

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

8 Attorneys for Defendant

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

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

14 Plaintiffs, )

15 vs. )

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

19 Defendant. )

Civil Action No. S-03-0157 GEB JFM

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

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

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

20  
21  
22 Defendant, Demetrios A. Boutris, in his official capacity as California Corporations  
23 Commissioner (“Commissioner”) hereby submits his Opposition to the *Amicus Curiae* brief  
24 submitted by the Office of the Comptroller of the Currency in support of plaintiffs’ motion for a  
25 Preliminary Injunction.

26 **INTRODUCTION**

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

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

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

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

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

22 The OCC’s assertions and analysis regarding DIDMCA and the preemption of California’s  
23 per diem statute are without merit. DIDMCA does not preempt California Financial Code §  
24 50204(o), as that section does not expressly restrict or limit the annual percentage rate or amount of  
25 interest that may be charged by Plaintiffs. Section 50204(o) affects only *when* interest may  
26  
27

28 <sup>1</sup> It is undisputed that the OCC has exclusive regulatory authority over Wells Fargo, a national bank.

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

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

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

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

## 15 ARGUMENT

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

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

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

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

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

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

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

25 ///  
26 ///  
27 ///  
28 ///

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

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

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

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

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

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

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

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

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

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

26 ///

27 ///

28 ///

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

28 ///

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

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

16 **CONCLUSION**

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

23 ///  
24 ///  
25 ///  
26 ///  
27 ///  
28 ///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

Dated: March 3, 2003

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

---

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

ATTORNEYS FOR DEFENDANT