No. 14-56755

In the

United States Court Of Appeals

For the

Ninth Circuit

DONALD M. LUSNAK,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee.

Appeal from a Final Judgment of the United States District Court
for the Central District of California in
Lusnak v. Bank of America, N.A.,
D.C. No. 2:14-cv-01855-GHK-AJW

APPELLANT'S OPENING BRIEF

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REGULATIONS

INTRODUCTION

As part of the Dodd-Frank Act of 2010, Congress provided that all creditors must comply with exactly the type of state law at issue in this case. Notwithstanding this expression of congressional intent, the District Court held that the National Bank Act preempted the state law as to creditor and Defendant-Appellee Bank of America, N.A. ("BofA"). The District Court's ruling is erroneous and should be reversed.

The Dodd-Frank Act affirmatively states that all creditors—including national banks—must administer mortgage escrow accounts in compliance with state laws, including specifically laws concerning the payment of interest on funds held in such escrow accounts. Yet BofA, unlike Wells Fargo and other large mortgage lenders, admittedly failed (and still fails) to comply with a California Civil Code provision enacted in 1976 that requires mortgage lenders to pay interest to California consumer borrowers on funds held in their mortgage escrow accounts. The passage of Dodd-Frank, in 2010, made clear that Congress does not view compliance with such state laws as being inconsistent with federal lenders' powers, and that creditors like BofA need to follow this California law in connection with California residential mortgages.

The idea that federal law could supersede this California cause of action contradicts the intent of Congress, which controls every preemption analysis. Even

though Congress provided that national banks *are* subject to this type of state law, the District Court inferred preemption from Congress's statement that lenders are subject to "applicable" state laws requiring interest payments on mortgage escrow accounts: the court found California's law supposedly "inapplicable" on the basis that federal law preempts it. Not only is this reasoning circular, it would render the federal provision in question largely or entirely without effect, which could not have been Congress's intent in enacting it. The District Court read Dodd-Frank's clarification—that state consumer laws requiring escrow-interest payments do apply to all creditors—straight out of the statute. And the District Court further erred by holding that Congress needed to express its intent to preserve these state laws by using the magic word "preemption," and by wrongly insisting that Congress can only require national banks to comply with state laws by amending the National Bank Act itself.

The District Court's ruling should be reversed and the claims reinstated.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). On October 29, 2014, the District Court dismissed Appellant's claims with prejudice and entered judgment. *See* Excerpts of Record ("ER"), 1-14 (Dismissal Order), 15 (Judgment). Plaintiffs timely noticed this appeal on November 4, 2014. ER 16-17 (Notice of Appeal). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Where Congress provided that national banks must administer consumer-funded mortgage escrow accounts in conformance with the law of the State in which the securing real property exists, including specifically state laws requiring the payment of interest on such accounts, does federal law preempt enforcement of the California law that requires all mortgage lenders to pay at least 2 percent interest on these accounts?

2. Is this state law preempted on the grounds (a) that Congress provided that creditors must comply with any "applicable" state mortgage escrow-interest laws, or (b) that Congress enacted the requirement at issue—which applies to all creditors, not just national banks—by amending the Truth in Lending Act rather than the National Bank Act?

STATEMENT OF THE CASE

A. Appellant's Escrow Account

As a condition for his home loan, BofA mandated that Appellant open a mortgage escrow account into which he pays $250 each month (in addition to his monthly mortgage payments). ER 111 (First Amended Compl. ("FAC") ¶¶ 15-16). BofA manages this account, draws interest on it, and pays property taxes and insurance out of it. ER 105-07, 111 (FAC ¶¶ 1-2, 15). Such escrow accounts regularly carry a significant positive balance, in part because the borrower makes monthly deposits but the bank pays expenses associated with the loan less often.

As the Consumer Financial Protection Bureau explained, "consumers pay the same fixed amount" into these accounts, "sometimes interest-free [depending on applicable law], throughout the year, without having to pay a large lump-sum payment in the end." Consumer Financial Protection Bureau, *Escrow Requirements Under the Truth in Lending Act*, 78 Fed. Reg. 4,726, 4,746 (Jan. 22, 2013).

B. California Civil Code Section 2954.8(a)

Since 1976, California's Civil Code has required that mortgage lenders pay California residential borrowers interest on their mortgage escrow account balances:

> Every financial institution that makes loans upon the security of real property containing only a one- to four-family residence and located in this state or purchases obligations secured by such property and that receives money in advance for payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, shall pay interest on the amount so held to the borrower. The interest on such amounts shall be at the rate of at least 2 percent simple interest per annum. Such interest shall be credited to the borrower's account annually or upon termination of such account, whichever is earlier.

Cal. Civ. Code § 2954.8(a).

C. Relevant Provisions of the Dodd-Frank Act

In 2010, Congress enacted and the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat.

1376 ("Dodd-Frank"). Dodd-Frank included both a specific and a general provision relevant to this case.

First, with regard to mortgage escrow accounts required by law or agreed to by the parties to a consumer real-estate loan, Congress provided that, "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." 15 U.S.C. § 1639d(g)(3);[1] *see also* 15 U.S.C. § 1602(g) (broadly defining "creditor" without excluding national banks).

Second, Congress clarified the legal standard for evaluating federal preemption claims by national banking institutions:

> State law preemption standards for national banks and subsidiaries clarified
>
> * * *
>
> (b) Preemption standard.
>
> (1) In general. State consumer financial laws are preempted, only if --
>
> (A) application of a State consumer financial law would have a discriminatory effect on national

[1] This provision was enacted and signed into law in 2010. The direct federal law obligation under the provision, for all creditors, took effect in January 2013. The state law obligation, for "[e]very financial institution" that makes a residential loan secured by property in California, has been in place since 1976. Cal. Civ. Code § 2954.8(a).

> banks, in comparison with the effect of the law on a bank chartered by that State;
>
> (B) in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the Comptroller of the Currency ["OCC"] on a case-by-case basis, in accordance with applicable law; or
>
> (C) the State consumer financial law is preempted by a provision of Federal law other than this title.

12 U.S.C. § 25b.[2]

D. Appellant's Home Mortgage Agreements

As Appellant served in the U.S. Army, the Veterans Administration ("VA") guaranteed the loans on the Palmdale, California home that he purchased in July 2008. ER 111 (FAC ¶ 15), 45-70 (BofA's Request for Judicial Notice), 37-40 (Plaintiff's Request for Judicial Notice). Appellant's original loan agreement is a form contract that "shall be governed by federal law and the law of the jurisdiction

[2] The parties agree there is no preemption under subparagraphs (A) or (C). As to (A), Civil Code section 2954.8(a) is a state consumer financial law that does not distinguish between state- and federally-chartered banks. As to (C), the only federal statute alleged to have any preemptive impact here is the National Bank Act.

in which the Property is located." ER 52 (BofA's Request for Judicial Notice).[3] The original agreement further indicates that the lender will comply with laws requiring interest payments on escrow account balances: "Unless an agreement is made in writing or Applicable Law requires interest to be paid on the [escrowed] Funds, Lender shall not be required to pay Borrower any interest . . . ." ER 48 (BofA's Request for Judicial Notice).

In March 2009, Plaintiff executed a refinance agreement with Countrywide—which BofA had acquired—under which Plaintiff's original 2008 agreement was extinguished and a new loan issued with a different interest rate and certain other revised terms. ER 22-33 (BofA's Supp. Request for Judicial Notice).[4]

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[3] The original lender was Countrywide KB Home Loans, LLC ("Countrywide"), whose mortgage business and loans, including Appellant's, BofA subsequently acquired. ER 111-12 (FAC ¶¶ 15, 17).

[4] As of April 2009, BofA assumed full control over Countrywide's operations, and its subsidiary BAC Home Loans Servicing, LP began servicing Appellant's loan and administering the associated escrow account. ER 112 (FAC ¶ 17); *see SEC v. Mozilo*, 2009 U.S. Dist. LEXIS 104689, at *5 n.1 (C.D. Cal. Nov. 3, 2009). Congress clarified at 15 U.S.C. § 1639d(g) that national banks, such as BofA and its subsidiaries, must comply with state laws applicable to administration of this type of account. Since the VA guaranteed Appellant's home loan (ER 111 (FAC ¶ 15)), the related escrow account is "mandatory" within the meaning of section 1639d(b)(2). Even apart from this guarantee, section 1639d(g) applies to the administration of Appellant's account because it was established pursuant to an agreement between a lender and a consumer borrower. *See* 15 U.S.C. §§ 1639d(f)(1), (f)(2) (statute covers mortgage escrow accounts established "on terms mutually agreeable to the parties to the loan" or "at the discretion of the lender or servicer, as provided by the contract"); 15 U.S.C. §§ 1639d(g)(2), (g)(3) (provisions regarding escrow-account administration govern accounts "subject to this section").

Like the original agreement, the refinance agreement "shall be governed by federal law and the law of the jurisdiction in which the Property is located," and it contemplates interest payments to Appellant if applicable law "requires interest to be paid on the Funds" in the escrow account. ER 30 (BofA's Supp. Request for Judicial Notice).

In January 2011, Appellant and BofA entered into a loan modification agreement that amended certain terms of the previous agreement and included an amended and restated note. ER 60-70 (BofA's Request for Judicial Notice).

E. Appellant's Civil Action

On March 12, 2014, Appellant filed suit in the Central District. As detailed in the complaint, although Appellant's mortgage escrow account has regularly contained surplus funds (which BofA has had use of), BofA never paid him the statutorily mandated annual interest on those funds. ER 105-07, 111 (FAC ¶¶ 1-2, 15-16).

Because this failure violates state law—Cal. Civ. Code § 2954.8(a)—as well as federal law—15 U.S.C. § 1639d(g)(3)—Appellant alleged violations of the "unlawful" prong of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq*. ER 116-17 (FAC ¶¶ 30-34). Appellant also brought a breach of contract claim based on BofA's failure to perform on its promise to comply with applicable law requiring payment of escrow interest. ER 117 (FAC ¶¶ 35-39).

Appellant proposed to prosecute the claims on behalf of a class of similarly situated consumers whose mortgage loans are secured by family residences in California and who, like Appellant, had surplus funds in their mortgage escrow accounts with BofA but never received interest on the amounts held therein. ER 113-16 (FAC ¶¶ 20-29).

F. BofA's Motion to Dismiss

On July 31, 2014, BofA filed a motion to dismiss (ER 75-104), which Appellant opposed. BofA did not deny the core factual allegation that it failed to pay Appellant any interest on his surplus mortgage escrow account balances. Instead, BofA argued that federal law preempts the relevant Civil Code section. With regard to the new Dodd-Frank provision that mortgage lenders "shall pay interest to the consumer" as prescribed by "applicable State or Federal law" (15 U.S.C. § 1639d(g)(3)), BofA stated: "The preemptive force of the National Bank Act, coupled with the absence of any federal requirement to pay interest, means that no *applicable law* requires Bank of America to pay interest[.]" ER 101 (Motion to Dismiss (emphasis in original)). BofA also noted that "Section 1639d is not part of the National Bank Act ["NBA"], and it does not even appear in the same title as Dodd-Frank's preemption provisions." ER 99 (Motion to Dismiss).

G. The Dismissal Order

Without the benefit of oral argument or discovery, the District Court adopted BofA's interpretation and dismissed the case with prejudice. ER 1-14 (Dismissal Order). After discussing whether Dodd-Frank changed or simply clarified preemption principles under the NBA, the District Court found that enforcement of Civil Code section 2954.8(a) "would jeopardize a helpful (and free) service that Defendant provides its real estate borrowers." ER 6-7, 10. Additionally, the District Court found that enforcement "would interfere with a national bank's ability to make loans given evolving and potentially fluid market conditions" and "might subject Defendant to different interest rate requirements in the 49 other states . . . ." ER 10. Addressing the specific Dodd-Frank provision, the court found it "subtle" and not susceptible to a "reasonable infer[ence]" that Congress intended to preserve state laws concerning escrow-interest payments when it provided that, "[i]f prescribed by applicable State or Federal law, each creditor shall pay interest to the consumer on the amount held in any impound, trust, or escrow account that is subject to this section in the manner as prescribed by that applicable State or Federal law." ER 11 (citing 15 U.S.C. § 1639d(g)(3)). The court thereafter stated:

> Section 1639d does not mention national banks, the NBA, or preemption. Further, Section 1639d is located in a different Title of the United States Code and as part of a different statutory scheme. Thus, it lacks sufficient logical connection to

> the NBA to demonstrate Congressional intent to change the NBA's preemptive scope in this arena.
>
> * * *
>
> There is no "applicable" state law because Section 2954.8(a) is preempted by the NBA, and therefore is not capable of being applied to national banks.

ER 12.

This appeal followed.

STANDARD OF REVIEW

Federal preemption determinations are reviewed *de novo*. *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 106 (2012). "It is axiomatic that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Hall v. Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986) (internal quotation marks and citation omitted). A defendant seeking to dismiss a claim as preempted by federal law bears the burden of establishing that preemption applies. *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n.6 (9th Cir. 1995).

SUMMARY OF THE ARGUMENT

Nothing in federal law conflicts—let alone conflicts irreconcilably—with this consumer protection case. On the contrary, Congress has made clear that application of state laws requiring real-estate lenders to "pay interest to the consumer on the amount held in any impound, trust, or escrow account," is fully

consistent with federal lenders' powers; Congress expressly provided that *all creditors*, including national banks, "shall" comply with such state laws where they exist. 15 U.S.C. § 1639d(g)(3). At a minimum, California Civil Code section 2954.8(a) bound BofA as of 2010, when Congress enacted Dodd-Frank and expressed this intent.

The intent of Congress controls any preemption analysis, but the District Court here failed to uphold Congress's manifest intent. The court's conclusion that section 2954.8(a) is not "applicable" *because* it is preempted is circular and contradicts the plain meaning of the federal provision. Indeed, the interpretation below would render the provision largely or entirely nullified. Under the District Court's reasoning, 15 U.S.C. § 1639d(g)(3) would be deadweight, robbed of any effect as to national banks (and as to other federally-regulated lending institutions as well). That cannot be what Congress intended.

Nor should BofA be heard to claim preemption when it assented to comply with state law in its own contract. While the District Court apparently overlooked the loan agreements, this Court should not. Rather, it should hold BofA to its private contractual promise—a quintessential area of state law enforcement.

As detailed below, preemption does not apply.

ARGUMENT

I. NOTHING IN FEDERAL LAW PREEMPTS THE UCL CLAIM.

The well-pled complaint in this case alleges (and BofA does not deny) that BofA failed to pay interest to Appellant on the funds it held in the escrow account connected with his home loan. BofA's failure in this regard facially violates the California law requiring all mortgage lenders to pay their consumer borrowers at least 2 percent interest annually on such accounts. Cal. Civ. Code § 2954.8(a). BofA's failure therefore violates the UCL, which "makes independently actionable" any business practice "forbidden by law." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539-40 (Cal. 1999) (citations omitted). Additionally, BofA's violation of the relevant Dodd-Frank provision, 15 U.S.C. § 1639d(g)(3), after it took effect on January 21, 2013, supplies an independent ground for UCL liability. *See McKell v. Washington Mut., Inc.*, 49 Cal. Rptr. 3d 227, 251 (Cal. Ct. App. 2006) (rejecting preemption where federal law violation supplied predicate for UCL liability). BofA's only defense—preemption—is wholly without merit following Dodd-Frank's clarification of congressional intent in this area of banking law.

A. Congress Expressed Its Intent That State Laws Requiring Escrow-Interest Payments Apply to National Banks.

"[A] high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Chamber of Commerce of the*

U.S. v. Whiting, 131 S. Ct. 1968, 1985 (2011) (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J. concurring)). A conflict must be "irreconcilable" to justify preemption. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 664 (1982) (prohibiting courts from "seeking out conflicts between state and federal regulation where none *clearly* exists.") (emphasis added) (citation omitted). Defying this standard, the District Court found preemption because it believed Congress was too "subtle" in Dodd-Frank for California law to apply. ER 11.

The lower court erred in undertaking a "freewheeling judicial inquiry into whether [state law] is in tension with federal objectives," because this inquiry "undercut the principle that it is Congress rather than the courts that pre-empts state law." *Gade*, 505 U.S. at 111 (Kennedy, J., concurring). Under this principle, where Congress has indicated that a state law affecting banking practices does not abridge any federally-recognized power, the law may be enforced against a national bank. *Barnett Bank*, 517 U.S. at 34.

California's "historic police powers" extend "to banking, including national banking" in local real-estate markets. *Peatros v. Bank of Am.*, 990 P.2d 539, 543 (Cal. 2000); *see also Perdue v. Crocker National Bank*, 702 P.2d 503, 520 (Cal. 1985). As the United States Supreme Court explained, states "have always enforced their general laws against national banks—and have enforced their

banking-related laws against national banks for at least 85 years[.]" *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 534 (2009).

Congressional intent determines whether federal law displaces a state law applicable to banking. In *Barnett Bank*, the Court unanimously held that the question of preemption "is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?" 517 U.S. at 30.[5] There, the Supreme Court held that a federal statute expressly permitting national banks to sell insurance in small towns preempted a state statute forbidding national banks from selling insurance in small towns; the two laws directly conflicted, as the federal law authorized what the state law prohibited. At the same time, the Court cautioned that a conflict of law must be "irreconcilable" to justify a preemption holding, *id*. at 31, and that decisions finding NBA preemption do *not* "control the interpretation of federal banking statutes that accompany a grant of an explicit power with an explicit statement that *the exercise of that power is subject to state law*," *id*. at 34 (emphasis added) (citing *First Nat'l Bank in Plant City v.*

[5] This Court, too, has reiterated that the intent of Congress serves as the touchstone for any preemption analysis. *E.g.*, *Aguayo*, 653 F.3d at 917-18 ("[T]he dispositive issue in any federal preemption question remains congressional intent.") (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), and *Barnett Bank*, 517 U.S. at 30).

Dickinson, 396 U.S. 122 (1969); *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966); *Van Allen v. Assessors*, 70 U.S. 573 (1866)).

Similarly, the OCC's post-Dodd-Frank regulation on national banks' real-estate lending powers incorporates these *Barnett Bank* principles and accordingly preserves any state law "that is made applicable by Federal law," as well as state laws governing enforcement of contracts. 12 C.F.R. § 34.4(b)(1), (9) (2011); *accord* 12 U.S.C. § 25b(b)(1)(B). To the extent BofA's argument relies on the statement, in 12 C.F.R. § 34.4(a)(6), that national banks may extend loans without regard to state law limitations concerning escrow accounts, the analysis must also consider the savings clause at 12 C.F.R. § 34.4(b) and, in particular, the fact that federal law now makes state laws governing escrow-interest payments applicable to national banks pursuant to 12 C.F.R. § 34.4(b)(9).[6] Congress expressed its

[6] Congress thereby leveled the competitive playing field in this substantive area, just as it did with its clarification in the McFadden Act that national banks are subject to state branch-banking laws to the same degree as state banks. *See Walker Bank & Trust*, 385 U.S. 252 (interpreting 12 U.S.C. § 36(c)); *Dickinson*, 396 U.S. 122 (interpreting 12 U.S.C. §§ 36(c) and 36(f)); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583-84 (1987) (finding it "impossible to divine from these [Forest Service] regulations, which *expressly contemplate coincident compliance with state law* as well as with federal law, an intention to pre-empt all state regulation") (emphasis added); *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 505 (1986) (holding that a Bankruptcy Code provision authorizing the trustee to abandon worthless or burdensome property did not supersede state environmental and public-safety laws prohibiting disposal of hazardous waste, because the Code also provides that the trustee is to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State.") (citing 28 U.S.C. § 959(b)).

intent, in 2010, that *all creditors* (without excepting national banks) must comply with state laws like section 2954.8(a) and that such laws are not inconsistent with federal lenders' powers.[7]

Thus, Dodd-Frank contains an "explicit" statement that national banks' power to administer mortgage escrow accounts "is subject to state law." *Barnett Bank*, 517 U.S. at 34. Congress affirmatively provided that all creditors must administer these accounts pursuant to applicable state laws—including, as pertinent here, state laws that apply to such administration by requiring payment of interest to borrowers. 15 U.S.C. §§ 1639d(g)(2)(C), (g)(3). Notably, Congress used mandatory language in this savings clause. 15 U.S.C. § 1639d(g)(3) (providing that national banks "shall pay interest to the consumer" if and in the manner prescribed by such state laws).

BofA's violation of California's existing escrow-interest law unquestionably was actionable once Congress made this intent clear. Indeed, "[b]ecause consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required" to exempt BofA from operation of the

[7] While the ability to service mortgage escrow accounts falls within national banks' federally-authorized powers, that does not end the preemption analysis under *Barnett Bank*. And where Congress provided that each lender must pay escrow interest as required by state laws, the enforcement of such laws can cause no impairment of federal banking powers as defined and intended by Congress. *See also* Section I.B.3, Pages 24-25, *infra*.

California law. *Aguayo*, 653 F.3d at 917 (citation omitted). But there is absolutely nothing in federal law that precludes or suggests any congressional intent to preclude a national bank from paying interest to its home-loan borrowers. Much to the contrary, section 1639d(g)(3) is compelling evidence that Congress did *not* "intend to exercise its constitutionally delegated authority to set aside" the California law underlying this action. *Barnett Bank*, 517 U.S. at 30; *see also* Consumer Financial Protection Bureau, *Escrow Requirements Under the Truth in Lending Act*, 78 Fed. Reg. 4,726, 4,747 (Jan. 22, 2013) (noting that "the creditor may be able to gain returns on the money that the consumers keep in their escrow account," but that "some States require a fixed interest rate to be paid on escrow accounts, resulting in an additional cost to the creditors."). The District Court therefore erred in perceiving a conflict with federal law.

B. The District Court's Avoidance of Congressional Intent Does Not Withstand Scrutiny.

1. An "Applicable" Law Pursuant to Section 1639d(g)(3) Is a Law That Applies in the Manner Congress Described, by Requiring Escrow-Interest Payments.

The District Court erroneously held that Cal. Civ. Code § 2954.8(a) is not "applicable" under 15 U.S.C. § 1639d(g)(3) on the grounds that it is preempted. ER 12 (Dismissal Order). This circular reasoning disregards the federal statute's plain meaning, which "is always controlling 'unless that meaning would lead to

absurd results.'" *SEC v. McCarthy*, 322 F.3d 650, 655 (9th Cir. 2003) (citation omitted).

Not all States have laws governing administration of mortgage escrow accounts. *See* Consumer Financial Protection Bureau, *Escrow Requirements Under the Truth in Lending Act*, 78 Fed. Reg. 4,726, 4,745 (Jan. 22, 2013) ("Under some State regulations, creditors are not required to pay interest on consumers' funds held in escrow accounts."). Hence, by "applicable State . . . law," Congress was simply referring to those laws that exist and apply in this area. The statute accordingly requires creditors to administer escrow accounts consistent with the law (if any) of the State of the securing residence that requires interest payments to consumer borrowers. 15 U.S.C. § 1639d(g)(3). Congress entitled this subparagraph "Applicability of payment of interest" because it clarifies that state laws that apply in this manner have uniform applicability and are enforceable against each creditor.

Congress could have, but did not, exclude national banks from 15 U.S.C. § 1639d(g). The District Court, however, reads them out of the statute. Its reasoning strips subparagraph (g)(3) of operative effect, rendering it "nonsensical and superfluous." *Corley v. United States*, 556 U.S. 303, 314 (2009) (applying "one of the most basic interpretive canons, that [a] statute should be construed so that

effect is given to all its provisions, so that no part will be inoperative or superfluous") (internal quotation marks and citation omitted).

If state laws requiring interest payments "to the consumer on the amount held in any impound, trust, or escrow account" were preempted, then why would Congress describe them, provide that national banks "shall" comply with them, and create a right of action for state attorneys general as well as private plaintiffs? 15 U.S.C. §§ 1639d(g)(3), 1640(e). Furthermore, to what federally-regulated banking institutions would such laws even apply? Congress does not legislate aimlessly. In the District Court's interpretation, however, the universe of "applicable" state laws would be an empty set: the NBA would preempt the enforcement against national banks of all the escrow-interest laws to which Congress referred, and the same analysis would also exempt other federally-regulated lenders, such as federal savings associations, under *Barnett Bank*. *See* 12 U.S.C. § 1465(b) (clarifying that federal savings associations are subject to principles of conflict rather than field preemption); 12 C.F.R. § 34.6 (reiterating that federal savings associations now occupy the same position as national banks when it comes to preemption questions).

Perhaps aware of this problem, the District Court suggested that state escrow-interest requirements might or "might not always 'apply' to certain creditors under certain circumstances" (ER 12), but this statement clarifies nothing.

To begin with, the relevant Dodd-Frank provision is directed by its terms to "each" creditor—not merely to "certain" creditors. *Compare* 15 U.S.C. § 1639d(g)(3), *with* ER 12. Moreover, insofar as state-chartered and other non-federally-regulated mortgage lenders make residential loans in States that require payment of escrow interest to borrowers, those laws *independently* apply to *those* lenders. *See, e.g.*, Patricia McCoy, *Federal Preemption, Regulatory Failure and the Race to the Bottom in US Mortgage Lending Standards*, in *The Panic of 2008: Causes, Consequences and Implications for Reform* 142 (L. Mitchell & A. Vilmarth eds., 2010) (observing that "mortgage brokers and independent non-depository mortgage lenders escape federal banking regulation but have to comply with all state laws in effect."). Finally, the District Court gave no concrete example of a state law governing mortgage escrow account administration that would *not* be preempted under its reasoning.

The District Court's analysis leaves no room for any such law to be enforced against any national banking institution. The holding below—that section 2954.8(a) and similar state laws are not "applicable" within the meaning of 15 U.S.C. § 1639d(g)(3) *because* they are preempted—is erroneous.

2. Congress Need Not Have Used the Word "Preemption" or Amended the NBA to Preserve Laws Like Civil Code Section 2954.8(a).

The District Court's other stated grounds for finding preemption are superficial and equally lacking in merit. First, the court reasoned that "Section 1639d does not mention . . . preemption" (ER 12)—yet Congress need not have used the word "preemption" to preserve state laws governing mortgage escrow account administration. That the statute does not mention preemption by name could hardly dictate a finding of preemption: the Supreme Court's "pre-emption jurisprudence explicitly rejects the notion that mere congressional silence on a particular issue may be read as pre-empting state law." *Wyeth*, 555 U.S. at 602-03 (Thomas, J., concurring) (citation omitted). In fact, "[m]ore often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank*, 517 U.S. at 31 (citation omitted); *cf.*, *e.g.*, *Walker Bank & Trust*, 385 U.S. at 261 (upholding applicability of a Utah law on branch banking against national banks, where Congress—without mentioning federal preemption or its absence—provided that national banks are subject to such local laws) (citing 12 U.S.C. § 36(c)).

Here, far from evincing a clear preemptive intent, Congress manifested its intent to *save* laws like section 2954.8(a) from being preempted by federal law. *See* 15 U.S.C. § 1639d(g)(3).

Second, the District Court attributed importance to the fact that section 1639d(g)(3) is not found within the NBA itself. ER 12. But it makes sense that Congress added section 1639d(g)(3) to the Truth in Lending Act, 15 U.S.C. § 1601, *et seq*. ("TILA"), because TILA governs consumer credit transactions and a home loan is a form of consumer credit. *See* 15 U.S.C. § 1602(dd)(5) (defining "residential mortgage loan" under TILA as, with limited exceptions, "any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling"). Congress, moreover, plainly intended for section 1639d(g)(3) to apply not just to national banks but to other creditors as well.

"[W]here the meaning of a statutory provision is clear," this Court will "not rely upon the location the legislature chose for it in its system of codification" as an interpretative aid. *Deutsch v. Turner Corp*., 317 F.3d 1005, 1019 (9th Cir. 2003) (citing *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1328 (7th Cir. 1997)). Regardless of its location in the Code, section 1639d(g)(3) mandates that "each creditor" comply with state laws requiring interest payments on mortgage escrow accounts, and BofA meets the applicable definition of

"creditor."[8] Section 1639d(g)(3) makes the relevant California law binding upon BofA and other federal lenders no less than if Congress had placed the operative language elsewhere. *See also, e.g.*, 12 C.F.R. § 34.4(b)(9) (saving state laws from NBA preemption that "are made applicable by Federal law," without limitation to where in the U.S. Code such federal law may appear).

3. Compliance with a State Law That Congress Has Specified Applies to National Banks Does Not Impair BofA's Federally-Granted Powers.

BofA nowhere claims that "it is impossible to comply with both state and federal requirements" for escrow-account servicing. *Serv. Eng'g Co. v. Emery*, 100 F.3d 659, 661 (9th Cir. 1996) (citation omitted). Indeed, BofA concedes "the absence of any federal requirement" regarding escrow-interest payments. ER 101 (Motion to Dismiss). Nor, after Dodd-Frank clarified Congress's intent in this substantive area, can BofA credibly maintain that "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Emery*, 100 F.3d at 661 (citation omitted).

It is Congress that defines the scope of federal banking authority, *First Nat'l Bank v. Missouri*, 263 U.S. 640, 656 (1924), and "when Congress has made its intent known through explicit statutory language, the courts' task is an easy one,"

[8] In perceiving no "logical connection" to the NBA (ER 12), the District Court overlooked that TILA's comprehensive definition of "creditor" includes national banks engaged in the defined activity. 15 U.S.C. § 1602(g).

English v. General Elec. Co., 496 U.S. 72, 78-79 (1990); *accord Barnett Bank*, 517 U.S. at 34. By definition, enforcement of section 2954.8(a) against BofA neither frustrates nor "significantly interfere[s] with the national bank's exercise of its powers," *id.* at 33, as those powers are intended and limited by Congress in view of 15 U.S.C. § 1639d(g). *See, e.g.*, *Dickinson*, 396 U.S. at 130-31 (no preemption of Florida banking law because Congress made national banks subject to applicable state law in the substantive area); *see also Granite Rock*, 480 U.S. at 583-84 (no preemption of California permit requirement for limestone mining in a national forest, given that Forest Service regulations "expressly contemplate[d] coincident compliance with state law as well as with federal law"); *Luna v. Harris*, 888 F.2d 949, 953 (2d Cir. 1989) (no preemption of New York law setting conditions on patients' ability to take methadone home, as relevant federal regulations provided that state law applied); *Midlantic Nat'l Bank*, 474 U.S. at 505 (no preemption of New Jersey environmental and public-safety laws where Bankruptcy Code "commands the trustee to 'manage and operate the property in his possession . . . according to the requirements of the valid laws of the State.'") (citation omitted). In enacting 15 U.S.C. § 1639d(g)(3) and specifying that it applies to all creditors, including national banks, Congress made clear that adherence to state escrow-interest laws does not hinder, but rather is consistent with, BofA's federally-granted authority.

C. Even Accepting *Arguendo* the District Court's View of BofA's Federal Lending Powers, It Was Premature to Conclude That Compliance With California Law Would Significantly Interfere With Them.

The District Court based its analysis of the "significant interference" question upon its conclusion that Congress, despite providing that all creditors "shall" comply with state escrow-interest laws, did not intend for such laws to apply to national banks. ER 10. Even accepting *arguendo* this nonsensical interpretation, the District Court erred when it found on a motion to dismiss that enforcement of section 2954.8(a) would significantly interfere with BofA's federal powers.

Wells Fargo, one of BofA's chief mortgage-lending competitors, *complies* with section 2954.8(a) and other state laws that require interest payments on consumer borrowers' mortgage escrow accounts. ER 107-08 (FAC ¶¶ 2, 7); *see Association for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011) (this Court must accept all complaint allegations as true, consider them as a whole, and draw all reasonable inferences in Appellant's favor), *cert. denied*, 132 S. Ct. 1797 (2012). Wells Fargo is able to do so notwithstanding differences among various States' laws on this issue, and notwithstanding that only some States, like California, have these requirements. Wells Fargo's compliance undermines the District Court's assertions that requiring BofA also to comply would somehow "jeopardize" its mortgage services, impair its "ability to make

loans given evolving and potentially fluid market conditions," and result in an unworkable patchwork regime. ER 10 (Dismissal Order). The District Court failed to explain how the burden of compliance could be "undue," *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944), under the circumstances here, where competitor and fellow national bank Wells Fargo bears it (and where BofA itself is enriched by maintaining the surplus escrow-account funds in question). ER 106-07 (FAC ¶ 2). The fact is that compliance with section 2954.8 and similar state laws is eminently workable for BofA. It has simply chosen not to comply.

At bottom, there has been no discovery and no evidence supports the District Court's statements. Even under the court's incorrect reading of Dodd-Frank, discovery would be necessary to determine the effect of BofA's compliance on its lending policies and operations. *See, e.g.*, *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358, 1366, 1369 (N.D. Ga. 2008) ("At least at this stage" (on a motion to dismiss) and "before the parties have developed record evidence," court was "unprepared to hold that the state laws under which Plaintiffs assert their claims are contrary to federal banking law.").

II. NOTHING IN FEDERAL LAW PREEMPTS THE BREACH OF CONTRACT CLAIM.

BofA's challenge to the breach of contract claim similarly fails. In its loan agreement with Appellant, BofA promised to comply with "the law of the jurisdiction in which the Property is located": California. ER 30 (BofA's Supp.

Request for Judicial Notice). And the agreement specifically contemplates interest payments to Appellant if governing law "requires interest to be paid on the Funds" in his escrow account. ER 25 (BofA's Supp. Request for Judicial Notice). BofA's undisputed violation of section 2954.8(a) breached these contractual provisions, a breach that stands apart from anything in federal law.

A federally-chartered banking institution cannot avoid liability for breaching its contract simply by pointing to the federal regime—even when more stringent field preemption applies. Even federal "assertion of plenary regulatory authority does not deprive persons harmed by the wrongful acts of savings and loan associations of their basic state common-law-type remedies." *In re Ocwen Loan Servicing, LLC*, 491 F.3d 638, 643-44 (7th Cir. 2007). For instance, the Sixth Circuit reversed a ruling that HOLA field preemption eliminated a claim that a federal savings association had breached its agreement not to charge a particular fee. *Molosky v. Washington Mutual Inc.*, 664 F.3d 109, 114-16 (6th Cir. 2011). The court explained that "[l]ending practices cannot be more than incidentally affected by claims that 'merely seek[] to make defendants live up to the word of their agreements they sign with their customers.'" *Id*. at 116 (citing *McAnaney v. Astoria Fin. Corp.*, 665 F. Supp. 2d 132, 164 (E.D.N.Y. 2009)). And in this regard "breach of contract claims are even more clearly not preempted than claims that an

association has violated state laws that prohibit deceptive acts and practices." *Molosky*, 664 F.3d at 116.

In this case, under ordinary conflict (not field) preemption principles, the bare contention that BofA's loan officers thought "applicable" law excludes section 2954.8(a) affords no immunity for BofA's breach of its agreement to follow California law. This Court should reject any attempt by BofA to rely on extra-contractual "notices" it sent Appellant prior to Dodd-Frank disclosing the self-serving view that BofA is exempt from California consumer protection law. ER 72, 74. That position is wrong—and national banks' preemption challenges to breach of contract claims were "ridiculous" even before Dodd-Frank because "[t]here is no federal banking law absolving banks from complying with the bank's contractual obligation to pay interest." Kenneth S. Klein, *Following the Money*, 46 CAL. W. L. REV. 305, 338 (2010).

III. APPELLANT'S CLAIM PREMISED ON FEDERAL LAW VIOLATIONS IS WELL PLED.

The District Court further erred in dismissing Appellant's UCL claim to the extent it is based on violations of the federal statute, 15 U.S.C. § 1639d(g)(3). *See McKell*, 49 Cal. Rptr. 3d at 251 (federal law violations may trigger UCL liability). The complaint alleges continuing failures by BofA to pay interest on the mortgage escrow account balances of Appellant and the numerous members of the proposed

consumer class after the direct federal obligation became effective. ER 106-07, 111, 116.

CONCLUSION

"The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [may be] between them." *Wyeth*, 555 U.S. at 575 (citation omitted). Congress here indicated its awareness of state laws, like California Civil Code section 2954.8(a), requiring payment of "interest to the consumer" on escrow-account funds connected with a home loan, and provided that national banks "shall" comply with them. 15 U.S.C. § 1639d(g)(3). There is consequently no tension, much less an "irreconcilable conflict," *Barnett Bank*, 517 U.S. at 31, between this California law and federal banking law. The judgment should be reversed.

Respectfully submitted,

Dated: May 13, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. Pro. 32(a)(7)(B), because it contains 6,867 words, as determined by Microsoft Word 2007, including the headings and footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The text appears in 14-point Times New Roman, a proportionally spaced serif typeface.

Dated: May 13, 2015

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STATEMENT OF RELATED CASES

Plaintiffs are aware of no cases to disclose pursuant to Ninth Circuit Rule 28–2.6.

Dated: May 13, 2015

/s/ *Jordan Elias*
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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, via the appellate CM/ECF system. Case participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

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