as broad. Section 93a grants the OCC the authority to "prescribe rules and regulations to carry out the responsibilities of the office". The statutory language at issue in *Fidelity* suggested that Congress contemplated and approved the FHLBB's promulgation of regulations that preempted contrary state laws. *Fidelity,* 458 U.S. at 162. This, in conjunction with the legislative history, led the Court to conclude that preemption was appropriate. *Id.* at 163-164. However, there is nothing in the language of Section 93a that indicates that Congress contemplated or authorized the OCC to promulgate regulations preempting state laws applicable not to *national banks,* over which they have regulatory authority, but to *non –bank state-chartered corporations.*

Wells Fargo, National City and the OCC also rely upon the distinguishable *Conference of State Bank Supervisors v. Conover,* 710 F.2d 878 (1983) (*Conover*) in support of their arguments that Section 93a authorizes the OCC to issue regulations preempting state laws applicable to operating subsidiaries. Ans/OpBr p.25; OCCAmBr p.28.

However, the Court in *Conover* was not presented with the issue of the OCC regulating in an area not addressed whatsoever by Congress. *See* 12 U.S.C. § 371

(authorizing national banks to make and arrange real estate loans pursuant to the terms and conditions prescribed by the OCC). The regulation at issue in *Conover* was applicable only to *national banks*, the very entities the OCC was created to oversee. 12 U.S.C. § 1.

In this case, the OCC has promulgated regulations applicable not to *national banks*, but to *non-bank state-chartered corporations* that happen to be *operating subsidiaries*. Nothing in the Circuit Court's opinion indicates that the ruling in *Conover* may be stretched so far as to include the OCC's preemptive regulations at issue in this case.

Further, the legislative history does not support the OCC's promulgation of preemptive regulations related to non-bank state-chartered operating subsidiaries. Wells Fargo, National City and the OCC mistakenly rely on the Senate Report in relation to the enactment of the GLBA. 12 U.S.C. §24a; Ans/OpBr p.38; OCCAmBr p.27. The GLBA grants national banks the authority to engage in insurance activities, securities transactions and other activities through "*financial subsidiaries*". 12 U.S.C. §24a (emphasis added). However, there is no express mention of *operating subsidiaries* in the GLBA. Rather, the Senate Report mentions the term "operating subsidiary" in passing:

> For at least 30 years, national banks have been authorized to invest in operating subsidiaries that are engaged only in activities that national banks may engage in directly. For example, national banks are authorized directly to make mortgage loans and engage in related

> mortgage banking activities. Many banks choose to conduct these activities through subsidiary corporations. Nothing in this legislation is intended to affect the authority of national banks to engage in bank permissible activities through subsidiary corporations, or to invest in joint ventures to engage in bank permissible activities with other banks or nonblank companies.

S. Rep. No. 106-44, at 6 (1999); *See also Wells Fargo Bank, N.A. v. Boutris,* 265 F.Supp.2d 1162, 1168 (E.D. Cal. 2003).

A fair reading of this passage indicates congressional acknowledgment of the ability of national banks to invest in, and to choose to conduct permissible banking business through operating subsidiaries. There is no reference, however, to the OCC, the authority of the OCC to regulate such state-chartered operating subsidiaries, or the authority of the OCC to craft preemptive regulations eliminating state licensing and visitorial powers over non-bank state-chartered corporations. Contrary to Wells Fargo, National City and the OCC's assertions, this legislative history in no way indicates congressional intent to delegate to the OCC the authority to regulate in the area of non-bank state-chartered operating subsidiaries.

Wells Fargo and National City's reliance on the GLBA and its legislative history is also misplaced wherein they contend that Congress is presumed to have been aware of the OCC's operating subsidiary regulations when it enacted the GLBA in 1999. Ans/OpBr p. 38-39 (citing *Marchese v. Shearson Hayden Stone, Inc.*, 822 F.2d 876, 878 (9th Cir. 1987) for the proposition that it is proper for the

court to presume that Congress was aware of administrative regulations when it enacted further legislation.) This argument is without merit because 12 C.F.R. § 7.4006, which preempts state laws applicable to operating subsidiaries, was not drafted at the time Congress enacted the GLBA and, in fact, did not become effective until August 1, 2001.

Therefore, Congress could not have been aware of the OCC's preemptive regulation and did not impliedly acquiesce to the OCC's assertion of exclusive regulatory authority over non-bank state-chartered operating subsidiaries.

Further analysis of national banking legislative history supports the conclusion that the OCC has exceeded its authority in promulgating preemptive regulations. In the Riegle-Neal Interstate Banking and Efficiency Act of 1994, members of the banking committee reaffirmed that the states retain the power to regulate, particularly in the area of consumer protection:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers . . . .

H.R. Conf. Rep. No. 103-651, 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

The record also confirms that Members of Congress were concerned about the OCC's applying "traditional preemption principles in a manner [that] is

inappropriately aggressive, resulting in preemption of State law in situations where the federal interest did not warrant that result." *Id*. The record cites to several situations where the OCC incorrectly determined that state law should be preempted. In light of this overreaching by the OCC, Congress mandated a notice and comment procedure be utilized by the OCC when issuing preemption opinions and/or regulations. *Id.* at 2076.

Wells Fargo and National City incorrectly argue that the OCC's compliance with this "notice and comment" provision in promulgating the preemptive regulations is all that is required. Ans/OpBr p.33-34. This misinterprets the nature and scope of permissible agency action. This case *is not* about the OCC's compliance with proper administrative procedure. Rather, this case *is* about the congressionally delegated authority to an administrative agency. In this case, the OCC has exceeded its delegated authority regardless of whether it complied with the proper administrative procedure in promulgating the subject regulations. Since the OCC exceeded its delegated authority, the regulations cannot support a finding of preemption.

2. Recent Pronouncements From Members Of Congress Confirm That The OCC Has Exceeded Its Delegated Authority

Senate Banking Committee Democrats recently sent to the Comptroller of the Currency, John D. Hawke, Jr., correspondence regarding the OCC's aggressive preemption positions. That letter provides:

> We [the 10 Democratic members on the Senate Banking, Housing and Urban Affairs Committee] write to express our continuing concern about the Office of the Comptroller of the Currency's ("OCC") positions on the issue of federal preemption of state laws and state enforcement relating to national banks. In recently proposed regulations (Docket No. 03-16), *amicus curiae briefs* and official pronouncements, the OCC has adopted an aggressive policy of asserting that most state laws, particularly predatory lending and other consumer protection statutes, do not apply to national banks *or to subsidiaries of national banks.* We understand that the OCC, pursuant to its "visitorial powers" examination authority, is also asserting that it has the right to supplant all state enforcement of state laws of general application that may affect national banks.
>
> National banks are creatures of federal law and the OCC is the exclusive supervisor of *national banks.* However, for many years it has been widely accepted by Supreme Court decisions as well as actual practice that national banks are subject to state laws that do not discriminate against, or significantly burden, the operations of national banks. *For example, many states have routinely licensed and regulated separately incorporated mortgage companies that happen to be subsidiaries of national banks.* In addition, states regularly have enforced their unfair and deceptive practices laws against national banks, without controversy as to the states' enforcement role. Under the OCC's current regimen, such traditional state functions would be eliminated.
>
> *Congress has previously voiced its intent that national banks not be immune from coverage by state laws*. The House-Senate conference committee report on the 1994 Riegle-Neal Interstate Branching and

> Bank Efficiency Act stated that: "States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities." In enacting the 1999 Gramm-Leach-Bliley Act in 1999, Congress affirmed the Supreme Court standard in Barnett Bank that state laws applied to national banks unless those laws serve to prohibit or significantly interfere with a national bank's *congressionally-authorized powers.*
>
> *The OCC now appears to be ignoring both the Supreme Court and Congress by pursuing a preemption agenda that would override any state law that has any impact on a national bank.* The OCC's actions and proposals would dramatically alter established preemption standards and would radically affect state-federal relations and consumer protection in the areas of banking.
>
> Our nation has been well served by our dual banking system for the past 140 years. This important balance between federal and state responsibilities should not be upended by precipitous preemption of state laws. We therefore urge you to defer any further rulemaking on preemption of state laws at this time and to vigorously examine claims of predatory lending and other violations of state consumer protection laws by national banks and their operating subsidiaries. (All emphases added).

Letter from Democratic members on the Senate Banking, Housing and Urban Affairs Committee to the Honorable John D. Hawke, Jr., Comptroller of the Currency dated November 24, 2003 attached hereto as an Addendum, at Exhibit 1.

Also weighing in on the issue of preemption and the OCC's attempt to exceed its delegated authority were the four Members of the House Financial Services Committee from the State of New York. They wrote to Comptroller Hawke regarding the OCC's attempt to extend its regulations into "the extremely

broad power of "field preemption" for both national banks and their operating subsidiaries." Letter from Members of the House Financial Services Committee from the State of New York to the Honorable John D. Hawke, Jr., Comptroller of the Currency, dated December 1, 2003 attached hereto as an Addendum, at Exhibit 2.

This letter goes on to state:

> This is the latest, and most far reaching, action in a series of regulatory steps that the OCC has taken without Congressional review. Federal statutes clearly subject national banks to state consumer protection and bank branching laws, as well as any state legislative regulation of national bank activities – particularly standards affecting consumer financial transactions. If such changes are to be made, they should be made after a thorough public review by Congress. *The laws of the fifty states should not be preempted by a federal regulator without public debate.*
>
> These proposals make significant changes to the financial regulatory structure and state law enforcement authority. *We are concerned that exclusive federal regulatory oversight of these entities will result in lesser, not greater, protections for consumers*. (All emphases added).

Id.

Both the legislative history detailed above and recent letters from Members of Congress confirm that the OCC has exceeded its delegated authority in promulgating the subject regulations. The OCC has only limited delegated authority and must be reigned in when it blatantly exceeds that authority.

D. Congress, Not The OCC, May Enact Legislation Preempting State Laws Applicable To Operating Subsidiaries

Undoubtedly, Congress has the authority to preempt state laws applicable to national banks. However, as set forth in the Commissioner's Opening Brief at pages 30-32, there has been a long history of dual regulation of national banks, which suggests that preemption should be the exception rather than the rule. That this is the intent of Congress is further supported by Congress' limited use of its preemption power in the area of national banking. *See* 12 U.S.C. § 36; 12 U.S.C. § 1867; 15 U.S.C. § 6701. Congress has never explicitly granted the OCC the express authority to preempt state laws applicable to non-bank state-chartered corporations that are also operating subsidiaries of national banks. The decision to preempt state laws, in this case, came solely from the agency responsible for administering the banking laws applicable to *national banks*, the OCC.

Preemption such as that exercised by the OCC in this case, without some indicia of congressional intent or a proper delegation of authority from Congress to the agency, is an improper transfer of legislative power to the administrative agency. Administrative agencies, unlike Congress, lack accountability. As noted by the California Superior Court in deciding *de la Cuesta,* "[t]he decision whether to displace state law is a fundamental one going to the very fabric of federalism; thus, the decision is one to be made by people through their elected representatives

in Congress rather than by agencies or tribunals insulated from democratic pressures." *De la Cuesta v. Fidelity Federal Savings & Loan Association,* 121 Cal.App.3d 328, 339-340 (1981), *rev'd on other grounds,* 458 U.S. 141 (1982).

To respect the historical powers of the states and principles of federalism, and to honor the doctrine of separation of powers, a careful review of the statutory language and the legislative history is appropriate. Such a review reveals no congressional intent to preempt state laws applicable to non-bank state-chartered corporations. Ultimately, as indicated by Members of the House Financial Services Committee from the State of New York, Congress has the power to legislate in this area and a determination that preemption is appropriate should only be reached after a thorough review by Congress. Letter from Members of the House Financial Services Committee from the State of New York to the Honorable John D. Hawke, Jr., Comptroller of the Currency, dated December 1, 2003 attached hereto as an Addendum, at Exhibit 2.

II. THE CRMLA AND CFLL ARE NOT PREEMPTED BY DIDMCA

A. Statutory Interpretation Is Essential To Resolution Of This Appeal

In their brief, Wells Fargo and National City once again try to have this case decided on the alleged "plain language" of the federal statute. Ans/OpBr p.43. However, the meaning of Section 501 of DIDMCA has never been held by an appellate court to be so self-evident on the issue at bar as to render irrelevant the

classic tools of statutory interpretation. Wells Fargo and National City cite *Carson Harbor Village, Ltd. v. Unocal Corp.,* 270 F.3d 863, 878 (9th Cir. 2001) *cert. denied*, 535 U.S. 971 (2002). However, that case dealt (in the cited part) with the definition of "disposal" in an environmental statute. It had nothing to do with the meaning of DIDMCA or of the words "expressly limiting the rate or amount of interest." In fact, the Commissioner, Wells Fargo and National City have all cited numerous cases applying interpretive tools to the meaning of this phrase, including the legislative history and genesis of DIDMCA. Ans/OpBr p.43-44.

Wells Fargo and National City attempt a mathematical shell game by characterizing the California per diem laws as "expressly limit(ing) the 'rate or amount of interest' to zero on a mortgage loan for as many days (minus one) as it takes to record the mortgage or deed of trust…" Ans/OpBr p. 43. But, by Wells Fargo and National City's own definition, the rate of interest must take into account the entire period of the loan, and the entire amount of interest collected. Ans/OpBr p. 48. Appellees cannot have their cake and eat it too, by then focusing narrowly on a period of a few days prior to recordation. But also, this shell game ignores both the purpose of DIDMCA and the purpose of the CRMLA.

The federal statute was enacted to protect the supply of mortgage money from state rate ceilings in times of very high rates. The state statutes seek to protect the borrowing consumer from paying interest on a loan that has not yet

delivered its benefit. Neither statute is fairly evaluated by the myopic mathematics of calling the rate "zero" for several days. To do so would be to ignore the broader vision, the reasons for the enactment of DIDMCA, and the limited preemption necessary for its proper implementation.

B. Wells Fargo And National City's Argument Mischaracterizes The "Usury" Issue And Perpetuates The District Court's Error

Wells Fargo and National City claim that the Commissioner argues that the per diem statutes are not usury statutes, and therefore are not pre-empted by DIDMCA, but that seriously misrepresents the point. Ans/OpBr p.44. As quoted in the Commissioner's Opening Brief (at page 48) a lengthy passage from *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 907 (3d Cir. 1989) analyzed the legislative history of DIDMCA. DIDMCA was aimed at state usury laws which required mortgage rates below then-prevailing market levels of interest; it would also serve to remove mortgage rate ceilings to allow savings and loans to pay market rates of interest on savings deposits. *See* CommOpBr p.48.

Therefore, the Commissioner does not argue (as represented by Wells Fargo and National City) that the per diem statutes are not usury laws, in the sense of being part of "collectively, the laws of a jurisdiction regulating the charging of interest." *Black's Law Dictionary* 1545 (6th ed. 1990) cited at Ans/OpBr p.44. Rather, these per diem statutes are not the kind of usury laws limiting the rate or

amount of interest that are the intended target of DIDMCA. The federal statute is not intended to pre-empt all state mortgage laws.

To fairly interpret the meaning of "expressly limiting the rate or amount of interest," one must examine whether the state statutes threaten the ability of lenders to offer rates related to the market price of money, and to attract savers and investors. The per diem statutes manifestly do not present this threat. Wells Fargo and National City characterize *Brown v. Investors Mortgage Co.,* 121 F.3d 472 (9th Cir. 1997) as saying that "the words are unqualified." Ans/OpBr p.45. However, that is misleading, because *Brown* did not interpret the meaning of the phrase "expressly limiting the rate or amount of interest." That court was addressing whether the entire section (§1735f-7a) applied to certain loans, i.e., to loans secured by a first lien. *Brown*, supra, at 475. In fact, the *Brown* case dealt with a 16% interest rate on a loan that violated Washington's 12.22% usury ceiling, and the Court therefore did not even have to approach the issue of the intended scope of "expressly limiting the rate or amount of interest."

C. Wells Fargo and National City Ignore The Obvious Consumer Protection Function Of The Per Diem Statutes

Next, Wells Fargo and National City attack the proposition that the per diem statutes protect the consumer. Ans/OpBr p.45. They begin by repeating the shell game argument, i.e., that the state is limiting the interest rate to zero prior to recordation. The only argument given is that "state laws limiting interest rates on

first mortgages are preempted" - - a perfectly circular argument. But recall that the Office of Thrift Supervision's own regulation, 12 C.F.R. 590.3(c) states: "Nothing in this section preempts limitations in state laws on prepayment charges, attorneys fees, late charges or *other provisions designed to protect borrowers."* (Emphasis added.) The *amicus* brief of Quicken Loans, Inc. ("Quicken") seeks to parse this quote to mean that consumer protection statutes are "un-preempted" only by the C.F.R. section, and not by the statute itself. Quicken Brief at p.22. But the point, of course, is that the federal administrative agency's own view is to give respect and deference to state consumer protection laws when applying the federal statute.

Wells Fargo and National City raise the interesting argument that recording the mortgage or deed of trust protects the lender, not the borrower. Ans/OpBr p.46. It is certainly true that recordation protects the lender. That is why the recordation date was such a fair bright line to use for commencement of interest in the per diem statutes. It is a step that the lender has had every incentive to cause to occur as soon as possible after funding of the loan. Or, conversely, the lender has had every incentive not to fund too long before recordation could reasonably be expected to occur. That is precisely the kind of allocation of burden that has traditionally been imposed by consumer protection statutes. The per diem statutes were drafted to provide a clear bright line to which lenders could perform, and which the lenders here at bar fully knew and understood.

What remains is that Wells Fargo and National City have no fair response to the fact that the per diem statutes are legitimate exercises of the consumer protection function long considered the legitimate province of state legislatures.

D. The Recent Amendment Of The Statutes Is Further Evidence Of The Consumer Protection Function Of The Statutes, And The Amendments Do Not Affect This Appeal

As the *amicus* brief of Quicken notes, the per diem statutes have recently been amended by Assembly Bill 313. Lenders may now charge only one day of interest prior to (in most cases) "the date the loan proceeds are disbursed from escrow." Civil Code Section 2948.5(a). Only in the event of there being no escrow does the operative date become "the date the loan proceeds are disbursed to the borrower." Civil Code Section 2948.5(b).

Even the legislative history provided by Quicken in its Request for Judicial Notice makes it even more indisputable that the California legislature was initially concerned, and still remains concerned, that the borrowing consumer not be charged interest more than one day before s/he has the benefit of the bargain. Note that the newly amended Civil Code statute ties commencement of interest (in the typical escrow transaction) to the date when funds are *"disbursed from escrow,"* i.e., when the loan funds actually accomplish the goal of executing the real estate transaction. Civil Code Section 2948.5 (emphasis added).

Wells Fargo and National City have never argued that any effective difference between recordation and disbursement *per se* makes the statutes fatally flawed, and that issue is not before this Court.

E. Wells Fargo and National City's Interpretation Of The Cases Still Ignores The Intent And Purpose Of DIDMCA

Wells Fargo and National City try once again to obscure the case authority. *Shelton v. Mutual Savings and Loan Assn.*, 738 F. Supp. 1050 (E.D. Michigan 1990) is simply not controlling on its facts. The Michigan statute dealt specifically with *rates of interest over the entire life of loans*, i.e., *exactly* the issue of concern in the drafting of DICMCA. The per diem statutes, of course, deal only with when interest may commence to accrue within a very short, narrowly defined time, i.e., between funding and recordation.

Wells Fargo and National City also try to minimize the import of *Grunbeck v. Dime Savings Bank of New York, FSB*, 74 F.3d 331 (1st Cir. 1996). Ans/OpBr p.48. But this argument about the inability to bargain for higher interest rates misses the point. *Grunbeck* clearly emphasizes the "congressional intention to confine the scope of section 501(a)(1) preemption to state laws which impose express ceilings on the rate or amount of interest which may be charged…" *Grunbeck*, supra, at 339. The per diem statutes do no such thing. The best Wells Fargo and National City can do to characterize these laws is to intone the word

“zero” six times, while glossing over the fact that the state statutes have nothing to do with interest rate ceilings.

Wells Fargo and National City are free to charge any interest rate they so choose under the per diem law, so long as they do not charge it more than one day in advance of recordation. The per diem statutes protect borrowing consumers from paying interest for too long before they have a benefit. In each case, the amount is quite small, with *de minimis* effect on the total interest received by the lender on each loan. Extrapolated over thousands of consumer loans, however, the statutes serve a laudatory public purpose, and one that DIDMCA was not intended to usurp.

F. Because The Issue Is Not In Doubt, Deference To The OTS Is Not Relevant Or Appropriate

Quicken’s *amicus* brief asserts that the OTS has spoken on this issue, and that its interpretation should control or be given deference. However, the major premise of this argument -- that its interpretation is relevant – must fail on examination.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984) the Supreme Court 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).

As earlier stated, the Congressional intent is clear from the history. In fact, the very FHLBB opinion cited by Quicken reiterates the purpose and intent of DIDMCA: to respond to state usury laws that required mortgage rates below market levels of interest, and to allow savings and loans to pay market rates of interest on deposits. We need not look any further than this expressed intent to realize that the per diem statutes do not have any impact on those goals. There is no "gap" left by Congress on this issue, as to which the OTS need opine with respect to the California statutes.

Moreover, the specific Maryland "odd-days interest" statute addressed in that FHLBB opinion is distinctly different from the per diem statutes at issue. There is no evidence whatsoever that the Maryland statute served any consumer protection function. While noting that its own regulation, 12 C.F.R. 590.3(c), "un-preempted" provisions designed to protect borrowers, the FHLBB did not find any such purpose to the Maryland statute. Given the detailed legislative comments on the consumer function served by the per diem statutes submitted in its own Request for Judicial Notice, Quicken cannot credibly dispute their purpose. They clearly fall within the types of statutes which the drafters of DIDMCA did not seek to disturb, and which the OTS (formerly FHLBB) expressly declined to preempt.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE COMMISSIONER DID NOT ENGAGE IN RETALIATION IN INITIATING LICENSE REVOCATION ACTIONS AGAINST WFHMI.

There is no dispute that "[t]he 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).

Because First Amendment rights are involved, this case is governed by the well-established framework for analyzing retaliation claims as set forth by the United States Supreme Court in *Mt. Healthy City School District Board of*

Education v. Doyle, 429 U.S. 274, 287 (1977). The Court in *Mt. Healthy* found that 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, then the burden shifts to the defendant to establish that it would have reached the same decision even in the absence of the protected conduct. This Court has consistently applied the *Mt. Healthy* analysis in cases of First Amendment retaliation claims. *See Allen v. Iranon*, 283 F.3d 1070, 1074 (9th Cir. 2002).

Under *Mt. Healthy,* Wells Fargo is required to first show that the filing of this federal lawsuit was a substantial or motivating factor of the Commissioner in initiating the license revocation proceedings. *Mt. Healthy,* 429 U.S. at 297. As demonstrated by the undisputed facts set forth below, Wells Fargo has failed to meet this burden.

In pursuing its retaliation claim, Wells Fargo was obligated to place as many facts in the record as it could evidence in support of its position. The only fact that Wells Fargo placed (or could place) in the record on this issue was proximity of time between the filing of this federal lawsuit and the Commissioner's initiation of license revocation proceedings against WFHMI. Wells Fargo argues that mere timing of the events is sufficient to show the Commissioner's retaliatory motive.

However, as Wells Fargo concedes, proximity in time, considered without regard to its factual setting, is not enough by itself to justify a grant of summary judgment either for or against plaintiff. *See* Ans/OpBr p.51, n. 23 *citing Coszalter v. Salem,* 320 F.3d 968, 978 (9th Cir. 2003). *See also Vasquez v. County of Los Angeles*, 349, F.3d 634 (9th Cir. 2003) wherein the Ninth Circuit recently, in citing *Coszalter,* noted that it would be error to consider the length of time [between the protected act and the alleged retaliatory action] in isolation. *Id.* at 647, n. 48.

Wells Fargo has failed to place any other facts in the record to establish a retaliatory motive. Wells Fargo attempts to improperly supplement the record with its unsupported assertions contained in its footnote 25. Ans/OpBr, p.55, n.25. However, there are no facts or evidence in the record to support these assertions (as readily evidenced by Wells Fargo's inability to cite to the record) and mere speculation is insufficient to meet their burden.

On the other hand, the record is replete with undisputed facts regarding the circumstances surrounding the initiation of the revocation proceedings, which overwhelmingly evidence that the Commissioner was pursuing administrative action prior to the lawsuit.

The uncontroverted evidence shows that Wells Fargo knew that the Commissioner intended to initiate enforcement proceedings against WFHMI if WFHMI did not comply with the Commissioner's demands to perform audits,

make refunds and comply with the CRMLA, under which WFHMI had voluntarily obtained a license. [ERVI 005 and 107]. This lawsuit was a preemptive strike by Wells Fargo to block the Commissioner from exercising his statutory authority and constitutional mandate to enforce the CRMLA and the CFLL against WFHMI as demonstrated by the undisputed facts leading up to the filing of this federal lawsuit.

It is undisputed that: (1) on December 4, 2002, the Commissioner, after completing an uncontested regulatory examination, demanded that WFHMI perform an audit to identify violations and make appropriate refunds of per diem interest overcharges in violation of Financial Code section 50204(o) and identify instances of understating finance charges in violation of the Truth in Lending Act ("TILA"), specifically reserving the right to proceed with all statutory remedies contained in the CRMLA if compliance was not forthcoming. [ERVI 082, and 106-107]; (2) between December 2002 and January 2003, WFHMI requested and was granted several continuances to respond to the Commissioner's demand. [ERVI 232, SUF No. 19]; (3) on January 17, 2003, the Commissioner demanded that no later than January 23, 2003, WFHMI provide the Department with a plan to conduct the audit and make the refunds. [ERVI 109-110]; (4) on January 22, 2003, WFHMI stated in a letter to the Commissioner that it would not comply with the Commissioner's demands. [ERVI 112-113]; (5) plaintiffs instituted this

lawsuit on January 27, 2003 alleging that WFHMI was not obligated to comply with the CRMLA, the CFLL or the Commissioner's demands. [ERVI 001-003]; (6) compliance with the statutes and applicable regulations is a necessary predicate to maintaining CRMLA and CFLL licenses. [ERVI 173, SUF No. 7]; (7) WFHMI acknowledged in its complaint that failure to comply with the Commissioner's demands and state law would result in an enforcement action. [ERVI 005, ¶ 2][5]; and (8) on February 4, 2003, the Commissioner instituted two administrative proceedings to revoke WFHMI's CRMLA and CFLL licenses. [ERVI 176, SUF No. 23].[6]

Based on the refusal set forth in the January 22, 2003 letter, WFHMI put the Commissioner on notice that it 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

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[5] The First Amended Complaint of Wells Fargo states "[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."

continued to hold itself out to the public through advertisements as a licensee of the Department of Corporations. Ample 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 revocation action was required in order to protect the public from misconceptions it might have that WFHMI was complying with the law.

Wells Fargo asserts that the District Court granted summary judgment to the Commissioner based on its conclusion that Wells Fargo had not proved retaliation was the *sole* reason for the Commissioner's decision to commence revocation proceedings against WFHMI. Ans/OpBr p.50. A review of the District Court's order discloses no such conclusion by the District Court. The District Court's order specifically states that "[p]laintiffs (Wells Fargo) have not presented facts controverting the Commissioner's evidentiary showing that he was going to exercise his regulatory authority over WFHMI whether or not it challenged him in a lawsuit . . ." [ERVI 271].

Wells Fargo next asserts that the Commissioner "avows that the assertion of a federal statutory and a constitutional right . . . automatically voided WFHMI's state license and thus its right to do business in California." Ans/OpBr p.52. Wells Fargo does not cite to the record in support of this assertion because there

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[6] *See also* ERVI 269-271 wherein the District Court finds these facts to be

has been no such admission. The nature of the revocation proceedings themselves, prior notice and hearing, refute such an assertion of automatic voidance. *See* Cal. Fin. Code §§ 22714 and 50327. Moreover, the quote from *Illinois Association of Mortgage Brokers v. Office of Banks and Real Estate,* 308 F.3d 762 (7th Cir. 2002) to which Wells Fargo cites in support of this non-existent assertion (Ans/OpBr p.52-53) is dicta directed by the court not at the state agency official charged with upholding the laws of the state, but rather, at the comments made by a nonparty who filed an *amicus* brief. Further, not only is *Illinois Association of Mortgage Brokers* a Seventh Circuit case, and thus not binding in this matter, it is also not on point as it involves a pre-licensing action as opposed to this matter which involves post-licensing actions.

Wells Fargo finally asserts that the Commissioner has not shown that he *would* have instituted revocation proceedings even if this lawsuit were not filed as required by *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310. Ans/OpBr p.54. This argument is unavailing. Unlike *Soranno's Gasco, Inc.*, Wells Fargo, as previously discussed, has set forth no facts to support an inference of unlawful retaliation and the burden has not shifted to the Commissioner.

In *Soranno's Gasco, Inc.*, the plaintiffs brought an action under 42 U.S.C. § 1983 against the County of Stanislaus and its Air Pollution Control District

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uncontroverted.

(“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 a “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 offered 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. Those facts were (1) evidence of a threat by an APCD employee that he would get even with Gasco for embarrassing him; (2) the timing *and nature* of the APCD action (permit

suspension just two weeks before the permits were set to expire instead of requiring submission of information as a condition for new permits or proceeding with a post-hearing revocation instead of a summary suspension), and (3) mailing notices to customers of Gasco regarding the suspension on the date Gasco was scheduled to meet with the APCD to submit the requested information. *Soranno's Gasco, Inc.,* 874 F.2d at 1315-1316 (emphasis added).

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. Length of time alone, which is what Wells Fargo asks this Court to consider in rendering a decision, is not sufficient to demonstrate a retaliatory motive by the Commissioner. *Coszalter v. Salem,* 320 F.3d at 978.

Accordingly, as Wells Fargo has failed to meet its initial burden, no burden can therefore be shifted to the Commissioner.

Even were this Court to find that Wells Fargo has met its 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. [ERVI 050-060 and 106-110]. WFHMI, by letter on January 22, 2003 and by filing this lawsuit on January 27, 2003, put the Commissioner on notice that it would not comply with the CRMLA, the CFLL or the Commissioner's demand because of its claim of federal preemption. [ERVI 001 and 112-113]. However, it does not matter whether this notice of non-compliance is achieved by telling the Commissioner by letter it does not intend to comply, simply ignoring the Commissioner's demands or by filing a federal lawsuit. The Commissioner had no choice but to institute revocation actions. The CRMLA and the CFLL specifically require license applicants to agree to comply with the provisions of the law and with any order or rule of the commissioner. Cal. Fin. Code §§ 50124(a)(7); 22101(a); Cal. Code Regs., tit. 10, § 1422.

Furthermore, notwithstanding a claim of federal preemption, the Commissioner was under a mandate pursuant to Article III, § 3.5 of the California Constitution to enforce the laws under his jurisdiction until an appellate court made a determination that the enforcement of the law is prohibited by federal law or federal regulation.

Thus, when WFHMI informed the Commissioner it would not comply with the CRMLA and the CFLL, the Commissioner not only had sufficient grounds to revoke the CRMLA and CFLL licenses of WFHMI, but at that point, WFHMI was also on notice that an enforcement action would ensue if such compliance was not forthcoming. WFHMI could not be allowed to continue to maintain CRMLA and CFLL licenses and yet refuse to comply with the provisions of these laws, all the while holding itself out to the public as a licensee, impliedly complying with the laws of the state. Therefore, the administrative revocation proceedings would have been instituted even if plaintiffs had not filed this lawsuit. Accordingly, there has been no violation of WFHMI's First Amendment rights and the District Court's grant of summary judgment for the Commissioner must be upheld.

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." Federal Rule of Civil Procedure 56(c). 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).

Accordingly, not only has Wells Fargo failed to evidence that the filing of

this lawsuit was a substantial or motivating factor of the Commissioner in initiating the license revocation proceedings, but as succinctly stated by the District Court, "Plaintiffs (Wells Fargo) have not presented facts controverting the Commissioner's evidentiary showing that he was going to exercise his regulatory authority over WFHMI whether or not it challenged him in a lawsuit. . .." [ERVI 271]

CONCLUSION

For the foregoing reasons, the California Corporations Commissioner Demetrios A. Boutris respectfully requests this Court reverse the judgment entered by the Eastern District of California on the issues of preemption and uphold the judgment entered by the Eastern District of California on the issues of retaliation and Title 42 U.S.C. §§ 1983 and 1988 and order judgment in his favor.

Dated: December 31 , 2003

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