

1 VIRGINIA JO DUNLAP (CA BAR NO. 142221)
Assistant Commissioner
2 ALAN S. WEINGER (CA BAR NO. 86717)
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 4th Street, Suite 750
6 Los Angeles, California 90013-2344
Telephone: (213) 576-7604
7 Facsimile: (213) 576-7181

8 Attorneys for Defendant

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

WELLS FARGO BANK, N.A., and WELLS
FARGO HOME MORTGAGE, INC.,

Plaintiffs,

vs.

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

Defendant.

) Civil Action No. S-03-0157 GEB JFM
)
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF
) DEFENDANT’S MOTION FOR SUMMARY
) JUDGMENT OR IN THE ALTERNATIVE
) PARTIAL SUMMARY JUDGMENT

) Hearing Date: May 5, 2003
) Time: 9:00 a.m.
) Location: Courtroom 10

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

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

9 INTRODUCTION

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

18 Plaintiffs cannot establish that federal preemption is appropriate. WFHMI is not a national
19 bank and therefore is not subject to the exclusive visitorial powers of the Office of the Comptroller
20 of the Currency (“OCC”) as plaintiffs claim. Plaintiffs cannot establish that the Depository
21 Institutions Deregulation and Monetary Control Act (“DIDMCA”) preempts the state per diem
22 interest laws that do not *expressly limit* the amount or rate of interest, but rather determine the date
23 upon which an institution may begin charging interest. The case now before this court presents only
24 the following issues of law.

- 25 1. That the National Bank Act (“NBA”) does not expressly preempt the CRMLA and
26 the CFL.
- 27 2. That the NBA does not grant exclusive visitorial powers over WFHMI to the OCC.

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

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

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

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

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

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

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

15 **STATEMENT OF FACTS**

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

22 Following several regulatory examinations, to which WFHMI submitted as a licensee
23 pursuant to California law, the Commissioner demanded on December 4, 2002, that WFHMI
24 conduct an audit of its residential mortgage loans made in California during 2001 and 2002. SUF
25 Nos. 16-18. The audit was demanded in order to identify all loans on which per diem interest was
26 charged by WFHMI in excess of that allowed under California Financial Code section 50204(o)¹, to
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¹ California Financial Code section 50204(o) prohibits lenders licensed under the CRMLA from charging interest for more than one day prior to the recording of the mortgage or deed of trust. Typically, in California, the deed of trust is

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

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

9 The California Constitution mandates that the laws of this state be enforced until they are
 10 stayed by an appellate court decision. *See* Cal. Const. art. III, § 3.5.² Accordingly, on February 4,
 11 2003, the Commissioner instituted proceedings to revoke the CRMLA and CFLL licenses of
 12 WFHMI. SUF No. 23. The revocation action was based on WFHMI's violations of the CRMLA,
 13 and WFHMI's stated intent to not abide by requirements of the CRMLA and the CFLL as set forth
 14 in its January 22, 2003, letter and this lawsuit. SUF Nos. 20, 21 and 23. A necessary predicate to
 15 maintaining CRMLA and CFLL licenses under these consumer protection statutes is compliance.
 16 SUF No. 7.

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

23 ² The California Constitution, Article III, Section 3.5 states:

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

- 25 (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional
 unless an appellate court has made a determination that such statute is unconstitutional;
 26 (b) To declare a statute unconstitutional;
 27 (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal
 regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the
 enforcement of such statute is prohibited by federal law or federal regulations.

1 WFHMI has never made application to the Commissioner for a ruling that it is exempt from
2 the CRMLA under California Financial Code section 50003³ or the CFLL under California Code
3 section 22050-22054.⁴ SUF Nos. 9 and 10. Through the date of the filing of this lawsuit, WFHMI
4 has never attempted to surrender its licenses.⁵ SUF No. 13.

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

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

13 There is no dispute that Wells Fargo Bank, N.A. ("Wells Fargo") is a national banking
14 association organized and existing under the NBA. SUF No. 1; *see also* Plaintiffs' First Amended
15 Complaint (hereinafter "FAC"), ¶ 7. Likewise, there is no dispute that the Commissioner's
16 regulatory authority has been directed solely at the state-chartered corporate entity of WFHMI, not of
17 the subsidiary's parent, Wells Fargo Bank. SUF Nos. 1 and 2; *see also* FAC, ¶ 7. Since at least
18 1996, WFHMI has been engaged in the residential mortgage business in California. SUF No. 4.

19 _____
20 ³ Examples of exemptions include those granted to national banks; federal savings associations; wholly owned service
21 corporations of national banks and federal savings associations.

22 ⁴ Examples of types of exemptions include those granted for any person doing business under any law of this state or of
the United States relating to banks, trust companies, and savings and loan associations.

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

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

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

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

6 **ARGUMENT**

7 **I. THE COMMISSIONER HAS MET THE STANDARDS FOR OBTAINING**
8 **SUMMARY JUDGMENT**

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

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

18 Federal Rule of Civil Procedure 56(c) provides that summary judgment “shall be rendered
19 forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together
20 with the affidavits, if any, show that there is no genuine issue as to any material fact and that the
21 moving party is entitled to a judgment as a matter of law.” Summary judgment should be granted
22 when a party fails to show a genuine issue as to a material fact that the party bears the burden of
23 proof of at trial, and judgment is appropriate against that party as a matter of law. *Celotex Corp. v.*
24 *Catrett*, 477 U.S. 317, 322 (1986).

25 An issue of fact is not “genuine” for the purposes of summary judgment unless it is of such a
26 nature that a reasonable jury could return a verdict in favor of the non-moving party. Summary
27

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

1 judgment cannot be defeated by evidence that is not sufficiently probative, or only colorable, it must
2 be such that a reasonable jury could find in the non-moving party's favor. *Anderson v. Liberty*
3 *Lobby, Inc.*, 477 U.S. 242, 248-252 (1986).

4 A "material" fact is one that might affect the outcome of the case. "Factual disputes that are
5 irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
6 (1986). As established in the Commissioner's Statement of Undisputed Facts, there are no material
7 facts in dispute that can affect the outcome of this case and any factual disputes that do exist are
8 irrelevant to the ultimate legal issues that this court is being asked to decide.

9 Accordingly, when the non-moving parties, like the plaintiffs here, have made an insufficient
10 showing of an essential element of their case on which they have the burden of proof, the court may
11 grant summary judgment "as a matter of law". See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
12 (1986).

13 The Commissioner has met his initial burden of persuasion to demonstrate to the court the
14 absence of a genuine issue as to a material fact as set forth in Sections II-VIII herein, including
15 references to sources of evidence. The Commissioner is not required to submit affidavits negating
16 Plaintiffs' claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323. Once the moving party has met its
17 initial burden, the burden shifts to the non-moving party that bears the burden of proof at trial to
18 show that there is a genuine issue for trial by going beyond the pleadings to its own affidavits or to
19 discovery responses. *Id.* at 324. As previously stated, plaintiffs will be unable to demonstrate that
20 there are any genuine issues for trial.

21 Summary judgment is appropriate where the case presents a pure question of law, such as
22 here, and where there is no dispute as to the historical facts of the case. *Edwards v. Aguillard*, 482
23 U.S. 578 (1987). In *Edwards*, the Supreme Court affirmed the grant of summary judgment brought
24 to challenge the constitutionality of the Louisiana Creation Act, even though the defendants argued
25 that they had created a genuine issue of fact by their submission of five expert witness affidavits.
26 The Court held that summary judgment was nonetheless proper because the uncontroverted
27 affidavits did not raise a genuine issue of material fact, and were not relevant to the issue. The court
28

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

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

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

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

12 If this court determines that there are genuine issues of fact that preclude it from granting the
13 Commissioner summary judgment, pursuant to Rule 56(d) of the Federal Rules of Civil Procedure,
14 the court has the authority, to “. . . make an order specifying the facts that appear without substantial
15 controversy, including the extent to which the amount of damages or other relief is not in
16 controversy, and directing such further proceedings in the action as are just.” *Williams v. Sinclair*,
17 529 F. 2d 1383, 1390 (9th Cir. 1975). The Commissioner requests that the court make an order in
18 accordance with Rule 56(d) in the event that the court decides to deny the Commissioner’s request
19 for summary judgment.

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

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

28 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

1 bank or national bank. Title 12 U.S.C. Section 1813 defines “bank” as “any national bank, State
2 bank, and District Bank, and any Federal branch and insured branch.” But, this definition of “bank”
3 formulated by Congress does not include “operating subsidiaries” of national banks. A court must
4 give meaning to all statutory provisions and to interpret the statute consistently with the structure,
5 legislative history and motivating policies, so as to not make ineffective other provisions of the
6 statute. *See; United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) *Bifulco v. United States*,
7 447 U.S. 381, 387 (1980); *United States v. Fisher*, 58 F.3d 96, 99 (4th Cir. 1995).

8 WFHMI is a state-chartered corporation and has held such corporate status in California
9 since 1964 (formerly known as Norwest Mortgage, Inc.). SUF No. 3. As a separate corporate
10 entity, WFHMI has its own identity, assets, liabilities, and regulatory responsibilities, separate and
11 distinct from those of its parent corporation. Therefore, Wells Fargo and WFHMI are insulated from
12 each other’s liabilities and responsibilities because “[e]xcept in unusual circumstances, courts will
13 not disregard the separate identity of a parent and its subsidiary, even a wholly-owned subsidiary.”
14 *Securities Industry Ass’n v. Fed. Home Loan Bank Board*, 588 F.Supp. 749 (D.C. Dist. 1984) *citing*
15 *Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982) (“the greatest judicial deference
16 normally is accorded to the separate corporate entity.”) It is undisputed that WFHMI is not a bank;
17 it is not a state or federally authorized bank. It is a state-authorized corporate citizen who engages in
18 residential lending transactions. SUF Nos. 3 and 4.

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

25 In fact, at least one other District Court concluded that a mortgage company operating
26 subsidiary of Fleet National Bank was not a “bank” under Section 133 of the Gramm-Leach-Bliley
27 Act (codified at 12 U.S.C. § 1816), and thus, was subject to shared enforcement of jurisdiction by
28 the state of Minnesota and Federal Trade Commission regarding telemarketing activities. *Minnesota*

1 *v. Fleet Mortgage*, 181 F.Supp.2d 995, 1000 (U.S. Dist. Minn. 2001). The court found that although
2 the mortgage company was an “operating subsidiary” of a national bank it was not “a bank.” *Id.* at
3 999. The court rejected the arguments by both Fleet National Bank and the OCC that the subsidiary
4 was “effectively an incorporated department” of a national bank. *Id.* at 1000. The court further held
5 that “[a]llowing the State to enforce the [Telemarketing Sales Rule] against [Fleet Mortgage
6 Company] will in no way ‘restrict’ the authority of the OCC to regulate national bank operating
7 subsidiaries just as it has done in the past. The OCC’s insistence that it must have exclusive
8 jurisdiction over subsidiaries in order to avoid having its authority ‘restricted’ is not persuasive.” *Id.*
9 at 1001.

10 *Fleet Mortgage* analyzed the issues now before this Court, and (1) recognized the chartering
11 and regulatory differences between a national bank and a state-chartered corporation acting as an
12 operating subsidiary of the bank, (2) rejected the OCC’s claim of exclusive regulatory power over
13 operating subsidiaries of national banks, and (3) refused to defer to the OCC’s interpretation of the
14 GLBA and the FDIA [Federal Deposit Insurance Act]. *Id.* at 999-1002.

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

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

27 As has been succinctly stated by the district court for the Eastern District of Pennsylvania,
28 “The National Bank Act, 12 U.S.C. §§ 21 et seq. regulates national banks and only national banks,

1 which can be identified by the word “national” in their name as required by 12 U.S.C. § 22.” *Weiner*
2 *v. Bank of King of Prussia*, 358 F.Supp.684, 687 (E.D. PA 1973). WFHMI is not such a national
3 bank.

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

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

10 “The powers not delegated to the United States by the Constitution, nor prohibited by it to
11 the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X. Article I,
12 Section 8 of the Constitution authorizes Congress to establish national banks and “to enact
13 legislation for the protection, preservation and regulation of such institutions.” *Clark v. United*
14 *States*, 184 F.2d 952, 953 (10th Cir. 1950). Therefore, a federal statutory scheme over federally
15 created national banks does not violate the Tenth Amendment. *First Union National Bank v. Burke*,
16 48 F.Supp.2d 132 (D.C. CT 1999).

17 In *First Union*, the Connecticut District Court was presented with the question of the OCC’s
18 exclusive visitorial powers over national banks and the potential violation of the Tenth Amendment
19 such exclusivity presented. *Id.* at 148-149. The court found that the NBA and the OCC’s
20 regulations *properly* promulgated thereunder did not violate the Tenth Amendment because the NBA
21 “has carved out from state control supervisory authority over these *federal instrumentalities*. *Id.* at
22 148 (emphasis added). However, as set forth above, WFHMI is not a national bank, but rather a
23 corporate citizen of the state of California. Accordingly, neither Congress nor the OCC as the
24 regulatory agency responsible for application of the NBA, have the power to establish and regulate
25 operating subsidiaries of national banks to the exclusion of the states. *See Minnesota v. Fleet*
26 *Mortgage*, 181 F.Supp.2d 995, 1002 (U.S. Dist. Minn. 2001) (noting that there is no direct authority
27 establishing the OCC’s exclusive jurisdiction over operating subsidiaries).

28

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

4 The first question that must be answered in any preemption analysis is whether Congress
5 intended that federal law or regulation would supersede state law. *Louisiana Public Service*
6 *Commission v. FCC*, 476 U.S. 355 (1986). As to preemption of state law, the OCC regulations may
7 only preempt state law “. . . when and if it is acting within the scope of its congressionally delegated
8 authority An agency literally has no power to act, let alone pre-empt the validly enacted
9 legislation of a sovereign State, unless . . . Congress confers power upon it.” *Louisiana Pub. Serv.*
10 *Comm’n v. FCC*, 476 U.S. 355, 374 (1986). The OCC can point to no express delegation authority.

11 Congress has not defined an “operating subsidiary” in the NBA or the Gramm-Leach-Bliley
12 Act (“GLBA”). *See generally*, 12 U.S.C. § 21 et seq. & § 24(a). Congress has not expressly granted
13 national banks the authority to own or establish operating subsidiaries in the NBA or the GLBA.
14 The OCC has interpreted Title 12 U.S.C. Section 24 (Seventh) as giving the OCC the authority to
15 promulgate regulations authorizing national banks to establish operating subsidiaries. Title 12
16 U.S.C. Section 24 (Seventh), however, authorizes incidental powers to national banks, not the OCC.
17 Thus Section 24 (Seventh) does not constitute an express Congressional delegation to the oCC to
18 preempt state regulation of operating subsidiaries of national banks.

19 There is a long-standing rule designed to aid courts in statutory construction: “. . . courts
20 must presume that the legislature says in a statute what it means and means in a statute what it says
21 there.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The failure of the
22 Congress to define the term “operating subsidiary” or include operating subsidiaries in the statutory
23 scheme covering national banks must be presumed to be intentional in the absence of language to the
24 contrary.

25 In fact, the latest comprehensive congressional pronouncement on national banking, the
26 GLBA, makes no explicit reference to operating subsidiaries or the OCC’s authority to regulate such
27 entities. *See generally* 12 U.S.C. § 24a; 12 U.S.C. § 24a(g)(3)(A). However, the OCC which first
28 promulgated its regulation giving national banks the right to establish operating subsidiaries in 1966,

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

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

7 **A. The OCC’s General Rulemaking Authority Does Not Support Its Promulgation**
 8 **Of Regulations Exclusively Governing Operating Subsidiaries**

9 The OCC’s general rulemaking authority under 12 U.S.C. Section 93a is insufficient
 10 to support its promulgation of regulations that seek to give the OCC exclusive regulatory authority
 11 over operating subsidiaries, especially where as here, the entity is a state-chartered corporation.
 12 Title 12 U.S.C. Section 1 establishes the OCC as the federal agency responsible for overseeing
 13 national banks established pursuant to the NBA.⁶ The general rulemaking authority of the OCC is
 14 further defined by 12 U.S.C. § 93a, which provides in part:

15 Except to the extent that authority to issue such rules and regulations has
 16 been expressly and exclusively granted to another regulatory agency, *the*
 17 *Comptroller of the Currency is authorized to prescribe rules and*
regulations to carry out the responsibilities of the office, . . .”

18 12 U.S.C. § 93a (emphasis added).

19 It is undisputed that the OCC’s responsibilities include the oversight and regulation
 20 of national banks. While 12 U.S.C. § 93a recognizes and codifies the OCC’s authority to regulate
 21 in the area of national banking, it does not recognize or codify the OCC’s authority to regulate

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 23 ⁶ 12 U.S.C. § 1 provides:

24 There shall be in the Department of the Treasury a bureau charged with the execution of all laws
 25 passed by Congress relating to the issue and regulation of national currency secured by United
 26 States bonds . . . , of all Federal Reserve notes, except for the cancellation and destruction, and
 27 accounting with respect to such cancellation and destruction, of Federal Reserve notes unfit for
 28 circulation, the chief officer of which bureau shall be called the Comptroller of the Currency and
 shall perform his duties under the general directions of the Secretary of the Treasury. The
 Comptroller of the Currency shall have the same authority over matters within the jurisdiction of
 the Comptroller as the Director of the Office of Thrift Supervision has over matters within the
 Director's jurisdiction under section 3(b)(3) of the Home Owners' Loan Act [12 U.S.C. §
 1462a(b)(3)(b)(3)] . . .

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

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

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

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

24 Even the FCC, which had a much broader grant of authority than the OCC may
25

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

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

9 To find that the OCC’s general rulemaking authority vests in the agency the power
 10 to regulate operating subsidiaries of national banks, to the exclusion of the states, would be to grant
 11 the OCC unlimited authority not contemplated and not yet authorized by Congress. Administrative
 12 agencies, such as the OCC, are not granted unlimited power. Rather, they are given limited and
 13 delegated authority only “to adopt regulations to carry into effect the will of Congress as expressed
 14 by . . . statute.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). Congress has not seen fit
 15 to express its will with regard to operating subsidiaries and has not enacted legislation recognizing
 16 or governing operating subsidiaries of national banks. Therefore, the OCC’s promulgation of
 17 regulations governing operating subsidiaries is a manifestation of the OCC’s will, not the will of
 18 Congress. Such regulations are not proper and exceed the OCC’s limited delegated authority.

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

21 Title 12 U.S.C. § 24 (Seventh) authorizes *national banks* to exercise “. . . all such
 22 incidental powers as shall be necessary to carry on the business of banking; . . .” Conceding for
 23 purposes of argument that § 24 (Seventh) gives *national banks* the ancillary authority to establish
 24 operating subsidiaries, this section in no way acts as express Congressional authority for the *OCC*
 25 to regulate such operating subsidiaries to the exclusion of the states. Section 24 (Seventh) makes
 26 no mention of operating subsidiaries. Rather it is a broad grant of authority directly to *national*

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

1 banks, not the regulatory body.

2 Further, nothing within § 24 (Seventh) expressly grants to the OCC the authority to
3 regulate all “such incidental powers” in which the national banks are permitted to exercise or
4 engage. At best, 12 U.S.C. § 24 (Seventh) gives the OCC the authority to determine what powers
5 are, in fact, incidental to the business of banking. *See NationsBank of N.C., N.A. v. Variable*
6 *Annuity Life Insurance Co.*, 513 U.S. 251 (1996).

7 While several cases have impliedly recognized a national bank’s ability to conduct
8 banking activities through operating subsidiaries, no case has directly dealt with the issue of the
9 OCC’s exclusive regulatory authority over operating subsidiaries. In *M & M Leasing Corp. v.*
10 *Seattle First Nat’l Bank*, 563 F.2d 1377 (9th Cir. 1977), the issue before the court was whether the
11 “business of banking” authorized by 12 U.S.C. § 24 (Seventh) included the leasing of personal
12 property. *Id.* at 1380. Contrary to the case at bar, the court was never asked to reach the issue that
13 an operating subsidiary was the equivalent of a national bank or subject to the OCC’s exclusive
14 regulatory authority. *See also NationsBank of North Carolina, N.A. v. Variable Annuity Life*
15 *Insurance Co.*, 513 U.S. 251 (1995) (whether national banks may serve as agents in the sale of
16 annuities); *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) (whether the Comptroller
17 of the Currency exceeded his authority when he approved the application of national banks for the
18 establishment of discount brokerage subsidiaries); *Marquette National Bank of Minneapolis v. First*
19 *Omaha Service Corp.*, 439 U.S. 299 (1978) (whether the NBA authorized a national bank located in
20 one state to charge an interest rate allowed by its home state, when that interest rate is greater than
21 the rate permitted by the bank’s nonresident customers); *American Insurance Association v. Clarke*,
22 865 F.2d 278 (D.C. Cir 1988) (whether the formation of a national bank subsidiary to offer
23 municipal bond insurance was permissible under the NBA).

24 Moreover, Congress has been clear when it intends to delegate authority to the OCC
25 to address areas significantly implicating or preempting state laws. *See generally* 12 U.S.C. § 36; 12
26 U.S.C. §§ 1861-1867; 12 U.S.C. § 24a. That Congress has not seen fit to delegate such authority to
27 the OCC in the case of operating subsidiaries is tantamount to a declaration from Congress that it has

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

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

2 In 1994, Congress enacted the Riegle-Neal Interstate Banking Act, which established
3 interstate branches of national banks and codified the conditions upon which a national bank may
4 retain or establish and operate a branch or branches of a national bank. Pub. L. 103-328, 108 Stat.
5 2338 (Sept. 29, 1994) *codified at* 12 U.S.C. § 36.⁹ Pursuant to this statute, branches of national
6 banks are generally subject to the laws of the host State where the branch is located regarding
7 consumer protection, fair lending, community reinvestment and establishment of interstate branches.
8 12 U.S.C. § 36(f)(1)(A). This is true, except when federal law expressly preempts the application of
9 the state law to a national bank or if the OCC has made a determination that the application of the
10 state law would have a discriminatory impact on the branch. *Id.* The statute further provides that the
11 OCC is responsible for enforcing all applicable state laws to which the branch of a national bank is
12 subject. 12 U.S.C. § 36(f)(1)(B).

13 There has been no similar declaration from Congress addressing the application of
14 state law, or authorizing preemption of state law applicable to operating subsidiaries of national
15 banks, or authorizing the OCC's exclusive authority over them.

16 In the Bank Service Company Act, 12 U.S.C. §§ 1861-1867, Congress has expressly
17 given the OCC the same examination and enforcement authority over a bank service company¹⁰
18 owned by a national bank that the OCC exercises over the parent national bank. *See* 12 U.S.C. §
19 1818.¹¹ The Bank Service Company Act specifically provides that the performance of those acts

21 ⁹ 12 U.S.C. §36(l) defines "branch" as follows:

22 The term "branch" as used in this section shall be held to include any branch bank, branch office,
23 branch agency, additional office, or any branch place of business located in any State or Territory
24 of the United States or in the District of Columbia at which deposits are received, or checks paid,
or money lent. The term "branch" as used in this section, does not include an automated teller
machine or a remote service unit.

25 ¹⁰ A "bank service company" is defined as:

26 . . . (2) any corporation-- (i) which is organized to perform services authorized by this Act [12
27 USCS §§ 1861 et seq.] (ii) all of the capital stock of which is owned by 1 or more insured banks;
and (B) any limited liability company-- (i) which is organized to perform services authorized by
28 this Act [12 USCS §§ 1861 et seq]; and (ii) all of the members of which are 1 or more insured
banks.

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

1 permissible by the bank service company shall be governed and “subject to regulation and
2 examination by such agency to the same extent as if such services were being performed by the bank
3 itself.” 12 U.S.C. § 1867(c)(1). In the case of a bank service company owned or operated by a
4 national bank, the OCC is the appropriate federal agency responsible for such supervision and
5 enforcement. 12 U.S.C. § 1818; 12 U.S.C. §§ 1861-1867.

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

8 Congress also spoke to the issue of the application of state law to national banks and
9 the preemption of state law when it enacted the Gramm-Leach-Bliley Act (GLBA). *See generally* 12
10 U.S.C. §§ 24a et seq; *see also* 15 U.S.C. 6701. The GLBA grants national banks the authority to
11 engage in certain activities, such as insurance activities and securities transactions, through
12 “financial subsidiaries,” subject to certain conditions. 12 U.S.C. § 24a(a)(1) and (a)(2).

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

22 There has been no similar declaration from Congress regarding the application of
23 state law, or preemption of same, as it applies to operating subsidiaries of national banks, or the
24 OCC’s exclusive authority over them. In short, where Congress has intended to preempt state laws
25 and vest all authority in the OCC, it has done so explicitly, not implicitly.

26 The assertions by plaintiffs and the OCC in the preliminary injunction briefing that
27 the OCC has plenary authority to adopt regulations governing operating subsidiaries of national
28 banks to the exclusion of the states is, therefore, flawed and to find otherwise would be to usurp the

1 power of Congress. As the court stated in *Independent Insurance Agents of America, Inc. v.*
2 *Hawke*, 211 F.3d 638 (D.C. Cir. 2000), such expansive authority would allow national banks and
3 their federal regulatory agency “to constantly expand their field of operations on an incremental
4 basis without congressional action.” *Id.* at 645. In this case, an impermissible expansion of the
5 OCC’s authority to the exclusive regulation of operating subsidiaries would result in just such an
6 unprecedented and unauthorized expansion of the OCC’s power.

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

9 In promulgating 12 C.F.R. § 7.4006, the OCC cited only the GLBA as its statutory
10 authority to expand its exclusive regulatory authority to operating subsidiaries. *See* 66 Fed.Reg.
11 34784, 34788, n.15. However, Congress did not recognize operating subsidiaries in the GLBA or
12 expressly authorize the OCC to promulgate regulations governing such entities to the exclusion of
13 the states. *See generally* 12 U.S.C. § 24a.

14 The GLBA grants national banks the authority to engage in certain activities through
15 “*financial subsidiaries*,” subject to certain conditions. 12 U.S.C. § 24a(a)(1) and (a)(2) (emphasis
16 added). Title 12 U.S.C. section 24a, subsection (g)(3)(A), to which the OCC cites as its authorizing
17 power, is a definition of a “financial subsidiary,” not an “operating subsidiary”. The term “financial
18 subsidiary” means “any company that is controlled by 1 or more insured depository institutions *other*
19 *than a subsidiary that*—(A) engages solely in activities that national banks are permitted to engage
20 in directly and are conducted subject to the same terms and conditions that govern the conduct of
21 such activities by national banks. . . .” 12 U.S.C. § 24a(g)(3)(A) (emphasis added).

22 It has been the plaintiffs’ and the OCC’s contention that this definition impliedly
23 recognizes operating subsidiaries. Memorandum of Points and Authorities in Support of Plaintiffs’
24 Motion for Summary Judgment and Permanent Injunction, p. 11 However, this argument is without
25 merit. Under the maxim *expressio unius est exclusio alterius*, where a statute provides authority for
26 one action, and is silent as to a similar, related action, the law must be interpreted as authorizing only
27 the former and not the latter. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978);
28 *Nextwave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 152-153 (D.C. Cir. 2001), *petition*

1 *for cert granted*, 122 S.Ct. 1202 (U.S. Mar. 4, 2002) (No. 01-657). That is, “[a] statute listing the
2 things it does cover exempts, by omission, the things it does not list. As to the items omitted, it is a
3 mistake to say that Congress has been silent. Congress has spoken – these matters are outside the
4 scope of the statute.” *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir.
5 1999). Congress did not expressly recognize operating subsidiaries or grant to the OCC the
6 authority to promulgate regulations governing operating subsidiaries in the GLBA. Accordingly,
7 operating subsidiaries and their regulation are outside the scope of the GLBA.

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

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

20 **D. Absent A Delegation Of Authority From Congress, The OCC’s Regulations Are**
21 **Not Entitled To Deference**

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

25 The Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*
26 *Inc.*, 467 U.S. 837 (1984) set forth the analysis in two steps. In the first step, the Court must
27 determine if “Congress has directly spoken to the precise question at issue.” *Id.* at 842-843. If
28 Congress has spoken to the issue, that is the end of the Court’s inquiry because the Court, as well as

1 the agency, “must give effect to the unambiguously expressed intent of Congress.” *Id.* If Congress
2 has not spoken to the exact question and the agency is acting pursuant to an express or implied grant
3 of authority, the Court must employ the second step of the *Chevron* analysis. Under this second
4 step, the Court must determine if the agency’s interpretation of the statute is “reasonable” and not
5 otherwise “arbitrary, capricious, or manifestly contrary to the statute.” *Id.*

6 Deference to an agency’s action is warranted “only when Congress has left a gap for
7 the agency to fill pursuant to an express or implied ‘delegation of authority to the agency.’”
8 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see*
9 *also United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001). Where the agency lacks
10 such delegated authority, such as here, there is no need for the Court to engage in the second step of
11 the *Chevron* analysis and inquire whether the regulations are reasonable, as “an agency may not
12 promulgate even reasonable regulations that claim the force of law without delegated authority from
13 Congress.” *Motion Picture Association of America, Inc. v. Federal Communications Commission*,
14 309 F.3d 796, 801 (2002); *see also Christensen v. Harris County*, 529 U.S. 576, 596-597 (2000)
15 (BREYER, J., dissenting) (where it is in doubt that Congress actually intended to delegate particular
16 interpretive authority to an agency, *Chevron* is “inapplicable”).

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

21 **E. The OCC’s Assertion Of Exclusive Authority Over Operating Subsidiaries Is**
22 **Unreasonable**

23 The OCC’s promulgation of regulations giving it exclusive regulatory authority over
24 operating subsidiaries cannot be a reasonable interpretation of the statute when there is no express
25 congressional delegation of authority to the OCC to regulate operating subsidiaries. *Chevron U.S.A.*
26 *Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); *see also United*
27 *States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001); *Motion Picture Association of America,*
28 *Inc. v. Federal Communications Commission*, 309 F.3d 796, 801 (2002). Not only is the OCC’s

1 statutory authority lacking, but the OCC’s interpretation of this alleged statutory authority is
2 unreasonable and conflicts with the purposes of the National Bank Act.

3 The purpose of the National Bank Act of 1864 was to establish a “national banking
4 system.” *Marquette National Bank v. First Omaha Service Corp.*, 439 U.S. 299, 314-315 (1978).
5 National banks were established to perform various functions, including providing a currency for the
6 whole country, financing commerce and acting as private depositories. *Franklin National Bank of*
7 *Franklin Square v. New York*, 347 U.S. 373, 375 (1954).

8 Since the creation of national banks, courts have recognized the applicability of state
9 laws to national banks. *See National Bank v. Commonwealth*, 76 U.S. (9 Wall) 353 (1870) (first
10 case recognizing applicability of state laws to national banks). In *National Bank*, the Supreme Court
11 upheld a Kentucky statute regarding the collection of state taxes directly from national banks,
12 finding that since the NBA was silent on the issue, the bank was subject to the state law. *Id.* at 361-
13 362.

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

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

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

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

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

8 Similarly, recent cases affirm the principle that a national bank is subject to state law
9 unless that law “interferes with the purposes of its creation, or destroys its efficiency, or is in conflict
10 with some paramount federal law.” *American Bankers Association v. Lockyer*, 2002 U.S. Dist.
11 LEXIS 24521 (E.D. Cal. Dec. 2002) (quoting *Lewis v. Fidelity & Deposit Co. of Maryland*, 292 U.S.
12 559, 566 (1934)).

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

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

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

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

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

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

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

16 Because the OCC specifically prescribed the preemption rule become effective August 1,
 17 2001 there is no need to look at the second prong in *Landgraf* to determine that the rule is not to be
 18 applied retroactively.

19 Accordingly, were the court to find in favor of plaintiffs at trial based upon federal
 20 preemption of the CRMLA and the CFLL, it should have no effect on the conduct of WFHMI prior
 21 to August 1, 2002. Accordingly, the Commissioner must be allowed to assert his jurisdiction under
 22 the CRMLA and the CFLL, including revocation of licenses, for conduct that occurred prior to that
 23 date.

24 **V. THE DIDMCA DOES NOT PREEMPT CALIFORNIA LAW**

25 Plaintiffs cannot demonstrate that preemption exists such that the California per diem interest
 26

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

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

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

6 Under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, federal law may preempt
7 state law “either by express provision, by implication, or by a conflict between federal and state law.
8 (Citations omitted).” *Shin v. Encore Mortgage Servs.*, 96 F. Supp. 2d 419, 423 (D. N.J. 2000) *citing*
9 *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645,
10 654 (1995). In addition, in areas traditionally regulated by the states, such as consumer protection,
11 there is a presumption against finding preemption of state law. *California v. Arc America Corp.*, 490
12 U.S. 93, 101 (1989). “When Congress legislates in a field traditionally occupied by the States, ‘we
13 start with the assumption that the historic police powers of the States were not to be superseded by
14 the Federal Act unless that was the clear and manifest purpose of Congress.’ (Citations omitted).”
15 *Id.* at 101. In *Smiley v. Citibank (S.D.), N.A.*, 11 Cal. 4th 138 (1995), the California Supreme Court
16 found that “historic police powers of the States” extend to banking. *Id.* at 148.

17 If a statute contains an express preemption clause, the task of statutory construction
18 must in the first instance focus on the plain wording of the clause, which necessarily contains the
19 best evidence of Congress' preemptive intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658
20 (1993).

21 If the statutory language is ambiguous, *Burlington N. R.R. Co. v. Oklahoma Tax*
22 *Comm'n*, 481 U.S. 454, 461 (1987), or would work an unreasonable result, the courts may consult
23 relevant legislative history, *Cabral v. INS*, 15 F.3d 193, 194 (1st Cir. 1994), to confirm an
24 interpretation indicated by the plain language. *Strickland v. Commissioner, Maine Dep't of Human*
25 *Servs.*, 48 F.3d 12, 17 (1st Cir. 1996), *cert. denied*, 116 S. Ct. 145 (1995).

26 There is no clear and manifest intent of Congress to preempt California statutes
27 concerning when the lender may begin to charge interest. Furthermore, to the extent potential
28 conflict preemption is alleged, compliance with both state and federal law is possible, thus obviating

1 the need for federal preemption of the state statute. *See Arc America Corp.*, 490 U.S. at 94.

2 The first issue regarding DIDMCA before this court is whether the California
3 Corporations Commissioner may enforce the per diem limitation provision of subdivision (o) of
4 California Financial Code section 50204. This section provides that a lender may not "require a
5 borrower to pay interest on the mortgage loan for a period in excess of one day prior to recording of
6 the mortgage or deed of trust. . . ." Cal. Fin. Code § 50204(o).

7 Also at issue is whether the Commissioner may enforce an earlier version of
8 California Civil Code § 2948.5¹³ (subsequently amended) that read in pertinent part as follows:

9 "interest on the principal obligation of a promissory note secured by a
10 mortgage or deed of trust on real property improved with one-to-four
11 residential dwelling units shall not commence to accrue prior to close of
12 escrow if the loan proceeds are paid into escrow or, if there was no escrow,
13 the date upon which the loan proceeds have been made available for
14 withdrawal as a matter of right, as specified in subdivision (d) of Section
15 12413.1 of the Insurance Code."

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

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

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

¹³ It should be noted that the Commissioner's authority to enforce the per diem statute is now codified in California Financial Code section 50204(o), and the California Attorney General, who is not a party to this action, retains jurisdiction to enforce the amended Civil Code section 2948.5.

1 legislative intent:

2 "DIDMCA was passed at a time when inflation and interest rates were
3 soaring; in this context, *state usury laws* decreased the availability of home
4 mortgage loans and hindered the ability of financial institutions to pay market
5 rates of interest to depositors since usury laws limited them to lending at rates
6 well below those that the market would have dictated. Thus, the Senate
7 Report that accompanied the bill containing what became § 501 of DIDMCA
8 found:

9 that where *state usury laws* require mortgage rates below market levels of
10 interest, mortgage funds in those states will not be readily available and those
11 funds will flow to other states where market yields are readily available. This
12 artificial disruption of
13 funds availability not only is harmful to potential homebuyers in states with
14 such usury laws, it also frustrates national housing policies and programs. . . .

15 The committee believes *that this limited modification in state usury laws* will
16 enhance the stability and viability of our Nation's financial system and is
17 needed to facilitate a national housing policy and the functioning of a national
18 secondary market in mortgage lending. . . ."

19 *Smith* at 12 (emphasis added).

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

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

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

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

4 **B. Unlike State Usury Laws, The “Per Diem” Statute Does Not Impose Any**
 5 **Limitations Or Barriers Upon The Loan Market.**

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

12 "A mortgage loan or a land contract made under this Act shall not provide for
 13 *a rate of interest* added or deducted in advance, and interest on the mortgage
 14 loan or land contract shall be computed from time to time only on the basis of
 15 unpaid balances." (Emphasis added.)

16 While the court struggled with the meaning of the state statutory language, and found
 17 at least three possible interpretations, including those urged by both parties to the suit, the *Shelton*
 18 court unlike this Court was faced with a statute that did expressly refer to “a rate of interest.” The
 19 district court ultimately found it too ambiguous to interpret, and held that it is "not within the
 20 province of a federal court to attempt to read the minds of state legislators. . . ." *Shelton* at 1058.

21 Therefore, it is simply not accurate to say the *Shelton* case holds that a per diem
 22 statute like the one at issue here is preempted by DIDMCA. Indeed, that federal court said, ". . . if
 23 the state legislature had intended to prohibit lenders from charging interest on undisbursed funds, it
 24 could have done so clearly and unambiguously." *Id.* at 1058. Therefore, it remains an open question
 25 as to how the *Shelton* court would have ruled on a statute, such as California Financial Code section
 26 50204(o), that does not expressly affect the rate of interest. While the *Shelton* court could not
 27 interpret the Michigan statute, it apparently concluded the Michigan law was a usury statute. *See*

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

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

3 The Commissioner invites the Court to review the express language and the
4 underlying intent of DIDMCA expressed by Congress, to address the limitations imposed by the
5 usury laws when they impede the loan market. The per diem interest statutes do not seek to impose
6 such limitations. However, the statutes most certainly are "designed to protect borrowers," a goal
7 which the DIDMCA drafting committee thought could peacefully coexist with the goals of the
8 federal statute, and which the Office of Thrift Supervision ("OTS")¹⁶ recognizes as permissible
9 pursuant to its own regulations. *See* 12 C.F.R. 590.3 (c) ("Nothing in this section preempts
10 limitations in state laws on prepayment charges, attorneys fees, late charges or other provisions
11 *designed to protect borrowers.*" (emphasis added.)).

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

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

18 The *Grunbeck* court emphasized the interpretive importance of the language from
19 Section 501 of DIDMCA "expressly limiting the rate or amount of interest," the same issue under
20 consideration in this case. The court contrasted this language with that contained in companion
21 Section 521 where Congress, as relates to credit cards, preempted all state legislation "with respect
22 to interest rates." *Grunbeck* at 338. The court recognized that Congress was acutely aware that its
23 choice of the distinctive terminology -- "expressly limiting" - would be a primary interpretive tool.
24 *Id.* In other words, this is evidence that if Congress had intended to preempt all state laws relating to
25 interest rates, it could have done so as it did in Section 521. By preempting only those state statutes
26 that "expressly limit" the amount or rate of interest, Congress contemplated state statutes, like the
27
28

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

3 Plaintiffs contend that “there is no basis for the Commissioner’s argument that an
4 analogy may be drawn between [the] California [per diem restriction] and the simple interest statute
5 (SIS) which is not preempted by DIDMCA according to the appellate court in *Grunbeck*.”
6 Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for Summary Judgment and
7 Permanent Injunction, at page 19. Plaintiffs argument seeks to avoid the clear and simple holding of
8 *Grunbeck* because the SIS, like per diem, does not *expressly limit* the amount of interest.. In
9 analyzing the preemption issue, the *Grunbeck* court looked to the legislative history and to the
10 reason Section 501 of DIDMCA was enacted:

11 "The legislative aim in enacting section 501 focused on "state usury ceilings,"
12 [Citations] with particular emphasis on state usury laws which restrict interest
13 rates to below-market levels and result in artificial disruptions in the supply of
home-loan mortgage funds."

14 *Grunbeck, supra*, at 339.

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

18 Like the simple interest statutes in *Grunbeck*, the per diem statutes are consumer
19 protection statutes. By placing the responsibility for any delays between funding and recording the
20 deed on the lender, the California statutes protect the consumer from an "unseen" cost, in much the
21 same way as did the simple interest statute in *Grunbeck*. Despite plaintiffs’ contention that “ the
22 parties cannot contract around the per diem interest restriction as they could with the simple interest
23 statute in *Grunbeck*” (Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for
24 Summary Judgment and Permanent Injunction, at page 19), nothing in the per diem interest statutes
25 would prevent a lender from disclosing to and bargaining with borrowers for additional fees or
26 charges that it might use to cover any alleged lost per diem interest income and which would be fully
27

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

1 disclosed to the borrower.

2 Additional guidance may be found in *Larsen v. Countrywide Home Loans, Inc.*, 2001
3 U.S. Dist. LEXIS 10023 (Ill. 2001). There, the plaintiffs were homeowners who paid off their
4 mortgage early, on August 18, 2000. The lender, however, charged them interest for the entire
5 month of August. The Larsens sued, alleging violation of an Illinois statute prohibiting lenders from
6 charging interest for any period after payment of the principal. The court found that Congress did
7 not mean for DIDMCA to preempt all interest charges since interest charges that constitute
8 prepayment penalties fall outside the scope of the Act. The *Larsen* court noted that other courts have
9 found that state statutes regulating the computation of interest on federally insured loans are not
10 preempted by federal law, citing *Grunbeck*. The court in *Larsen* specifically declined to interpret the
11 term "rate or amount of interest" so liberally as to preempt to *any* state law that has an effect on how
12 much interest a borrower must pay. *Larsen* at 3. Yet, that is precisely the gist of plaintiff's
13 argument. See Plaintiff's Memorandum in Support of Plaintiff's Motion for Preliminary Injunction
14 at 15. As in *Grunbeck* and as followed in *Larsen*, such an argument must be rejected.

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

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

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

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

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

1 appellate case. The plain reading of the California statute shows no language *expressly limiting* the
2 amount or rate of interest being charged. And, the legislative aim of DIDMCA (to prevent
3 disruption in the supply of home mortgage loans) is not frustrated by California’s application of the
4 per diem statute.

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

10 **VI. PLAINTIFFS’ CLAIM OF RETALIATION IS SPECIOUS**

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

15 The filing of a lawsuit and the right of access to the courts is subsumed under the First
16 Amendment right to petition the government for redress of grievances. (citations) *Soranno’s Gasco,*
17 *Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989); *American Civil Liberties Union of Maryland,*
18 *Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993). The United States Supreme Court has
19 set forth a well-established framework for analyzing retaliation claims based on First Amendment
20 rights. In order to show a First Amendment violation, the burden is initially on the plaintiff to show
21 conduct was constitutionally protected and that this protected conduct was a “substantial” or
22 “motivating” factor in the defendant’s decisions. If the plaintiff carries this burden, the burden then
23 shifts to the defendant to establish that it would have reached the same decision even in the absence
24 of the protected conduct. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S.
25 274, 287 (1977). The Ninth Circuit has consistently used the *Mt. Healthy* analysis in cases of First
26 Amendment retaliation claims. *See Allen v. Iranon*, 283 F.3d 1070, 1074 (9th Cir. 2002).

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

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

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

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

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

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

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

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

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

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

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

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

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

22 In this matter, the Commissioner demanded that WFHMI perform audits and comply with the
23 CRMLA months before this federal action was filed, and the Commissioner informed WFHMI that
24 there would be consequences for its failure to comply. *See* SUF Nos. 18, 19 and 22. Further,
25 WFHMI told the Commissioner by letter on January 22, 2003 and by filing this lawsuit on January
26 27, 2003, that it would not comply with the provisions of the CRMLA and the CFLL because of its
27 claim of federal preemption. SUF Nos. 20 and 21.

28

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

5 The CRMLA and the CFLL require license applicants to agree to comply with the provisions
6 of the law and with any order or rule of the commissioner. Cal. Fin. Code §§ 50124(a)(7); 22101(a);
7 Tit. 10, Cal. Code Regs. § 1422. When WFHMI informed the Commissioner it would not comply
8 with the CRMLA and the CFLL, the Commissioner had sufficient grounds to revoke WFHMI's
9 CRMLA and CFLL licenses. WFHMI cannot be allowed to continue to maintain CRMLA and
10 CFLL licenses and yet claim it is not subject to the provisions of these laws. Therefore, the
11 administrative revocation proceedings would have been appropriately instituted even if plaintiffs had
12 not filed the federal court action. Accordingly, there has been no violation of WFHMI's First
13 Amendment rights and the claim of retaliation must fail as a matter of law.

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

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

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

1 51.

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

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

14 The Ninth Circuit Court of Appeals in *White Mountain* found that the "Supremacy Clause . . .
15 establishes federal-state priorities; it does not create individual rights, nor does it 'secure' such rights
16 within the meaning of section 1983. *Id.* at 848. Thus, "preemption of state law under the Supremacy
17 Clause . . . will not support an action under § 1983, and will not, therefore, support a claim of
18 attorney's fees under § 1988. *Id.* at 850. *Accord Howard v. Burlingame*, 937 F.2d 1376, 1380 (9th
19 Cir. 1991).

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

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

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

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

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

12 Drawing heavily on the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S.
13 555 (1992), the court noted the following requirements for standing to sue in federal actions:

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

22 Wells Fargo cannot demonstrate that it has suffered an "injury-in-fact" to a legally protected
23 interest. The only action taken by the Commissioner was as against WFHMI, a separate and distinct
24 legal entity that had sought licensure with him and was failing to comply with the California law.
25 Although Wells Fargo is the parent corporation, as set forth more fully in Section II above, it is
26 isolated from any regulatory liabilities incurred by WFHMI by settled principals of corporate law
27 relating to parents and their subsidiaries. Second, there is no injury to Wells Fargo other than the
28 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

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

3 **CONCLUSION**

4 The Commissioner submits that summary judgment against plaintiffs should be granted
5 because the NBA does not expressly preempt the CRMLA and the CFLL nor grant to the OCC
6 exclusive visitorial powers over WFHMI, federal regulations 12 C.F.R. section 5.34 and 12 C.F.R.
7 section 7.4006 were improperly promulgated by the OCC, DIDMCA does not preempt California
8 Financial Code section 50204(o) or California Civil Code section 2948.5, there has been no
9 retaliation by the Commissioner in bringing the revocation actions, and this action was improperly
10 brought under 42 U.S.C. section 1983. Based thereon, the Commissioner respectfully requests this
11 Court grant his motion for summary judgment. In the alternative, the Commissioner requests the
12 Court enter partial summary judgment as to all issues pertaining to plaintiffs' four causes of action
13 for which the Court considers there to be no triable issues of material fact.

14 Dated: April 4, 2003

VIRGINIA JO DUNLAP (CA BAR NO. 142221)
Assistant Commissioner
ALAN S. WEINGER (CA BAR NO. 86717)
Supervising Counsel

19 _____
JUDY L. HARTLEY (CA BAR NO. 110628)
Senior Corporations Counsel
KIMBERLY L. GAUTHIER (CA BAR NO. 186012)
Corporations Counsel
320 West 4th Street, Ste. 750
Los Angeles, California 90013-2344
Telephone: (213) 576-7604
Fax: (213) 576-7181

25 ATTORNEYS FOR DEFENDANT