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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WELLS FARGO BANK, N.A., and WELLS FARGO HOME MORTGAGE, INC., Plaintiffs, vs. DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, Defendant.	Civil Action No. S-03-0157 GEB JFM MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT Hearing Date: May 5, 2003 Time: 9:00 a.m. Location: Courtroom 10 **Hearing Requested** [15 minutes each side]

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INTRODUCTION

Plaintiffs' Wells Fargo Bank, N.A. ("Wells Fargo") and Wells Fargo Home Mortgage, Inc. ("WFHMI") have failed to establish that the California Residential Mortgage Lending Act ("CRMLA") and the California Finance Lenders Law ("CFLL") are preempted by federal law and/or federal regulations or that the Office of the Comptroller of the Currency ("OCC") has exclusive visitorial powers over WFHMI. Likewise, the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") does not preempt California Financial Code section 50204(o) or California Civil Code section 2948.5. Therefore, Defendant respectfully requests this Court deny plaintiffs' motion for summary judgment.

STATEMENT OF FACTS

Defendant California Corporations Commissioner Demetrios A. Boutris ("Commissioner"), in his response to plaintiffs' Statement of Undisputed Facts, objects to plaintiffs' assertion concerning statements made to the press by his spokesman as this assertion is based upon inadmissible hearsay which may not be considered on a summary judgment motion as more fully discussed below. This disputed fact, however, is not material to the issue of preemption as to the CRMLA, the CFLL or the per diem statute, and is relevant only to plaintiffs' request for a permanent injunction. Accordingly, the Commissioner has admitted sufficient facts upon which he believes this Court may make a substantive ruling on the motion and therefore does not request a delay to conduct discovery prior to responding to the motion.

ARGUMENT

I. THE COMMISSIONER'S ASSERTION OF LICENSING, SUPERVISORY, REGULATORY, EXAMINATION, AND ENFORCEMENT AUTHORITY UNDER THE CRMLA AND THE CFLL IS NOT PREEMPTED BY THE NATIONAL BANK ACT OR OCC REGULATIONS.

For the sake of brevity, and because the Court is already familiar with this portion of the argument, the Commissioner hereby presents a summary of this section of his argument, which is fully set forth in the 38 page Memorandum of Points and Authorities filed in support of his Motion for Summary Judgment or in the Alternative Partial Summary Judgment, filed on April 7, 2003. The Commissioner respectfully requests this Court fully consider the arguments contained in his Motion for Summary Judgment as if fully presented in Section I of this opposition.

A. An Operating Subsidiary Is *Not* A National Bank.

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

If Congress had intended operating subsidiaries to be the equivalent of national banks, it would have declared its intention and included an operating subsidiary in the very definition of a bank or national bank. Since WFHMI is a state-chartered corporation with a separate corporate identity, WFHMI has its own assets, liabilities, and regulatory responsibilities, separate and distinct from those of its parent corporation. Therefore, Wells Fargo and WFHMI are insulated from each other's liabilities and responsibilities. *Securities Industry Ass'n v. Fed. Home Loan Bank Board,* 588 F.Supp. 749, 754 (D.C. Dist. 1984) *citing Labadie Coal Co. v. Black,* 672 F.2d 92, 96 (D.C. Cir. 1982) ("the greatest judicial deference normally is accorded to the separate corporate entity.")

It is undisputed that WFHMI is not a bank; it is not a state or federally authorized bank. Yet plaintiffs are asking this Court to rule WFHMI is entitled to the same benefits, protections and exclusive oversight as if it were a bank. This interpretation is not supported by any Congressional mandate authorizing an "operating subsidiary" as a separate legal entity distinct from a national bank to be treated the same as a national bank for purposes of regulation.

B. The OCC Lacks Authority To Adopt Regulations Giving It Exclusive Regulatory Powers Over Operating Subsidiaries.

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

As set forth above, WFHMI is not a national bank, but rather a corporate citizen of the state of California. Accordingly, neither Congress nor the OCC as the regulatory agency

responsible for application of the NBA, have the power to establish and regulate operating subsidiaries of national banks to the exclusion of the states. *See Minnesota v. Fleet Mortgage*, 181 F.Supp.2d 995, 1002 (U.S. Dist. Minn. 2001) (noting that there is no direct authority establishing the OCC's exclusive jurisdiction over operating subsidiaries).

Further, the OCC has exceeded its constitutional and statutory authority in promulgating 12 C.F.R. section 7.4006 which, in essence, seeks to preempt state laws as they apply to operating subsidiaries of national banks. The OCC can point to no express delegation of authority to create this rule as Congress has not defined an "operating subsidiary" in the NBA or the Gramm-Leach-Bliley Act ("GLBA"). *See generally,* 12 U.S.C. § 21 et seq. & § 24(a). Congress has not expressly granted national banks the authority to own or establish operating subsidiaries in the NBA or the GLBA. It is only the OCC's own interpretation of Title 12 U.S.C. section 24 (Seventh) that has purportedly given the OCC the "authority" to preempt state law such as the CRMLA and the CFLL. *See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

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

The OCC's general rulemaking authority under 12 U.S.C. section 93a is insufficient to support its promulgation of regulations that seek to give the OCC exclusive regulatory authority over operating subsidiaries, especially where as here, the entity is a state-chartered corporation. While 12 U.S.C. section 93a recognizes and codifies the OCC's authority to regulate in the area of national banking, it does not recognize or codify the OCC's authority to regulate operating subsidiaries of national banks. To regulate operating subsidiaries the OCC must have express Congressional authorization. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Motion Picture Association of America, Inc. v. Federal Communications Commission,* 309 F.3d 796, 801 (D.C. Cir. 2002).

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

Administrative agencies, such as the OCC, are not granted unlimited power. Rather, they are given limited and delegated authority only "to adopt regulations to carry into effect the will of Congress as expressed by . . . statute." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 214 (1976). Congress has not seen fit to express its will with regard to operating subsidiaries and has not enacted legislation recognizing or governing operating subsidiaries of national banks. Therefore, the OCC's promulgation of regulations governing operating subsidiaries is a manifestation of the OCC's will, not the will of Congress. Such regulations are not proper and exceed the OCC's limited delegated authority.

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

Title 12 U.S.C. section 24 (Seventh) authorizes *national banks* to exercise ". . . all such incidental powers as shall be necessary to carry on the business of banking; . . ." Conceding for purposes of argument that Section 24 (Seventh) gives *national banks* the ancillary authority to establish operating subsidiaries, this section in no way acts as express Congressional authority for the *OCC* to regulate such operating subsidiaries to the exclusion of the states. Section 24 (Seventh) makes no mention of operating subsidiaries. Rather it is a broad grant of authority directly to *national banks,* not the regulatory body.

Moreover, Congress has been clear when it intends to delegate authority to the OCC to address areas significantly implicating or preempting state laws. *See generally* 12 U.S.C. § 36; 12 U.S.C. §§ 1861-1867; 12 U.S.C. § 24a. That Congress has not seen fit to delegate such authority to the OCC in the case of operating subsidiaries is tantamount to a declaration from Congress that it has withheld such power. *See Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978). In this case, an impermissible expansion of the OCC's authority to the exclusive regulation of operating subsidiaries would result in just such an unprecedented and unauthorized expansion of the OCC's power.

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

In promulgating 12 C.F.R. section 7.4006, the OCC cited only the GLBA as its statutory authority to expand its exclusive regulatory authority to operating subsidiaries. *See* 66

Fed.Reg. 34784, 34788, n.15. However, Congress did not recognize operating subsidiaries in the GLBA or expressly authorize the OCC to promulgate regulations governing such entities to the exclusion of the states. *See generally* 12 U.S.C. § 24a. Title 12 U.S.C. section 24a, subsection (g)(3)(A), to which the OCC cites as its authorizing power, is a definition of a "financial subsidiary," not an "operating subsidiary".

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

Thus, the GLBA is not the express, and cannot be the implied, Congressional authority required to support the OCC's promulgation of 12 C.F.R. section 7.4006, whereby the OCC purports to restrict the application of state laws to operating subsidiaries of national banks. *See United States v. Mead,* 533 U.S. 218 (2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Neither plaintiffs nor the OCC provide this Court with any other Congressional authority for the OCC's action.

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

Absent direct Congressional authority to regulate operating subsidiaries of national banks, the OCC's regulations regarding operating subsidiaries are not entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

Deference to an agency's action is warranted "only when Congress has left a gap for the agency to fill pursuant to an express or implied 'delegation of authority to the agency.'" *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-844 (1984); *see also United States v. Mead Corporation,* 533 U.S. 218, 226-227 (2001). Where the agency lacks such delegated authority, such as here, there is no need for the Court to engage in the second step of the *Chevron* analysis and inquire whether the regulations are reasonable, as "an agency may not promulgate even reasonable regulations that claim the force of law without delegated authority from

Congress." *Motion Picture Association of America, Inc. v. Federal Communications Commission,* 309 F.3d 796, 801 (2002); *see also Christensen v. Harris County,* 529 U.S. 576, 596-597 (2000) (BREYER. J., dissenting) (where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is "inapplicable").

In this case, the OCC lacks the necessary delegated authority from Congress to enact regulations governing operating subsidiaries to the exclusion of the states. Accordingly, the Court need not engage in the second step of the *Chevron* analysis. However, even if the Court were to do so, the OCC's regulations are not reasonable.

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

The OCC's promulgation of regulations giving it exclusive regulatory authority over operating subsidiaries cannot be a reasonable interpretation of the statute when there is no express congressional delegation of authority to the OCC to regulate operating subsidiaries. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see also United States v. Mead Corporation,* 533 U.S. 218, 226-227 (2001); *Motion Picture Association of America, Inc. v. Federal Communications Commission,* 309 F.3d 796, 801 (2002). Not only is the OCC's statutory authority lacking, but the OCC's interpretation of this alleged statutory authority is unreasonable and conflicts with the purposes of the National Bank Act.

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

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

Without conceding the foregoing arguments, if this Court were to find preemption of the CRMLA and the CFLL appropriate, it should be applied prospectively from the effective date of the OCC's regulation, August 1, 2001. There is a presumption against applying preemption retroactively. *See Scott v. Boos,* 215 F.3d 940, 943 (9th Cir. 2000) citing *Landgraf v. USI Film,* 511 U.S. 244 (1994). "[C]ongressional enactments and administrative rules will not be construed to have

retroactive effect unless their language requires this result." *Landgraf*, 511 U.S. at 272 (cite omitted).

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

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

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

Accordingly, were the Court to find in favor of plaintiffs on summary judgment based upon federal preemption of the CRMLA and the CFLL, it should have no effect on the conduct of WFHMI prior to August 1, 2001. Accordingly, the Commissioner must be allowed to assert his jurisdiction under the CRMLA and the CFLL, including revocation of licenses, for conduct that occurred prior to that date.

III. THE DIDMCA DOES NOT PREEMPT CALIFORNIA LAW.

As the Court is familiar with the Commissioner's position, a summary of his arguments will

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

be presented here. The Commissioner requests that the Court take judicial notice of his arguments in the Motion for Summary Judgment or in the Alternative Partial Summary Judgment previously filed with this Court on April 7, 2003.

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

There is no clear and manifest intent of Congress to preempt California statutes concerning when the lender may begin to charge interest. Furthermore, to the extent potential conflict preemption is alleged, compliance with both state and federal law is possible, thus obviating the need for federal preemption of the state statute. *See California v. Arc America Corp.*, 490 U.S. 93, 94 (1989).

Section 501 (a) of DIDMCA only preempts state laws "*expressly limiting* the rate or amount of interest, discount points, finance charges, or other charges . . . secured by a first lien on residential real property. . . ." 12 U.S.C. § 1735f-7a(a)(1) (emphasis added). Subdivision (o) of California Financial Code section 50204 does not fall within the type of activities preempted by DIDMCA because it does not *expressly limit* interest rates or amounts. Rather, the state statute establishes the date upon which the per diem interest may be assessed upon a borrower.

It does not limit the total amount of interest WFHMI can collect, as the rate of interest charged remains within the control of the WFHMI and may be bargained with the consumer. The state law merely provides a bright line rule for the commencement of interest based upon industry standards relative to when funds are disbursed on behalf of the borrower; i.e., usually the same day as recordation of the deed of trust.

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

Plaintiffs reliance on *Shelton v. Mutual Savings and Loan*, 738 F.Supp. 1050 (E.D. Mich. 1990) for the proposition that if a state law that prohibits charging of interest before loan funds are disbursed is preempted then California's per diem statutes must also be preempted is misplaced. While the court struggled with the meaning of the state statutory language, and found at least three possible interpretations, including those urged by both parties to the suit, the *Shelton* court, unlike this Court, was faced with a statute that did expressly refer to "a rate of interest. While the *Shelton* court could not interpret the Michigan statute, it apparently concluded the Michigan law

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

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

Grunbeck v. Dime Savings Bank of New York, FSB, 74 F.3d 331 (1st Cir. 1996) considered whether DIDMCA preempted New Hampshire's simple interest statute (SIS). The court failed to find any congressional intent that would allow DIDMCA to preempt the SIS and determined that no express interest rate limitations existed in the SIS.

The *Grunbeck* court emphasized the interpretive importance of the language from Section 501 of DIDMCA "expressly limiting the rate or amount of interest," the same issue under consideration in this case. The court recognized that Congress was acutely aware that its choice of the distinctive terminology -- "expressly limiting" - would be a primary interpretive tool. *Grunbeck* at 338. By preempting only those state statutes that "expressly limit" the amount or rate of interest, Congress contemplated state statutes, like the California per diem interest statutes or the New Hampshire simple interest statutes, would not be preempted.

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

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

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

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

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

Without conceding any of the foregoing arguments, were the Court to find preemption appropriate, Wells Fargo is not entitled to summary judgment against the Commissioner because of its failure to show that any of its constitutional or statutory rights have been violated. Wells Fargo bases its attack on the statutes in question -- the CRMLA, the CFLL, Civil Code Section 2948.5 -- on the premise that they are unconstitutional *as applied to* it. FAC, ¶ 40, 45. Although Wells Fargo complains that it makes some residential mortgage loans directly, not through the separate corporate identity of WFHMI, the Commissioner has never attempted to enforce any California laws relating to Wells Fargo. *See* FAC, ¶ ¶7, 31. The only administrative actions in question brought by the Commissioner were solely against WFHMI, not against Wells Fargo. FAC ¶ 31.

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

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

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

Wells Fargo cannot demonstrate that it has suffered an "injury-in-fact" to a legally protected interest. The only action taken by the Commissioner was as against WFHMI, a separate and distinct legal entity that had sought licensure with him and was failing to comply with California law. Although Wells Fargo is the parent corporation, as set forth more fully in Section I.A. above, it is isolated from any regulatory liabilities incurred by WFHMI by settled principals of corporate law

relating to parents and their subsidiaries. Second, there is no injury to Wells Fargo other than the alleged injury claimed by WFHMI. FAC ¶ 31. Finally, because there is no injury to Wells Fargo, there is no redress that this Court could provide even in a favorable decision to WFHMI. Because standing issues may be properly raised at any time, including during motions for summary judgment, plaintiffs' motion for summary judgment as to Wells Fargo should not be granted. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

V. A PERMANENT INJUNCTION IS NOT WARRANTED IN THIS MATTER.

A. Plaintiffs Have Failed To Meet The Standards for Issuance of a Permanent Injunction.

"'The requirements for the issuance of a permanent injunction are the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.'" *EasyRiders Freedom F.I.G.H.T. v. Hannigan*, 92 F. 3d 1486, 1495 (9th Cir. 1996) citing *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1066-1067 (9th Cir. 1995). Accord *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988). "This requires a court to balance the competing claims of injury and the effect on each party of granting or withholding of the requested relief. *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988) citing *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987). Accordingly, the standard for a permanent injunction is the same as a preliminary injunction except that actual success on the merits must be shown. *Sierra Club v. Penfold*, 857 F.2d at 1318.

Plaintiffs, in their Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction, have failed to even address the issue of inadequacy of legal remedies, and as demonstrated in Sections I and III above, are unable to succeed on the merits because the CRMLA, CFLL and the per diem statues are not preempted by either federal law or regulation. Further, plaintiffs have been unable to demonstrate irreparable injury.

"In order to demonstrate irreparable injury, a plaintiff must show a 'real or immediate threat' that he or she 'will be wronged again;' in other words, 'a likelihood of substantial and immediate irreparable injury." *Ashker v. California Department of Corrections*, 224 F.Supp. 1253, 1262-1263 (N.D. Cal. 2002) citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

In *Ashker*, a state prison inmate sued the California Department of Corrections seeking a permanent injunction via summary judgment based upon alleged First Amendment violations by the Department of Corrections concerning a book labeling policy the Department of Corrections had instituted, and was continuing to apply, that was designed to ensure that books or periodicals were shipped to inmates by authorized publishers and not family or friends in an attempt to reduce the contraband entering the prison. In *Ashker*, the U.S. District Court for the Northern District of California found irreparable injury. The finding of irreparable injury was based upon the fact that the Department of Corrections did not dispute that the book labeling policy had impeded and *would continue* to impede the inmate's First Amendment right to receive reading materials. See *Ashker v. California Department of Corrections*, 224 F.Supp. at 1263.

By contrast, the only facts that Plaintiffs offer in support of substantial and immediate irreparable injury are the audit and refund demands of the Commissioner on WFHMI and alleged statements by the Commissioner's spokesperson in a March 7, 2003 Los Angeles Times article. See Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction, Section III.

The audit and refund demands made by the Commissioner to WFHMI and relied upon by plaintiffs in support of their claim of irreparable injury were prior to the commencement of this federal action and the CRMLA and the CFLL license revocation proceedings, which this Court specifically authorized to go forward in its March 10, 2003 Preliminary Injunction Order. Plaintiffs have offered no evidence that, were the Court to declare that the CRMLA, the CFLL and/or the per diem statutes are preempted, the Commissioner would not abide by this Court's declaratory judgment by insisting on an audit and refunds. Absent admissible and credible evidence of this nature, plaintiffs are unable to show irreparable injury, or for that matter, any need whatsoever for injunctive relief.[2]

[2] The necessity of injunctive relief is questionable in light of Wells Fargo's recent announcement via publication in the San Francisco Chronicle that it has applied to the Federal Deposit Insurance Corporation to merge WFHMI into Wells Fargo. Such a merger would leave no question as to whether the CRMLA, including Financial Code § 50204(o), and the CFLL are preempted by federal law as to WFHMI, in that it would now be a national bank.

The only recent evidence that plaintiffs' cite to in support of their claim of irreparable injury is a statement contained in a March 7, 2003 Los Angeles Times article allegedly made by the Commissioner's spokesman. Not only was the alleged comment made prior to the Court's ruling on March 10, 2003, but it is also inadmissible hearsay, which may not be considered on a summary judgment motion. *In Re Cypress Semiconductor Sec. Litig.*, 891 F. Supp. 1369, 1374 (N.D. CA 1995) citing *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991) "(holding that newspaper article offered to prove that defendant made statement quoted in article was hearsay)" and *Burlington Coat Factory v. Esprit de Corp.*, 769 F.2d 919 (2d Cir. 1985) "(inadmissible hearsay may not be considered on motion for summary judgment)". *In Re Cypress Semiconductor Sec. Litig.*, 891 F. Supp. at 1374.

Further, plaintiffs' belief that they are entitled to a permanent injunction because this Court made certain findings at the preliminary injunction hearing is without merit. First, as demonstrated above, irreparable injury no longer exists. Secondly, as specifically noted by this District in *The Wilderness Society v. Tyrrel*, 701 F.Supp. 1473 (E.D. Cal. 1988), "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party is thus not required to prove his case in full at a preliminary injunction hearing . . . *and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits*." *Id.* at 1476 (citation omitted) (emphasis added).

B. Injunctive Relief Is Inappropriate When The Rights of Nonparties Will Be Affected.

The injunctive relief sought by plaintiffs would adversely affect the borrowers who were overcharged, as well as all other California consumers, who rely upon the CRMLA and CFLL for protection. None of the consumers or borrowers is a party to this matter. If granted it also could adversely impact other persons or officials acting in the name of the People of the State of California, such as the California Attorney General, none of whom is a party to this action or has been given notice of the action by plaintiffs. Further, other licensees under the CRMLA and the

CFLL will be unfairly disadvantaged in business by being required to abide by the laws of the State of California while their competitor, WFHMI, would be under no such requirement. The Court must consider the effect of the injunction upon nonparties in determining whether to grant the far-reaching permanent injunction requested by plaintiffs. *Publications Int'l, Ltd. v. Meredith Corporation,* 88 F.3d 473, 478 (7th Cir. 1996).

By way of example, the United States District Court for the District of Nevada refused to grant a single shareholder a preliminary injunction to prevent corporate officers from taking actions in furtherance of stock rights they had declared as a dividend to common stockholders of the company. *Horwitz v. Southwest Forest Industries, Inc.,* 604 F.Supp. 1130, 1136 (D.NV 1985). The court held such an action would seriously affect the investing public who were not parties to the litigation. *Id.* To allow one shareholder to disrupt the operations of the corporation by way of a preliminary injunction gave too much power to the allegedly aggrieved party. *Id.*

Here, this Court should refuse to allow plaintiffs to disrupt the statutory schemes set forth in the CRMLA and the CFLL to the detriment of California consumers and businesses. Moreover, plaintiffs' attempts to enjoin others, including other state officials, from applying the CRMLA, the CFLL and Civil Code section 2948.5, without notice, undermines the concepts of due process.

C. The Public Will Be Harmed By Granting The Permanent Injunction.

The public will suffer harm if the permanent injunction is granted because the CRMLA and the CFLL offer the only effective protection for consumers with respect to the lending and servicing activities of WFHMI.

Plaintiffs argue that no harm will be suffered, because as a matter of law, if the area has been expressly preempted, there can be no harm. Plaintiffs cite to *Trans World Airlines, Inc. v. Mattox,* 897 F.2d 773 (5th Cir. 1990) in support of this proposition. However, Congress did not expressly preempt <u>any law</u> with respect to operating subsidiaries. See Section I above. As such, plaintiffs cite to *Trans World Airlines* is inapposite to this case.

Plaintiffs misstate the law and the function of the OCC when they claim that California and the public will suffer no harm if the permanent injunction were granted. Although the

OCC represented to this Court that it would enforce non-preempted state laws, the OCC is not a prty to this action and is not bound by any determinations this Court makes as to any finding that a state law is not preempted. Therefore, the harm that plaintiffs fail to acknowledge is that California consumers who obtain loans through WFHMI will continue to be overcharged, as WFHMI deems appropriate, unless this Court allows the Commissioner to enforce California laws. While the OCC may continue to regulate plaintiffs, even the OCC makes clear that its regulation is not based on consumer protection but rather on protecting the safety and soundness of the financial institutions. *See* OCC letter attached as Exhibit A to FAC.

Plaintiffs must therefore establish, to the satisfaction of this Court, both irreparable injury and actual success on the merits. As demonstrated above, plaintiffs have not met this burden.

VI. THE PROPOSED ORDER SUBMITTED BY PLAINTIFFS IS OVERBROAD.

Without conceding the foregoing arguments, if this Court were to find preemption of the CRMLA, the CFLL and/or the per diem statutes appropriate, the declaratory relief order should be limited in its application to plaintiffs, more specifically, WFHMI, and should not include Civil Code section 2948.5.

The [Proposed] Final Judgment and Permanent Injunction submitted by plaintiffs at paragraph 1 declares the CRMLA and the CFLL preempted as to a "class"; to wit: "all national bank operating subsidiaries, and as applied to all national banks' conduct of their federally authorized activities through such subsidiaries, . . .". [Proposed] Final Judgment and Permanent Injunction, ¶ 1, p. 2, l. 3-4. Plaintiffs have included this overly broad language in their proposed order notwithstanding that plaintiffs in the Notice of Motion and Motion for Summary Judgment seek preemption of the CRMLA and the CFLL only as applied to themselves.

"Relief cannot be granted to a class before an order has been entered determining that class treatment is proper. . . . In light of the failure to meet the plain requirements of Rule 23 for maintenance of a class action, we must view the claim for injunctive and *declaratory relief* as the individual claim of the named plaintiffs." *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974). *See also Zapeda v. INS, 753 F.2d 719, 728 (9th Cir. 1983).*

Further, the [Proposed] Final Judgment and Permanent Injunction submitted by plaintiffs

provides not only for a declaration that California Civil Code section 2948.5 is preempted, but also that the Commissioner and his agents, which plaintiffs have previously defined as the California Attorney General, be enjoined from enforcing California Civil Code section 2948.5, among other things. [Proposed] Final Judgment and Permanent Injunction, ¶¶ 2-3, p. 2, l. 9-16. As noted in Section II above, the Commissioner's authority to enforce California Civil Code section 2948.5 has been codified in California Financial Code section 50204(o). As such, the California Attorney General retains jurisdiction to enforce California Civil Code section 2948.5 as amended in 2001. The California Attorney General is not a party to this action, and thus, the Court has no personal jurisdiction over him, and no judgment should issue that encompasses the California Attorney General or his jurisdiction. *See Zapeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983).*

Accordingly, as plaintiffs have not sought class status any declaratory relief that may be granted by this Court is proper only as to plaintiffs, and California Code section 2948.5 should not be encompassed in any judgment possibly issued by this Court in that the California Attorney General is not a party to this action.

VII. ANY INJUNCTIVE RELIEF GRANTED SHOULD BE SPECIFIC AS TO ITS COVERAGE.

The Court, in its March 10, 2003 Order granting the preliminary injunction, specifically stated that "however, the portion of Plaintiffs' motion seeking to preliminarily enjoin the Commissioner from revoking WFHMI's California issued licenses is denied." On March 11, 2003, the Commissioner, pursuant to the Court's March 10, 2003 Order, proceeded with an administrative hearing on the revocation of WFHMI's CRMLA and CFLL licenses based upon the allegations contained in the accusations. Declaration of Judy L. Hartley In Support of Defendant's Opposition to Plaintiffs' Motion for Summary Judgment dated April 16, 2003, ¶ 5, ("Hartley Decl."). Copies of the relevant accusations were previously provided to the Court by plaintiffs as Exhibit 1 to the Declaration of Peter J. Wissinger in Support of Plaintiffs' Motion for Preliminary Injunction dated February 10, 2003 ("Wissinger Decl."). The CRMLA accusation contains specific allegations of the violations of the CRMLA by WFHMI during its licensure, in particular, California Financial Code section 50204(o), and California Financial Code section 50204, subsections (i), (j), and (k), which were based upon violations of the Truth In Lending Act. Wissinger Decl., Exhibit 1. The

administrative matter was submitted for decision on March 11, 2003. A decision by the Commissioner has not yet been rendered, but could possibly include findings of violations of the CRMLA, in particular, California Financial Code section 50204, subsections (i), (j), (k), and (o). Hartley Decl. ¶ 6.

During the administrative proceedings, WFHMI objected to the proceedings as being in violation of the Court's March 10, 2003 preliminary injunction order if the Commissioner revoked WFHMI's licenses for any reason other than WFHMI's claim that it was preempted from having to comply with the CRMLA and/or the CFLL. Hartley Decl. ¶ 7. WFHMI continues with this objection as noted in its Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment and Permanent Injunction at page 3, lines 3-9.

In that the revocation proceedings are still ongoing, were the Court to consider granting a permanent injunction to plaintiff(s), it is imperative for the Court to specifically define what actions of the Commissioner are not enjoined, i.e, revocation proceedings, and on what grounds the Commissioner could continue with such proceedings. As presently written, plaintiff's [Proposed] Final Judgment would specifically preclude *any* further attempt by the Commissioner to revoke WFHMI's CRMLA and CFLL licenses for any reason. [Proposed] Final Judgment and Permanent Injunction, ¶ 3, p. 2, l. 13-19.

The administrative accusations and the Commissioner's various pleadings filed with the Court regarding plaintiffs' request for a temporary restraining order and preliminary injunction clearly disclosed that the Commissioner sought to revoke WFHMI's CRMLA license for underlying violations of the CRMLA, in addition to the claim of WFHMI that it did not have to comply with the CRMLA. Accordingly, there is no conclusion that can be arrived at other than that the Court authorized the Commissioner to move forward in the revocation proceedings on all allegations in its accusations when it issued it March 10, 2003 Order, and that this ruling should not be disturbed were the Court to determine that WFHMI is entitled to a permanent injunction in this matter.

CONCLUSION

For the foregoing reasons, plaintiffs have not shown that the NBA expressly preempts the CRMLA or the CFLL or grants the OCC exclusive visitorial powers over WFHMI, that OCC

regulations were properly promulgated, or that DIDMCA preempts California Financial Code section 50204(o) or California Civil Code section 2948.5. Further, plaintiffs have been unable to demonstrate substantial and immediate irreparable injury. Based thereon, the Commissioner respectfully requests this Court deny plaintiffs' request for summary judgment.

Should the Court believe that preemption applies pursuant to 12 C.F.R. section 7.4006, there is no question but that the OCC regulation was not effective until August 1, 2001. Therefore, preemption could have no bearing on the actions of WFHMI prior to the date. As a result, any injunction issued should only restrict acts occurring after August 2001, and no permanent injunction should apply to any revocation proceeding instituted by the Commissioner pursuant to his statutory and/or regulatory authority regarding conduct by WFHMI prior to the effective date of the OCC regulation.

The Commissioner respectfully requests this Court deny plaintiffs' motion for summary judgment in its entirety, or in the alternative, grant the limited relief requested above.

Dated: April 18, 2003

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