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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21-15667

D.C. No. 3:18-cv-05131-WHA

[Filed: May 17, 2022]

WILLIAM KIVETT; et al.,

Plaintiffs-Appellees,

v.

FLAGSTAR BANK, FSB,

Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted April 14, 2022
San Francisco, California

Before: BYBEE and R. NELSON, Circuit Judges, and BOLTON,[**] District Judge.

Flagstar Bank, FSB ("Flagstar"), a midsize federal savings bank operating in all fifty states, appeals the district court's order granting summary judgment to William Kivett, Bernard Bravo, and Lisa Bravo. The three are representatives of former and current mortgagors to whom Flagstar never paid interest on escrow ("IOE"), notwithstanding California Civil Code § 2954.8(a), which requires all banks to pay 2% interest to borrowers on money held in escrow accounts. The district court found that *Lusnak v. Bank of America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), foreclosed Flagstar's argument that the National Bank Act ("NBA") preempted § 2954.8(a) and granted summary judgment to the classes without making any factual findings as to the impact of § 2954.8(a) on Flagstar's banking operations. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

1. "Questions of statutory interpretation are reviewed de novo . . . as are questions of preemption." *Lopez v. Wash. Mut. Bank, F.A.*, 302 F.3d 900, 903 (9th Cir. 2002), *as amended*, 311 F.3d 928 (9th Cir. 2002) (internal citations omitted). Summary judgment is also reviewed de novo. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). Viewing the evidence in the light most favorable to the nonmovant, we must

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[**] The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.* (citation omitted).

In *Lusnak*, we reversed a district court's holding that the NBA preempted § 2954.8(a). 883 F.3d at 1194–97. We found that the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd–Frank"), which mandates that national banks comply with applicable state IOE laws, "expresses Congress's view that [IOE] laws would not necessarily prevent or significantly interfere with a national bank's operations." *Id.* at 1194–95. We therefore held that the NBA did not preempt § 2954.8(a).

Here, the district court correctly concluded that, given our decision in *Lusnak*, Flagstar could not succeed in arguing that § 2954.8(a) was preempted by the NBA. Flagstar concedes that its banking operations in this case are regulated by the NBA, which has regulated all federal savings banks since the passage of Dodd–Frank. *See id*, 883 F.3d at 1196 & n.8 (reasoning that the OCC, regulator under the NBA, does not enjoy field preemption over the regulation of national banks or federal savings associations). Though Flagstar argues that *Lusnak*'s holding applies only to "large corporate banks," *Lusnak*'s language is unqualified: "no legal authority establishes that state [IOE] laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd–Frank, has indicated that they do not. Accordingly, we hold that the NBA does not preempt California Civil Code § 2954.8(a)." *Id.* at 1197.

Flagstar's argument that *Lusnak*'s procedural posture limits its authority in this case is similarly unavailing. Arguing that the instant appeal of summary judgment should not be controlled by a decision reversing a motion to dismiss, Flagstar ignores our practice of deciding questions of preemption whenever they may arise in litigation, including on motions to dismiss. *See, e.g.*, *McShannock v. JP Morgan Chase Bank N.A.*, 976 F.3d 881, 895 (9th Cir. 2020) (reversing denial of motion to dismiss on basis that the Home Owners' Loan Act of 1933 preempted state law); *Gutierrez v. Wells Fargo Bank, N.A.*, 704 F.3d 712, 716–18, 730 (9th Cir. 2012) (vacating permanent injunction after bench trial on basis that the NBA preempted state law); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1035–38 (9th Cir. 2008) (affirming judgment on the pleadings on basis that the NBA preempted state law); *Polich v. Burlington N., Inc.*, 114 F.3d 122, 124 (9th Cir. 1997) (per curiam) (affirming summary judgment on basis that the Interstate Commerce Act preempted state law). Relatedly, Flagstar argues that Dodd–Frank mandated preemption determinations be "case-by-case" and based on "substantial evidence." But as the *Lusnak* court reasoned, "[t]hese [regulations] have no bearing here where the preemption determination is made by this court and not the OCC." 883 F.3d at 1194; *see also* 12 U.S.C. § 25b(b)(1)(B). No factual review of Flagstar's record on summary judgment was necessary to determine whether § 2954.8(a) prevented or significantly interfered with Flagstar's banking operations, and the district court did not err in declining to conduct such review.

Flagstar and amici Mortgage Bankers Association and American Bankers Association alternatively ask us to overrule *Lusnak* as wrongly decided. A three-judge panel may only depart from an earlier panel's decision if it is "clearly irreconcilable with the reasoning or theory of intervening higher authority[.]" *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Considering neither the Supreme Court nor the Ninth Circuit sitting en banc has heard a case that could bring *Lusnak*'s holding into question, we reject Flagstar and amici's invitation to overturn *Lusnak*.

2. Flagstar also argued that the district court incorrectly tolled the statute of limitations and accordingly misstated the award. Appellees concede this point and all parties agree that, pursuant to 28 U.S.C. § 2106, we should modify the final class certification order and judgment. The Court will therefore remand for modification of these two points.

The district court's preemption holding is AFFIRMED. The judgment and class certification order are VACATED and REMANDED to modify the judgment amount from $9,262,769.24 to $9,180,580.15 and the class definition date from April 18, 2014, to August 22, 2014.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 18-05131 WHA

[Filed: November 20, 2019]

WILLIAM KIVETT, individually and on behalf of others similarly situated,	)
Plaintiff,	)
v.	)
FLAGSTAR BANK, FSB, a federal savings bank, and DOES 1-100, inclusive,	)
Defendant.	)

ORDER GRANTING CLASS CERTIFICATION AND MOTION TO AMEND COMPLAINT

INTRODUCTION

In this putative class action, plaintiff moves for class certification and for new plaintiffs to intervene with leave to amend the complaint. To the extent stated herein, both motions are **GRANTED**.

STATEMENT

California Civil Code § 2954.8(a) requires "[e]very financial institution that makes loans upon the security of real property containing only a one- to four-family residence and located in this state" to "pay interest on the amount so held to the borrower." Defendant Flagstar Bank, FSB is a federal savings bank that makes the loans covered by Section 2954.8(a).

In 2010, the enshrinement of the Dodd-Frank Wall Street Reform and Consumer Protection Act changed the federal preemption scheme for banks and federal savings associations. *See, e.g.*, Dodd-Frank Act § 1046 (codified at 12 U.S.C. § 1465). In 2018, our court of appeals relied on this change to hold that the National Bank Act — which governs national banks — did not preempt Section 2954.8(a). *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1194 (9th Cir. 2018). The instant action is one of three pending actions in the wake of *Lusnak* to allege violation of Section 2954.8(a). *See also McShannock v. JP Morgan Chase Bank N.A.*, 354 F. Supp. 3d 1063 (N.D. Cal. 2018) (Judge Edward Chen); *Wilde v. Flagstar Bank FSB*, No. 18-cv-1370-LAB (BGS), 2019 WL 1099841 (S.D. Cal. Mar. 8, 2019) (Chief Judge Larry Alan Burns). Judge Edward Chen has since certified for interlocutory appeal the question of whether the Home Owners' Loan Act preempts state law claims. *McShannock v. JP Morgan Chase Bank N.A.*, No. 18-cv-01873-EMC, 2019 WL 955289, at *1 (N.D. Cal. Feb. 27, 2019).

This civil action began in April 2018, filed by Lowell and Gina Smith. The Smiths alleged that in October

2004, they had obtained a mortgage loan to finance their purchase of real property located in California. The Smiths had executed a deed of trust as security for the loan. The deed of trust called for the establishment of an escrow impound account and required that interest be paid on funds in the escrow account if doing so was required by applicable law. Flagstar then took over the servicing of the Smiths' mortgage account and remained the loan servicer until August 2015. No interest accrued on the funds (Case No. 18-02350, Dkt. No. 1).

The Smiths' complaint alleged two claims against Flagstar: (i) breach of contract, and (ii) violation of California's Unfair Competition Law, California Business & Professions Code §§ 17200 *et seq*. In August 2018, a Rule 12 order dismissed that complaint without prejudice due to the Smiths' failure to comply with a threshold notice-and-cure requirement provided by the deed of trust. Judgment then entered in favor of Flagstar and against the Smiths (Case No. 18-02350, Dkt. Nos. 1, 38).

The Smiths quickly provided Flagstar written notice and an opportunity to cure, which Flagstar refused. Having fixed the cure issue, the Smiths filed the instant suit, alleging the same claims on the same facts as before (Case No. 18-05131, Dkt. No. 1).

In October 2018, William Kivett came in as another plaintiff. He only alleged a violation of Section 17200 (Dkt. No. 30 at 2). He alleged that he had obtained a mortgage loan from Flagstar in September 2012. Flagstar serviced his loan from the loan's inception in 2012 until he refinanced with another institution in

April 2015. Flagstar held his money in an escrow account during that time. No interest accrued on the account. In September 2018, plaintiff Kivett gave written notice and demand for cure, which Flagstar denied (First Amd. Compl. ¶¶ 19, 22–24) (Dkt. No. 16).

In December 2018, a case management schedule set a deadline of January 30, 2019, for leave to add any new parties or to amend the pleadings (Dkt. No. 28). Rule 12 practice followed as to the Smiths but not to plaintiff Kivett. In February 2019, an order converted Flagstar's motion to dismiss into one for summary judgment under Rule 12(d).

At bottom, Flagstar's motion presented a threshold issue as to whether or not the Home Owners' Loan Act preempted the Smiths' claims. To be clear, the enactment of the Dodd-Frank Act in 2010 had generally ended HOLA preemption. Section 1043 of the Dodd-Frank Act, however, preserved HOLA's preemption scheme for any contract *entered into* on or before July 21, 2010, "by national banks, [f]ederal savings associations, or subsidiaries thereof . . . ." 12 U.S.C. § 5553. The Smiths had obtained their mortgage in October 2004.

The preemption argument veered outside the complaint. Flagstar sought judicial notice of the Smiths' promissory note to establish that Flagstar participated in the origination of the Smiths' loan and became its original servicer immediately after origination. The Smiths, however, countered that the deed of trust clearly identified Wholesale America Mortgage as the lender, not Flagstar. Owing to the importance of this factual question and because

"matters outside the pleading [were] presented to and not excluded by the court," the motion to dismiss became one for summary judgment (Dkt. Nos. 26-1, 29, 37).

Following discovery and further briefing, summary judgment issued in favor of Flagstar (Dkt. No. 63). In brief, the order hewed to a practical construction of the Dodd-Frank Act's phrase "entered into," determining that even though Flagstar had not *directly* entered into the contract with the Smiths, it sufficed that Flagstar had participated in the origination of the Smiths' loan in 2004. Put simply, the Smiths' claims were still preempted by the Home Owners' Loan Act. With the Smiths out of the picture, the sole surviving plaintiff and claim in this action became plaintiff Kivett and his claim under Section 17200. This brings us to the two instant motions.

First, plaintiff Kivett seeks to certify a single class of 125,189 Flagstar customers who, from April 18, 2014, onward, have not received two percent interest on the amounts Flagstar held in their mortgage escrow accounts (Dkt. No. 65). More specifically, plaintiff Kivett seeks to certify the following class pursuant to Rule 23(b)(3):

> All persons who on or after April 18, 2014 had mortgage loans serviced by Flagstar Bank FSB ("Flagstar") on 1–4 unit residential properties in California and paid Flagstar money in advance to hold in escrow for the payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, but did not receive interest on the amounts held by

> Flagstar in their escrow accounts (excluding, however, any such persons whose mortgage loans originated on or before July 21, 2010).

The class plaintiff Kivett seeks to represent will be within the four-year statute of limitations counting from the filing of the complaint in the *first* action. The proposed class would also exclude the mortgage loans that originated before July 21, 2010, for which the claims continue to be preempted. Flagstar opposes plaintiff Kivett's motion for class certification, training all its fire on one Rule 23 element: predominance.

Second, plaintiff Kivett also moves for Bernard and Lisa Bravo to intervene in this action and to amend the complaint. The primary purpose for this motion is to add a class member *currently* serviced by Flagstar to ensure standing for an injunction and a class under Rule 23(b)(2), as plaintiff Kivett has not been a Flagstar customer since 2015. Plaintiff Kivett moved for the Bravos to intervene on August 20. The deadline to add any new parties was January 30.

Plaintiff Kivett's instant motion for class certification only seeks certification of a class under Rule 23(b)(3). This differs from the operative complaint, which sought certification of a class under both Rule 23(b)(2) and Rule 23(b)(3) (First Amd. Cmpl. ¶ 26). Plaintiff Kivett never moved to certify a class under Rule 23(b)(2). (Even the proposed order plaintiff Kivett appended to his motion for class certification omitted any reference to Rule 23(b)(2) (Dkt. No. 65-1).) As such, this order will only assess certification under Rule 23(b)(3), and whether or not it is too late for new plaintiffs to intervene.

This order follows full briefing, supplemental submissions, and oral argument.

ANALYSIS

1. NOTICE-AND-CURE PROVISION.

Before the hearing on the motions, an order requested further briefing because "the Court questions whether it reached the correct decision earlier (Case No. 18-2350, Dkt. No. 34) in holding that Section 20 [of the Smiths' deed of trust] barred the Smiths' claims" (Dkt. No. 99 at 1). To recall, before the instant action, a Rule 12 order had dismissed both of the Smiths' claims in their original action pursuant to a notice-and-cure provision. One of those claims had been for breach of contract, and the other claim had been for a violation of Section 17200. The notice-and-cure provision provided as follows (Poles Decl. ¶ 9; Exh. D § 20) (Dkt. No. 116) (emphasis added):

> Neither [b]orrower nor [l]ender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this [s]ecurity [i]nstrument or that alleges that the other party has breached any provision of, *or any duty owed by reason of, this [s]ecurity [i]nstrument*, until such [b]orrower or [l]ender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

No binding decision has ever interpreted this exact notice-and-cure provision in the context of statutory claims, and district courts have split. *Compare Higley v. Flagstar Bank, FSB*, 910 F. Supp. 2d 1249, 1254 (D. Or. 2012) (Judge Michael Simon) *with Kim v. Shellpoint Partners, LLC*, No. 15-cv-611-LAB (BLM), 2016 WL 1241541, at *7 (S.D. Cal. Mar. 30, 2016) (Chief Judge Larry Alan Burns).

In barring *both* of the Smiths' claims, the prior order relied on Judge Beth Freeman's decision in *Giotta v. Ocwen Financial Corporation*, subsequently affirmed by our court of appeals in a non-precedential decision. No. 15-cv-00620-BLF, 2016 WL 4447150, at *4–5 (N.D. Cal. Aug. 24, 2016), *aff'd*, *Giotta v. Ocwen Loan Servicing, LLC*, 706 F. App'x 421, 422 (9th Cir. 2017). Specifically, Judge Freeman interpreted the exact notice-and-cure provision, and held that various California and federal consumer protection statutes "f[e]ll squarely within the ambit of the notice-and-cure provision" because they "ar[o]se from the property inspections and [broker price opinions] obtained by [a defendant] and charged to [p]laintiffs pursuant to the terms of the [d]eed of [t]rust." *Id.* at *4. Thus despite some differences in the claims alleged, the order "saw no alternative but to" follow *Giotta* and dismiss both alleged claims (Case No. 18-2350, Dkt. No. 34 at 6).

Subsequently, Chief Judge Larry Alan Burns followed *Giotta* (and the undersigned's prior order in *Smith*). *Wilde*, 2019 WL 1099841, at *2. In brief, Judge Burns found it persuasive that "the [d]eed of [t]rust provided that Flagstar had no obligation to pay interest on the escrow account unless 'applicable law' — e.g.,

§ 2954.8 — provides otherwise." *Ibid*. So, "Flagstar's decision not to pay interest on the account was therefore a decision made 'pursuant to' the [d]eed of [t]rust. Even if that decision was unlawful in light of § 2954.8 or constituted a breach of the contract, it was a decision made 'pursuant to' terms of that contract, and [plaintiff] was required to first give Flagstar notice and an opportunity to cure prior to bringing suit." *Ibid*.

In *McShannock v. JP Morgan Chase Bank N.A.*, however, Judge Edward Chen did not abide by the analysis in *Giotta*. 354 F. Supp. 3d 1063, 1072 (N.D. Cal. 2018). Instead, Judge Chen held that the provision did not apply to statutory claims because such claims did not arise "pursuant" to the deed of trust and the duty to pay interest was not "owed by reason of" the deed of trust. *Ibid*. The reason stemmed from a statutory duty. Judge Chen accordingly concluded that the plaintiff there did not need to comply with the notice-and-cure provision to maintain a claim for a violation arising under Section 2954.8(a).

This order finds Judge Chen's analysis in *McShannock* persuasive. The duty to comply with the law did not originate from the deed of trust — it originated from Section 2954.8(a). To the extent the provision in the deed of trust contained ambiguity, such ambiguity must be construed against the drafter of the contract, namely Flagstar. This order therefore holds that the prior order erred in dismissing the Smiths' statutory claim.

In this connection, since the dismissal of the claim had been erroneous, the tolling of the class claims begins from April 18, 2018, when the Smiths filed their

first complaint — not August 22, 2018, when the Smiths filed their second complaint. Moreover, as to any predominance analysis, compliance with the notice-and-cure provision is irrelevant to this statutory claim, and so does not trigger any individualized inquiry.

Here, this order pauses to note that even if the notice-and-cure provision applied here, the failure of absent class members to comply with the notice-and-cure provision is excusable on the ground of futility. Flagstar has never shown a single instance of curing after receiving notice, whereas both plaintiff Kivett and the Smiths gave notice and Flagstar refused to cure. It is true that Flagstar has independently begun to cure accounts owned by third-parties for certain months, but that has nothing to do with any notice. Thus, either way, the notice-and-cure issue here is not an individual inquiry more prevalent than the common questions.

In sum, the prior *Smith* order erred when it dismissed the statutory claim under the deed of trust's notice-and-cure provision. That requirement did not apply to the statutory claim at issue here. The tolling of class claims therefore began from April 18, 2014. Furthermore, the notice-and-cure provision is not an individualized inquiry, because it is not an inquiry here at all. This order now proceeds to the instant motions.

2. MOTION FOR CLASS CERTIFICATION.

Class certification under Rule 23(b)(3) is a two-step process. *First*, plaintiff Kivett must show that the following four requirements of Rule 23(a) have been met: (1) the class is so numerous that joinder of all

members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *Second*, plaintiff must establish under Rule 23(b)(3) "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

A. Rule 23(a).

Flagstar does not contest that any of the Rule 23(a) requirements have been met here. Indeed, plaintiff Kivett has sufficiently established each element. The class would comprise 125,189 California borrowers, the sole claim at issue stems from Flagstar's purported obligation to pay interest on every class member's mortgage loan, and the named plaintiff suffers the identical injury as the rest of the class, namely that his escrow account never received an interest payment. Furthermore, the class definition is tailored so that no class member would be subject to HOLA field preemption or Section 17200's statute of limitations. This sufficiently satisfies the elements of numerosity, commonality, and typicality, as required by Rule 23(a)(1)–(3). This order also finds plaintiff Kivett and his counsel to be adequate representatives as required by Rule 23(a)(4).

B. Rule 23(b)(3).

Flagstar does not contest that it is both manageable and superior to allow this case to proceed as a class action. Indeed, Flagstar's mortgage records provide current or former home addresses, phone numbers, and social security numbers for all class members, and the low individual restitution amounts are readily calculable based on Flagstar's data. What Flagstar does contest, however, is whether common issues predominate.

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." "The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotation marks omitted). An individual question is "one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Ibid*. (citation and internal quotation marks omitted; brackets in original). This "inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Ibid*. (citation and internal quotation marks omitted). Plaintiff Kivett's claim meets this standard, as now discussed.

Plaintiff Kivett contends common issues predominate because the unlawfulness or unfairness of Flagstar's actions here primarily turn on whether or not Section 2954.8 obligates Flagstar to pay interest on certain mortgage loans. If so, Section 2954.8 will apply on a class-wide basis. Furthermore, the class is tailored so that none of these loans would be subject to Section 1043 of the Dodd-Frank Act and all of the interest payments are within the statute of limitations. If the Home Owners' Loan Act continues to preempt Section 2954.8 for savings associations, the preemption will, of course, apply on a class-wide basis.

Flagstar offers three responses, none persuasive. *First*, Flagstar contends individualized loan-by-loan analysis is required to determine which escrow accounts already receive interest payments. The parties agree that in January 2017, Flagstar began a rolling process of paying interest on escrow accounts when another entity owned the mortgage servicing rights of the account. So, according to Flagstar, individualized inquiries are required to determine if another entity owns the mortgage servicing rights, which in turn would create a tree of additional individualized inquiries.

Plaintiff Kivett's restitution model, however, sufficiently accounts for third-party entities owning the mortgage servicing rights of the account. More specifically, plaintiff Kivett's restitution model consists of a list of borrowers to whom interest is owed and the amount owed to each of them. For loans corresponding to third-party mortgage service rights holders, plaintiff Kivett's restitution model built in an assumption that

Flagstar had paid the interest starting in January 2017, and so, for those loans, and those months, the model calculated zero outstanding interest (Dkt. No. 111 ¶ 12.d.i.–vii.). At this stage, this suffices to establish that restitution can be determined for the proposed class and can be attributed to the theory of liability. That this may lead to some differences in restitution calculations does not defeat class certification. *See Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 988 (9th Cir. 2015), *Cert. Denied*, 136 S. Ct. 2410 (2016).

Second, Flagstar contends individualized inquiries will predominate because some accounts will not be entitled to recover restitution *at all*. For example, such accounts include class members who entered bankruptcy during the class period or were discharged in bankruptcy proceedings prior to the class period. Flagstar's argument fails to show that individual issues predominate and defeat class certification. Whether or not a class member has undergone a bankruptcy proceeding, thereby exempting its claims, is not a fact-intensive inquiry. It therefore does not preclude certification. "Although some class members may not be entitled to personally recover damages because their claims have become part of a bankruptcy estate, the common issues of law and fact regarding defendant's liability still predominate." *Jordan v. Paul Fin., LLC*, 285 F.R.D. 435, 464 (N.D. Cal. 2012) (Judge Susan Illston).

Third, Flagstar points out that it can assert affirmative defenses against putative class members based on Flagstar's right to an offset, good faith

compliance with applicable law, and waivers and modifications. Even if these questions exist, however, they do not negate the predominance of the common issues here. "[C]ourts traditionally have been reluctant to deny class action status under Rule 23(b)(3) simply because affirmative defenses may be available against individual members." *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2015 WL 2265972, at *3 (N.D. Cal. May 14, 2015) (Judge Jon Tigar) (*quoting Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 39 (1st Cir. 2003)).

Moreover, that some loans had been modified or were subject to a forbearance, is similarly unavailing to defeat class certification at this stage. Flagstar has the documents available. Yet, Flagstar does not provide evidence that its forms of loan modification agreements or forbearance letters impact any claims. As Judge Yvonne Gonzalez Rogers held with respect to a similar argument advanced by Wells Fargo, "[u]ntil the legal implication of this defense is established, common questions continue to predominate over individual questions." *Bias v. Wells Fargo & Co.*, 312 F.R.D. 528, 542 (N.D. Cal. 2015).

In this connection, it must be noted that Flagstar provided faulty statistics for each affirmative defense. For example, Flagstar asserted that 13,066 loans were in default and 1,636 loans were in foreclosure, but advanced these statistics based on a borrower population of 196,706 loans — not based on the 125,189 loans limited to the class. Flagstar's statistics, therefore, could apply to loans that fell outside the statute of limitations, and therefore outside the class. Flagstar's statistics as to the applicability of any

affirmative defenses do not persuade to defeat certification.

Possibly, some individualized questions will linger as to circumstances unique to specific accounts, but at this stage that possibility pertaining to a relatively small corner of this case does not predominate over centerpiece, class-wide issues like whether a violation of Section 2954.8 incurs class-wide liability and whether Home Owners' Loan Act preemption will continue to preempt such liability. If individualized questions come into greater focus as this litigation continues to the point that they become unmanageable or threaten to overwhelm class-wide issues, the class can be decertified. At this point, however, this order concludes that class-wide issues predominate over individualized questions as required by Rule 23(b)(3).

To repeat, where, as here, "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc.*, 136 S. Ct. at 1045. In other words, Flagstar is free to raise all these challenges to the merits of plaintiff Kivett's theories. But they do not undermine plaintiff Kivett's showing for purposes of class certification at this stage.

In sum, this is a classic and textbook issue of the class action device. The law required interest to be paid but the savings association did not do so to its borrowers, all allegedly cheated by the savings

association. These borrowers now join together to vindicate their right to interest under the law. The miscellaneous differences thrown out by the savings association are just that — miscellaneous — and cannot obfuscate the main point that the savings association allegedly *cheated* thousands of borrowers out of the interest due to them and pocketed the money for itself. It is hard to imagine a case more worthy of class treatment.

3. MOTION TO INTERVENE.

Once a district court has established a deadline for amended pleadings under Rule 16(b), any modification must be based on a showing of good cause. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607–08 (9th Cir. 1992). Such good cause has been shown here. The Bravos contacted plaintiff's counsel on July 11, 2019 (Fredman Decl. ¶ 7) (Dkt. No. 83). By July 24, plaintiff's counsel had confirmed the Bravos's status as current Flagstar customers who had not received interest on their escrow accounts, entered into a retainer agreement, and served a notice-to-cure letter as required by the Bravos's deed of trust (*id.* ¶¶ 8–10). Plaintiff provided Flagstar three weeks to respond to the letter, Flagstar did not respond, and plaintiff brought the motion to intervene on August 20 (Dkt. No. 81). Plaintiff's counsel diligently sought this amendment.

Flagstar first argues that adding the Bravos would be prejudicial because it would require an internal investigation and the potential for additional discovery, in addition to further class certification briefing. None of these reasons show prejudice to Flagstar because

these are both actions that Flagstar would have had to take had the Bravos began the action as plaintiffs. Flagstar has not shown any additional prejudice beyond normal litigation. The prejudice Flagstar props up does not suffice to turn the Bravos away. Moreover, the Bravos have already provided Flagstar all their mortgage related documents, and have offered to appear for deposition upon request.

Flagstar next argues that amendment would be futile because this proposed class can never seek prospective injunctive relief. Under Flagstar's theory, not every class member is a current Flagstar customer and so because the entire class cannot be entitled to injunctive relief, no class can be entitled to injunctive relief.

This argument also fails. Even assuming Flagstar's argument to be true, a separate sub-class under Rule 23(b)(2) can be certified for all class members who are currently serviced by Flagstar. For these reasons, plaintiff Kivett's motion to intervene and for leave to amend the complaint is **GRANTED**.

CONCLUSION

To the extent stated herein, plaintiff's motion for class certification is **GRANTED**. The following class is **CERTIFIED**:

> All persons who on or after April 18, 2014 had mortgage loans serviced by Flagstar Bank FSB ("Flagstar") on 1–4 unit residential properties in California and paid Flagstar money in advance to hold in escrow for the payment of taxes and assessments on the property, for insurance, or

> for other purposes relating to the property, but did not receive interest on the amounts held by Flagstar in their escrow accounts (excluding, however, any such persons whose mortgage loans originated on or before July 21, 2010) (the "Class").

This class definition shall apply for all purposes, including settlement. This class is certified as to plaintiff Kivett's Section 17200 claim, except for prospective injunctive relief. William Kivett is hereby **APPOINTED** as class representative. Plaintiff's counsel from Hagens Berman Sobol Shapiro LLP and the Law Office of Peter Fredman PC are hereby **APPOINTED** as class counsel.

Plaintiff's motion for new plaintiffs to intervene and for leave to amend to add new class representatives is provisionally **GRANTED**. Defendant shall have until **JANUARY 2, 2020** to **SHOW CAUSE** why the Bravos should not be authorized to co-represent the class. Plaintiff's counsel shall promptly make the Bravos available for depositions on or before **DECEMBER 6, 2019**, and shall produce their records by that date. By **JANUARY 2, 2020** both sides shall submit a proposed form of notice to the class with a plan of distribution by first-class mail.

Plaintiff also moved for an extension on the deadline to bring dispositive motions. To the extent stated, that motion is **GRANTED IN PART**. The deadline on dispositive motions is hereby set for **DECEMBER 5, 2019**. All other deadlines remain in place.

IT IS SO ORDERED.

Dated: November 20, 2019.

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C 18-05131 WHA

[Filed: March 4, 2020]

LOWELL SMITH and BERNARD and LISA BRAVO, and LOWELL and GINA SMITH, individually and on behalf of others similarly situated,

Plaintiffs,

v.

FLAGSTAR BANK, FSB, a federal savings bank, and DOES 1—100, inclusive,

Defendants.

ORDER RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

This order holds *Lusnak* applies to the claim in this case, and that exceptions proposed by Flagstar are not persuasive, including the "small bank vs. large bank" distinction. Therefore, the motion for summary judgement is **DENIED** to the foregoing, and plaintiff's motion is **GRANTED**.

This order further finds that Flagstar does not and has not paid any interest on California loans owned by Flagstar.

IT IS SO ORDERED.

Dated: March 4, 2020.

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C 18-05131 WHA

[Filed: December 10, 2020]

WILLIAM KIVETT and BERNARD and LISA BRAVO, individually, and on behalf of others similarly situated,

Plaintiffs,

v.

FLAGSTAR BANK, FSB, a federal savings bank,

Defendant.

ORDER RE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In this certified class action against defendant bank for non-payment of interest on escrows for California borrowers, as required under Section 2954.8(a) of California's Civil Code, brought under Section 17200 of California's Business and Professions Code, plaintiffs

move for summary judgment, requesting restitution and injunctive relief. A prior order already determined the bank's liability, finding it in violation of Section 2954.8(a), and thereby liable under the "unlawful" prong of Section 17200. This order grants plaintiffs' request for restitution of accrued and outstanding interest on escrows that the bank failed to pay to class members. Because its violations of Section 2954.8(a) are ongoing with respect to a subclass of class members whose loans it continues to service, this order certifies a subclass under Rule 23(b)(2), appoints subclass representatives, and grants injunctive relief thereunder. To the extent stated herein, therefore, plaintiffs' motion for summary judgment is **GRANTED**.

STATEMENT

Section 2954.8(a) of California's Civil Code requires:

> 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.

In short, California's interest-escrow-law requires financial institutions to pay certain borrowers at least two percent annual interest on funds held in borrowers' escrow accounts. Such accounts are typically set up in conjunction with a home loan — indeed often as a condition by a lender — to ensure payment of property obligations associated with a home loan, such as property taxes.

Defendant Flagstar Bank, FSB, is a federally chartered savings bank, which originates, purchases, sells, and services home loans covered by Section 2954.8(a). After a loan is originated, it is typically sold in the secondary market to third-party investors. This leads to a bifurcation of the loan into two main assets: "[o]ne is the beneficial ownership of the loan and the other would be the income received to do the actual servicing activities" (Chang. Dep. 13:21–14:19). The latter creates the mortgage servicing right ("MSR") asset.

From at least 2014 until January 28, 2017, Flagstar categorically failed to pay or credit interest on escrow ("IOE") to California borrowers' whose loans Flagstar serviced (Ryan Dep. 47:4–7). More specifically, when Flagstar collected money in advance from California borrowers for payment of taxes and assessments on a property mortgaged as security for a home loan, or for insurance, for example, it failed to pay them the two percent interest per annum required under Section 2954.8(a). Beginning on January 28, 2017, however, Flagstar began a phased-out process of prospectively paying IOE for loans that it subserviced on behalf of third-party investors who owned the mortgage

servicing rights (Ryan Dep. 46:21–47:2). Though Flagstar now complies with Section 2954.8(a) for all loans it subservices for third-party investors, it still does not pay IOE on loans for which *it* owns the mortgage servicing rights (Ryan Dep. 34:13–19; 45:14–16); nor does it plan to (Ryan Dep. 47:24–48:2) (*see also* Stip. Fact ¶ 6). Its reason: federal preemption. More specifically, Flagstar says that the Home Owner's Loan Act ("HOLA") — applicable to federal savings associations such as itself — preempts Section 2954.8(a) and thus exempts it from paying IOE.

In 2018, however, our court of appeals held that the passage of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act changed the federal preemption scheme. *Lusnak v. Bank of Am., N.A.*, 883 F.3d 1185, 1194 (9th Cir. 2018). In so holding, it found that the National Bank Act does not preempt Section 2954.8(a). *Id.* at 1197. Various actions against banks, including this one, ensued. *See McShannock v. JP Morgan Chase Bank N.A.*, 354 F.Supp.3d 1063 (N.D. Cal. 2018) (Judge Edward Chen); *see also Wilde v. Flagstar Bank FSB*, No. 18-cv-1370-LAB (BGS), 2019 WL 1099841 (S.D. Cal. Mar. 8, 2019) (Chief Judge Larry Alan Burns).

In April 2018, Lowell and Gina Smith brought this civil action against Flagstar. They alleged that in October 2004, they'd obtained a loan to finance their purchase of real property located in California. They had executed a deed of trust as security for the loan. The deed of trust called for the establishment of an escrow impound account and required that interest be paid on funds in the escrow account if doing so was

required by applicable law. Flagstar then took over the servicing of the Smiths' mortgage account and remained the loan servicer until August 2015. No interest accrued on their escrow funds (Case No. 18-02350, Dkt. No. 1).

The Smiths' complaint alleged two claims against Flagstar: (i) breach of contract, and (ii) violation of California's Unfair Competition Law, California Business & Professions Code §§ 17200 *et seq*. In August 2018, a Rule 12 order dismissed that complaint without prejudice due to the Smiths' failure to comply with a threshold notice-and-cure requirement provided by the deed of trust. Judgment then entered in favor of Flagstar and against the Smiths (Case No. 18-02350, Dkt. Nos. 1, 38). The Smiths quickly provided Flagstar written notice and an opportunity to cure, which Flagstar refused. Having fixed the cure issue, the Smiths filed the instant suit, alleging the same claims on the same facts as before (Case No. 18-05131, Dkt. No. 1).

In October 2018, William Kivett came in as another plaintiff. He only alleged a violation of Section 17200 (Dkt. No. 30 at 2). In 2012, Kivett and Flagstar had executed a promissory note reflecting a $400,610 mortgage loan secured by a deed of trust on a California residential property. Flagstar serviced Kivett's loan from its inception until 2015 when he refinanced his loan with another institution. Pursuant to the deed of trust, Flagstar "established and maintained an escrow account for the payment of [Kivett's] property taxes and insurance premiums and

other potential charges related to the property" throughout that time (Stip. Fact ¶ 5).

Following discovery and motion practice, summary judgment issued in favor of Flagstar, dismissing the Smiths from this action. In brief, that order found that the Smiths' claims were still preempted by HOLA because Section 1043 of the Dodd-Frank Act preserved HOLA's preemption scheme for any contract entered into on or before July 21, 2010, "by national banks, [f]ederal savings associations, or subsidiaries thereof . . ." 12 U.S.C. § 5553. Because Flagstar, a federal savings association, had participated in the origination of the Smiths' 2004 loan, their claims were dismissed.

Kivett pressed on. Then, a November 2019 order appointed Kivett as class representative and certified the following class pursuant to Rule 23(b)(3) (Dkt. No. 120):

> All persons who on or after April 18, 2014 had mortgage loans serviced by Flagstar Bank FSB ("Flagstar") on 1–4 unit residential properties in California and paid Flagstar money in advance to hold in escrow for the payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, but did not receive interest on the amounts held by Flagstar in their escrow accounts (excluding, however, any such persons whose mortgage loans originated on or before July 21, 2010) (the "Class").

That class was "certified as to plaintiff Kivett's Section 17200 claim, except for prospective injunctive

relief" (*id*. at 13). But, in express contemplation of seeking injunctive relief, Kivett had also moved for leave to amend in order to add Bernard and Lisa Bravo as named plaintiffs. On December 1, 2017, the Bravos had executed a promissory note with California Financial Real Estate Center, Inc., secured by a deed of trust on a California property. The servicing rights to the Bravos' loan were almost immediately transferred from Financial Real Estate Center to Flagstar (Mansell Decl. ¶¶ 6–7). Pursuant to the terms of the deed of trust, Flagstar "maintained an escrow account for the Bravos upon servicing the loan from origination through present" (*id*. at ¶¶ 8–9). Unlike Kivett's loan, therefore, Flagstar *currently* services the Bravos' loan for which Flagstar still does not pay any IOE to.

Accordingly, the "primary purposes" for seeking leave to amend, as stated in the class certification order, was to add the Bravos as class representatives "to ensure standing for an injunction and a class under Rule 23(b)(2)" (Dkt. No. 120 at 4). Rejecting Flagstar's arguments of prejudice and futility, the class certification order also granted Kivett's motion for leave to amend the first amended complaint. More specifically, that order held that Kivett's "motion for new plaintiffs to intervene and for leave to amend to add new class representatives [was] provisionally **GRANTED**" (*id*. at 13). It ordered Kivett's counsel to "promptly make the Bravos available for depositions and to produce their records to Flagstar by December 6, 2020." Flagstar, in turn, had until January 2, 2020, to show cause "why the Bravos should not be authorized to co-represent the class" (*ibid*.). Flagstar failed to show cause by that date.

Instead, on January 2, 2020, the parties submitted a joint stipulation and proposed order, which slightly altered the class definition and included the details of the parties' proposed form of notice to the class. An order then entered the proposed order, approving the parties' notice plan, and redefined the class as follows (Dkt. No. 144) (emphasis in original):

> All persons who **at any time** on or after April 18, 2014 **through September 30, 2019** had mortgage loans serviced by Flagstar Bank, FSB ("Flagstar") on 1–4 unit residential properties in California and paid Flagstar money in advance to hold in escrow for the payment of taxes and assessments on the property, for insurance, or for other purposes relating to the property, but did not receive interest on the amounts held by Flagstar in their escrow accounts (excluding, however, any such persons **(a)** whose mortgage loans originated on or before July 21, 2010 **or (b) who would be owed less than $1 in interest-on- escrow as of September 30, 2019 if plaintiffs' allegations are proven**) (the "Class").

Notice was effected. Out of the 139,923 class members, four opted out.

In December 2019, the parties filed cross-motions for summary judgment. Finding *Lusnak* controlling, and Flagstar's proposed exceptions unpersuasive, a March 2020 order denied Flagstar's motion, and granted plaintiffs' motion for partial summary judgment instead (Dkt. No. 154). In so ruling, that order found that plaintiffs had established Flagstar's

liability under Section 17200 for failing to pay or credit two percent interest on the positive balances in California borrowers' escrow accounts in violation of Section 2954.8(a). That order also found that "Flagstar does not and has not paid any interest on California loans owned by Flagstar" (Dkt. No. 154). That is, while Flagstar now complies with Section 2954.8(a) — *i.e.*, pays IOE — for loans that it subservices for third-party investors, it remains in violation of the same for loans whose mortgage servicing rights Flagstar itself owns and services.

Plaintiffs now move for summary judgment seeking restitution for accrued and outstanding IOE owed to class members through December 31, 2019, and prejudgment interest of two percent per annum thereon. Additionally, plaintiffs also seek a permanent injunction ordering Flagstar to comply with Section 2954.8(a) — to pay and/or credit IOE that accrues from January 1, 2020, onward, to *current* Flagstar customers (Dkt. No. 174). To repeat, while Flagstar has now completed its phased-out process of paying IOE to class members whose loans it subservices on behalf of third-parties who own the mortgage servicing rights, Flagstar itself continues *not* to pay IOE to class members whose MSR Flagstar owns and whose loans it currently services. Flagstar opposes. It argues that there are numerous triable issues for trial. For example, it argues that there are disputed issues of fact as to whether or not the amount of restitution to class members should be *offset* by unrelated expenses that it ostensibly incurred with respect to the 8,936 class loans that were "in default"; the 722 class loans that

were "in foreclosure"; and the 41,523 class loans that carried negative escrow balances (Albers Decl. ¶ 6).

A review of the evidence in the record, however, shows that there are no triable issues of fact. Flagstar has not presented any evidence of any unreimbursed cost exacted against any particular class loan in this litigation. Instead, it presents amorphous, globalized, and conjectural evidence — and in some case, none at all — in an attempt to manufacture after-the-fact expenses where none existed prior to class certification. Thus, it has failed to carry its burden in showing any offset is merited in law or in equity, and the class is entitled to restitution and injunctive relief, as now discussed.

1. THE EVIDENCE.

Plaintiffs' expert, Arthur Olsen, is an expert in data analysis. Flagstar's expert is David M. Skanderson, Ph.D., a former head of compliance at Washington Mutual Bank F.A., and the current Vice President of an economic consulting firm. Skanderson has extensive history testifying in mortgage lending and servicing matters (Powell Decl. Exh. A).

Using the same data sets, and "implement[ing] the basic IOE calculations that are outlined in Flagstar's operating procedures," both experts calculated the same number of class loans (139,923). They also calculated the total amount of accrued and unpaid IOE for the subject loans "within a penny or two" difference, leading Expert Skanderson to testify that "[he] has no issues with the accuracy of [Olsen's] calculations mathematically" (Skanderson Dep. 19:11–18). In his

report, Expert Olsen calculated total outstanding IOE to be $8,536,758.84. Though Expert Skanderson's report does not independently state his corresponding figure, it states that the figure differs from Expert Olsen's by *just two cents* (Skanderson Report at 9 n.7). Both experts used two percent as the annual interest rate in calculating IOE. Both experts ignored all negative and zero daily escrow account balances carried by any borrower who held one; instead, they only applied a two percent interest rate to positive daily escrow account balances that all class members held throughout the class period, and aggregated those amounts in coming up with $8,536,758. For example (Olsen Report ¶ 21(c)):

> [S]uppose a loan had an escrow balance of $10,000 as of January 10, 2017. In that case, interest outstanding for that day would be $0.55, which is the daily interest rate (i.e., .02/365) multiplied by $10,000 (the daily escrow balance for that day). The process was then repeated for each day for each Class Loan.

Expert Olsen's figure, moreover, excluded loans owned by third-party investors, for which Flagstar had started paying IOE, for the appropriate and relevant time periods. For instance, with respect to loans whose mortgage servicing rights were owned by Lakeview, but for which Flagstar subserviced the loans on Lakeview's behalf, the experts ignored escrow account activity after March 2017, the date Flagstar started prospectively paying IOE for those loans. The amounts of unpaid IOE which accrued prior to that date, however, were included in the total figure. (Olsen

Report ¶ 21(d)). The experts observed this methodology for all applicable loans. The experts' reports, however, only included calculations through July 2019, not through December 31, 2019 — the date through which plaintiffs request restitution.

Along with its opposition to plaintiffs' motion for summary judgment, however, Flagstar includes the supplemental declaration of Expert Skanderson, wherein he incorporates the relevant data through December 31, 2019. Expert Skanderson revises his calculations to not only reflect IOE that *accrued* from August through December 2019, but also "updated information regarding certain MSR holder's loans for which previously unpaid IOE has now been *paid*" (Skanderson Suppl. Decl. ¶ 2) (emphasis added).

More specifically, Expert Skanderson represents that Flagstar has now paid all of the accrued IOE that was owed to class members whose mortgage servicing rights are owned by Lakeview and New Residential Mortgage. While Flagstar had begun prospectively paying IOE on the Lakeview loans as of March 2017, and on the New Residential loans as of May 2018, the amounts accrued before those periods remained unpaid and thus part of the $8,536,758 figure above. Additionally, his updated figures exclude the four class members who opted out of this class action (*id.* at ¶ 6). Making the foregoing adjustments, Expert Skanderson represents that the number of class loans is now 139,492; and the amount of accrued and unpaid IOE through December 31, 2019, is $8,101,175.65 (*id.* at ¶ 7).

In their reply brief, plaintiffs accept Flagstar's representations of amounts paid to borrowers whose mortgage servicing rights are owned by Lakeview and New Residential. Moreover, plaintiffs also supply the declaration of Expert Olsen similarly implementing the after-acquired data information, including accrued interest on positive escrow balances through December 2019 (Olsen Decl. ¶¶ 1–6). Applying the same methodology as before, he, too, provides updated figures for class membership, total amount of unpaid and accrued IOE through December 2019, and the total amount of prejudgment interest plaintiffs seek, as follows (*id.* at ¶ 5):

	As of 12/31/ 2019 Loans	As of 12/31/ 2019 IOE	As of 5/21/2020 prejud. int. at 2%	Daily prejudg- ment interest at 2%
Prior	139,923	$8,536, 758.84	$567,582. 51	$467.77
Adjusted	**139,492**	**$8,101, 175.64**	**$541,053. 11**	**$443.90**
Difference	431	$435,583 .20	$26,529 .40	$23.87

To the foregoing extent, therefore, there is no dispute of fact or difference of opinion between the parties' experts. The scope of their assignments, however, differed. Thus, this order briefly summarizes their findings and opinions as to those differing subjects. In brief, Expert Olsen was asked to calculate

prejudgment interest while Expert Skanderson was asked to list categories of expenses Flagstar could potentially offset against accrued and unpaid IOE to class members.

A. EXPERT OLSEN'S CALCULATION OF PREJUDGMENT INTEREST.

In calculating the prejudgment interest figure in the above table, Expert Olsen "distinguished between IOE accruals and the date those accruals should have been paid (or credited) to each Class Loan." More specifically, he "assumed that IOE accruals should have been paid on the first day of the following calendar year or the day after termination of the account, whichever was earlier." For instance (Olsen Report ¶ 21(e)):

> [S]uppose a Class Loan had an escrow balance through February 28, 2015, but did not contain an escrow balance after that date. In that case, IOE accruals for 2014 would have a due date of January 1, 2015, but the IOE accruals for 2015 would have a due date of March 1, 2015.

Indeed, Expert Olsen's assumptions are consistent with not just Section 2954.8(a) ("Such interest shall be credited to the borrower's account annually or upon termination of such account, whichever is earlier."), but also with Flagstar's own practice. That is, through Stephanie Ryan, Flagstar testified that for loans that Flagstar does pay IOE, Flagstar credits their accrued interest at the end of the calendar year, or upon termination of an escrow account, whichever is earlier (*see* Ryan Dep. 26:8–18).

Since any IOE that Flagstar would have credited to borrowers' escrow accounts would have also earned two percent interest, Expert Olsen used a two percent interest rate in calculating prejudgment interest. Unlike Expert Olsen, Expert Skanderson does not provide a figure for prejudgment interest. But Expert Skanderson testified that, assuming "the interest that was credited remains in the escrow account," he had "no principled objection" to a two percent interest rate for prejudgment interest used by Expert Olsen (Skanderson Dep. 23:1–26:5). Expert Skanderson agreed that had Flagstar credited class members' escrow accounts for interest that accrued at the point where they became due, that interest itself would also earned interest at two percent, assuming the credited interest would have stayed in the escrow account. He also agreed with Expert Olsen's methodology in calculating prejudgment interest inasmuch as Expert Olsen assessed prejudgment interest based on the following assumptions: (1) Flagstar would have credited accrued IOE to class members' escrow accounts at the end of the calendar year; (2) or, in the event that a class members' account was terminated prior to the end of the year, at the point of termination.

Thus, Expert Skanderson testified that, assuming two percent was indeed an accurate prejudgment interest rate, he agreed with Expert Olsen's figure for the total amount of prejudgment interest (*id*. at 28:12–29:4; 46:23–25). In short, he agreed that "2 percent represents [class members'] opportunity cost" as a matter of economics (*id*. at 23:6–14).

B. Expert Skanderson's Opinion Regarding Categories of Offsets.

In his report, Expert Skanderson opines that any restitution for unpaid IOE to class members should be offset by losses imposed on Flagstar arising from situations where class members defaulted on their mortgage loans; entered foreclosure; filed for bankruptcy; received a loan modification; struck a forbearance agreement; or carried a negative escrow balance at any point during the class period (Skanderson Report ¶¶ 33–40).

According to Mark Albers, the First Vice President of Flagstar, his analysis of the class loans in this action show that of the 139,923 total loans, 8,936 were "in default," 722 were "in foreclosure," and 41,523 had a negative escrow balance for at least one monthly period from January 2014 through December 2019 (Albers Decl. ¶ 6). Flagstar maintains that defaults and foreclosures "often" lead it to incur unreimbursed costs, including "costs related to tasks such as property inspections, retention of counsel, retention of a foreclosure trustee, as well as other hard costs related to filing fees and Broker Price Opinions" (White Decl. ¶ 5). "Flagstar calculates *an average* of $8,034.16 in unreimbursed costs per each defaulted loan where non-judicial or judicial foreclosure proceedings have been performed" (*id*. at ¶ 6) (emphasis added).

With respect to the class members whose escrow accounts carried a negative balance, Expert Skanderson opines that "the costs imposed on the servicer include the working capital cost of advancing funds on behalf of the borrower, which is a tangible

financial cost to the loan servicer" (Skanderson Report ¶ 35). With respect to class members who obtained loan modifications and/or forbearance agreements, he opines that "the servicer and investor incur the cost of reduced or deferred interest income from a loan" (*id*. at ¶ 36). With respect to foreclosures, he opines that Flagstar loses a portion of the outstanding principal balance of a loan (*id*. at ¶ 38). "Similarly, any loans that were discharged in bankruptcy would have imposed costs on Flagstar (charged-off principal, foregone interest, legal costs, and other costs), which would offset any IOE that Flagstar may have been obligated to pay the borrower to the extent that those costs were borne by Flagstar" (*id*. at ¶ 37).

In his report, Expert Skanderson states that with the exception of class loans that carried a negative escrow balance, the *number* of class loans which would fall within the other potential offsets categories he identifies, cannot be ascertained from the data Flagstar provided him. And, even if the number of loans in each of his offset categories could be identified, he opines that (*id*. at ¶ 41) (emphasis added):

> the *amount* of offset for each loan could not be identified by applying a standard data query or calculation to the data. The type of calculation required to determine offsets would differ among the categories of loans subject to offsets and, based on [his] experience in analyzing loan servicing data, such calculations generally could not be performed by applying straightforward and uniform queries to loan servicing data. In most cases, analysis of data beyond those

> contained in the escrow account histories and manual review of documents would need to be performed.

In short, even if the number of class loan in each category of offset are identified, Expert Skanderson's position is that a "loan-by-loan review of Flagstar's servicing records would be required to calculate the amount of offset for loans subject to offsets"; assuming, of course, such offsets are legally cognizable to begin with (Skanderson Report ¶ 11(e)). For example, he states that for loans that had a negative escrow balance over some period of time (*id.* at ¶ 42):

> An offset could be calculated by determining an interest rate that represents Flagstar's cost of working capital and applying that rate to the (negative) balance for periods during which a negative balance occurred. The resulting amount would be subtracted from the IOE accrued for such loans during periods for which the average daily escrow balance was positive.

To bolster this claim, Flagstar now submits the declaration of Sean Mansell, Flagstar's Director of Servicing Loans, who swears that (Mansell Decl. ¶ 5):

> For customers who accrue a negative escrow balance for any period of time, Flagstar must advance its own funds on behalf of the customer to make the customer's tax, insurance payments, or other property related payments. In doing so, Flagstar incurs direct and indirect costs associated with advancing such funds, proportionate with the funding costs for Flagstar

(i.e., the effective interest rate paid for working capital) at the time each amount was advanced, which can vary based on market fluctuations.

Both experts agree that a total of 41,523 loans within the class carried negative escrow balances on one or more days throughout the class period. Applying a two percent interest rate, Expert Olsen calculated the cost bore to Flagstar for advancing funds to these 41,523 loans to be $142,766.88 (Olsen Decl. ¶ 12).[1]

Unlike Expert Olsen, Expert Skanderson testified that he was not asked to quantify the effect of crediting Flagstar's costs associated with negative escrow balances against accrued and unpaid IOE; but that he easily could have done so if he was supplied with information pertaining to Flagstar's cost of funds. Instead, Expert Skanderson only calculated the total amount of accrued IOE ($217,000) associated with loans that carried a negative escrow balance (Skanderson Dep. 85:8–87:2; 92:10–13) (Skanderson Decl. ¶ 9).

Crucially, Expert Skanderson testified that for loans where Flagstar does pay IOE — *e.g.*, loans that Flagstar subservices for Lakeview — Flagstar does not credit itself for negative escrow balances (Skanderson Dep. 87:10–13). Indeed, he testified that "in general, in

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[1] Flagstar contends that Expert Olsen's use of a two percent interest rate in calculating $142,766.88 figure "is not grounded in any evidentiary support," and is plaintiffs' attempt to "simplify the calculation." Pointing to Expert Skanderson's report, Flagstar contends that the calculation is "more complex," requiring knowledge of numerous variables (*see* Opp. 11).

the industry," banks do not give themselves credit for negative escrow balances. "To the extent that interest is paid, it is paid when there is a positive escrow balance. And to the extent the balance is zero or negative, there is no positive or negative interest associated with that" (Skanderson Dep. 93:12–94:1–3).[2]

Moreover, throughout his testimony, Expert Skanderson makes clear that: (1) his opinions concerning purported expenses that are potentially offset-able are purely economic, not legal; and that (2) he agrees that he does not offer an opinion about the *extent* of costs associated with any of the various offset categories he elucidates in his report (Skanderson Dep. 123:20–25). His opinions about these categories of offsets are not based on any individual review of any class loan or any expenses Flagstar actually may have incurred in servicing the class loans

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[2] Plaintiffs point to Expert Skanderson's testimony for the proposition that the "industry norm" is for banks not to credit themselves for negative escrow balances. Flagstar objects, stating that they mischaracterize Expert Skanderson's testimony, and that their "argument of an 'industry norm' should be excluded as it lacks foundation, is speculative, and relies on improper expert opinion. See FRE 701-705, 900-902, 1000-1004" (Opp. 11). First off, Expert Skanderson is a banking expert with extensive experience in that field. Not only has he worked in the compliance department of a bank, but he has testified and submitted expert reports in many bank related litigations, including those concerning loan servicing. Moreover, his testimony shows that he did not speculate when he proffered this opinion. Rather, he based it, in part at least, on knowledge he acquired during the course of another litigation involving another bank. It thus strains credulity that Flagstar now objects to its own expert's testimony, contending that it lacks foundation.

herein (Skanderson Dep. 124:22–25). Indeed, in his deposition, he conceded that he did not know the parameters of class loans Flagstar has classified as "in foreclosure" or "in default," as they were provided to him in the form of tabulations (Skanderson Dep. 115:19–21). Rather, his opinions regarding potential costs imposed on Flagstar with respect to all of the categories of offsets (*e.g.*, loans modifications) are solely based on his "extensive experience in mortgage servicing" (Skanderson Dep. 126: 19–21); (*see, e.g.*, Skanderson Dep. 116:19–20) ("any default, I would argue, would impose costs on the servicer"). For illustration, some of the costs that he opines are potentially offset-able, include costs Flagstar incurred in *preparing* a loan modification agreement (Skanderson Dep. 127:11–15).

ANALYSIS

Given that liability under Section 17200's "unlawful" prong — using Section 2954.8(a) as the predicate offense — was already established in a prior order, what remains is the appropriate remedy and/or remedies. Plaintiffs and the class seek both restitution and injunctive relief.

"A UCL action is an equitable action by means of which a plaintiff may recover money or property obtained from the plaintiff or persons represented by the plaintiff through unfair or unlawful business practices." *Cortez v. Air Filtration Products Co.*, 23 Cal.4th 163, 173 (2000). Under Section 17203 of California's Business and Professions Code:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments . . . as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

A court's discretion in fashioning a remedy under Section 17203 "is very broad." *Cortez*, 23 Cal.4th at 180. In addition to injunctive relief — "the primary form of relief" available under Section 17200 — Section 17203 also provides for restitution. *See In re Tobacco II Cases*, 46 Cal.4th 298, 319 (2009).

"[W]hat would otherwise be equitable defenses may be considered by the court when the court exercises its discretion over which, if any, remedies authorized by [S]ection 17302 should be awarded." *Cortez*, 23 Cal.4th. at 179–80. Indeed, "[a] court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute." *Id*. at 180. Equitable defenses, however, "may not be asserted to wholly defeat a UCL claim since such claims arise out of unlawful conduct." *Id*. at 179.

1. RESTITUTION.

This order finds that an award of $8,101,175.64 in restitution is warranted under Section 17203 to restore the unpaid IOE that Flagstar failed to pay to class

members through its unlawful practice as stated herein. This amount is supported by substantial evidence. Moreover, Flagstar has not carried its burden in showing there is any substance to its categories of so-called offsets. Importantly, Flagstar has not shown that it levied any charges against any class members for any of the expenses that it now contends it incurred — and ought to be able to offset against restitution — at the moment in time that they purportedly occurred. Instead, its attempt is a gimmick to manufacture charges after-the-fact based on amorphous evidence, such as its aliquot share of general overhead.[3]

Aside from offering general evidence about the number of class loans that were "in foreclosure," and/or in "in default," Flagstar offers no evidence — specific or globalized — concerning the dollar amount of any expenses it claims those loans subjected it, and for which it argues it is entitled to offsets. Its only effort is a vague declaration about the average cost that foreclosures — not any associated with any particular loan in this litigation — sometimes impose on it (*see* White Decl. ¶ 6). This is in stark contrast to the $8,101,175.64, which was calculated on an account-by-account basis.

Moreover, with respect to one of the other categories of its purported offsets (*i.e.*, bankruptcies), it doesn't even provide any evidence. Lastly, with respect to class

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[3] The $8,101,175.64 figure excludes the amount of interest owed to the four class members who opted out, and all accrued amounts that Flagstar has retroactively paid to borrowers whose loans it subservices on behalf of third-party investors, such as Lakeview.

loans that carried negative escrow balances, it also fails to provide any dollar amount of any alleged cost to it. In any event, as Flagstar's own expert testified, Flagstar's own practice is to not charge its customers for any cost associated with negative escrow balances. For the following reasons, equity demands that class members be paid full restitution without any offsets thereto.

Restitution under California's Unfair Competition Law "serves two purposes — returning to the plaintiff monies in which he or she has an interest and deterring the offender from future violations." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 695 (2006) (citations omitted). These dual purposes are concurrent rather than independent. Restitution "must be of a measurable amount to restore to the plaintiff what has been acquired by violation[] of the statute[], and that measurable amount must be supported by [substantial] evidence." *Id.* at 698–70.

"The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of that person." *Cortez*, 23 Cal.4th at 178. "Instead, restitution is broad enough to allow a plaintiff to recover money or property in which he or she has a vested interest." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1149 (2003). In *Cortez*, for example, the defendant failed to pay its employees the lawful rate for overtime. The California Supreme Court determined that "earned wages that are due and payable pursuant to . . . the Labor Code are as much the property of the employee who has given his or her

labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice." 23 Cal.4th at 178. It reasoned that because "equity regards that which ought to have been done as done [citation], and thus recognizes equitable conversion" it follows that "unlawfully withheld wages are property of the employee within the contemplation of the UCL." *Ibid*. It thus concluded "that orders for payment of wages unlawfully withheld from an employee are also a restitutionary remedy authorized by [S]ection 17203." *Id*. at 177.

Similarly, here, the IOE that Flagstar unlawfully withheld from class members are also the proper subject of a restitutionary remedy under Section 17203. Class members' interest in accrued IOE became vested when the IOE would have otherwise became due: at the end of each calendar year or, for escrow accounts that closed before then, at the point of closure.

Moreover, the total amount of accrued and unpaid IOE is a "measurable amount" that is supported by "substantial evidence." *See Colgan*, 135 Cal.App.4th at 698–70. Both experts analyzed the daily escrow balances of all class members from January 2014 through December 2019. They applied a two percent annual interest rate — the minimum IOE rate required by Section 2954.8(a) — to the positive daily escrow balances of all class members. They ignored days where any class member carried either a negative escrow balance or a balance of zero. In doing so, both experts were able to calculate with mathematical precision the total amount of IOE necessary to restore borrowers to the position in which they would have been but for

Flagstar's unlawful conduct. Importantly, both experts arrived at the same figure. Thus, there is no dispute as to the total amount of IOE that Flagstar would have been required to pay class members through December 2019 had it been complying with Section 2954.8(a).

Rather, the dispute concerns whether or not that amount should be offset by Flagstar's alleged unreimbursed expenses that it claims to have incurred with respect to class loans that were "in default," "in foreclosure," went through bankruptcy, or held negative escrow balances.

Flagstar points to the 8,936 class loans that were "in default" at some point between 2014 through 2019, the 722 class loans that were "in foreclosure" during the same period, and the 41,523 class loans that had a negative escrow balance for at least one day during the same period, to argue that "there are triable issues of material fact regarding whether Flagstar is entitled to reduce or entirely offset the accrued IOE sought in restitution for these loans, and in what amount" (Opp. 10). More specifically, it contends that "the amount of IOE restitution for loans that were in default or had at least one negative escrow balance should be offset on the basis of legal, contractual, or equitable principles" because (*ibid.*) (internal citations omitted):

> Flagstar incurs unreimbursed costs as a result of the customers' default and foreclosure, including property inspections, retention of counsel, retention of a foreclosure trustee, waived fees, filing fees, and Broker Price Opinions. For loans with negative escrow balances, Flagstar incurs unreimbursed costs as

> it advances its own funds to make a customer's tax and insurance payments. According to Flagstar's expert, calculating the cost requires determining the amounts advanced, the amount of time over which the amounts were advanced, and Flagstar's funding cost (i.e., the effective interest rate paid for working capital) at the time each amount was advanced.

This order disagrees with Flagstar's contention that there are disputed issues of material fact. To the contrary, the issues it raises present questions of law and/or considerations of equity. *See Cortez*, 23 Cal.4th at 173, 180 ("A UCL action is an equitable action" and a court's discretion in fashioning a remedy is "very broad."). Balancing the equities, this order finds that Flagstar has not shown a basis for reducing the amount of restitution by its purported categories of offset. Had Flagstar adduced concrete evidence showing that it had levied specific charges against a specific class loan within the relevant class period, the undersigned would have been amenable to holding a trial and requiring Flagstar to give notice to those class members, so that they could contest those charges at trial. But what Flagstar did instead was pull a gimmick — an after-the-fact manufacturing of factual issues for trial where none existed prior to class certification. The supposed offset-able charges that Flagstar now complains of will not be allowed by way of defense because Flagstar failed to show a contractual, legal, or equitable basis for them to be offset. Had it done so, it would have produced that evidence. Indeed, it was its burden to do so. Tellingly, it failed to produce a shred of concrete evidence

showing that it perfected any such charges and/or expenses by levying them against any of the class members prior to class certification, or that any such charges remain unpaid to Flagstar. Rather, Flagstar produces amorphous evidence, stating generally, for example, that loans that go through foreclosure cost it, *on average*, approximately eight thousand dollars. And yet, as discussed in detail below, neither itself nor its expert, tethered any such purported foreclosure expenses to any of the class loans herein. In sum, there are no issues for trial because the amount and method of restitution are undisputed, and because this order rejects Flagstar's defenses. Such rejection is without prejudice to pursuing those individual claims against individual borrowers.

Furthermore, the decisions Flagstar cites to are inapposite here. The decisions it cites to stand for the proposition that an award of restitution under Section 17203 does not allow consumers to recover the full amount they paid for a product or service when such product or service had some value to consumers, notwithstanding the alleged deceptive advertising. For instance, in *Chowning v. Kohl's Dep't Stores, Inc.*, 2016 WL 1072129 (C.D. Cal. Mar. 15, 2016) (Judge Gary Klausner), the plaintiffs purchased the defendant's products because the defendant's juxtaposition of a lower "selling price" next to a significantly higher price purporting to represent the item's "original price" created the belief that they were receiving a certain discount. Judge Klausner noted that "any proposed method [of restitution] must account for the benefits or value that a plaintiff received at the time of purchase." *Id*. at 6; *see also In re POM Wonderful LLC*, 2014 WL

1225184, at *3 (C.D. Cal. Mar. 25, 2014) (Judge Dean D. Pregerson) ("Plaintiffs do not cite, nor is the court aware of, any authority for the proposition that a plaintiff seeking restitution may retain some unexpected boon, yet obtain the windfall of a full refund and profit from a restitutionary award.").

The banking decision Flagstar cites to sings the same tune. *See Corvello v. Wells Fargo Bank N.A.*, 2017 WL 3449072 (N.D. Cal. May 4, 2017) (Judge Vince Chhabria). The plaintiffs there brought a Section 17200 claim against Wells Fargo based on allegations that it misled borrowers into enrolling in trial period payment plans incorrectly believing it would lead to permanent loan modifications within a certain time. It was undisputed that the plaintiffs would have lost the right to stay in their homes if they did not make the trial period payments. Accordingly, Judge Chhabria granted the bank's motion for summary judgment because he found that the plaintiffs had "not presented evidence supporting any theory of restitution that account[ed] for this benefit." 2017 WL 3449072, at *2.

All of these decisions are distinguishable. The challenged products and practices in these mislabeling and deceptive advertising cases conferred some benefit on the plaintiffs. By contrast, here, Flagstar's unlawful conduct — failure to pay IOE in accordance with California law — conferred no benefit to any of the class members. Unlike in *Chowning*, plaintiffs here were not duped into purchasing a tangible product such that any award of restitution must account for the value of what they believed they received. In contrast to *Corvello*, moreover, the unlawful conduct here did

not confer any benefit to class members. Put differently, whether or not Flagstar paid IOE in compliance with Section 2954.8(a), it had no bearing on whether or not class members could stay in their homes.

These decisions would have had import here, if, hypothetically, Flagstar had been paying class members part of the IOE required by Section 2954.8(a) all along, say, one percent. In that event, surely, any award of restitution should have accounted for the one percent IOE — *i.e.*, the benefit — class members had received. Here, to repeat, all accrued IOE amounts that Flagstar has already paid to class members have been excluded from the total figure of restitution ($8,101,175.64). Unlike the decisions Flagstar cites, therefore, not double dipping or windfalls will result here.

To the extent Flagstar is trying to offset total restitution by administrative expenses that it *may* have incurred in connection with services and disputes unrelated to the unlawful business practice discussed herein — *e.g.*, the cost of drafting a loan modification agreement or attorney's fees associated with foreclosures — none of the decisions it cites to provide support for such a fanciful proposition. To the contrary, as plaintiffs point out, California law limits a lender's recourse to foreclosure of the secured asset. *See, e.g., Sec. Pac. Nat'l Bank v. Wozab*, 51 Cal.3d 991, 997 (1990).

Furthermore, Flagstar isn't servicing class members' loans for free. Rather, the owner of a loan's mortgage servicing rights receives income in exchange

for servicing that loan (Chang Dep. 14:3–19). It therefore strains credulity that Flagstar wants to offset the amounts it unlawfully withheld by its overhead expenses, which, presumably, already factor into its servicing fee. Notably, Flagstar's argument for offset for alleged costs it incurred with respect to escrow accounts that carried a negative balance is particularly egregious given that Flagstar's own expert testified that for loans where Flagstar does pay IOE, Flagstar does not credit itself for negative escrow balances (Skanderson Dep. 87:10–13). Thus, seeking to apply a discount based on a classification that is contrary to Flagstar's own practice offends — and, is antithetical to — any notion of equity.

Lastly, Flagstar's evidence of the various unreimbursed expenses it claims to have incurred is speculative, at best. For instance, though it puts into the record that it "often" incurs an "average" cost of approximately eight thousand dollars in connection with loans that proceed to foreclosure, it has not adduced any evidence that any of the class loans herein inflicted any such expense. As Albers testified, the 722 class loans that he identifies as having been "in foreclosure," refer not necessarily to loans associated with completed foreclosure proceedings, but to loans associated with a foreclosure "status code" (Albers Dep. 49:11–19). Loans bearing this designation can include active, suspended, on hold, and completed foreclosures (*id*. at 50:16–22). Yet, Albers' tabulation that 722 class loans bear this designation fails to identify how many fall into each bucket, let alone any alleged unreimbursed expense associated with any which one. For instance, as Albers testified, even for borrowers

that go on to cure their default and thus suspend foreclosure, the designation of "in foreclosure" still remains (*id.* at 52:2–13). In making his calculation that 722 class loans were "in foreclosure," Albers did not look at any of the individual loan files. Rather, he just added up the loans that had the "in foreclosure" designation in Flagstar's system without discriminating as to their various circumstances (*id.* at 50:9–15). Thus, as far as we know, it is entirely possible that all 722 class loans that are associated with a "status code" of "in foreclosure" later cured their default, suspended foreclosure, and Flagstar thereby bore no unreimbursed expense. Again, it was Flagstar's burden to adduce evidence on these issues. It failed.

Moreover, as plaintiffs point out, Expert Skanderson's opinion regarding the various categories of offsets he elucidated suffer from similar deficiencies. For one thing, Flagstar just provided Albers' tabulations to Expert Skanderson without explaining how each category was constructed or what each category even meant. Expert Skanderson agreed that he did not know the exact parameters of any of the categories of offset he identified in his report — except for negative escrow balances — and that they were provided to him in tabulated form. Expert Skanderson also did not examine any class-loan-specific documents. Thus, his opinions about the *fact* of expenses is not tethered to any particular class loan herein. Unsurprisingly, therefore, he offers no opinion about the *amount* of any such expenses.

In short, Flagstar has not adduced any evidence that *any* of the class loans herein subjected it to

unreimbursed expenses, assuming Flagstar claims were even legally cognizable in the first instance. The same is true for all of the purported categories of offsets. Accordingly, Flagstar has failed to carry its burden concerning its defenses of offset. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986) (on an issue where the nonmoving party will have the burden of proof at trial, the party moving for summary judgment need only point out "that there is an absence of evidence to support the nonmoving party's case.").

2. PRE-JUDGMENT INTEREST.

"Although a court may not award prejudgment interest under Civil Code section 3287, subdivision (a), to a restitutionary award under the UCL, a court nevertheless has discretion in equity to award prejudgment interest on a UCL award as a component of restitution." *Espejo v. The Copley Press, Inc.*, 13 Cal.App.5th 329, 375 (2017). "The policy underlying an award of prejudgment interest is to make the injured party whole for the accrual of wealth that could have been produced during the period of loss." *Ibid*. "[W]here, as here, an award of prejudgment interest is a matter of the trial court's equitable discretion, the requirement under Civil Code section 3287, subdivision (a), that damages be 'certain, or capable of being made certain by calculation' does not apply." *Id*. at 376.

Here, but for Flagstar's unlawful conduct, class members' escrow accounts would have been credited two percent IOE at the end of each calendar year or, in the event of termination before then, such amounts would have been disbursed to them at the point of termination. In turn, any credited IOE would have

earned two percent IOE. Importantly, Flagstar's own expert agreed that, economically speaking, a two percent prejudgment interest rate represented class members' "opportunity cost" (Skanderson Dep. 23:8–21). For disbursed IOE, class members would have been able to earn interest elsewhere. Either way, therefore, had class members been in possession of the wrongfully withheld IOE, they would have been able to earn interest on those amounts. This order thus finds that awarding plaintiffs two percent prejudgment interest is a necessary component of restitution in order to make class members whole.

As already discussed, Expert Olsen calculated total accrued IOE to class members with near mathematical certainty. Moreover, in calculating prejudgment interest to the class, he made assumptions — *e.g.*, crediting class members' escrow accounts for accrued IOE at the end of each calendar year — that were consonant with Flagstar's own practices. Thus, his calculation of prejudgment interest bears a reasonable relationship to making the class members "whole for the accrual of wealth that could have been produced during the period of loss." *Espejo*, 13 Cal.App.5th at 375.

Accordingly, this order hereby awards class members the requested two percent of prejudgment interest as a component of their award of restitution. According to Expert Olsen, this amount was $541,053.11 as of the May 21, 2020; with $443.90 accruing every day since (Olsen Decl. ¶ 5).

3. INJUNCTIVE RELIEF.

In addition to restitution, plaintiffs also seek a permanent injunction. *See In re Tobacco II Cases*, 46 Cal.4th 298, 319 (2009) ("[T]he primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction."). Again, Flagstar does not currently pay IOE to class members whose mortgage servicing rights Flagstar owns and whose loans it currently services. This is an undisputed fact. To avoid repetitive lawsuits, therefore, the Bravos, on behalf of themselves and a subset of similarly situated class members, seek a permanent injunction ordering Flagstar to prospectively comply with Section 2954.8(a) from January 1, 2020, onward — namely, to pay them two percent interest on funds held in their escrow accounts. Plaintiffs seek such relief not just with respect to the described subclass, but with respect "to *all* [of Flagstar's] California customers" (Dkt. No. 180 at 12) (emphasis in original).

Flagstar mounts both procedural and substantive challenges to the Bravos' request for injunctive relief. To the following extent and for the following reasons, the request for injunctive relief is **GRANTED**. Such relief is limited to the subclass certified herein.

A. PROCEDURAL ISSUES.

As an initial matter, Flagstar lodges procedural attacks to oppose plaintiffs' request for injunctive relief. It argues that Kivett is the only named plaintiff and "the sole class representative" in this action, and injunctive relief is thus improper because Kivett — a *former* customer whose loan Flagstar no longer services

— does not have standing to seek injunctive relief on behalf of class members' whose loans Flagstar *currently* services but for which it does not pay IOE. Put differently, it argues that the Bravos — *current* Flagstar customers — are not named plaintiffs and thus cannot serve as co-class representatives for a subclass of *current* Flagstar customers. The crux of Flagstar's argument is that once Kivett was granted leave to file his second amended complaint to add the Bravos as named plaintiffs, Kivett failed to formally file the second amended complaint as a standalone document on the docket. In its view, therefore, the first amended complaint is still the operative complaint. Flagstar also argues that Kivett's failure to formally file the second amended complaint deprived it of procedural safeguards afforded it by the Federal Rules of Civil Procedure, such as asserting affirmative defenses.

This order disagrees and finds that the second amended complaint is the operative complaint. First off, Kivett had attached the second amended complaint to the declaration of his attorney as part of his motion for leave to amend (Dkt. No. 83-2). The second amended complaint differed from the first amended complaint only insofar as it added the Bravos as named plaintiffs. It remained similar in all other material respects. Although Kivett should have formally filed it again on the docket as a standalone document, that failure is not fatal here. Flagstar had access and notice of the contents of the second amended complaint. And, significantly, Flagstar subsequently filed an answer to the second amended complaint, asserting all its defenses therein (Dkt. No. 178). At bottom, the parties

have acted for all intents and purposes as though the Bravos are named plaintiffs, and Flagstar's cries of prejudice are insincere.

Moreover, context and chronology are important here. This order thus finds it helpful to place events in context before proceeding further. Importantly, the class certification order granted Kivett's request to file his second amended complaint in express contemplation of ensuring there would be co-class representatives whose loan Flagstar currently services such that standing to pursue injunctive relief wouldn't be an issue (*see* Dkt. No. 120 at 4, 12–13); (*see also id.* at 13) ("Plaintiff's motion for new plaintiffs to intervene and for leave to amend to add new class representatives is provisionally **GRANTED**.").

That order gave Flagstar until January 2, 2020, to show cause why the Bravos should not be authorized to co-represent the class; and required the facilitation of discovery from the Bravos to Flagstar. Specifically, the Bravos were required to promptly turn over their records to Flagstar and sit for depositions before the due date for Flagstar to show cause. The Bravos obliged.

Yet, Flagstar did not show cause by said deadline. Instead, in the parties' joint stipulation regarding class notice that was filed on January 2, 2020, it opted for a footnote therein, purporting to reserve its ability to do so "in the future, including at trial" (Dkt. No. 164 at 1 n.1). Simultaneously, plaintiffs again announced their intention of pursuing injunctive relief (*see id.* at 3 n.2) ("Plaintiffs will seek injunctive relief covering the period from January 1, 2020 forward."). Meanwhile, the

December 5, 2019, deadline to file dispositive motion had come to pass.

Accordingly, on March 13, 2020, plaintiffs filed a proposed order, unaccompanied by a motion, requesting the certification of a subclass "consisting of all members of the certified [c]lass who (a) did not opt out and (b) are current customers of Flagstar" pursuant to Rule 23(b)(2) for the purpose of seeking injunctive relief (Dkt. No. 155).

Flagstar objected. It filed an administrative motion to strike plaintiffs' proposed order for an injunction subclass on the ground that the class certification order specifically confined its holding to a certification under Rule 23(b)(3) (Dkt. No. 156) (citing Dkt. No. 120 at 13) ("class is certified as to plaintiff Kivett's Section 17200 claim, except for prospective injunctive relief.").

In response to this dispute along with plaintiffs' representation that this action could be decided if given further opportunity to move for summary judgment, an order dated March 23, 2020, invited each party to file a motion for summary judgment "addressing both damages and injunctive relief. The parties shall include any briefing they deem necessary in light of Rule 23(b)(2)" (Dkt. No. 171). Thus, the parties dispute about a Rule 23(b)(2) subclass has cascaded into this current motion, as now discussed.

(i) Subclass of Current Flagstar Customers Under Rule 23(b)(3).

"An order that grants or denies class certification may be altered or amended before final judgment." Rule 23(c)(1)(C). Accordingly, this order hereby certifies

a Rule 23(b)(2) subclass of class members whose loans Flagstar currently services, and appoints Bernard and Lisa Bravo as subclass representatives, in order to seek injunctive relief on behalf of the subclass.

(a) Rule 23(a) Requirements are met.

In previously certifying a class of both former and current Flagstar customers under Rule 23(b)(3) based on the same claim, a prior order already found that all of the requirements of Rule 23(a) were met (*see* Dkt. No. 120). With the exceptions noted below, the same rationales apply here and need not be discussed in detail herein again.

Where this subclass varies is as to numerosity, typicality, and adequacy of representation. The main class comprises of both former and current Flagstar customers. According to expert Olsen, as of December 31, 2019, the existent certified class includes 65,477 current Flagstar customers, 14,907 of whom Flagstar still does not pay any IOE to (Olsen Decl. ¶ 10). Numerosity is thus satisfied. Moreover, Bernard and Lisa Bravo's claims — harm caused by Flagstar's ongoing violations of Section 2954.8(a) — are typical of other class members whose loans Flagstar currently services but does not pay IOE to.

Now, as to the adequacy of the Bravos as subclass representatives. First off, despite the facilitation of discovery from the Bravos to Flagstar — including depositions — and ample opportunity to show cause why the Bravos should not be authorized to co-represent the class, Flagstar failed to do so by the

required deadline. Nonetheless, this order still considers Flagstar's current arguments.

Flagstar contends that the Bravos are not adequate representatives to seek injunctive relief on behalf of the subclass because they lack standing. It points to the fact that their escrow account carried a negative balance of $239 for thirty days in 2018 (*see* Albers Decl. ¶ 7). Flagstar thus claims that it is entitled to "offset" the unspecified alleged cost of advancing that amount to the Bravos against any amount of accrued IOE owed to them, which it argues "may" preclude the Bravos from having suffered any injury in fact (Opp. 21).

This order disagrees on various grounds. *First*, as discussed earlier in this order, Flagstar has not shown that it has a cognizable defense of offset based on negative escrow balances. But, even if it did, simple math tells another story. Namely, it is undisputed that at two percent interest, the funds held in the Bravos' escrow account accrued $39.57 in IOE from origination through December 31, 2019; and that Flagstar has not paid this amount. Hypothetically then, even giving Flagstar the benefit of a glaring fifty percent interest rate for its cost of working capital in advancing the $239 to the Bravos for thirty days — equaling $9.82 — and offsetting it against the amount owed to the Bravos, $29.75 would still remain. Tellingly, Flagstar avoids this math. At bottom, the Bravos' injury — a sum certain — is "concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

Second, it is undisputed that Flagstar does not pay any IOE on class loans for which Flagstar owns the mortgage servicing rights (Ryan Dep. 34:13–19;

45:14–16) (Stip. Facts ¶ 6); nor is it disputed that Flagstar owns the Bravos' mortgage servicing rights and that it currently services their loan. Thus, Flagstar remains in continuing violation of Section 2954.8(a), causing ongoing injuries to the Bravos, as it is not paying them the two percent interest on their escrow funds. Importantly, then, the Bravos injuries are continuing and imminent, traceable to Flagstar's ongoing violation of Section 2954.8(a), and an injunction will more than likely redress that harm. *See Lujan*, 504 U.S. at 561. Irrespective of the amounts owed to them in restitution for accrued IOE arising out of Flagstar's past violations, therefore, the Bravos have standing to seek injunctive relief for Flagstar's present and future violations of Section 2954.8(a). Accordingly, the Bravos have standing and are adequate subclass representatives.

Lastly, Flagstar's challenges to the sufficiency and admissibility of the Bravos' declaration are red herrings (Opp. 22–23) (citing Bravos Decl. ¶ 4) ("The declaration is riddled with vague and speculative representations, none of which actually show that the Bravos have actually been injured by Flagstar's challenged conduct"). The evidence adduced by Flagstar itself belies its assertion and demonstrate that the Bravos have standing. For example, it submits the declaration of Mansell who swears that: (1) Flagstar owns the mortgaging servicing rights to the Bravos' loan; (2) Flagstar began servicing their loan beginning in February 2018 through the present; (3) Flagstar created and maintains an escrow account pursuant to their deed of trust; (4) "[a]t 2% interest for funds held in their escrow account, $39.57 would have accrued on

the Bravos loan from origination through December 31, 2019" (Mansell Decl. ¶¶ 6–10).

(b) The Condition of Rule 23(b)(2) is also met.

The condition of Rule 23(b)(2) itself is also met. Because Flagstar continues not to pay the two percent interest required by Section 2954.8(a) to a subclass of class members — such as the Bravos — whose loans servicing rights Flagstar owns and currently services, Flagstar "has acted or refused to act on grounds that apply generally to the class, so that the final injunctive relief . . . is appropriate respecting the [sub]class as a whole." Rule 23(b)(2).

Furthermore, the parties had already stipulated that if a subclass is certified under Rule 23(b)(2), another round of notice would not be necessary (Dkt. No. 144). Regardless, notice to a class certified under Rule 23(b)(2) is discretionary. *See* Rule 23(c)(2)(A).

In order to obtain injunctive relief, therefore, a subclass of the existent class that are current Flagstar customers is hereby **CERTIFIED** pursuant to Rule 23(b)(2). Additionally, the Bravos are hereby **APPOINTED** subclass representatives.

(ii) Subclass members' standing is irrelevant to injunctive relief.

Next, Flagstar makes multiple arguments, the thrust of which is that all subclass members must have standing in order for injunctive relief to issue. Not so. To the contrary, our court of appeals has held that in seeking injunctive relief, as opposed to individual

monetary damages, only the class representative need have standing. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020) (citing *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc). Similarly, "actions for relief" under Section 17200 may be brought by "a person who has suffered injury in fact and has lost money or property as a result of their unfair competition." Bus. & Prof. Code § 17204. In representative actions, Section 17204 is satisfied as long as the representative plaintiff meets the standing requirements. *In re Tobacco II Cases*, 46 Cal.4th at 315–16.

For reasons already discussed, the Bravos, the subclass representatives, have standing. They can thus pursue injunctive relief on behalf of the class.

B. FLAGSTAR'S SUBSTANTIVE OBJECTIONS TO INJUNCTIVE RELIEF.

The Bravos and the subclass of current Flagstar customers seek a permanent injunction enjoining Flagstar from the unlawful business practice stated herein. This order finds that such relief is appropriate under Section 17203 of the California Business and Professions Code, and necessary to prevent further harm to current Flagstar customers. The Effective Date shall be January 1, 2020. The following subclass-wide relief is therefore ordered:

1. Flagstar shall credit subclass members' escrow accounts for any IOE that may have accrued after January 1, 2020. Consistent with its current practices and with Section 2954.8(a) itself, Flagstar shall do so at the

end of each calendar year for escrow accounts that remain active. For example, Flagstar shall credit the escrow accounts of subclass members for any IOE that has already accrued and will accrue in 2020 on January 1, 2021. That process shall continue each year thereafter.

2. For class members whose loans (a) Flagstar serviced in 2020; (b) did not pay IOE on; (c) whose escrow accounts were subsequently closed after January 1, 2020, but before the issuance of this order, Flagstar shall retroactively pay those class members their accrued IOE, if at all, for the relevant time period. Flagstar shall do so by January 29, 2021.

3. Similarly, going forward, subclass members whose loans Flagstar will stop servicing for whatever reason before the end of a calendar year, shall be paid their accrued IOE, if at all, at the point where Flagstar closes their escrow accounts.

4. Consistent with Section 2954.8(a), the amount of IOE Flagstar pays shall be at least two percent.

CONCLUSION

To the foregoing extent, plaintiffs' motion for summary judgment is **GRANTED**. Plaintiffs' are **AWARDED** $8,101,175.64 in restitution for accrued and unpaid IOE to the class through December 31, 2019, as well as prejudgment interest of two percent thereon.

Plaintiffs should calculate the account-by-account allotment to each class member — with IOE and prejudgment interest stated separately — and file a form of judgment with class members' names that gives exact recovery. The injunction herein is limited to the subclass.

IT IS SO ORDERED.

Dated: December 10, 2020.

/s/ William Alsup
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

No. 3:18-CV-05131-WHA

[Filed: March 7, 2021]

WILLIAM KIVETT and BERNARD and LISA BRAVO, individually, and on behalf of others similarly situated,	)
Plaintiffs,	)
vs.	)
FLAGSTAR BANK, FSB, a federal savings bank, and DOES 1-100, inclusive,	)
Defendant.	)

JUDGMENT

Honorable Judge William Alsup

Judgment in favor of the Class and Subclass and against Defendant Flagstar Bank, FSB is hereby entered in the total amount of $9,262,769.24. The individual Class and Subclass members' names and

exact recoveries through December 31, 2020 are set forth in Exhibit A hereto.

Dated: March 17, 2021

/s/ William Alsup

William Alsup

United States District Court Judge

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 21-15667

D.C. No. 3:18-cv-05131-WHA
Northern District of California, San Francisco

[Filed: July 14, 2022]

WILLIAM KIVETT; et al.,

Plaintiffs-Appellees,

v.

FLAGSTAR BANK, FSB,

Defendant-Appellant.

ORDER

Before: BYBEE and R. NELSON, Circuit Judges, and BOLTON,[*] District Judge.

Judge R. Nelson voted to deny the petition for rehearing en banc, and Judge Bybee and Judge Bolton

[*] The Honorable Susan R. Bolton, United States District Judge for the District of Arizona, sitting by designation.

have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is **DENIED**.

APPENDIX G

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-56755

D.C. No. 2:14-cv-01855-GHK-AJW

[Filed: March 2, 2018]

DONALD M. LUSNAK, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,
Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted November 7, 2016
Pasadena, California

Filed March 2, 2018

Before: Marsha S. Berzon, Morgan Christen, and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Nguyen

SUMMARY[*]

Preemption / National Bank Act

The panel reversed the district court's dismissal of a putative class action; held that that the National Banking Act did not preempt California's state escrow interest law, Cal. Civil Code § 2954.8(a); and remanded so that the plaintiff could proceed with his California Unfair Competition Law ("UCL") and breach of contract claims against Bank of America.

Plaintiff filed his lawsuit on behalf of himself and a proposed class of similarly situated Bank of America customers, alleging that the Bank violated both California state law and federal law by failing to pay interest on his escrow account funds.

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act. Titles X and XIV of Dodd-Frank aim to prevent, and mitigate the effects of, another mortgage crisis.

The panel held that although Dodd-Frank significantly altered the regulatory framework governing financial institutions, with respect to National Bank Act preemption, it merely codified the

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[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

existing standard established in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). Applying that standard, the panel held that the National Bank Act did not preempt Cal. Civil Code § 2954.8(a) because it did not prevent or significantly interfere with Bank of America's exercise of its powers.

Turning to plaintiff's claims for relief, the panel held that plaintiff may proceed with his California UCL and breach of contract claims against Bank of America. The panel held that plaintiff could not rely on 15 U.S.C. § 1639d(g)(3) in prosecuting his UCL claim where plaintiff's escrow account was established prior to the effective date of the section, but this did not preclude him from obtaining relief under the theory that the Bank violated the UCL by failing to comply with Cal. Civil Code § 2954.8(a).

COUNSEL

Roger N. Heller (argued), Jordan Elias, and Michael W. Sobol, Lieff Cabraser Heimann & Bernstein LLP, San Francisco; Jae K. Kim and Richard D. McCune, Redlands, California; for Plaintiff-Appellant.

Mark William Mosier (argued), Andrew Soukup, and Keith A. Noreika, Covington & Burling LLP, Washington, D.C.; Peter J. Kennedy and Marc A. Lackner, Reed Smith LLP, Los Angeles, California; for Defendant-Appellee.

OPINION

NGUYEN, Circuit Judge:

Congress significantly altered the regulation of financial institutions with the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). This sweeping piece of legislation was a response to the worst financial crisis since the Great Depression, in which millions of Americans lost their homes. This appeal requires us to determine whether in light of Dodd-Frank, the National Bank Act ("NBA") preempts California's state escrow interest law, California Civil Code § 2954.8(a).

California's escrow interest law, enacted in 1976, requires financial institutions to pay borrowers at least two percent annual interest on the funds held in the borrowers' escrow accounts. This type of account is often set up in conjunction with a mortgage, either as a condition set by the lender or at the request of the borrower. Its purpose is to ensure payment of obligations such as property taxes and insurance. These accounts often carry a significant positive balance.

Plaintiff Donald Lusnak, on behalf of a putative class, filed suit against Bank of America, which does not pay borrowers any interest on the positive balance in their accounts. The district court dismissed the suit on the ground that the NBA preempted California Civil Code § 2954.8(a).

We reverse. Although Dodd-Frank significantly altered the regulatory framework governing financial institutions, with respect to NBA preemption, it merely

codified the existing standard established in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). Applying that standard here, we hold that the NBA does not preempt California Civil Code § 2954.8(a), and Lusnak may proceed with his California Unfair Competition Law ("UCL") and breach of contract claims against Bank of America.

I. Background

A. The National Bank Act

"In 1864, Congress enacted the NBA, establishing the system of national banking still in place today." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10 (2007) (citations omitted). The NBA provides for the formation of national banks and grants them several enumerated powers as well as "'all such incidental powers as shall be necessary to carry on the business of banking.'" *Id.* at 11 (quoting 12 U.S.C. § 24(Seventh)). Congress established the Office of the Comptroller of the Currency ("OCC") to charter, regulate, and supervise these national banks. National Bank Act, 38 Cong. Ch. 106, § 1, 13 Stat. 99, 99–100 (1864)[1]; *About the OCC*, Office of the Comptroller of the Currency, https://www.occ.treas.gov/about/what-we-do/mission/index-about.html (last visited Jan. 25, 2018) ("The OCC charters, regulates, and supervises all national banks . . . .").

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[1] The Act was renamed "the national-bank act" in 1874. An Act Fixing the Amount of United States Notes, 43d Cong. Ch. 343, § 1, 18 Stat. 123, 123 (1874).

The NBA also ushered in a "dual banking system," wherein banks could be chartered either by the OCC or by a State authority and be subject to different legal requirements and oversight from different regulatory bodies. *See First Nat'l Bank of Fairbanks v. Camp*, 465 F.2d 586, 592 (D.C. Cir. 1972); Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1 (1977). Since the NBA's enactment, the Supreme Court has often ruled on the scope of State authority to regulate national banks. *See Watters*, 550 U.S. at 11–13. Congress has also enacted legislation "[t]o prevent inconsistent or intrusive state regulation from impairing the national system." *See id.* at 11.

B. Dodd-Frank

In 2010, Congress enacted Dodd-Frank in response to a "financial crisis that nearly crippled the U.S. economy."[2] S. Rep. No. 111-176, at 2 (2010); *see also id.* at 15 ("It has become clear that a major cause of the most calamitous worldwide recession since the Great Depression was the simple failure of federal regulators to stop abusive lending, particularly unsustainable home mortgage lending." (quoting *The Creation of a Consumer Financial Protection Agency to Be the Cornerstone of America's New Economic Foundation: Hearing Before S. Comm. On Banking, Hous., and Urban Affairs*, 111th Cong. 82 (2009) (Statement of

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[2] The crisis resulted in 9.3 million lost homes, 8.8 million lost jobs, and $19.2 trillion in lost household wealth. *See* U.S. Dep't of the Treasury, The Financial Crisis Response in Charts 3 (2012); Laura Kusisto, *Many Who Lost Homes to Foreclosure in Last Decade Won't Return*, Wall St. J., Apr. 20, 2015, at A2.

Travis Plunkett, Legislative Director, Consumer Federation of America))). Dodd-Frank brought about a "sea change" in the law, affecting nearly every corner of the nation's financial markets. *See, e.g.*, *Loan Syndications & Trading Ass'n v. S.E.C.*, 818 F.3d 716, 718 (D.C. Cir. 2016); Damian Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, Wall St. J., July 16, 2010, at A1 ("Congress approved a rewrite of rules touching every corner of finance . . . ."). One of Congress's main goals in this sweeping legislation was to prevent another mortgage crisis, which resulted in "unprecedented levels of defaults and home foreclosures." *See, e.g.*, H.R. Rep. No. 111-94, at 48 (2009).

Titles X and XIV of Dodd-Frank, at issue in this case, aim to prevent, and mitigate the effects of, another mortgage crisis. In a section of Title X called "Preservation of State Law," Congress addressed the framework of NBA preemption determinations. These provisions were designed to address "an environment where abusive mortgage lending could flourish without State controls." S. Rep. No. 111-176, at 17. Congress aimed to undo broad preemption determinations, which it believed planted the seeds "for long-term trouble in the national banking system." *Id.* at 17. In a section of Title XIV called "Escrow and Impound Accounts Relating to Certain Consumer Credit Transactions," Congress established a series of measures to help borrowers understand their mortgage obligations. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1461, 124 Stat. 1376, 2178–81 (2010) (codified at 15 U.S.C. § 1639d). These provisions were designed to correct abusive and

deceptive lending practices that contributed to the mortgage crisis, specifically with regard to the administration of escrow accounts for property taxes and insurance. H.R. Rep. No. 111-94, at 53–56.

C. Factual Background

In July 2008, Lusnak purchased a home in Palmdale, California with a mortgage from Countrywide Financial. Soon thereafter, Bank of America purchased Countrywide Financial and assumed control over Lusnak's mortgage. In March 2009, Lusnak refinanced his mortgage, and in January 2011, he and Bank of America agreed to modify certain terms. The 2009 agreement and 2011 modification contain the relevant terms governing Lusnak's mortgage. The agreements provide that Lusnak's mortgage "shall be governed by federal law and the law of the jurisdiction in which the Property is located." The parties agree that the terms of Lusnak's mortgage require Bank of America to pay interest on escrow funds if required by federal law or state law that is not preempted.

As a condition for obtaining a mortgage, Lusnak was required to open a mortgage escrow account into which he pays $250 per month. Lusnak alleges that Bank of America is able to enrich itself by earning returns on funds in his account. Bank of America acknowledges that it does not comply with state escrow interest laws and that Wells Fargo—its chief competitor and the largest mortgage banker in America—does. But it contends that no federal or "applicable" state law requires it to pay interest on Lusnak's escrow account funds.

D. Procedural History

On March 12, 2014, Lusnak filed this lawsuit on behalf of himself and a proposed class of similarly situated Bank of America customers. Pursuant to the "unlawful" prong of California's UCL, Lusnak alleged that Bank of America violated both state law, Cal. Civ. Code § 2954.8(a), and federal law, 15 U.S.C. § 1639d(g)(3), by failing to pay interest on his escrow account funds. Lusnak also brings a breach of contract claim, alleging that Bank of America's failure to pay interest violated his mortgage agreement. Bank of America promptly moved to dismiss on the ground that California Civil Code § 2954.8(a) is preempted by the NBA.

The district court granted the motion to dismiss. *Lusnak v. Bank of Am., N.A.*, No. CV 14-1855-GHK (AJWx), 2014 WL 6779131 (C.D. Cal. Oct. 29, 2014). It first acknowledged that Dodd-Frank clarified and amended the NBA preemption framework. *Id.* at *3–5. The district court then concluded that California's escrow interest law "prevents or significantly interferes with" banking powers and therefore is preempted by the NBA. *Id.* at *7–8. In so concluding, the district court determined that section 1639d(g)(3) of Dodd-Frank did not impact the preemption analysis. *Id.* at *8–9. This appeal followed.

II. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1291. This court reviews de novo a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Aguayo v. U.S. Bank*, 653 F.3d 912,

917 (9th Cir. 2011). "Questions of statutory interpretation are reviewed de novo . . . as are questions of preemption." *Lopez v. Wash. Mut. Bank*, 302 F.3d 900, 903 (9th Cir. 2002) (citations omitted).

III. Discussion

The central question here is whether the NBA preempts California Civil Code § 2954.8(a). Section 2954.8(a) requires "[e]very financial institution" to pay "at least 2 percent simple interest per annum" on escrow account funds.[3] The portion of Dodd-Frank to which the parties draw this court's attention, section 1639d(g)(3), which amends the Truth in Lending Act ("TILA"), states:

> (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

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[3] In full, California Civil Code § 2954.8(a) states:

> 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.

> the manner as prescribed by that applicable State or Federal law.

15 U.S.C. § 1639d(g)(3). According to Lusnak, this section's plain language—requiring creditors to pay interest on escrow fund accounts like his if "prescribed by applicable" state law—made clear that Congress perceived no conflict between state laws like California Civil Code § 2954.8(a) and the powers of national banks. Therefore, Congress clearly did not intend for these state laws to be preempted by the NBA. Bank of America counters that such state laws are preempted because they prevent or significantly interfere with the exercise of its banking powers, and a preempted law cannot be an "applicable" law under section 1639d(g)(3). We begin by examining the relevant preemption framework.

A. Preemption Framework

1. *Guiding Principles of Preemption*

Our analysis is governed by "the two cornerstones of . . . preemption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). "[W]hen Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Second, we start with the assumption that the State's historic police powers are not preempted "unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (quoting *Medtronic*, 518 U.S. at 485).

In the context of the NBA, Dodd-Frank provides that state laws are preempted if they "prevent[] or significantly interfere[] with the exercise by the national bank of its powers." 12 U.S.C. § 25b(b)(1)(B). Applying this standard, there is no presumption against preemption. *See Bank of Am. v. City & Cty. of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002). This does not, however, absolve a national bank of the burden of proving its preemption defense. *See Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014) ("Defendants . . . bear the burden of proof in establishing the affirmative defense of preemption."). Where, as here, we are confronted with state consumer protection laws, "a field traditionally regulated by the states, compelling evidence of an intention to preempt is required." *Aguayo*, 653 F.3d at 917 (quoting *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41–42 (2d Cir. 1990)). Accordingly, because this case involves state regulation of consumer credit, Bank of America must affirmatively demonstrate that Congress intended to preclude states from enforcing their escrow interest laws.

2. *Dodd-Frank's Amendments to the NBA Preemption Framework*

Dodd-Frank addressed the preemptive effect of the NBA in several ways. First, it emphasized that the legal standard for preemption set forth in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), applies to questions of whether state consumer financial laws are preempted by the NBA. 12 U.S.C. § 25b(b)(1)(B). Second, it required the OCC to follow specific procedures in making any preemption

determination. *See id.* §§ 25b(b)(1)(B) (requiring the OCC to make any preemption determination on a "case-by-case basis"); 25b(b)(3)(B) (requiring the OCC to consult the Bureau of Consumer Financial Protection when making a preemption determination). And third, it clarified that the OCC's preemption determinations are entitled only to *Skidmore* deference. 12 U.S.C. § 25b(b)(5)(A); *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (explaining that an agency's views are "entitled to respect" only to the extent that they have the "power to persuade"). Of these, only the second amendment was an actual change in the law. The first and third amendments merely codified existing law as set forth by the Supreme Court.

Before Dodd-Frank, the Supreme Court held in *Barnett Bank* that states are not "deprive[d] . . . of the power to regulate national banks, where . . . doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers." 517 U.S. at 33 (emphasis added). This is because "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.*

Following *Barnett Bank*, the OCC issued in 2004 its interpretation of the NBA preemption standard: "Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks." 12 C.F.R. § 34.4(a) (effective Jan. 13, 2004). The OCC framed its interpretation as merely reflecting

Barnett Bank and earlier obstacle preemption case law. *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004) ("The OCC intends this phrase as the distillation of the various preemption constructs articulated by the Supreme Court, as recognized in Hines and Barnett, and not as a replacement construct that is in any way inconsistent with those standards."). But its formulation raised concern and confusion over the scope of NBA preemption.[4]

We never addressed whether the OCC's interpretation was inconsistent with *Barnett Bank*, or whether the regulation was owed deference while it was in effect. The Supreme Court, however, has indicated that regulations of this kind should receive, at most, *Skidmore* deference—and even then, only as to a conflict analysis, and not as to the legal conclusion on

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[4] The OCC's preemption rule reads more broadly than *Barnett Bank*'s "prevent or significantly interfere" standard in two respects. First, the OCC omitted the intensifier "significantly" and used the terms "impair" and "condition" rather than "interfere." Second, it insisted that banks be able to "fully" exercise their NBA powers. *See* Staff of H. Comm. on Fin. Servs., 108th Cong., Views and Estimates of the Committee on Financial Services on Matters to be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005 15–16 (Comm. Print 2004) ("[The OCC's 2004] rules may represent an unprecedented expansion of Federal preemption authority . . . ."); Jared Elosta, *Dynamic Federalism and Consumer Financial Protection: How the Dodd-Frank Act Changes the Preemption Debate*, 89 N.C. L. Rev. 1273, 1280 (2011) ("[T]here is reason to believe that the OCC went beyond clarifying Barnett Bank and in fact made it much easier for the OCC to preempt state laws than the Barnett Bank standard would allow.").

preemption. In *Wyeth v. Levine*, the Supreme Court noted that when Congress has not authorized an agency to preempt state law directly, the Court "ha[s] not deferred to an agency's *conclusion* that state law is pre-empted." 555 U.S. at 576. Rather, it "ha[s] attended to an agency's explanation of how state law affects the regulatory scheme" based on the agency's "unique understanding of the statutes [it] administer[s] and [its] attendant ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 576–77 (citations omitted). And the weight to be accorded an agency's explanation of a state law's impact on a federal scheme "depends on its thoroughness, consistency, and persuasiveness." *Id.* at 577; *see Skidmore*, 323 U.S. at 140.

We conclude that under *Skidmore*, the OCC's regulation would have been entitled to little, if any, deference in light of *Barnett Bank*, even before the enactment of Dodd-Frank. This regulation was the OCC's articulation of its legal analysis; the OCC simply purported to adopt the Supreme Court's articulation of the applicable preemption standards in prior cases, but did so inaccurately. *See* 69 Fed Reg. at 1910 ("We have adopted in this final rule a statement of preemption principles that is consistent with the various formulations noted [in Supreme Court precedent] . . . ; that is, that state laws do not apply to national banks if they impermissibly contain a bank's exercise of a federally authorized power."). The OCC did not conduct its own review of specific potential conflicts on the ground. *See id.* It follows that the OCC's 2004

preemption regulation had no effect on the preemption standard prior to Dodd-Frank, which was governed by *Barnett Bank*.

In Dodd-Frank, Congress underscored that *Barnett Bank* continues to provide the preemption standard; that is, state consumer financial law is preempted *only if* it "prevents or significantly interferes with the exercise by the national bank of its powers," 12 U.S.C. § 25b(b)(1)(B). Congress also made clear that only *Skidmore* deference applies to preemption determinations made by the OCC.[5] *See id.* § 25b(b)(5)(A). The OCC has recognized as much. *See, e.g.*, 76 Fed. Reg. at 43557 (conceding that section 25b(b)(1)(B) "may have been intended to change the OCC's approach by shifting the basis of preemption back to the [*Barnett Bank*] decision itself"). Therefore, to the extent that the OCC has largely reaffirmed its

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[5] That these provisions were among those that had a future effective date, *see* 124 Stat. at 2018, makes no difference to our analysis. If we were to apply the "previous" NBA preemption standard and level of deference to OCC preemption determinations, we would apply, as explained above, the *Barnett Bank* standard and *Skidmore* deference required by the Dodd-Frank amendments.

Of course, a statute should be "so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). But no such superfluity exists here where the effective date provision applies to the whole subtitle, which imposes other requirements upon the OCC, and not just the provisions clarifying the preemption and agency deference standards. 124 Stat. at 2018. In fact, the OCC appears to have interpreted the effective date in just such a manner. *See* 76 Fed. Reg. at 43557.

previous preemption conclusions without further analysis under the *Barnett Bank* standard, *see* 76 Fed. Reg. at 43556, we give it no greater deference than before Dodd-Frank's enactment, as the standard applied at that time did not conform to *Barnett Bank*. That is, the OCC's conclusions are entitled to little, if any, deference.

The one substantive change in the law that Dodd-Frank enacted was to require the OCC to follow certain procedures in making preemption determinations. Dodd-Frank mandates that all of the OCC's future preemption determinations be made "on a case-by-case basis, in accordance with applicable law." 12 U.S.C. § 25b(b)(1)(B). Under the "case-by-case basis" requirement, the OCC must individually evaluate state consumer laws *and* consult with the Bureau of Consumer Financial Protection before making any preemption determinations. 12 U.S.C. § 25b(b)(3). In addition, the OCC may not deem preempted a provision of a state consumer financial law "unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with [*Barnett Bank*]." 12 U.S.C. § 25b(c). Finally, the OCC must review its preemption determinations at least once every five years. 12 U.S.C. § 25b(d). These changes have no bearing here where the preemption determination is made by this court and not the OCC.

We now turn to the question of whether the NBA preempts California's escrow interest law.

B. The NBA Does Not Preempt California's Escrow Interest Law

Under both *Barnett Bank* and Dodd-Frank, we must determine whether California Civil Code § 2954.8(a) "prevents or significantly interferes" with Bank of America's exercise of its national bank powers.[6] As Congress provided in Dodd-Frank, the operative question is whether section 2954.8(a) *prevents* Bank of America from exercising its national bank powers or *significantly interferes* with Bank of America's ability to do so. *See* 12 U.S.C. § 25b(b)(1)(B). Minor interference with federal objectives is not enough. *Watters*, 550 U.S. at 11 ("[F]ederal control shields national banking from *unduly* burdensome and duplicative state regulation." (emphasis added)); *id.* at 12 ("[W]hen state prescriptions *significantly* impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way." (emphasis added)).

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[6] Ordinarily, affirmative defenses such as preemption may not be raised on a motion to dismiss except when the defense raises no disputed issues of fact. *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) (per curiam); *see also Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1038 n.4 (9th Cir. 2008) (declining to remand for further discovery because "no amount of discovery would change the central holding that Congress intended for the NBA to preempt [this] state restriction[] on national banks . . . ."). Such is the case here. Bank of America's arguments are purely legal and do not depend on resolution of any factual disputes over the effect of California law on the bank's business. Indeed, Bank of America confirms that "[n]o discovery is necessary . . . because this is a legal inquiry, not a factual one."

Applying that standard here, we hold that California Civil Code § 2954.8(a) is not preempted because it does not prevent or significantly interfere with Bank of America's exercise of its powers. Again, section 1639d(g)(3) of Dodd-Frank states, "If prescribed by applicable State or Federal 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 or Federal law." 15 U.S.C. § 1639d(g)(3). This language requiring banks to pay interest on escrow account balances "[i]f prescribed by applicable State [] law" expresses Congress's view that such laws would not necessarily prevent or significantly interfere with a national bank's operations.

Dodd-Frank does not define the term "applicable." But the Supreme Court recently explained:

> "Applicable" means "capable of being applied: having relevance" or "fit, suitable, or right to be applied: appropriate." Webster's Third New International Dictionary 105 (2002). See also New Oxford American Dictionary 74 (2d ed. 2005) ("relevant or appropriate"); 1 Oxford English Dictionary 575 (2d ed. 1989) ("[c]apable of being applied" or "[f]it or suitable for its purpose, appropriate"). So an expense amount is "applicable" within the plain meaning of the statute when it is appropriate, relevant, suitable, or fit.

Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 69 (2011); *see also Applicable*, Collins English Dictionary 97 (12th ed. 2014) ("being appropriate or relevant");

Applicable, Oxford Dictionaries (Oxford University Press), https://premium.oxford dictionaries.com/defin ition/american_english/applicable (last visited Jan. 25, 2018) ("[r]elevant or appropriate"). Accordingly, "applicable" law in the context of section 1639d(g)(3) would appear to include any relevant or appropriate state laws that require creditors to pay interest on escrow account funds.

The inclusion of this term makes sense because not every state has escrow interest laws. In a regulation implementing Dodd-Frank's amendments to the TILA, the Consumer Financial Protection Bureau explained that:

> [T]he creditor may be able to gain returns on the money that the consumers keep in their escrow account. Depending on the State, the creditor might not be required to pay interest on the money in the escrow account. The amount that the consumer is required to have in the consumer's escrow account is generally limited to two months' worth of property taxes and home insurance. However, some States require a fixed interest rate to be paid on escrow accounts, resulting in an additional cost to the creditors.

Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 4726, 4747 (Jan. 22, 2013). Lusnak notes that only thirteen states appear to have escrow interest laws similar to California's. Through its requirement that creditors pay interest "in the manner as prescribed by" the relevant state law, Congress demonstrated an awareness of, and intent to address, the differences among state escrow interest laws. 15

U.S.C. § 1639d(g)(3). "[W]e may reasonably presume that Congress was aware of [existing law when it legislated]," *Do Sung Uhm v. Humana, Inc.*, 620 F.3d 1134, 1155 (9th Cir. 2010), and that it used the term "applicable" to refer to state escrow interest laws where they exist.[7]

Although we need not resort to legislative history, we note that it, too, confirms our interpretation of section 1639d(g)(3). A House Report discusses how mortgage servicing, and specifically escrow accounts, contributed to the subprime mortgage crisis. H.R. Rep. No. 111-94, at 53–56. The Report notes that mortgage servicers are typically "large corporations" who "may . . . earn income from the float from escrow accounts they maintain for borrowers to cover the required payments for property insurance on the loan." *Id.* at 55. The Report's section-by-section analysis of Dodd-Frank then explains Congress's purpose behind section 1639d(g)(3), stating:

> Servicers must administer such accounts in accordance with the Real Estate Settlement Procedures Act (RESPA), [Flood Disaster Protection Act], and, if applicable, the law of the

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[7] In so construing the term "applicable," we do not suggest that a state escrow interest law can *never* be preempted by the NBA. For example, a state law setting punitively high rates banks must pay on escrow balances may prevent or significantly interfere with a bank's ability to engage in the business of banking. We simply recognize that Congress's reference to "applicable State . . . law" in section 1639d(g)(3) reflects a determination that state escrow interest laws do not necessarily prevent or significantly interfere with a national bank's business.

> State where the real property securing the transaction is located, *including* making interest payments on the escrow account if required under such laws.

Id. at 91 (emphasis added). This passage shows Congress's view that creditors, including large corporate banks like Bank of America, can comply with state escrow interest laws without any significant interference with their banking powers.

No legal authority supports Bank of America's position that California Civil Code § 2954.8(a) prevents or significantly interferes with the exercise of its powers. Bank of America falls back on the OCC's pre-Dodd-Frank preemption rule, 12 C.F.R. § 34.4(a) (2004), but as we explained, Congress has since clarified that *Barnett Bank*'s preemption standard applies. Bank of America's reliance on the OCC's post-Dodd-Frank revision of section 34.4(a) also fails. Reading section 34.4(a) in isolation, Bank of America argues that state escrow interest laws necessarily prevent or significantly impair its real estate lending authority. However, the OCC's amendments specifically altered the language of section 34.4(b) to clarify that state laws "that [are] made applicable by Federal law" (which would include Dodd-Frank's TILA amendments) "are not inconsistent with the real estate lending powers of national banks . . . to the extent consistent with [*Barnett Bank*]." 12 C.F.R. § 34.4(b)(9) (2011).

All of Bank of America's cited cases are inapposite. *Flagg v. Yonkers Savings & Loan Association* concerned the Office of Thrift Supervision's ("OTS")

authority to regulate federal savings associations, and the Second Circuit's holding in that case was based on the OTS's field preemption over the regulation of such associations. 396 F.3d 178, 182 (2d Cir. 2005). Unlike the OTS, the OCC does not enjoy field preemption over the regulation of national banks.[8] *Aguayo*, 653 F.3d at 921–22 ("[W]hile the OTS and the OCC regulations are similar in many ways . . . the OCC has explicitly avoided full field preemption in its rulemaking and has not been granted full field preemption by Congress."). *First Federal Savings and Loan Association of Boston v. Greenwald* also fails to support Bank of America's position. 591 F.2d 417 (1st Cir. 1979). *Greenwald* concerned a direct conflict between a state regulation requiring payment of interest on certain escrow accounts and a federal regulation expressly stating that no such obligation was to be imposed on federal savings associations "apart from the duties imposed by this paragraph" or "as provided by contract." *Id.* at 425. Here, there is no federal regulation that directly conflicts with section 2954.8(a).[9]

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[8] Nor does the OCC enjoy field preemption over the regulation of federal savings associations. 12 U.S.C. § 1465(b).

[9] Bank of America's district court authorities are nonbinding and unpersuasive. *See Hayes v. Wells Fargo Bank, N.A.*, No. 13cv1707 L(BLM), 2014 WL 3014906 (S.D. Cal. Jul. 3, 2014); *Wis. League of Fin. Insts., Ltd. v. Galecki*, 707 F. Supp. 401 (W.D. Wis. 1989). As in *Flagg*, the court in *Hayes* based its holding on the OTS's field preemption over the regulation of federal savings associations. 2014 WL 3014906, at *5. And *Galecki* concerned the regulatory authority of the Federal Home Loan Bank Board, which was "*preemptive of any state law purporting to address the subject of the*

In sum, no legal authority establishes that state escrow interest laws prevent or significantly interfere with the exercise of national bank powers, and Congress itself, in enacting Dodd-Frank, has indicated that they do not. Accordingly, we hold that the NBA does not preempt California Civil Code § 2954.8(a).

C. Lusnak's Claims For Relief

We turn now to Lusnak's two claims for relief. Using the UCL as a procedural vehicle, Lusnak alleges that Bank of America violated both state law, Cal. Civ. Code § 2954.8(a), and federal law, 15 U.S.C. § 1639d(g)(3), by failing to pay interest on his escrow account funds. *See Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1130 (9th Cir. 2014) ("In prohibiting 'any unlawful' business practice, the UCL 'borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.'"). Lusnak also brings a state-law breach of contract claim, alleging that Bank of America's failure to pay interest violated his mortgage agreement.

Bank of America—failing to distinguish between Lusnak's state and federal theories—argues that his UCL claim cannot proceed because his escrow account was created before section 1639d's effective date of January 21, 2013. 124 Stat. at 2136. We agree that Lusnak cannot rely on section 1639d in prosecuting his UCL claim. Section 1639d mandates that creditors establish escrow accounts in connection with certain mortgages. *See* 15 U.S.C. § 1639d(a)–(b). Specifically,

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operations of a Federal [savings] association." 707 F. Supp. at 404 (quoting 12 C.F.R. § 545.2).

section 1639d(a) states 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, before the consummation of such transaction*, an escrow or impound account . . . *as provided in, and in accordance with, this section*." 15 U.S.C. § 1639d(a) (emphasis added). The use of prospective language, specifically "shall establish, before the consummation of such transaction," indicates that Congress intended the detailed requirements in section 1639d to apply to accounts established pursuant to that section after it took effect in 2013.

Moreover, section 1639d(g)(3) requires creditors to pay interest under "applicable" state law on funds in federally mandated escrow accounts that are "subject to this section." 15 U.S.C. § 1639d(g)(3). Lusnak's escrow account was not a federally mandated account "subject to" section 1639d at the time it was created because it was established before that section took effect in 2013. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.").

However, these conclusions do not preclude Lusnak from obtaining relief under the UCL. Because California Civil Code § 2954.8(a) is not preempted, Bank of America was required to follow that law, and Lusnak may proceed on his UCL claim on the theory that Bank of America violated the UCL by failing to comply with section 2954.8(a). The parties argue over when exactly Bank of America's obligation to comply

with section 2954.8(a) might have begun. Given that the *Barnett Bank* standard applied both pre- and post-Dodd Frank, the preemption analysis is the same in both time periods. Therefore, because section 2954.8(a) was not preempted when Bank of America assumed control over Lusnak's pre-existing escrow account, Bank of America's obligation to pay interest on any funds in Lusnak's escrow account was triggered from that point forward.

Lusnak may also proceed on his breach of contract claim. Lusnak's mortgage documents require Bank of America to pay escrow interest if "Applicable Law requires interest to be paid on the Funds." The mortgage 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." Accordingly, on the allegations in the complaint, a jury could find that the "Applicable Law" provision of the contract also requires that Bank of America pay interest on funds in Lusnak's escrow account.

IV. Conclusion

For the reasons set forth above, we **REVERSE** and **REMAND** the case for further proceedings consistent with this Opinion.

APPENDIX H

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Const. Art. VI cl. 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 25b

§25b. 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 [12 U.S.C. 3101 et seq.].

(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.

(c) Substantial evidence

No regulation or order of the Comptroller of the Currency prescribed under subsection (b)(1)(B), shall be interpreted or applied so as to invalidate, or otherwise declare inapplicable to a national bank, the provision of the State consumer financial law, unless substantial evidence, made on the record of the proceeding, supports the specific finding regarding the preemption of such provision in accordance with the legal standard of 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).

(d) Periodic review of preemption determinations

(1) In general

The Comptroller of the Currency shall periodically conduct a review, through notice and public comment, of each determination that a provision of Federal law preempts a State consumer financial law. The agency shall conduct such review within the 5-year period after prescribing or otherwise issuing such determination, and at least once during each 5-year period thereafter. After conducting the review of, and inspecting the comments made on, the determination, the agency shall publish a notice in the Federal Register announcing the decision to continue or rescind the determination or a proposal to amend the determination. Any such notice of a proposal to amend a determination and the subsequent resolution of such proposal shall comply with the procedures set forth in subsections (a) and (b) of section 43 of this title.

(2) Reports to Congress

At the time of issuing a review conducted under paragraph (1), the Comptroller of the Currency shall submit a report regarding such review to the Committee on Financial Services of the House of Representatives and the Committee on Banking, Housing, and Urban Affairs of the Senate. The report submitted to the respective committees shall address whether the agency intends to continue, rescind, or propose to amend any determination that a provision of Federal law preempts a State consumer financial law, and the reasons therefor.

(e) Application of State consumer financial law to subsidiaries and affiliates

Notwithstanding any provision of title 62 of the Revised Statutes or section 371 of this title, a State

consumer financial law shall apply to a subsidiary or affiliate of a national bank (other than a subsidiary or affiliate that is chartered as a national bank) to the same extent that the State consumer financial law applies to any person, corporation, or other entity subject to such State law.

(f) Preservation of powers related to charging interest

No provision of title 62 of the Revised Statutes shall be construed as altering or otherwise affecting the authority conferred by section 85 of this title for the charging of interest by a national bank at the rate allowed by the laws of the State, territory, or district where the bank is located, including with respect to the meaning of "interest" under such provision.

(g) Transparency of OCC preemption determinations

The Comptroller of the Currency shall publish and update no less frequently than quarterly, a list of preemption determinations by the Comptroller of the Currency then in effect that identifies the activities and practices covered by each determination and the requirements and constraints determined to be preempted.

(h) Clarification of law applicable to nondepository institution subsidiaries and affiliates of national banks

(1) Definitions

For purposes of this subsection, the terms "depository institution", "subsidiary", and "affiliate" have the same meanings as in section 1813 of this title.

(2) Rule of construction

No provision of title 62 of the Revised Statutes or section 371 of this title shall be construed as preempting, annulling, or affecting the applicability of

State law to any subsidiary, affiliate, or agent of a national bank (other than a subsidiary, affiliate, or agent that is chartered as a national bank).

(i) Visitorial powers

(1)[1] In general

In accordance with the decision of the Supreme Court of the United States in Cuomo v. Clearing House Assn., L. L. C. (129 S. Ct. 2710 (2009)), no provision of title 62 of the Revised Statutes which relates to visitorial powers or otherwise limits or restricts the visitorial authority to which any national bank is subject shall be construed as limiting or restricting the authority of any attorney general (or other chief law enforcement officer) of any State to bring an action against a national bank in a court of appropriate jurisdiction to enforce an applicable law and to seek relief as authorized by such law.

(j) Enforcement actions

The ability of the Comptroller of the Currency to bring an enforcement action under title 62 of the Revised Statutes or section 45 of title 15 does not preclude any private party from enforcing rights granted under Federal or State law in the courts.

(R.S. § 5136C, as added and amended Pub. L. 111–203, title X, §§ 1044(a), 1045, 1047(a), July 21, 2010, 124 Stat. 2014, 2017, 2018.)

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[1] So in original. No par. (2) has been enacted.

12 U.S.C. § 371(a)

§ 371. Real estate loans

(a) Authorization to make real estate loan 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.

12 U.S.C. § 1464(a) and (c)(1)(B)

§ 1464. Federal savings associations

(a) In general

In order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services, the Comptroller of the Currency is authorized, under such regulations as the Comptroller of the Currency may prescribe—

(1) to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations (including Federal savings banks), and

(2) to issue charters therefor,

giving primary consideration of the best practices of thrift institutions in the United States. The lending and investment powers conferred by this section are intended to encourage such institutions to provide credit for housing safely and soundly.

* * *

(c) Loans and investments

To the extent specified in regulations of the Comptroller, a Federal savings association may invest in, sell, or otherwise deal in the following loans and other investments:

(1) Loans or investments without percentage of assets limitation

Without limitation as a percentage of assets, the following are permitted:

(B) Residential real property loans

Loans on the security of liens upon residential real property.

12 U.S.C. § 2605(g)

§ 2605. Servicing of mortgage loans and administration of escrow accounts

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due. Any balance in any such account that is within the servicer's control at the time the loan is paid off shall be promptly returned to the borrower within 20 business days or credited to a similar account for a new mortgage loan to the borrower with the same lender.

12 U.S.C. § 2609

§ 2609. Limitation on requirement of advance deposits in escrow accounts

(a) In general

A lender, in connection with a federally related mortgage loan, may not require the borrower or prospective borrower—

(1) to deposit in any escrow account which may be established in connection with such loan for the purpose of assuring payment of taxes, insurance premiums, or other charges with respect to the property, in connection with the settlement, an aggregate sum (for such purpose) in excess of a sum that will be sufficient to pay such taxes, insurance premiums and other charges attributable to the period beginning on the last date on which each such charge would have been paid under the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, and ending on the due date of its first full installment payment under the mortgage, plus one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period; or

(2) to deposit in any such escrow account in any month beginning with the first full installment payment under the mortgage a sum (for the purpose of assuring payment of taxes, insurance premiums and other charges with respect to the property) in excess of the sum of (A) one-twelfth of the total amount of the estimated taxes, insurance premiums

and other charges which are reasonably anticipated to be paid on dates during the ensuing twelve months which dates are in accordance with the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, plus (B) such amount as is necessary to maintain an additional balance in such escrow account not to exceed one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period: *Provided*, *however*, That in the event the lender determines there will be or is a deficiency he shall not be prohibited from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency.

(b) Notification of shortage in escrow account

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer (as the term is defined in section 2605(i) of this title) of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall notify the borrower not less than annually of any shortage of funds in the escrow account.

(c) Escrow account statements

(1) Initial statement

(A) In general

Any servicer that has established an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established

a statement clearly itemizing the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the escrow account during the first 12 months after the establishment of the account and the anticipated dates of such payments.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower at closing with respect to the property for which the mortgage loan is made or not later than the expiration of the 45-day period beginning on the date of the establishment of the escrow account.

(C) Initial statement at closing

Any servicer may submit the statement required under subparagraph (A) to the borrower at closing and may incorporate such statement in the uniform settlement statement required under section 2603 of this title. The Bureau shall issue regulations prescribing any changes necessary to the uniform settlement statement under section 2603 of this title that specify how the statement required under subparagraph (A) of this section shall be incorporated in the uniform settlement statement.

(2) Annual statement

(A) In general

Any servicer that has established or continued an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established or continued a statement clearly itemizing, for each period described in

subparagraph (B) (during which the servicer services the escrow account), the amount of the borrower's current monthly payment, the portion of the monthly payment being placed in the escrow account, the total amount paid into the escrow account during the period, the total amount paid out of the escrow account during the period for taxes, insurance premiums, and other charges (as separately identified), and the balance in the escrow account at the conclusion of the period.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower not less than once for each 12-month period, the first such period beginning on the first January 1st that occurs after November 28, 1990, and shall be submitted not more than 30 days after the conclusion of each such 1-year period.

(d) Penalties

(1) In general

In the case of each failure to submit a statement to a borrower as required under subsection (c), the Secretary shall assess to the lender or escrow servicer failing to submit the statement a civil penalty of $50 for each such failure, but the total amount imposed on such lender or escrow servicer for all such failures during any 12-month period referred to in subsection (b)[1] may not exceed $100,000.

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[1] So in original. Probably should be subsection "(c)".

(2) Intentional violations

If any failure to which paragraph (1) applies is due to intentional disregard of the requirement to submit the statement, then, with respect to such failure—

(A) the penalty imposed under paragraph (1) shall be $100; and

(B) in the case of any penalty determined under subparagraph (A), the $100,000 limitation under paragraph (1) shall not apply.

(Pub. L. 93–533, § 10, Dec. 22, 1974, 88 Stat. 1728; Pub. L. 94–205, § 8, Jan. 2, 1976, 89 Stat. 1158; Pub. L. 101–625, title IX, § 942(a), Nov. 28, 1990, 104 Stat. 4411; Pub. L. 104–208, div. A, title II, § 2103(g)(2), Sept. 30, 1996, 110 Stat. 3009–401; Pub. L. 111–203, title X, § 1098(8), July 21, 2010, 124 Stat. 2104.)

15 U.S.C. § 1639d(a)-(b), (f), (g)(3)

§ 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.

* * *

(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 [42 U.S.C. 4012a(d)].

(g) Administration of mandatory escrow or impound accounts

(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.

State of California

CIVIL CODE

§ 2954.8

2954.8. (a) 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.

(b) No financial institution subject to the provisions of this section shall impose any fee or charge in connection with the maintenance or disbursement of money received in advance for the payment of taxes and assessments on real property securing loans made by such financial institution, or for the payment of insurance, or for other purposes relating to such real property, that will result in an interest rate of less than 2 percent per annum being paid on the moneys so received.

(c) For the purposes of this section, "financial institution" means a bank, savings and loan association or credit union chartered under the laws of this state or the United States, or any other person or organization making loans upon the security of real property containing only a one- to four-family residence.

(d) The provisions of this section do not apply to any of the following:

(1) Loans executed prior to the effective date of this section.

(2) Moneys which are required by a state or federal regulatory authority to be placed by a financial institution other than a bank in a non-interest-bearing demand trust fund account of a bank.

The amendment of this section made by the 1979–80 Regular Session of the Legislature shall only apply to loans executed on or after January 1, 1980.

(Amended by Stats. 1979, Ch. 803.)

12 C.F.R. § 34.4

§ 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;[1]

(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

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[1] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85 and 1735f–7a; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

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;[2]

(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.

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[2] But see the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903), where the Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).