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.

On Appeal From The United States District Court
For the Central District Of California
Hon. Beverly Reid O'Connell, District Judge

APPELLEE'S RESPONSE BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellee Bank of America, N.A., hereby submits the following corporate disclosure statement:

Bank of America, N.A. is a national bank that is wholly owned by Bank of America Corporation. Bank of America Corporation, a bank holding company, is publicly traded. Bank of America Corporation has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

As a national bank chartered under the National Bank Act, Defendant Bank of America, N.A. ("Bank of America") has broad authority to make mortgage loans and to provide escrow account services. Under this grant of authority, Bank of America establishes for mortgage-loan customers, including Plaintiff, escrow accounts from which tax and insurance payments are made. Any state law that "prevents or significantly interferes" with Bank of America's power to set the terms and conditions for mortgage loans and escrow accounts is preempted by the National Bank Act. 12 U.S.C. § 25b(b)(1)(B); *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996).

Plaintiff nevertheless filed this lawsuit to prevent Bank of America from offering escrow accounts unless it complies with a state-law requirement to pay interest on those accounts. All of Plaintiff's claims are derived from his argument that California Civil Code § 2954.8(a) forced Bank of America to pay him an above-market rate of at least 2 percent interest on his escrow account balance. As the district court held, the National Bank Act preempts Section 2954.8(a) because that law "prevent[s] or significantly interfere[s]" with Bank of America's federal power to set the terms and conditions for mortgage loans and escrow accounts. ER 7-11.

Plaintiff's main challenge to the district court's order rests on a radical—and flawed—interpretation of 15 U.S.C. § 1639d(g)(3). According to Plaintiff, Section 1639d(g)(3) overturned an unbroken line of authority exempting national banks from complying with state-law escrow interest requirements and now forces national banks to comply with such laws. Plaintiff advances this position even though he is unable to cite any court decision, agency position, or legislative history agreeing with his extreme reading of Section 1639d(g)(3).

Plaintiff's reliance on Section 1639d(g)(3) is wholly misplaced. Section 1639d(g)(3) only requires a lender to pay interest "[i]f prescribed by *applicable* State … law." By definition, a preempted law cannot be an "applicable" law, and there is no indication Section 1639d was intended to save laws like Section 2954.8 from preemption by the National Bank Act. Moreover, any obligation to pay interest could only apply to accounts "subject to" that Section, but Plaintiff's escrow account was established nearly four years before Section 1639d took effect and thus cannot be "subject to" it.

Because Plaintiff has no viable theory for why Section 2954.8(a) applies to Bank of America, this Court should affirm the district court's order dismissing Plaintiff's claims with prejudice.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case under 28 U.S.C. § 1331 and § 1332(d). On October 29, 2014, the district court entered a final, appealable judgment when it dismissed the First Amended Complaint with prejudice. *See* ER 1. Plaintiff filed his notice of appeal on November 4, 2014, giving this Court jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Did the district court correctly conclude that California Civil Code § 2954.8's requirement to pay Plaintiff an above-market interest rate on his escrow account balance prevented or significantly interfered with Bank of America's federal right to set the terms and conditions for its mortgage loans and to offer escrow accounts, making that law preempted by the National Bank Act?

2. Did the district court correctly dismiss Plaintiff's Unfair Competition Law claim, when neither state nor federal law required Bank of America to pay interest on Plaintiff's escrow account balance?

3. Did the district court correctly dismiss Plaintiff's breach-of-contract claim, when no "applicable" law required Bank of America to pay interest on Plaintiff's escrow account balance?

STATUTES AND REGULATIONS INVOLVED

Relevant statutes and regulations are reprinted in an addendum to this brief.

STATEMENT OF THE CASE

A. The Parties.

Plaintiff is a California resident who obtained a mortgage in 2008. *See* ER 111 ¶ 15. Plaintiff refinanced his mortgage in 2009, which he then modified in early 2011. *See* ER 1-2; ER 19-20; ER 111 ¶ 15.

Bank of America is a national bank chartered under the National Bank Act. *See* ER 112 ¶ 17. Bank of America's predecessor originated Plaintiff's 2008 mortgage, Bank of America's subsidiary originated Plaintiff's 2009 mortgage, and Bank of America agreed to modify Plaintiff's mortgage in 2011. ER 19-20; ER 111-12 ¶¶ 15-17. Bank of America currently owns and services Plaintiff's mortgage and related escrow account. ER 112 ¶ 17.

B. Bank of America's Federal Authority To Make Mortgages And Provide Escrow Account Services.

National banks are empowered by the National Bank Act to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. § 371(a). National banks are also authorized to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). For nearly 40 years, the Office of the Comptroller of the Currency ("OCC")—the primary federal regulator of national banks—has recognized that these grants of authority permit national banks to "provid[e] escrow services in a variety of contexts." OCC Interp. Ltr. 1041, 2005 WL

3629258, at *2 (Sept. 28, 2005) (citing, among other authorities, Interp. Ltr. (May 13, 1975)).

Under an escrow account like the one at issue in this case, a certain percentage of a customer's monthly mortgage payment is set aside to pay taxes and insurance bills. *See, e.g.*, ER 110-12 ¶¶ 11, 15, 17. This service provides a "benefit to the borrowers as it relieves them of the tasks of paying such regular tax and insurance obligations in a lump sum." OCC, Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998). Escrow accounts are also often required by national banks making mortgage loans in order to protect their security interests.

No federal law requires national banks to pay interest on these escrow account balances. Instead, federal law closely regulates the circumstances when a national bank may require an escrow account and the maximum balance that may be held in that account. *See, e.g.*, 12 U.S.C. §§ 2605, 2609. Federal law also authorizes national banks to make real estate loans "without regard to state law limitations concerning … [t]he terms of credit" and "escrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 34.4(a)(4), (a)(6).

C. Plaintiff's Mortgage and Related Escrow Account.

Plaintiff alleged that he entered into a mortgage contract with Countrywide Financial in 2008. *See* ER 111 ¶ 15. Although Plaintiff alleged in his Complaint

that his claims arose out of his 2008 mortgage, he concedes that this agreement was "extinguished" when Plaintiff refinanced his loan in 2009.[1] Br. at 7.

Instead, Plaintiff asserts that his claims arise out of a mortgage loan made by Bank of America's subsidiary in 2009 and now owned by Bank of America. *See* ER 19-20. Under the mortgage agreement, Plaintiff agreed that a portion of his monthly mortgage payment would be set aside into an escrow fund that would be used to pay "taxes and assessments and other items which can attain priority over [the mortgage] as a lien or encumbrance on the property" and "premiums for any and all insurance required." ER 25 § 3; *see also* ER 109 ¶ 10. Plaintiff also acknowledged that the mortgage agreement provided that Bank of America "shall not be required to pay [Plaintiff] any interest on earnings on the Funds" unless "Applicable Law" required otherwise.[2] ER 109. ¶ 10; *see also* ER 25 § 3.

Plaintiff was repeatedly notified that he would not receive interest on funds deposited in his escrow account. For example, on the same day that Plaintiff

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[1] To the extent Plaintiff's claims relate to his 2008 mortgage, his claims would also be preempted by the Home Owners' Loan Act. *See* ER 95 n.13.

[2] The mortgage agreement defines "Applicable Law" as "all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." *See* ER 23, Definitions § (J).

obtained his 2009 mortgage, Bank of America provided Plaintiff with a "Notice Concerning Your Escrow Account" that informed Plaintiff:

> As a federally chartered bank, Bank of America is subject to federal law and the Office of the Comptroller of the Currency regulations, and in most cases is not subject to state laws that regulate or otherwise affect its credit activities. The federal law and regulations that Bank of America is subject to do not require the payment of interest on escrow accounts. Accordingly, you will not receive interest on your escrow account even if your state has a law concerning the payment of interest on escrow accounts.

ER 74. Plaintiff received a similar notice when he obtained his 2008 mortgage. *See* ER 72.

In 2011, after Plaintiff had fallen behind on his mortgage payments, Plaintiff and Bank of America agreed to modify Plaintiff's 2009 mortgage. *See* ER 111 ¶ 15; *see also* ER 60-70. The modified mortgage agreement changed Plaintiff's monthly payment requirements (including the amount that would be deposited in Plaintiff's escrow account), but it did not change any other terms of the mortgage. *See, e.g.*, ER 61 (besides the monthly payment terms, "[a]ll other terms and conditions of the Mortgage will remain the same for the Modified Mortgage").

D. The Allegations In the Complaint.

Although Plaintiff's escrow funds have been deposited in a non-interest-bearing account since 2008, Plaintiff filed this action in March 2014 contending that state law requires Bank of America to pay him at least 2 percent interest on his

escrow funds. *See, e.g.*, ER 105 ¶ 1. Count I of Plaintiff's First Amended Complaint (the "Complaint") asserted a claim under California's Unfair Competition Law based on the theory that California Civil Code § 2954.8(a) and 15 U.S.C. § 1639d(g)(3) require interest payments on Plaintiff's escrow account balance.[3] *See* ER 116-17 ¶ 32. Count II asserted a common-law claim for breach of contract, which likewise rests on the theory that Bank of America agreed to "comply with applicable state and federal law" that allegedly mandates interest payments on escrow account balances. ER 117 ¶ 38.

Plaintiff effectively conceded that he has no claim under the Unfair Competition Law for conduct that occurred before Dodd-Frank's effective date. *See* ER 107 ¶ 3 (acknowledging that national banks refused to pay interest on escrow account balances because of "the preemptive effects of regulations of … the Office of the Comptroller of the Currency"). Plaintiff instead alleged that Dodd-Frank changed the legal landscape and that Bank of America is now required to comply with Section 2954.8's requirement to pay above-market interest on escrow account balances. *See* ER 107 ¶ 4. Although Plaintiff admitted that the OCC has "reaffirm[ed] its prior broad preemption regulations" in the wake of

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[3] Although Plaintiff also asserted that HUD Handbook 4330.1 required interest payments on Plaintiff's escrow account balance, *see* ER 116-17 ¶ 32, Plaintiff has abandoned this argument, *see* ER 3 n.3.

Dodd-Frank, Plaintiff nevertheless alleged that these regulations are "unenforceable." ER 108 ¶ 4.

E. The District Court's Order Dismissing The Complaint.

Bank of America moved to dismiss all the claims in the Complaint on the ground that Bank of America had no obligation to comply with Section 2954.8(a). The district court agreed.

The district court first concluded that the National Bank Act preempted Section 2954.8(a). The court first observed that the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), supplied "the appropriate standard for courts … to apply to [National Bank Act] preemption decisions," meaning a state law was preempted if it "'prevents or significantly interferes with the exercise by the national bank of its powers.'" ER 5 (quoting 12 U.S.C. § 25b(b)(1)(B)). The court next observed that there was no dispute that the National Bank Act gave national banks the power "to offer and service escrow accounts." ER 9; *see also* ER 8 n.10. The court went on to conclude that Section 2954.8(a) "constitutes a significant interference" with this federal banking power because the law "seeks to directly impede [Bank of America]'s authority under the [National Bank Act] to provide and service its escrow accounts as it sees fit." ER 10-11.

The district court next rejected Plaintiff's argument that 15 U.S.C. § 1639d affected this preemption analysis. The court observed that Section 1639d "contains no language from which we can 'reasonably infer' that Congress intended to limit [National Bank Act] preemption." ER 11. With respect to Plaintiff's argument that Section 1639d(g)(3) required Bank of America to comply with Section 2954.8(a), the court observed that "Section 1639d was not meant, in and of itself, to override established rules of preemption in a different statutory scheme." ER 12. And even if Section 1639d was intended to have such an effect, the district court observed that since "Plaintiff's account was established prior to Section 1639d's effective date, and Congress has expressed no intent that Section 1639d shall apply retroactively, his account is not subject to the requirements of this section." ER 13.

The district court thus dismissed all of the claims in the Complaint with prejudice. The Unfair Competition Law claim failed because the California Civil Code § 2954.8(a) was preempted and because Bank of America had not violated 15 U.S.C. § 1639d(g)(3). *See* ER 7-13. The breach-of-contract claim likewise failed because Bank of America "has complied with 'applicable law' in not paying interest on Plaintiff's escrow account," since "[n]either Section 2954.8 nor Section 1639d is controlling on Plaintiff's loan agreements." ER 13.

SUMMARY OF THE ARGUMENT

The district court's order dismissing the Complaint with prejudice was correct and should be affirmed.

1. Every claim in the Complaint rests on the premise that Bank of America was required to comply with California Civil Code § 2954.8(a)'s requirement to pay an above-market rate of interest of at least two percent on escrow account balances. This premise is mistaken because Section 2954.8(a) is preempted by the National Bank Act.

a. In contrast to other federal laws that are subject to a presumption against preemption, the National Bank Act "ordinarily" preempts state laws. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996). As a result, the National Bank Act preempts any state law that prevents or significantly interferes with a national banks' exercise of its federal banking powers. *See id.* at 33.

b. The National Bank Act gives national banks the authority to set the terms and conditions of mortgage loans and to establish escrow accounts from which taxes and insurance payments may be made for, among other reasons, the protection of the bank's security interests. Plaintiff does not dispute that Bank of America has these federal banking powers.

c. Section 2954.8(a) is preempted because it prevents or significantly interferes with Bank of America's exercise of its federal banking powers. Plaintiff seeks to prohibit Bank of America from exercising its federal authority to set the terms and conditions of mortgage loans and to offer escrow accounts unless the national bank first complies with a state law requiring the payment of at least 2 percent interest on that escrow account balance. However, it is black-letter law that a state may not condition a national bank's exercise of any enumerated or incidental power upon compliance with state law. *See Barnett Bank*, 517 U.S. at 34. The OCC's preemption regulations—which provide that national banks may exercise their mortgage lending authority "without regard to state law limitations concerning … terms of credit" and "[e]scrow accounts, impound accounts, and similar accounts"—confirm that laws like Section 2954.8(a) are preempted as a matter of law. 12 C.F.R. § 34.4(a)(4), (a)(6).

d. To the extent Plaintiff argues that Dodd-Frank's amendments to the National Bank Act's preemption framework affect this preemption analysis, *see* 12 U.S.C. § 25b, Plaintiff is mistaken. Dodd-Frank simply codified the *Barnett Bank* standard and provides that state laws that "prevent[] or significantly interfere[] with the exercise by the national bank of its powers" are preempted. 12 U.S.C. § 25b(b)(1)(B). Following Dodd-Frank, the OCC re-examined its prior preemption determination and concluded that laws like Section 2954.8 continue to be

preempted. Although preemption in this case exists because Section 2954.8 interferes with Bank of America's statutory banking powers, the OCC's preemption determination—which is entitled to deference from this Court—further confirms that Section 2954.8 prevents or significantly interferes with Bank of America's banking powers.

e. Plaintiff's main argument on appeal—that Dodd-Frank's amendments to the Truth in Lending Act codified at 15 U.S.C. § 1639d(g)(3) require Bank of America to comply with state laws like Section 2954.8(a)—rests on a flawed and circular interpretation of Section 1639d.

As a threshold matter, a state may not restrict a national bank's federal banking powers unless Congress provides "an explicit statement that the exercise of that power is subject to state law." *Barnett Bank*, 517 U.S. at 34. Section 1639d(g)(3) falls far short of containing the necessary "explicit statement" requiring national banks to comply with state laws requiring interest payments on escrow accounts. Instead, Section 1639d(g)(3) only requires payments if required by "applicable State … law," meaning another federal law besides Section 1639d(g)(3) must make state law applicable to national banks. Here, no such federal law exists. And a preempted state law cannot be an "applicable" law.

Plaintiff's argument to the contrary ignores the background, text, and structure of Section 1639d. Plaintiff himself concedes that when Section 1639d

was enacted, there was no dispute that laws like Section 2954.8 were considered preempted, and there is no indication Congress intended to disrupt this state of affairs. Congress's use of the word "applicable" indicates that Congress did not give states permission to impose conditions on how national banks exercise their federal power to offer and administer escrow accounts. This conclusion is confirmed by the fact that Dodd-Frank's amendments to the TILA say nothing about national banks, the National Bank Act, or preemption. Notably, the only federal agency to consider whether state escrow laws continue to be preempted after Section 1639d has answered that question in the affirmative.

Plaintiff's opening brief also ignores the district court's alternate holding that Section 1639d does not apply to Plaintiff's escrow account. By its terms, Section 1639d only applies to escrow accounts established "before the consummation of a loan" originated on or after January 21, 2013. There is no indication that Congress intended Section 1639d to apply retroactively to Plaintiff's escrow account, which was created as part of a loan made more than a year before Section 1639d was enacted and nearly four years before Section 1639d took effect.

2. Accordingly, the district court correctly dismissed Plaintiff's Unfair Competition Law claim. Plaintiff cannot establish a violation of state law because Section 2954.8 is preempted. Plaintiff also cannot establish a violation of state law

because 15 U.S.C. § 1639d(g)(3) does not require Bank of America to comply with Section 2954.8 and does not apply to Plaintiff's escrow account.

3. The district court also correctly dismissed Plaintiff's breach-of-contract claim. Plaintiff's mortgage agreement provides that Bank of America "shall not be required to pay [Plaintiff] any interest on earnings on the Funds." ER 25. Although Plaintiff argues that Bank of America agreed to comply with "Applicable Law," Plaintiff's mortgage agreement defines "Applicable Law" as "all *controlling* applicable … state … statutes," ER 23 § J, meaning Section 2954.8 cannot be considered "controlling applicable" law because it is preempted. Plaintiff's related argument that his mortgage agreement's choice-of-law provision requires Bank of America to comply with state law ignores that the U.S. Supreme Court has held that an indistinguishable choice-of-law provision does not require a lender to comply with preempted laws. *See Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 n.12 (1982).

STANDARD OF REVIEW

An order dismissing a complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 553 (9th Cir. 2010). "[I]ssues of statutory interpretation and preemption" are likewise reviewed *de novo*. *Id.*

In ruling on a Rule 12(b)(6) motion, a district court may consider matters judicially noticed, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), and documents that "are not physically attached to the complaint" but whose "authenticity is not contested and the plaintiff's complaint necessarily relies on them," *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (internal quotation marks and citation omitted). Here, the district court took judicial notice of Plaintiff's 2008 mortgage agreement and a notice Plaintiff received about the escrow account established by that 2008 agreement, Plaintiff's 2009 mortgage agreement and a notice Plaintiff received about the escrow account established by that 2009 agreement, and the 2011 modification of Plaintiff's 2009 mortgage agreement. *See* ER 2 & n.2. On appeal, Plaintiff does not challenge the district court's decision to take judicial notice of these mortgage-related documents.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE NATIONAL BANK ACT PREEMPTS CAL. CIV. CODE § 2954.8.

Every claim in the Complaint derives from Plaintiff's argument that Bank of America must comply with California Civil Code § 2954.8's requirement to pay at least 2 percent interest on escrow account balances. As the district court correctly held, the National Bank Act preempts Section 2954.8 because that law "prevents or significantly interferes" with Bank of America's federal power to set the terms and

conditions for mortgage loans and escrow accounts. 12 U.S.C. § 25b(b)(1)(B); *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 33 (1996).

A. The Usual Presumption Against Preemption Does Not Apply To The National Bank Act.

For more than a hundred years, the Supreme Court has recognized that a grant of federal authority under the National Bank Act preempts state-law restrictions on the exercise of that authority. *See generally Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 1-13 (2007). This "history of significant federal presence" in the regulation of national banks gives the National Bank Act a preemptive force that other federal laws do not enjoy. *Bank of Am. v. City & Cnty. of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002) (internal quotation and citation omitted). The strong preemptive force of the National Bank Act is necessary to prevent the "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking" that would result from the application of state laws with their individual "limitations and restrictions." *Watters*, 550 U.S. at 13-14; *see also Bank of Am.*, 309 F.3d at 561 ("The National Bank Act … was enacted to protect national banks against intrusive regulation by the States.").

For these reasons, the "usual presumption against federal preemption of state law is inapplicable to federal banking regulation." *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1037 (9th Cir. 2008) (internal quotation and citation omitted). Instead, the "enumerated and incidental powers" granted to national banks under

the National Bank Act "ordinarily pre-empt[] contrary state law." *Barnett Bank*, 517 U.S. at 32 (quotation marks omitted). In other words, "where Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies." *Id.* at 34.

B. National Banks Have Federal Authority To Set Terms And Conditions For Their Mortgage Loans And To Offer Escrow Accounts.

There is no dispute that Plaintiff's attempt to force Bank of America to comply with Section 2954.8 implicates two banking powers: the power to offer mortgages and the power to offer escrow accounts. *See* ER 8 n.10 ("Plaintiff does not challenge [Bank of America]'s arguments that maintaining and servicing escrow accounts are incidental national bank powers."); Br. at 17 n.7. ("[T]he ability to service mortgage escrow accounts falls within national banks' federally-authorized powers.").

First, 12 U.S.C. § 371 empowers national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate." 12 U.S.C. § 371(a). This power to offer mortgages includes the right to set the terms and conditions of mortgages. To protect against the risk that the property secured by a mortgage may become subject to a lien or loss, banks often include as a "term" of a mortgage that a borrower make tax and insurance payments into an escrow account. While banks could charge higher interest rates as compensation

for this risk, escrow accounts provide an alternative way for a bank to mitigate the risk of loss that the loan security might face from the borrower's failure to pay taxes or have the property properly insured. Banks often refuse to make or acquire secured mortgage loans without these escrow accounts. *See* OCC Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998) (observing that "the secondary mortgage market typically requires the establishment of escrow accounts").

Second, federal law empowers national banks to establish escrow accounts. 12 U.S.C. § 24(Seventh) authorizes national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." The power conferred by Section 24(Seventh) includes the power to engage in any conduct that "is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 960 (9th Cir. 2005). It has long been recognized that the grants of authority in 12 U.S.C. § 371 and § 24(Seventh) include the power to provide "escrow services in the context of collecting real estate taxes." OCC Interp. Ltr. 1041, 2005 WL 3629258, at *2 (Sept. 28, 2005).[4]

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[4] *See also* OCC, Corporate Decision No. 99-06, 1999 WL 74103, at *2 (Jan. 29, 1999) ("[N]ational banks are authorized to provide … escrow services to their loan … customers as activities that are part of or incidental to the business of (continued…)

C. The National Bank Act And Accompanying OCC Regulations Preempt Plaintiff's Claims.

The district court correctly concluded that Section 2954.8(a) "significantly interferes" with Bank of America's powers to offer mortgages and escrow accounts. ER 9-11. Accordingly, Section 2954.8(a) is preempted by the National Bank Act. *See* 12 U.S.C. § 25b(b)(1); *Barnett Bank*, 517 U.S. at 33.

1. Section 2954.8(a) Prevents Or Significantly Interferes With Bank Of America's Federal Banking Powers.

For two reasons, the National Bank Act preempts Plaintiff's attempt to force Bank of America to comply with Section 2954.8. *See, e.g.*, *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274, 283 (6th Cir. 2009) ("[T]he level of 'interference' that gives rise to preemption under the [National Bank Act] is not very high.").

First, the Complaint seeks to impose state-law conditions on the exercise of a national bank's power to provide escrow account services. Plaintiff seeks to prohibit Bank of America from exercising its federal authority to offer escrow accounts unless the national bank first agrees to comply with a state law requiring

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banking."); OCC, Conditional Approval No. 276, 1998 WL 363812, at *9 (May 8, 1998) ("National banks have long been permitted to service the loans that they make and servicing frequently entails the assurance that local real estate taxes are paid on time, particularly when such loans involve tax and insurance escrow accounts.").

the payment of at least 2 percent interest on escrow account balances. However, it is black-letter law that a state may not condition a national bank's exercise of any enumerated or incidental power upon compliance with state law. *See Barnett Bank*, 517 U.S. at 34 ("[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies"); *Parks v. MBNA America Bank, N.A.*, 54 Cal. 4th 376, 388 (Cal. 2012) ("Requiring compliance with" state law "as a condition of" exercising a national bank power "significantly impairs the exercise of authority granted to national banks by the [National Bank Act]."") (internal quotation marks and citation omitted).

OCC regulations confirm that Section 2954.8 "prevents or significantly interferes" with Bank of America's exercise of its power to offer escrow accounts.[5] In particular, 12 C.F.R. § 34.4 provides that national banks may exercise their mortgage-lending authority "without regard to state law limitations concerning … [e]scrow accounts, impound accounts, and similar accounts." 12 C.F.R.

[5] OCC regulations that interpret and apply the National Bank Act have the same preemptive force as the National Bank Act itself. *See, e.g.*, *de la Cuesta*, 458 U.S. at 153 (federal regulations "have no less pre-emptive effect than federal statutes"). Congress has entrusted the OCC with "primary responsibility for surveillance of the 'business of banking' authorized by § 24 Seventh," *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995), and the OCC has "authority to displace contrary state regulation," *Boutris*, 419 F.3d at 962.

§ 34.4(a)(6). Courts have likewise agreed that federal law preempts state laws requiring federally chartered depository institutions to pay interest on escrow account balances. *See Flagg v. Yongers Sav. & Loan Ass'n*, 396 F.3d 178, 181-85 (2d Cir. 2005);[6] *First Fed. Sav. & Loan Ass'n of Boston v. Greenwald*, 591 F.2d 417, 425-26 (1st Cir. 1979); *cf. Hayes v. Wells Fargo Bank, N.A.*, 2014 WL 3014906, at *5-6 (S.D. Cal. July 3, 2014) (federal law preempted California claim challenging the manner in which national bank serviced escrow accounts); *Wis. League of Fin. Insts., Ltd. v. Galecki*, 707 F. Supp. 401, 404-06 (W.D. Wis. 1989) (federal law preempted state-law attempts to regulate escrow-related disclosures).

Second, the Complaint seeks to impose state-law conditions on the circumstances under which banks may extend mortgage credit. As a condition of underwriting a mortgage, banks often require a consumer to establish an escrow account as a "term of credit" to ensure that funds remain available to pay taxes and keep the property secured by the mortgage free of liens. A bank that is unable to require such a provision might refuse to make the mortgage loan in light of the heightened risk to its security interest from the borrower's failure to pay taxes or to

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[6] *Flagg* involved 12 C.F.R. § 560.2(b), which preempts "state laws purporting to impose requirements regarding … [e]scrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 560.2(b)(6). Because the preemption regulation in 12 C.F.R. § 34.4(a) is "almost identical to" the preemption regulation in 12 C.F.R. § 560.2(b), "the preemption analysis remains the same." *Zlotnick v. U.S. Bankcorp*, 2009 WL 5178030, at *6 (N.D. Cal. Dec. 22, 2009).

properly insure the property. Indeed, Plaintiff acknowledges that his escrow account was one of "the express terms of the [mortgage] contracts." ER 109 ¶ 10; *accord* ER 111 ¶ 16. Section 2954.8 undermines national banks' mortgage-lending powers by prohibiting banks from having a term in mortgage loans requiring an escrow account unless the bank first pays interest on that account balance. *Barnett Bank* specifically prohibits this result. *See* 517 U.S. at 34; *accord Watters*, 550 U.S. at 13 ("Beyond genuine dispute, state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the [National Bank Act].").

Again, 12 C.F.R. § 34.4 confirms this conclusion. 12 C.F.R. § 34.4(a)(4) provides that banks may exercise their mortgage-lending authority without regard to state laws relating to the "terms of credit." An escrow account is a "term of credit" because it affects the payment a borrower must pay each month, and the nature of the security that the borrower has given to the bank on the loan note, to ensure the borrower does not default on the loan. This Court has consistently recognized the broad preemptive force of Section 34.4. *See, e.g.*, *Deming v. Merrill Lynch & Co.*, 528 F. App'x 775, 777 (9th Cir. 2013); *O'Donnell v. Bank of Am., N.A.*, 504 F. App'x 566, 568 (9th Cir. 2013); *Gutierrez v. Wells Fargo Bank,*

N.A., 704 F.3d 712, 726 (9th Cir. 2012); *Martinez v. Wells Fargo Home Mortgage, Inc.*, 598 F.3d 549, 556-57 (9th Cir. 2010).

In challenging this result, Plaintiff suggests that "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." Br. at 18. But 12 U.S.C. § 371 and § 24(Seventh) are broad grants of authority, and "the high court has repeatedly found a sufficient basis for preemption where the federal banking statute provides 'a broad, not a limited, permission.'" *Parks*, 54 Cal. 4th at 384 (quoting *Barnett Bank*, 517 U.S. at 32). Since "Congress has not expressly conditioned the grant of 'power'" to set the terms and conditions of mortgage loans and escrow accounts "upon a grant of state permission"—including state laws prohibiting the establishment of escrow accounts unless interest payments are made on the account balance—"no such condition applies." *Barnett Bank*, 517 U.S. at 34.

2. Contrary To Plaintiff's Argument, It Was Not Premature To Conclude That A Requirement To Pay Above-Market Interest Interfered With Bank Of America's Federal Banking Powers As A Matter Of Law.

For the first time on appeal, Plaintiff argues that it was "premature" for the district court to conclude on a motion to dismiss that Section 2954.8's requirement to pay above-market interest prevents or significantly interferes with Bank of

America's banking powers. Br. at 26-27. For two independent reasons, this argument lacks merit.

First, this argument "was not presented to the district court, so it is not appropriately before this court."[7] *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1007 (9th Cir. 2008); *see also United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994) ("Issues not presented to the district court cannot generally be raised for the first time on appeal.").

Second, Plaintiff's argument invokes the wrong preemption standard. At one point, Plaintiff asserts that "[a] conflict must be 'irreconcilable' to justify preemption" Br. at 14 (citation omitted). Elsewhere, Plaintiff argues that Section 2954.8 is not preempted so long as it is "eminently workable" for Bank of America to comply with its requirements. Br. at 27.

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[7] Plaintiff bases his argument that dismissal was "premature" on his allegation that because another national bank allegedly complies with Section 2954.8(a), "discovery would be necessary to determine the effect of [Bank of America's] compliance on its lending policies and operations." Br. at 27. But in the district court, Plaintiff invoked the practices of this other national bank only to establish that it was not impossible for Bank of America to comply with Section 2954.8(a). *See* Pl.'s Memo. in Opp. to Mot. to Dismiss, Dkt. No. 28, at 11. Nowhere did Plaintiff argue that a fact dispute existed as to whether Section 2954.8(a) interfered with Bank of America's banking powers. *See, e.g.*, Reply Memo. in Support of Def. Bank of Am.'s Mot. to Dismiss, Doc. No. 30, at 6 ("Notably, Plaintiff never asserts that, in the absence of a federal law requiring national banks to comply with state escrow interest laws, Section 2954.8 does not interfere with Bank of America's federal banking powers.").

However, neither Congress nor the Supreme Court has imposed an "irreconcilable" or "eminently workable" standard for preemption under the National Bank Act. *See* 12 U.S.C. § 25b(b)(1)(B); *Barnett Bank*, 517 U.S. at 33. Instead, "[t]he level of 'interference' that gives rise to preemption under the [National Bank Act] is not very high." *Monroe Retail*, 589 F.3d at 283. Plaintiff's "attempt to redefine 'significantly interfere' as 'effectively thwart' is unpersuasive" and should be rejected. *Ass'n of Banks in Ins., Inc. v. Duryee*, 270 F.3d 397, 409 (6th Cir. 2001) (quoting *Barnett Bank*, 517 U.S. at 33); *see also Watters*, 550 U.S. at 13 ("Beyond genuine dispute, state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated, under the [National Bank Act]").

Applying the correct preemption standard, the district court correctly concluded that a state law that *requires* a national bank to pay above-market interest on escrow account balances prevents or significantly interferes as a matter of law with the bank's federal authority to *choose* whether to make such payments. Section 2954.8(a) "does not take changing prevailing interest rates into account," ER 10, the district court correctly observed that its "rigid 2 percent requirement" therefore restricts "a national bank's ability to make loans given evolving and

potentially fluid market conditions," *id.*, especially when, as here, the statutory interest rate is significantly higher than the current market rate.[8]

No discovery is necessary to reach these conclusions because this is a legal inquiry, not a factual one.[9] Federal law says that national banks "may" exercise their "authorization, permission, or power," *Barnett Bank*, 517 U.S. at 34-35, to offer mortgages with escrow accounts without paying interest on such accounts. However, Section 2954.8(a) conditions the exercise of that mortgage lending power on the national bank paying interest on such accounts. And where Congress "does not condition federal permission upon that of the State, the Court has "ordinarily" found that no such condition applies. *Id.*

Against this weight of authority, Plaintiff's opening brief does not cite a single decision from any court holding that state-law attempts to force a national

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[8] The actual interest rate on FDIC-insured deposit accounts is far less than 2 percent. *See, e.g.*, http://www.bankrate.com/finance/cd/rate-roundup.aspx (last viewed on July 1, 2015) (national average for 1-year CD is 0.27%).

[9] Indeed, courts routinely decide at the pleading stage whether state laws prevent or significantly interfere with a national bank's exercise of its federal banking powers, as the district court did here. *See, e.g.*, *Robinson v. Bank of Am., N.A.*, 525 F. App'x 580, 581 (9th Cir. 2013) (affirming district court's preemption determination made on a Rule 12 motion); *O'Donnell*, 504 F. App'x at 568 (same); *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1198 (11th Cir. 2011) (same); *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d at 552-53 (same); *Rose v. Chase Bank USA, N.A.*, 513 F.3d at 1035-36 (same); *cf. Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 13 (2003) ("[P]re-emption requires a … court to *dismiss* a particular claim that is filed under state law." (emphasis in original)).

bank to make payments to its customers do not interfere with the bank's banking powers. Nor does Plaintiff cite any case merely holding that discovery is necessary to answer that question.

Instead, the only reason why Plaintiff claims that discovery is necessary here is because the website of another mortgage service supposedly establishes that it is "eminently workable" for Bank of America to comply with state law. Br. at 27; *see also* ER 121. However, as the district court correctly observed, the relevant question is "whether allowing California to *force* a national bank to pay interest on escrow accounts would significantly interfere" with Bank of America's banking powers. ER 7 n.9. What another national bank elects to do, for competitive or other reasons, has no relevance to the preemption analysis, and Plaintiff cites no authority to suggest otherwise. A contrary rule would force every national bank to comply with 50 different state laws whenever one national bank voluntarily elected to comply with those laws, leading to exactly the kind of "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking" that "the [National Bank Act] was designed to prevent." *Watters*, 550 U.S. at 13-14.

D. The Dodd-Frank Act's Amendments To The National Bank Act Do Not Affect The Preemption Analysis.

In the district court, Plaintiff argued at times that Dodd-Frank's amendments to the National Bank Act changed the foregoing preemption analysis. *See, e.g.*, ER 4 & n.4; ER 5; ER 10 n.14; ER 107-08 ¶¶ 4-5. Although it is not clear from

Plaintiff's opening brief whether Plaintiff intends to advance this argument on appeal, as the district court correctly held, any such argument "is mistaken." ER 5.

Although Dodd-Frank contains provisions addressing the preemption of state law under the National Bank Act, *see* 12 U.S.C. § 25b(b)(1), those provisions do not affect the preemption analysis discussed above. As numerous courts have recognized, Dodd-Frank merely codified the preemption framework set forth in *Barnett Bank* and applied above. *See, e.g.*, *Baptista*, 640 F.3d at 1197; *U.S. Bank Nat'l Ass'n v. Schipper*, 812 F. Supp. 2d 963, 968 n.1 (S.D. Iowa 2011) ("the Dodd-Frank Act did not materially alter the standard for preemption"). The applicable statutory framework instructs courts to apply "the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank*" and continue to preempt state laws that "prevent[] or significantly interfere[] with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). As explained above, Section 2954.8 is preempted because it "prevents or significantly interferes with the exercise by [a] national bank of its powers" to offer mortgages and escrow accounts. ER 5; *see supra* at 20-24.

12 C.F.R. § 34.4 continues to reflect the OCC's agreement that state laws like Section 2954.8 prevent or significantly interfere with a national bank's power to offer escrow account services. After Dodd-Frank was enacted, the OCC reexamined its preemption regulations, including Section 34.4, and "confirm[ed]

that the specific types of laws cited in the rules are consistent with the standard for conflict preemption in the Supreme Court's *Barnett* decision." OCC, *Office of Thrift Supervision Integration; Dodd-Frank Act Implementation*, 76 Fed. Reg. 43,549, 43,557 (July 21, 2011). For example, the OCC concluded that laws that "affect the ability of national banks to underwrite and mitigate credit risk" and "manage credit risk exposures" interfere with the banks' powers "in the lending arena." *Id.* With respect to escrow accounts, the OCC specifically concluded that

> state laws that would affect the ability of national banks to … manage loan-related assets, such as laws concerning … escrow standards … would meaningfully interfere with fundamental and substantial elements of the business of national banks and with their responsibilities to manage that business and those risks.

Id. As a result, the OCC concluded that national banks may exercise their mortgage-lending authority "without regard to state law limitations concerning … [t]he terms of credit [and] … [e]scrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 34.4(a)(4), (a)(6). Like all federal regulations, Section 34.4 has "no less pre-emptive effect than federal statutes." *de la Cuesta*, 458 U.S. at 153; *see also Boutris*, 419 F.3d at 962 (the OCC has "authority to displace contrary state regulation").

Plaintiff has previously argued that Section 34.4 was "unenforceable" and should be ignored because the OCC did not comply with a Dodd-Frank requirement to make a "case-by-case" analysis of a state's law before making a

preemption determination. ER 108 ¶ 4 (citing 12 U.S.C. § 25b(b)(1)(B)). Plaintiff appears to have shifted his position on appeal, now *urging* this Court to consider Section 34.4 in its preemption analysis. *See* Br. at 16 (citing 12 C.F.R. § 34.4(b)). To the extent Plaintiff reverts to the position he embraced in the district court in his reply brief, such an argument would have no impact on the preemption analysis.

First, preemption in this case turns on the fact that Section 2954.8 interferes with Bank of America's *statutory* banking powers. Plaintiff seeks to prohibit Bank of America from exercising its federal authority under 12 U.S.C. § 24(Seventh) and 12 U.S.C. § 371 to offer escrow accounts and to set the terms of credit unless the national bank first agrees to comply with a state law requiring the payment of above-market interest on that escrow account balance. This Court can therefore conclude—as the district court did, *see* ER 10 n.13—that Section 2954.8 is preempted without relying upon the OCC's preemption regulation. *See, e.g.*, *Parks*, 54 Cal. 4th at 393 (holding that California law was preempted by the National Bank Act without consulting an OCC preemption regulation).

Second, 12 U.S.C. § 25b(b)(5) requires courts to give *Skidmore* deference to the OCC's preemption determination made in Section 34.4. Under Section 25b(b)(5), any OCC determination that state law is preempted by "section 371"—which includes the determination made in 12 C.F.R. § 34.4—is entitled to deference based upon the "thoroughness evident in the consideration of the agency,

the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision."[10] 12 U.S.C. § 25b(b)(5)(A); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The preemption determination reflected in Section 34.4 is the product of a thorough, long-held, carefully reasoned and consistent view of the OCC that state laws imposing limitations on how national banks can exercise their power to offer escrow accounts are preempted. *See, e.g.*, 76 Fed. Reg. at 43,554-57; OCC, *Bank Activities and Operations; Real Estate Lending and Appraisals*, 69 Fed. Reg. 1904, 1905, 1907-11, 1917 (Jan. 13, 2004). Unsurprisingly, this Court has continued to rely on the preemptive force of

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[10] To the extent the degree of deference a court owes the OCC's preemption determination turns on whether the OCC conducted a "case-by-case" analysis of a state's law, *see* 12 U.S.C. § 25b(b)(1)(B), (b)(3), no case-by-case requirement applies to 12 C.F.R. § 34.4. First, regulations such as Section 34.4, which were "in effect prior to [July 21, 2011,] are not subject to the case-by-case requirement." 76 Fed. Reg. at 43,557. Second, when a regulation is promulgated under a grant of authority "other than title 62 of the Revised Statutes" Dodd-Frank does not require the OCC to make a case-by-case preemption determination. 12 U.S.C. § 25b(b)(1)(C). Instead, the OCC may generally determine what types of laws "prevent or significantly interfere" with a national bank's exercise of its banking powers, as the OCC has done in Section 34.4. That regulation was promulgated under 12 U.S.C. § 371, which is not part of Title 62 of the Revised Statutes and therefore is not subject to any case-by-case requirement. *See* 69 Fed. Reg. at 1909-10 (promulgating Section 34.4 under Section 371's grant of authority); 12 U.S.C. § 21 historical & statutory note (listing provisions of the United States Code that were part of Title 62 of the Revised Statutes, and omitting Section 371); Federal Reserve Act, Pub. L. No. 63-43, § 24 (1913) (enacting Section 371 as Section 24 of the Federal Reserve Act).

Section 34.4 even after Dodd-Frank. *See Deming*, 528 F. App'x at 777; *O'Donnell*, 504 F. App'x at 568; *cf. Gutierrez*, 704 F.3d at 726 (applying similar preemption regulation in 12 C.F.R. § 7.4007). There is no reason to depart from that approach here.

E. The Dodd-Frank Act's Amendments To The Truth In Lending Act Do Not Affect The Preemption Analysis.

Plaintiff's main argument as to why Section 2954.8(a) does not prevent or significantly interfere with Bank of America's banking powers rests on a flawed interpretation of 15 U.S.C. § 1639d(g)(3). That Section—added to the Truth In Lending Act ("TILA") by Dodd-Frank—provides:

> If 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.

Id. (emphasis added). According to Plaintiff, Section 1639d(g)(3) limits the National Bank Act's preemptive force and requires national banks to comply with state laws requiring the payment of interest on escrow account balances. *See* Br. at 13-25. This interpretation of Section 1639d(g)(3)—which has never been embraced by any court, agency, or member of Congress—is fundamentally flawed and should be rejected.

1. State Laws That Prevent Or Significantly Interfere With National Banks' Powers Only Apply To National Banks If Congress Says So "With An Explicit Statement."

The Supreme Court has repeatedly emphasized that when Congress intends to require national banks to comply with state laws that prevent or significantly interfere with national banking powers, it does so "with an explicit statement that the exercise of that power is subject to state law." *Barnett Bank*, 517 U.S. at 34 (collecting examples of such explicit statements); *see also Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 378 n.7 (1954) (same). For example, in *Barnett Bank*, the Supreme Court observed that "where Congress has not *expressly* conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found no such condition applies." 517 U.S. at 34 (emphasis added). Similarly, in *Franklin National Bank*, the Supreme Court held that Congress did not intend to require national banks to comply with state laws when the federal grant of authority contained "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by *express language* in several other instances." 347 U.S. at 377 (emphasis added).

Two decisions from this Court illustrate the difficulty Plaintiff faces in showing how provisions codified in Title 15 of the United States Code contain the necessary "explicit statement" of Congress's intent to subject national banking powers to state-law restrictions. In *Bank of America v. City & County of San*

Francisco, several municipal entities argued that the Electronic Funds Transfer Act ("EFTA"), which imposed a series of consumer protection measures on ATM transactions on all financial institutions, permitted them to prohibit national banks from charging ATM fees. *See* 309 F.3d at 564. Even though the EFTA contained an anti-preemption provision, this Court rejected the municipalities' argument, holding that the EFTA was not intended to give "'the states any additional authority to regulate national banks.'" *Id.* at 565 (quoting *Bank One v. Guttau*, 190 F.3d 844, 850 (8th Cir. 1999)). This Court thus held that the EFTA had no impact on National Bank Act preemption. *See id.* at 565-66.

Similarly, in *Silvas v. E*Trade Mortgage*, this Court extended *Bank of America*'s holding to the Truth in Lending Act ("TILA"). In *Silvas*, the plaintiff argued that TILA's imposition of certain disclosure and advertising requirements on all creditors authorized California to impose additional loan-related disclosures and advertisements on a federal savings association. *See Silvas*, 514 F.3d at 1003. Even though the plaintiff's state-law claims were premised on TILA violations and even though TILA contained an anti-preemption provision, this Court disagreed, holding that "TILA's savings clause is limited to TILA, and does not apply to" federal banking law. *Id.* at 1007. While *Silvas* involved the Home Owners Loan Act ("HOLA"), its reasoning also applies to the National Bank Act because the decision it relied on—*Bank of America*—drew no distinction between the

preemptive force of the HOLA and the National Bank Act. *See Bank of America*, 309 F.3d at 565 (EFTA "does not save the Ordinances against preemption by the HOLA and the National Bank Act.").

2. 15 U.S.C. § 1639d(g)(3) Lacks An "Explicit Statement" Giving States Additional Authority To Regulate National Banks.

In light of *Barnett Bank*, *Bank of America*, and *Silvas*, Section 1639d(g)(3) does not override the extraordinary preemptive force of the National Bank Act, *see supra* at 17-18, unless it contains an "explicit statement that the exercise of" Bank of America's power to set the terms and conditions of mortgage and escrow accounts "is subject to state law." *Barnett Bank*, 517 U.S. at 34. As explained below, no such "explicit statement" exists.

Section 1639d was enacted as part of Title XIV of the Dodd-Frank Act. *See* Pub. L. No. 111-203, 124 Stat. 1376, §§ 1461, 1462 (2010). Title XIV was Congress's response to certain lending practices that triggered the financial crises. In contrast to national banks that are subject to significant federal oversight, "the worst subprime loans were originated by nonbank lenders and brokers where national bank preemption was not applicable." 76 Fed. Reg. at 43,554. As a result, Title XIV was aimed primarily at ensuring that these nonbank entities' mortgage lending practices were subject to minimum federal consumer protection standards. Whereas other provisions of Dodd-Frank are directly aimed at national

banks or expressly amend the National Bank Act, *see, e.g.*, Pub. L. No. 111-203, §§ 610, 613, 1042, 1044, 1047, nothing in Title XIV mentions national banks, the National Bank Act, or preemption.

Section 1639d targeted the practices of some mortgage lenders who did not establish escrow accounts for borrowers and did not notify borrowers of their obligation to make tax and insurance payments. Such borrowers faced foreclosure if they did not budget for, and consequently failed to make, these payments. Section 1639d attempted to fix this problem by requiring creditors to establish escrow accounts in connection with certain mortgage loans. *See generally* Consumer Financial Protection Bureau, *Escrow Requirements Under the Truth in Lending Act*, 78 Fed. Reg. 4,726, 4,726-27, 4,744-46 (Jan. 22, 2013) (summarizing purpose and consumer benefits of Section 1639d).

As a result, beginning on January 21, 2013,[11] TILA provides that "a creditor, in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer, … shall establish … an escrow … account for the payment of taxes and hazard insurance …, as provided in, and in

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[11] *See* Pub. L. No. 111-203, § 1400(c)(3) (providing that any section of Title XIV of Dodd-Frank for which no regulations have been issued shall take effect "on the date that is 18 months after the designated transfer date"); Consumer Financial Protection Bureau, *Designated Transfer Date*, 75 Fed. Reg. 57,252 (Sept. 20, 2010) (transfer date was July 21, 2011); *see also* ER 13 (recognizing that "January 21, 2013" was Section 1639d's "effective date").

accordance with, this section." 15 U.S.C. § 1639d(a). Some provisions of Section 1639d—which refer to Section 1639d(a) escrow accounts as "mandatory" accounts—set forth the terms and conditions applicable to these accounts. *See* 15 U.S.C. § 1639d(d) (duration of escrow accounts); 15 U.S.C. § 1639d(g) (administration of escrow accounts); 15 U.S.C. § 1639d(h), (j) (disclosures applicable to escrow accounts). Other provisions clarify when these mandatory escrow accounts must be established. *See* 15 U.S.C. § 1639d(b), (c), (e). In cases where a mandatory escrow account is not required, Section 1639d clarifies that parties may still voluntarily agree to establish escrow accounts "on terms mutually agreeable to the parties to the loan." 15 U.S.C. § 1639d(f)(1).

Only four provisions of Section 1639d discuss the effect that state law has on these mandatory escrow accounts. Two provisions do not use the word "applicable" when referring to state law. *See* 15 U.S.C. § 1639d(b)(1), (b)(2) (mandatory escrow account must be established if "required by … State law" or if "a loan is made, guaranteed, or insured by a State … governmental lending or insuring agency); 15 U.S.C. § 1639d(i)(2) (definition of "hazard insurance" incorporates the relevant definition "under the law of the State where the real property securing the consumer credit transaction is located").

The remaining two provisions, both of which deal with the administration of mandatory escrow accounts, do use the word "applicable" when referring to state

law. For example, Section 1639d(g)(2) provides that "an escrow or impound account subject to this section shall be administered in accordance with" the Real Estate Settlement Procedures Act, the Flood Disaster Protection Act, and "the law of the State, if *applicable*, where the real property securing the consumer credit transaction is located." 15 U.S.C. § 1639d(g)(2)(C) (emphasis added). Similarly, Section 1639d(g)(3) provides "[i]f prescribed by *applicable* State … law, each creditor shall pay interest to the consumer on the amount held in any … escrow account that is subject to this section in the manner as prescribed by that *applicable* State … law." (emphasis added).

In short, while Section 1639d imposes new federal requirements on all creditors (including national banks), nothing in Section 1639d or Title XIV "contain[s] language from which it can be reasonably inferred that Congress intended to disrupt other federal laws including the National Bank Act by an implicit reservation of the power to administratively regulate banks to the states," *Bank of America*, 309 F.3d at 565 n.9 (internal quotation marks and citation omitted). Section 1639d therefore lacks the "explicit statement" necessary to show that Congress intended to place Bank of America's power to set the terms and conditions for mortgages and escrows "subject to state law." *Barnett Bank*, 517 U.S. at 34.

3. Plaintiff's Contrary Argument That 15 U.S.C. § 1639d(g)(3) Made Cal. Civ. Code § 2954.8 "Applicable" To National Banks Lacks Merit.

Section 1639d only imposes an obligation to pay interest on escrow account balances "[i]f prescribed by *applicable* State … law." 15 U.S.C. § 1639d(g)(3) (emphasis added). By definition, a preempted law cannot be an "applicable" law.

In arguing to the contrary, Plaintiff invites this Court to adopt a circular interpretation of Section 1639d(g)(3). Plaintiff claims Section 2954.8(a) is an "applicable State law" under Section 1639d(g)(3) because Section 1639d(g)(3) *itself* makes Section 2954.8 an "applicable State law." This argument assumes its own conclusion—by ignoring the word "applicable" in the statute—and is contrary to the background, text, and structure of Section 1639d and the rest of Dodd-Frank. The district court appropriately rejected it. ER 11-12.

At the time Congress enacted 15 U.S.C. § 1639d, courts and regulators had agreed for more than 30 years that federally chartered depository institutions were not subject to state escrow laws, including laws requiring the payment of interest on escrow account balances. *See, e.g.*, 12 C.F.R. § 34.4(a)(6); 12 C.F.R. § 560.2(b)(6); *Flagg*, 396 F.3d at 181-85; *Greenwald*, 591 F.2d at 425-26; *Galecki*,

707 F. Supp. at 404-06.[12] In fact, Plaintiff himself effectively conceded that before Dodd-Frank was enacted, state requirements like Section 2954.8(a) were preempted by the National Bank Act and OCC regulations. *See* ER 107 ¶ 3.

Nothing in Dodd-Frank itself or Dodd-Frank's voluminous legislative history indicates that Congress intended to overturn these regulations and court decisions. Because "Congress is presumed to be familiar with the background of existing law when it legislates," *Abebe v. Gonzales*, 493 F.3d 1092, 1101 (9th Cir. 2007), Congress's silence on this issue indicates that Congress intended to preserve, not disrupt, the unanimous and long-held held view that states lacked authority to regulate escrow accounts offered by national banks. *See also Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with … important precedents … and that it expected its enactment to be interpreted in conformity with them.").

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[12] While Plaintiff may urge this Court to ignore decisions that relied on HOLA or 12 C.F.R. § 560.2, *see* ER 9 n.12, the list of enumerated laws expressly preempted by that regulation is "almost identical to" the list of laws expressly preempted by 12 C.F.R. § 34.4(a), which has led courts to conclude that "the preemption analysis remains the same." *Zlotnick*, 2009 WL 5178030, at *6; *see also Fultz v. World Sav. & Loan Ass'n*, 2008 WL 4131512, at *1 (W.D. Wash. Aug. 18, 2008) (applying Section 34.4 and Section 560.2 "in the same way").

The plain language of Section 1639d further confirms that Congress did not give states permission to impose conditions on how national banks exercise their federal power to offer and administer escrow accounts. When Congress referred to state law in Section 1639d, it used the word "applicable" on some, but not all, occasions. *Compare* 15 U.S.C. § 1639d(g)(2)(C), (g)(3) (using "applicable" in reference to "State law"), *with* 15 U.S.C. § 1639d(b)(1), (b)(2), (i)(2) (omitting "applicable" in reference to "State law"). For example, Congress omitted the word "applicable" when it required creditors to establish escrow accounts if "required by Federal or State law." 15 U.S.C. § 1639d(b)(1). Furthermore, Congress did not use the word "applicable" when it required creditors to use that escrow account for payment of "hazard insurance" as that term was defined "under the law of the State where the real property securing the consumer credit transaction is located." 15 U.S.C. § 1639d(a), (i)(2). However, Congress *did* use the word "applicable" when referring to the role state law should play in determining how Section 1639d escrow accounts should be administered and whether creditors were required to pay interest on escrow account balances. *See* 15 U.S.C.§ 1639d(g)(2)(C), (g)(3).

Reading these provisions together, Section 1639d is best read as requiring all creditors, including national banks, to *create* escrow accounts when required by state law. However, when it comes to determining how those accounts should be *administered*—including whether interest payments on account balances were

required—Congress only required creditors to comply with state laws only if they were made "applicable" to each creditor by *another* federal law besides Section 1639d. As the district court observed, "Congress's use of conditional terms such as 'if' and 'applicable' demonstrates that Section 1639d was not meant, in and of itself, to override established rules of preemption in a different statutory scheme." ER 12.

Plaintiff argues that this result "strips [Section 1639d(g)(3)] of operative effect, rendering it 'nonsensical and superfluous'" because "the universe of 'applicable' state laws would be an empty set." Br. at 19, 20 (internal citations omitted). This is not true. As Plaintiff himself admits, Section 1639d(g)(3) forces a host of "creditors" besides federally chartered depository institutions to comply with state laws requiring interest payments on escrow account balances. *See* Br. at 21.

It is Plaintiff's proposed interpretation, not the district court's, that would render the word "applicable" in Section 1639d(g)(3) meaningless. Plaintiff interprets the phrase "applicable State … law" to require creditors to comply with "those laws that exist and apply in this area." Br. at 19. But, under Plaintiff's interpretation, there would be no difference between a requirement to comply with "applicable State law" and a requirement to comply with "State law." Although "Congress presumably included 'applicable' to achieve a different result," *Ransom*

v. FIA Card Servs., N.A., 562 U.S. 61, 70 (2011) (interpreting definition of word "applicable" in Bankruptcy Code), Plaintiff's proposed interpretation reads the word "applicable" right out of Section 1639(g)(3). The district court's interpretation "ensures that the term 'applicable' carries meaning, as each word in a statute should." *Ransom*, 562 U.S. at 70.

The fact that Congress continued to permit national banks to ignore state laws relating to the administration of escrow accounts and the payment of interest on escrow account balances is unsurprising. Given that Section 1639d(g)(3) was enacted to remedy abuses of "nonbank lenders and brokers where national bank preemption was not applicable," 76 Fed. Reg. at 43,554, it is reasonable for Section 1639d(g)(3) to treat national banks differently from other "creditors" when it comes to compliance with state laws regarding the administration of escrow accounts and interest payments on escrow account balances. The district court recognized as much, observing that the use of the word "applicable" in Section 1639d(g)(3) meant that "Congress recognized that [state escrow] laws might not always 'apply' to certain creditors under certain circumstances and made no affirmative changes to when this would occur." ER 12.

This conclusion is confirmed by examining Dodd-Frank's structure. When Congress wanted to modify the extent to which national banks were required to comply with state law, it did so explicitly in Title X of Dodd-Frank by amending

the National Bank Act and by expressly discussing the preemption standards applicable to "national banks." *E.g.*, Pub. L. No. 111-203, § 1044. By comparison, Section 1639d was enacted as part of Title XIV of Dodd-Frank. *See* Pub. L. No. 110-203, §§ 1461, 1462 (codified at 15 U.S.C. § 1639d). Title XIV does not include the phrase "national bank," it does not mention preemption, and it does not cross-reference the National Bank Act or the preemption standards that appear elsewhere in Dodd-Frank. As the district court observed, Section 1639d "lacks sufficient logical connection to the [National Bank Act] to demonstrate Congressional intent to change the [National Bank Act]'s preemptive scope in this arena." ER 12.

Abundant authority confirms that just because Congress imposes new federal requirements on national banks does not mean that Congress also gives states additional authority to regulate national banks. For example, in *Bank of America*, the Ninth Circuit held that EFTA requirements applicable to all financial institutions—not just national banks—and a preemption savings clause did not override the preemptive force of the National Bank Act or give states additional authority to regulate national banks' automated teller machines. *See* 309 F.3d at 565-66. Similarly, in *Silvas*, the Ninth Circuit held that disclosure and advertising restrictions applicable to all "creditors"—not just national banks—under TILA and TILA's anti-preemption provision do "not preclude the preemptive effect" of

federal banking laws. 514 F.3d at 1007. For the same reasons that the TILA provisions at issue in *Silvas* do not give states additional authority to regulate federally chartered financial institutions, the TILA provisions codified at Section 1639d cannot give states such authority. *See, e.g.*, *United States v. Locke*, 529 U.S. 89, 106 (2000) ("We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law."); *Parks*, 54 Cal. 4th at 389 (refusing to interpret 12 U.S.C. § 24(Seventh)'s language that banks exercise their incidental banking powers "subject to law" as imposing a requirement to comply with California law).

Notably, the only agency to consider whether national banks are subject to state laws regulating escrow accounts after Dodd-Frank has answered that question "no."[13] The OCC observed that laws like Title XIV of Dodd-Frank were aimed at loans "originated by nonbank lenders and brokers where national bank preemption was not applicable." 76 Fed. Reg. at 43,554 & n.30. "[A]s the primary Federal supervisor of national banks," the OCC went on to conclude that "state laws that would affect the ability of national banks to … manage loan-related assets, such as

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[13] Although the Consumer Financial Protection Bureau has enacted regulations interpreting Section 1639d's provisions, *see, e.g.*, 78 Fed. Reg. 4,726, those regulations do not require national banks to comply with state laws such as Section 2954.8. Indeed, the phrase "national bank" appears only once in the Bureau's final rule: when the Bureau referenced quarterly reports filed by "[e]very national bank." 78 Fed. Reg. at 4,744 n.41.

laws concerning … escrow standards … would meaningfully interfere with fundamental and substantial elements of the business of national banks." *Id.* at 43,557. For this reason, the OCC reaffirmed the undisputed pre-Dodd-Frank view that national banks may exercise their mortgage lending powers "without regard to state law limitations concerning … [t]he terms of credit [and] … [e]scrow accounts, impound accounts, and similar accounts." 12 C.F.R. § 34.4(a)(4), (a)(6). Because Congress entrusted the OCC with "primary responsibility for surveillance of the 'business of banking,'" the OCC's determination that national banks continue to remain exempt from state laws regulating escrow accounts even after the enactment of Section 1639d is entitled to substantial deference. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (quoting 12 C.F.R. § 24(Seventh)).

4. Alternatively, Plaintiff's Escrow Account Is Not "Subject To" 15 U.S.C. § 1639d.

Independently, the district court held that Section 1639d does not apply to Plaintiff's escrow account. *See* ER 13. In other words, if Section 1639d does not apply to Plaintiff's escrow account, Section 1639d cannot force Bank of America to comply with Section 2954.8(a).

Surprisingly, Plaintiff's opening brief ignores this alternate holding.[14] By failing to challenge this holding in his opening brief, Plaintiff has abandoned any claim that this holding was erroneous. *See, e.g.*, *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) ("The Court of Appeals will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief."); *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("[A]rguments not raised by a party in an opening brief are waived."). Having abandoned any claim that Section 1639d applies to Plaintiff's escrow account, Plaintiff's argument that Section 1639d forced Bank of America to comply with Section 2954.8(a) collapses.

Even if Plaintiff has not waived any challenge to the district court's alternative holding, the district court's conclusion that Section 1639d does not apply to Plaintiff's escrow account is correct. As the district court observed, any grant of authority to impose state-law escrow interest requirements on national banks could only apply to an "escrow account that is subject to this section." 15 U.S.C. § 1639d(g)(3). The only accounts that can be considered "subject to"

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[14] Plaintiff devotes just one footnote in his Statement of the Case to asserting that his account is covered by Section 1639d. *See* Br. 7 n.4. This footnote—like the rest of Plaintiff's brief—ignores the district court's holding that Plaintiff's account was not covered by Section 1639d because "Plaintiff's account was established prior to Section 1639d's effective date, and Congress has expressed no intent that Section 1639d shall apply retroactively." ER 13.

Section 1639d are the mandatory escrow accounts that must be established under Section 1639d(a). *See also* 15 U.S.C. § 1639d(f)(1) ("[N]o provision of this section shall be construed as precluding the establishment of" other, non-mandatory escrow accounts "on terms mutually agreeable to the parties to the loan"). Moreover, an escrow account cannot be a mandatory escrow account unless it was established "before the consummation of" a post-January 21, 2013 loan. 15 U.S.C. § 1639d(a); *see also supra* at 37 n.11 (effective date of Section 1639d was January 21, 2013).

Since Plaintiff's escrow account was established in connection with a loan consummated in 2009—before Dodd-Frank was even enacted—it cannot be a mandatory escrow account and thus is not "subject to" Section 1639d. Plaintiff never alleged that Section 1639d required him to establish an escrow account as a condition of obtaining a mortgage. Nor could he, considering that Section 1639d did not take effect until nearly four years after Bank of America and Plaintiff consummated the 2009 mortgage agreement. Rather, Plaintiff alleges that his escrow account was established "based on the express terms of the [mortgage] contracts." First Am. Compl. ¶ 10; *accord id.* ¶ 16. Escrow accounts like Plaintiff's, which are established as a matter of "the contract between the lender … and the borrower," are not subject to any requirements or limitations imposed by

Section 1639d. 15 U.S.C. § 1639d(f)(1), (f)(2). Section 1639d(g)(3) simply has no impact here.

Nor can Section 1639d be applied retroactively to change the terms of an escrow account established in connection with a mortgage consummated before January 2013. Applying a provision that took effect in 2013 to change the terms of an escrow account established in 2009 would violate a well-established "presumption against retroactive legislation" that "is deeply rooted in our jurisprudence." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). "The largest category of cases in which … the presumption against statutory retroactivity has [been applied] involve[s] new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 271. Plaintiff's interpretation of Section 1639d would modify Bank of America's obligations under the 2009 loan agreement by requiring Bank of America to pay interest on Plaintiff's escrow account. Because such a result would "impose new duties with respect to transactions already completed," Section 1639d may not be applied retroactively to Plaintiff's escrow account unless there is "clear congressional intent favoring such a result." *Id.* at 280.

Plaintiff has made no attempt—either in the district court or in his opening brief—to identify any "clear congressional intent" requiring Bank of America to pay interest on escrow accounts established before January 2013. Nor could such a

showing be made, given courts' repeated refusal to apply Dodd-Frank's Title XIV retroactively. *See, e.g.*, *Campbell v. Nationstar Mortgage*, __ F. App'x __, 2015 WL 2084023, at *7-8 (6th Cir. May 6, 2015) (recognizing that Title XIV regulations were not intended to apply retroactively); *Megino v. Linear Fin.*, 2011 WL 53086, at *8 n.1 (D. Nev. Jan. 6, 2011) (refusing to apply Title XIV to pre-Dodd Frank mortgage agreements); *Bates v. JPMorgan Chase Bank, N.A.*, 2012 WL 3727534, at *2-4 (M.D. Ga. Aug. 27, 2012) (refusing to apply Title XIV to conduct occurring before Title XIV's effective date); *Patton v. Ocwen Loan Servicing, LLC*, 2011 WL 3236026, at *4 n.7 (M.D. Fla. July 28, 2011) (same).[15]

If anything, by establishing an effective date, Section 1639d reflects Congress's clear intent to *exempt* pre-existing escrow accounts like Plaintiff's from Section 1639d's reach. Courts have held that Dodd-Frank provisions like Section 1639d, which are subject to an effective date, should not apply retroactively. *See*,

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[15] These decisions are consistent with the overwhelming majority of courts that refused to apply other Dodd-Frank provisions to agreements made before Dodd-Frank's effective date. *See, e.g.*, *United States ex rel. Sefen v. Animas Corp.*, __ F. App'x __, 2015 WL 1611698, *1-2 (3d Cir. Apr. 13, 2015); *Villareal v. Seneca Mortg. Services*, 2015 WL 2374288, *3 (E.D. Cal. May 18, 2015); *Khazin v. TD Ameritrade Holding Corp.*, 2014 WL 940703, at *8 (D.N.J. Mar. 11, 2014), *aff'd on other grounds*, 773 F.3d 488 (3d Cir. 2014); *Taylor v. Fannie Mae*, 839 F. Supp. 2d 259, 262-63 (D.D.C. 2012); *Blackwell v. Bank of America Corp.*, 2012 WL 1229673, at *3-4 (D.S.C. Mar. 22, 2012); *Holmes v. Air Liquide USA LLC*, 2012 WL 267194, at *6 (S.D. Tex. Jan. 30, 2012); *Henderson v. Masco Framing Corp.*, 2011 WL 3022535, at *3-4 (D. Nev. July 22, 2011).

e.g., *Mart v. Gozdecki, Del Giudice, Americus & Farkas LLP*, 910 F. Supp. 2d 1085, 1095 (N.D. Ill. 2012); *Mejia v. EMC Mortg. Corp.*, 2012 WL 367364, at *5 n.4 (C.D. Cal. Feb. 2, 2012). Moreover, Congress also expressly provided in Section 1639d that "no provision of [Section 1639d] shall be construed as precluding the establishment of" other, non-mandatory escrow accounts "on terms mutually agreeable to the parties to the loan" or "at the discretion of the lender …, as provided by the contract between the lender … and the borrower." 15 U.S.C. § 1639d(f)(1)-(2). Section 1639d(f) thus preserves the terms of existing agreements between lenders and borrowers that create non-mandatory escrow accounts—such as Plaintiff's 2009 mortgage agreement.

II. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S UNFAIR COMPETITION LAW CLAIM.

Plaintiff's Unfair Competition Law claim hinged on his assertion that Bank of America violated California Civil Code § 2954.8(a) and 15 U.S.C. § 1639d(g)(3) by refusing to pay interest on his escrow account balance. Because Bank of America "has not violated state or federal law in not paying interest on Plaintiff's escrow account[]," the district court correctly dismissed Plaintiff's Unfair Competition Law claim. ER 13.

A. The District Court Correctly Concluded that Bank of America Did Not Violate Cal. Civ. Code § 2954.8(a) Because That Law Was Preempted.

The district court correctly concluded that Plaintiff could not premise an Unfair Competition Law claim on a violation of state law. The only state law Plaintiff claimed Bank of America violated was California Civil Code § 2954.8(a). However, as explained above, that provision is preempted by the National Bank Act. *See supra* at 20-52.

B. The District Court Correctly Concluded that Bank of America Did Not Violate 15 U.S.C. § 1639d(g)(3) Because That Law Did Not Apply To Plaintiff's Escrow Account.

The district court also correctly concluded that Plaintiff could not premise an Unfair Competition Law claim on a violation of federal law. The only federal law Plaintiff claimed Bank of America violated was 15 U.S.C. § 1639d(g)(3), but, as explained above, there are two reasons why Bank of America did not violate that provision.

First, Section 1639d does not independently require interest payments to be made as a matter of federal law. Rather, that statute simply requires interest payments "[i]f prescribed by *applicable* State or Federal law." *id.* (emphasis added). There is no "applicable State … law" because Section 2954.8(a) is preempted. *See supra* at 20-52. And because Plaintiff failed to identify any other

federal requirement to pay interest,[16] there is no "applicable … Federal law" that requires Bank of America to pay interest on Plaintiff's escrow account balance.

Second, any obligation to make interest payments under Section 1639d(g)(3) could only apply to "an escrow … account subject to this section," 15 U.S.C. § 1639d(g)(2), but Plaintiff's escrow account is not "subject to" Section 1639d. *See supra* at 47-52. Instead, Plaintiff's escrow account was established in connection with a loan made more than a year before Section 1639d was enacted and near than four years before Section 1639d took effect. As the district court observed, because "Congress has expressed no intent that Section 1639d shall apply retroactively, his account is not subject to the requirements of this section." ER 13.

III. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S BREACH-OF-CONTRACT CLAIM.

Plaintiff also claimed that Bank of America's refusal to pay interest on Plaintiff's escrow account balance breached the 2009 loan agreement. *See* First Am. Compl. ¶ 38. The district court correctly rejected this argument and dismissed Plaintiff's breach-of-contract claim. *See* ER 13.

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[16] Although the Complaint also claimed that Bank of America also violated a provision of the Housing and Urban Development Handbook, "Plaintiff failed to respond to [Bank of America's] arguments on these subjects and thus, seems to have abandoned his related claims." ER 3 n.3.

Nothing in Plaintiff's mortgage agreement required Bank of America to pay interest on Plaintiff's escrow account. To the contrary, that agreement specifically provides that Bank of America "shall not be required to pay [Plaintiff] any interest on earnings on the Funds." ER 25 § 3; *see also* ER 109 ¶ 10. This provision remained operative after Plaintiff modified his mortgage. *See* ER 61.

Plaintiff identifies two provisions of his mortgage agreement—Section 3 and Section 16—that he claims required Bank of America to pay interest on his escrow account balance. Neither provision imposes any such obligation.

First, selectively quoting from Section 3 of the mortgage agreement, Plaintiff argues that Bank of America promised to pay interest "if governing law 'requires interest to be paid on the Funds' in his escrow account." Br. at 28 (quoting ER 25). However, the relevant language of Section 3 confirms that Bank of America never agreed to pay interest:

> Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds.

ER 25, § 3. Bank of America never agreed "in writing" to pay Plaintiff interest on his escrow account balance. The mortgage agreement is not such a writing; as Bank of America notified Plaintiff at the time he signed his mortgage documents, Plaintiff "will not receive interest on your escrow account even if your state has a

law concerning the payment of interest on escrow accounts." ER 74; *accord* ER 72. And Plaintiff never alleges—nor could he—that some separate "writing" exists where Bank of America promised to pay interest.

As a result, Plaintiff is reduced to arguing that "Applicable Law" requires Bank of America to pay interest on Plaintiff's escrow account balance, but this argument likewise fails. The mortgage agreement defines "Applicable Law" as "all *controlling* applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." ER 23, Definitions § (J) (emphasis added). As explained above, no federal law imposes a requirement to pay interest on escrow account balances. *See supra* at 33-54. Moreover, state law cannot constitute "Applicable Law" because it is preempted. *See supra* at 20-52.

Second, Plaintiff argues that the mortgage agreement's choice-of-law provision requires Bank of America to comply with Section 2954.8(a). *See* Br. at 27. That choice-of-law provision simply provides:

> This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in the Security Instrument are subject to any requirements and limitations of Applicable Law.

ER 30 § 16.

In *Fidelity Federal Savings and Loan Association v. de la Cuesta*, the U.S. Supreme Court held that when—as here—the choice-of-law provision in a California deed of trust provides that it "is to be governed by the 'law of the jurisdiction' in which the property is located," federally chartered depository institutions are not required to comply with preempted laws. 458 U.S. at 157 n.12. Applying *de la Cuesta*, the Second Circuit has held that language which is nearly identical to the mortgage agreement's choice-of-law provision does not incorporate state-law provisions that require the payment of interest on escrow account balances. *See Flagg*, 396 F.3d at 186 ("While contracts may incorporate particular laws as contract terms, the contract must do so with specificity), *aff'g* 307 F. Supp. 2d 565, 583 (S.D.N.Y. 2004) ("A general choice-of-law clause is, however, insufficient as a matter of law to incorporate by reference preempted state laws as the terms of a contract."). District courts have reached the same result. *See Sovereign Bank v. Sturgis*, 863 F. Supp. 2d 75, 99 (D. Mass. 2012) (identical definition of "applicable law" in mortgage contract did not encompass preempted state laws); *Cassese v. Wash. Mut., Inc.*, 2008 WL 8652499, at *8-9 (E.D.N.Y. June 27, 2008) ("the choice-of-law provisions here would only allow for the application of state law to the extent permitted by federal law").

In suggesting that breach-of-contract claims cannot be preempted (*see* Br. at 28-29), Plaintiff misunderstands Bank of America's argument and the district

court's holding. Bank of America did not argue—and the district court did not hold—that Plaintiff's breach-of-contract claim was preempted. Instead, Bank of America argued—and the district court held—that because Section 2954.8(a) was preempted, Section 2954.8(a) could not be a "controlling applicable … state … statute[]" that Bank of America agreed to follow. ER 13 (emphasis omitted) ("Neither Section 2954.8 nor Section 1639d is controlling on Plaintiff's loan agreements"). As the Supreme Court observed in rejecting an argument identical to Plaintiff's, a promise to follow "the 'law of the jurisdiction' includes federal as well as state law," and a mortgage agreement's choice-of-law clause was not intended "to elevate state law over federal law." *de la Cuesta*, 458 U.S. at 157 n.12.

CONCLUSION

The district court's order granting Bank of America's motion to dismiss with prejudice should be affirmed.

DATED: July 1, 2015.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees state that they are not aware of any related cases.

s/ Andrew Soukup
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July 1, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,697 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

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July 1, 2015

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

United States Code

Office of the Comptroller of the Currency regulation

California Civil Code

12 U.S.C. § 24(Seventh). Corporate powers of associations.

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power--

…

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking ….

12 U.S.C. § 25b(a), (b). State law preemption standards for national banks and subsidiaries clarified.

(a) Definitions

For purposes of this section, the following definitions shall apply:

(1) National bank

The term "national bank" includes--

(A) any bank organized under the laws of the United States; and

(B) any Federal branch established in accordance with the International Banking Act of 1978.

(2) State consumer financial laws

The term "State consumer financial law" means a State law that does not directly or indirectly discriminate against national banks and that directly and specifically regulates the manner, content, or terms and conditions of any financial transaction (as may be authorized for national banks to engage in), or any account related thereto, with respect to a consumer.

(3) Other definitions

The terms "affiliate", "subsidiary", "includes" , and "including" have the same meanings as in section 1813 of this title.

(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 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, Florida Insurance Commissioner, et al.*, 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 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 title 62 of the Revised Statutes.

(2) Savings clause

Title 62 of the Revised Statutes and section 371 of this title do not preempt, annul, or affect the applicability of any State law to any subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank).

(3) Case-by-case basis

(A) Definition

As used in this section the term "case-by-case basis" refers to a determination pursuant to this section made by the Comptroller concerning the impact of a particular State consumer financial law on any national bank that is subject to that law, or the law of any other State with substantively equivalent terms.

(B) Consultation

When making a determination on a case-by-case basis that a State consumer financial law of another State has substantively equivalent terms as one that the Comptroller is preempting, the Comptroller shall first consult with the Bureau of Consumer Financial Protection and shall take the views of the Bureau into account when making the determination.

(4) Rule of construction

Title 62 of the Revised Statutes does not occupy the field in any area of State law.

(5) Standards of review

(A) Preemption

A court reviewing any determinations made by the Comptroller regarding preemption of a State law by title 62 of the Revised Statutes or section 371 of this title shall assess the validity of such determinations, depending upon the thoroughness evident in the consideration of the agency, the validity of the reasoning of the agency, the consistency with other valid determinations made by the agency, and other factors which the court finds persuasive and relevant to its decision.

(B) Savings clause

Except as provided in subparagraph (A), nothing in this section shall affect the deference that a court may afford to the Comptroller in making determinations regarding the meaning or interpretation of title LXII of the Revised Statutes of the United States or other Federal laws.

(6) Comptroller determination not delegable

Any regulation, order, or determination made by the Comptroller of the Currency under paragraph (1)(B) shall be made by the Comptroller, and shall not be delegable to another officer or employee of the Comptroller of the Currency.

12 U.S.C. § 371(a). Real estate loans.

(a) Authorization to make real estate loans; orders, rules, and regulations of Comptroller of the Currency

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

15 U.S.C. § 1639d. Escrow or impound accounts relating to certain consumer credit transactions

(a) In general

Except as provided in subsection (b), (c), (d), or (e), a creditor, in connection with the consummation of a consumer credit transaction secured by a first lien on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, shall establish, before the consummation of such transaction, an escrow or impound account for the payment of taxes and hazard insurance, and, if applicable, flood insurance, mortgage insurance, ground rents, and any other required periodic payments or premiums with respect to the property or the loan terms, as provided in, and in accordance with, this section.

(b) When required

No impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property may be required as a condition of a real property sale contract or a loan secured by a first deed of trust or mortgage on the principal dwelling of the consumer, other than a consumer credit transaction under an open end credit plan or a reverse mortgage, except when--

(1) any such impound, trust, or other type of escrow or impound account for such purposes is required by Federal or State law;

(2) a loan is made, guaranteed, or insured by a State or Federal governmental lending or insuring agency;

(3) the transaction is secured by a first mortgage or lien on the consumer's principal dwelling having an original principal obligation amount that--

(A) does not exceed the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 1454(a)(2) of Title 12, and the annual percentage rate will exceed the average

prime offer rate as defined in section 1639c of this title by 1.5 or more percentage points; or

(B) exceeds the amount of the maximum limitation on the original principal obligation of mortgage in effect for a residence of the applicable size, as of the date such interest rate set, pursuant to the sixth sentence of section 1454(a)(2) of Title 12, and the annual percentage rate will exceed the average prime offer rate as defined in section 1639c of this title by 2.5 or more percentage points; or

(4) so required pursuant to regulation.

(c) Exemptions

The Bureau may, by regulation, exempt from the requirements of subsection (a) a creditor that--

(1) operates predominantly in rural or underserved areas;

(2) together with all affiliates, has total annual mortgage loan originations that do not exceed a limit set by the Bureau;

(3) retains its mortgage loan originations in portfolio; and

(4) meets any asset size threshold and any other criteria the Bureau may establish, consistent with the purposes of this part.

(d) Duration of mandatory escrow or impound account

An escrow or impound account established pursuant to subsection (b) shall remain in existence for a minimum period of 5 years, beginning with the date of the consummation of the loan, unless and until--

(1) such borrower has sufficient equity in the dwelling securing the consumer credit transaction so as to no longer be required to maintain private mortgage insurance;

(2) such borrower is delinquent;

(3) such borrower otherwise has not complied with the legal obligation, as established by rule; or

(4) the underlying mortgage establishing the account is terminated.

(e) Limited exemptions for loans secured by shares in a cooperative or in which an association must maintain a master insurance policy

Escrow accounts need not be established for loans secured by shares in a cooperative. Insurance premiums need not be included in escrow accounts for loans secured by dwellings or units, where the borrower must join an association as a condition of ownership, and that association has an obligation to the dwelling or unit owners to maintain a master policy insuring the dwellings or units.

(f) Clarification on escrow accounts for loans not meeting statutory test

For mortgages not covered by the requirements of subsection (b), no provision of this section shall be construed as precluding the establishment of an impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to the property--

(1) on terms mutually agreeable to the parties to the loan;

(2) at the discretion of the lender or servicer, as provided by the contract between the lender or servicer and the borrower; or

(3) pursuant to the requirements for the escrowing of flood insurance payments for regulated lending institutions in section 102(d) of the Flood Disaster Protection Act of 1973.

(g) Administration of mandatory escrow or impound accounts

(1) In general

Except as may otherwise be provided for in this subchapter or in regulations prescribed by the Bureau, escrow or impound accounts established pursuant to subsection (b) shall be established in a federally insured depository institution or credit union.

(2) Administration

Except as provided in this section or regulations prescribed under this section, an escrow or impound account subject to this section shall be administered in accordance with--

(A) the Real Estate Settlement Procedures Act of 1974 and regulations prescribed under such Act;

(B) the Flood Disaster Protection Act of 1973 and regulations prescribed under such Act; and

(C) the law of the State, if applicable, where the real property securing the consumer credit transaction is located.

(3) Applicability of payment of interest

If 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.

(4) Penalty coordination with RESPA

Any action or omission on the part of any person which constitutes a violation of the Real Estate Settlement Procedures Act of 1974 or any regulation prescribed under such Act for which the person has paid any fine, civil money penalty, or other damages shall not give rise to any additional fine, civil money penalty, or other damages under this section, unless the action or omission also constitutes a direct violation of this section.

(h) Disclosures relating to mandatory escrow or impound account

In the case of any impound, trust, or escrow account that is required under subsection (b), the creditor shall disclose by written notice to the consumer at least 3 business days before the consummation of the consumer credit transaction giving rise to such account or in accordance with timeframes established in prescribed regulations the following information:

(1) The fact that an escrow or impound account will be established at consummation of the transaction.

(2) The amount required at closing to initially fund the escrow or impound account.

(3) The amount, in the initial year after the consummation of the transaction, of the estimated taxes and hazard insurance, including flood insurance, if applicable, and any other required periodic payments or premiums that reflects, as appropriate, either the taxable assessed value of the real property securing the transaction, including the value of any improvements on the property or to be constructed on the property (whether or not such construction will be financed from the proceeds of the transaction) or the replacement costs of the property.

(4) The estimated monthly amount payable to be escrowed for taxes, hazard insurance (including flood insurance, if applicable) and any other required periodic payments or premiums.

(5) The fact that, if the consumer chooses to terminate the account in the future, the consumer will become responsible for the payment of all taxes, hazard insurance, and flood insurance, if applicable, as well as any other required periodic payments or premiums on the property unless a new escrow or impound account is established.

(6) Such other information as the Bureau determines necessary for the protection of the consumer.

(i) Definitions

For purposes of this section, the following definitions shall apply:

(1) Flood insurance

The term “flood insurance” means flood insurance coverage provided under the national flood insurance program pursuant to the National Flood Insurance Act of 1968.

(2) Hazard insurance

The term “hazard insurance” shall have the same meaning as provided for “hazard insurance”, “casualty insurance”, “homeowner's

insurance", or other similar term under the law of the State where the real property securing the consumer credit transaction is located.

(j) Disclosure notice required for consumers who waive escrow services

(1) In general

If--

(A) an impound, trust, or other type of account for the payment of property taxes, insurance premiums, or other purposes relating to real property securing a consumer credit transaction is not established in connection with the transaction; or

(B) a consumer chooses, and provides written notice to the creditor or servicer of such choice, at any time after such an account is established in connection with any such transaction and in accordance with any statute, regulation, or contractual agreement, to close such account,

the creditor or servicer shall provide a timely and clearly written disclosure to the consumer that advises the consumer of the responsibilities of the consumer and implications for the consumer in the absence of any such account.

(2) Disclosure requirements

Any disclosure provided to a consumer under paragraph (1) shall include the following:

(A) Information concerning any applicable fees or costs associated with either the non-establishment of any such account at the time of the transaction, or any subsequent closure of any such account.

(B) A clear and prominent statement that the consumer is responsible for personally and directly paying the non-escrowed items, in addition to paying the mortgage loan payment, in the absence of any such account, and the fact that the costs for taxes, insurance, and related fees can be substantial.

(C) A clear explanation of the consequences of any failure to pay non-escrowed items, including the possible requirement for the forced placement of insurance by the creditor or servicer and the potentially higher cost (including any potential commission payments to the servicer) or reduced coverage for the consumer in the event of any such creditor-placed insurance.

(D) Such other information as the Bureau determines necessary for the protection of the consumer.

12 C.F.R. § 34.4. Applicability of state law.

(a) A national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;

(13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j–3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996):

(1) Contracts;

(2) Torts;

(3) Criminal law;

(4) Homestead laws specified in 12 U.S.C. 1462a(f);

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

(8) Zoning; and

(9) Any other law that the OCC determines to be applicable to national banks in accordance with the decision of the Supreme Court in Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996), or that is made applicable by Federal law.

Cal. Civ. Code § 2954.8(a). Impound accounts; payment of interest; restrictions; exceptions application.

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.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 1, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Andrew Soukup
Andrew Soukup

Attorney for Defendant-Appellee
Bank of America, N.A.

July 1, 2015