

United States District Court  
Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SUSAN MCSHANNOCK, et al.,

Plaintiffs,

v.

JP MORGAN CHASE BANK N.A.,

Defendant.

Case No. [18-cv-01873-EMC](#)

**ORDER DENYING DEFENDANT’S  
MOTION TO DISMISS**

Docket No. 38

Plaintiffs Monica Chandler, Susan McShannock, and Mohamed Mekey (collectively “Plaintiffs”) filed suit against JPMorgan Chase Bank (“Chase”) on behalf of a putative class. Plaintiffs assert claims under the California Unfair Competition Law, Ca. Bus. & Prof. Code § 17200 *et seq.* (“UCL”), based on Chase’s alleged violation of a California law requiring mortgage lenders to pay interest to mortgagors on funds held in escrow accounts for residential mortgages. Currently pending before the Court is Chase’s motion to dismiss or, in the alternative, stay the case. Docket No. 38 (“Mot.”). For the reasons discussed below, the Court **DENIES** the motion to dismiss and **DENIES as moot** the motion to stay.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

The Consolidated Class Action Complaint alleges the following. Plaintiffs took out mortgage-secured loans from Washington Mutual Bank (“WaMu”), a federal savings bank, between 2005 and the end of 2007. Docket No. 37 (Consolidated Class Action Complaint, hereinafter “Con. Compl.”) ¶¶ 5, 9, 13. When WaMu failed in 2008, its assets, including Plaintiffs’ mortgages, were acquired by Chase via the Federal Deposit Insurance Corporation (“FDIC”). *Id.* ¶ 5; Mot. at 1.

The mortgage agreements at issue required Plaintiffs to make payments into escrow

1 accounts held by the lender, in order to cover any potential taxes and assessments, leasehold  
 2 payments, and insurance premiums on the property. Con. Compl. ¶¶ 6, 10, 14. Plaintiffs have  
 3 each made payments into the escrow accounts as required, but have never received any interest on  
 4 the escrow funds from Chase. *Id.* ¶¶ 7, 11, 14. The mortgage agreement contains a provision  
 5 addressing interest on escrow accounts:

6 Unless an agreement is made in writing or Applicable Law requires  
 7 interest to be paid on the Funds [in the escrow account], Lender  
 8 shall not be required to pay Borrower any interest or earnings on the  
 funds. Borrower and Lender can agree in writing, however, that  
 interest shall be paid on the Funds.

9 Docket No. 38-2, Exhs. A–F § 3.

10 Plaintiffs assert that Chase’s failure to pay escrow interest on their mortgage accounts  
 11 violates California Civil Code § 2954.8 and 15 U.S.C. § 1639d(g). Con. Compl. ¶¶ 35–37.  
 12 According to Plaintiffs, these violations constitute “unlawful” conduct within the meaning of the  
 13 UCL. They also assert that Chase’s alleged conduct violates the “unfair” prong of the UCL. *Id.*  
 14 ¶¶ 38–40.

15 Plaintiff McShannock and Plaintiff Chandler initially filed separate class action suits  
 16 against Chase asserting the same underlying claims. *See* Docket No. 19 (Motion to Relate Case).  
 17 The parties stipulated to consolidate the two cases. *See* Docket No. 33. In the ensuing  
 18 Consolidated Complaint, Plaintiffs proposed the following class for certification pursuant to  
 19 Federal Rule of Civil Procedure 23:

20 All mortgage loan customers of Chase (or its subsidiaries), whose  
 21 mortgage loan is for a one-to-four family residence located in  
 22 California, and who paid Chase money in advance for payment of  
 23 taxes and assessments on the property, for insurance, or for other  
 purposes relating to the property, and to whom Chase failed to pay  
 interest as required by Cal. Civ. Code § 2954.8(a). Excluded from  
 24 the above Class is any entity in which Chase has a controlling  
 interest, and officers or directors of Chase. The judge assigned to  
 this case and the judge’s staff members are also excluded from the  
 25 Class.

26 Con. Compl. ¶ 26.

27 Chase now moves to dismiss under Rule 12(b)(6) on two bases: first, that Plaintiffs failed  
 28 to comply with the provisions in their mortgage contracts requiring them to provide Chase with

1 notice and an opportunity to cure alleged misconduct before bringing a judicial action; and second,  
 2 that Plaintiffs’ state law claims are preempted by the Home Owners’ Loan Act. In the alternative,  
 3 Chase seeks to stay the case pending the resolution of *Lusnak v. Bank of America, N.A.*, which  
 4 concerns whether California’s mortgage escrow law is preempted by the National Banking Act.  
 5 883 F.3d 1185 (9th Cir. 2018), *petition for cert. filed*, (U.S. Aug. 14, 2018) (No. 18-212).

## 6 II. DISCUSSION

### 7 A. Legal Standard

8 For a plaintiff to survive a Rule 12(b)(6) motion to dismiss after *Ashcroft v. Iqbal*, 556  
 9 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), her factual allegations  
 10 “must . . . suggest that the claim has at least a plausible chance of success.” *Levitt v. Yelp! Inc.*,  
 11 765 F.3d 1123, 1134-35 (9th Cir. 2014). In other words, the complaint “must allege ‘factual  
 12 content that allows the court to draw the reasonable inference that the defendant is liable for the  
 13 misconduct alleged.’” *Id.* (citations omitted). “The plausibility standard is not akin to a  
 14 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
 15 unlawfully.” *Iqbal*, 556 U.S. at 678. Where a complaint pleads facts that are “merely consistent  
 16 with” a defendant’s liability, it “stops short of the line between possibility and plausibility ‘of  
 17 entitlement to relief.’” *Id.*

18 The Ninth Circuit has outlined a two-step process for evaluating pleadings against this  
 19 standard. “First, to be entitled to the presumption of truth, allegations in a complaint or  
 20 counterclaim may not simply recite the elements of a cause of action, but must contain sufficient  
 21 allegations of underlying facts to give fair notice and to enable the opposing party to defend itself  
 22 effectively. Second, the factual allegations that are taken as true must plausibly suggest an  
 23 entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the  
 24 expense of discovery and continued litigation.” *Levitt*, 765 F.3d at 1135 (citations omitted).

### 25 B. Notice and Cure Provisions

26 Chase first argues that Plaintiffs’ Deeds of Trust contain provisions that require them to  
 27 give Chase notice and an opportunity to cure any alleged wrongdoing, including actions relating to  
 28 escrow accounts, before seeking judicial remedies. Mot. at 4. Under the terms of the notice and

1 cure provision:

2 Neither Borrower nor Lender may commence, join, or be joined to  
 3 any judicial action (as either an individual litigant or the member of  
 4 a class) that arises from the other party's actions pursuant to this  
 5 Security Instrument or that alleges that the other party has breached  
 6 any provision of, or any duty owed by reason of, this Security  
 Instrument, until such Borrower or Lender has notified the other  
 party . . . of such alleged breach and afforded the other party hereto  
 a reasonable period after the giving of such notice to take corrective  
 action.

7 Docket No. 38-2, Exhs. A–F § 20. The Deed also provides that “[t]he covenants and agreements  
 8 of this Security Instrument shall bind . . . and benefit the successors and assigns of Lender.” *Id.*,  
 9 Exhs. A–F § 13.

10 The Consolidated Complaint does not contain any allegation that Plaintiffs have complied  
 11 with the notice and cure provisions in their Deeds of Trust. Plaintiffs state in their opposition to  
 12 the motion to dismiss that McShannock and Meky sent notices of dispute to Chase *after* Chase  
 13 moved to dismiss the original complaint and before Plaintiffs filed the Consolidated Complaint.  
 14 *Id.* at 5. Plaintiffs contend Meky gave Chase notice “on behalf of the class *before* he filed his  
 15 complaint” because he was not a part of the original action. *Id.* (emphasis in original). According  
 16 to Plaintiffs, “Chase rejected these opportunities to cure the breach.” *Id.*

17 As Chase points out, however, Plaintiffs cannot fix their pleading deficiencies by alleging  
 18 new facts in their opposition brief. “In determining the propriety of a Rule 12(b)(6) dismissal, a  
 19 court *may not* look beyond the complaint to a plaintiff’s moving papers, such as a memorandum in  
 20 opposition to a defendant’s motion to dismiss.” *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th  
 21 Cir. 2003) (emphasis in original) (quoting *Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197  
 22 n.1 (9th Cir. 1998)).

23 Moreover, even if the Court were to accept Plaintiffs’ assertion that they provided notice to  
 24 Chase after they filed the initial complaint, their actions would not satisfy the notice and cure  
 25 provision. “If the Notice Provision has any legitimate purpose, it is to promote the resolution of  
 26 contractual disputes without the expense of litigation—‘compliance’ after litigation has been  
 27 initiated is no compliance at all.” *Gerber v. First Horizon Home Loans Corp.*, No. 05–1554P,  
 28 2006 WL 581082, at \*2 (W.D. Wash. Mar. 8, 2006) (rejecting plaintiff’s argument “that his post-

1 lawsuit notice to Defendant is somehow ‘substantial compliance’ with the provision”); *Kim v.*  
 2 *Shellpoint Partners, LLC*, No. 15CV611-LAB (BLM), 2016 WL 1241541, at \*6 (S.D. Cal. Mar.  
 3 30, 2016) (explaining that accepting plaintiff’s notice to defendant “during the pendency of this  
 4 action” would “gut the ‘notice and cure’ provision, the purpose of which is to give each party an  
 5 opportunity to cure problems and prevent the need for litigation”). McShannock’s post-suit notice  
 6 is therefore ineffective.

7 Nor would the purported notice given by Meky “on behalf of the class” suffice, even  
 8 though he joined as a plaintiff after the original complaint was filed. The notice and cure  
 9 provision in Plaintiffs’ Deeds of Trust specifies that no borrower “may commence, *join, or be*  
 10 *joined* to any judicial action (as either an individual litigant or *the member of a class*)” prior to  
 11 giving notice. Docket No. 38-2, Exhs. A–F § 20 (emphases added). The notice provision thus  
 12 applies to borrowers like Meky who “join” the suit after it is initiated.

13 The question therefore becomes whether Plaintiffs’ failure to comply with the notice and  
 14 cure provisions warrants dismissal of their suit. Chase contends that such failure is “fatal” to their  
 15 claims. Mot. at 4. Plaintiffs respond that their “claims are not predicated on any violation of the  
 16 mortgage contract, but only on violations of § 2954.8<sup>1</sup> and the UCL, and thus the notice and cure  
 17 provision does not apply. Docket No. 41 (“Opp.”) at 4.

18 As an initial matter, Plaintiffs’ threshold argument that their “statutory rights under Civil  
 19 Code section 2954.8(a) and the UCL . . . are unwaivable as a matter of public policy” is without  
 20 merit. Opp. at 3. Providing notice to Chase pursuant to the notice and cure provision does not  
 21

---

22 <sup>1</sup> Section 2954.8(a) of the California Civil Code provides that:

23 Every financial institution that makes loans upon the security of real  
 24 property containing only a one- to four-family residence and located  
 25 in this state or purchases obligations secured by such property and  
 26 that receives money in advance for payment of taxes and  
 27 assessments on the property, for insurance, or for other purposes  
 28 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.

1 foreclose Plaintiffs from vindicating their statutory rights. “The purpose of this provision is ‘to  
2 give the allegedly breaching party an opportunity to cure its breach.’” *Sigwart v. U.S. Bank*, 713  
3 F. App’x 535, 537 (9th Cir. 2017) (quoting *Higley v. Flagstar Bank, FSB*, 910 F. Supp. 2d 1249,  
4 1253 (D. Or. 2012)). If Chase had been put on notice of its breach and failed to take corrective  
5 action, Plaintiffs could then bring suit under § 2954.8(a) and the UCL. Plaintiffs make no  
6 showing that providing such notice would be so burdensome as to impede enforcement of their  
7 statutory rights. Requiring compliance with the notice and cure provision therefore is not the  
8 equivalent of a coerced waiver of those statutory rights.

9 Turning to the merits of the notice and cure question, courts have reached differing  
10 conclusions. In *Giotta v. Ocwen Financial Corporation*, the plaintiffs sued the defendant  
11 companies for allegedly working in concert to charge inflated fees for servicing mortgage loans  
12 that were billed through to the homeowners. No. 15-CV-00620-BLF, 2016 WL 4447150, at \*1  
13 (N.D. Cal. Aug. 24, 2016). The plaintiffs’ Deeds of Trust contained notice and trust provisions  
14 identical in wording to those in this case, and the plaintiffs did not allege that they complied with  
15 the provisions before suing the defendants. *Id.* at \*3. The district court in *Giotta* concluded that  
16 all of the plaintiffs’ claims—including those under the UCL—“fall squarely within the ambit of  
17 the notice-and-cure provision” because they all “arise from the property inspections and BPOs  
18 obtained by [a defendant] and charged to Plaintiffs pursuant to the terms of the Deed of Trust.” *Id.*  
19 In an unpublished, non-precedential memorandum, the Ninth Circuit affirmed, writing that the suit  
20 was a ‘judicial action ... that *arises from* the other party’s actions *pursuant to* this Security  
21 Instrument’” because “the Deed of Trust authorized property inspections and valuations to protect  
22 the Lender’s interest in the property and to pass the fees for those services on to the borrower.”  
23 *Giotta v. Ocwen Loan Servicing, LLC*, 706 F. App’x 421, 422 (9th Cir. 2017) (emphases in  
24 original).

25 At least three other cases have reached the opposite conclusion. In *Gerber v. First Horizon*  
26 *Home Loans Corporation*, the plaintiff alleged that his mortgage lender charged him a fee not  
27 included in his mortgage agreement, and brought causes of action for both breach of contract and  
28 violations of the Washington Consumer Protection Act. No. 05–1554P, 2006 WL 581082, at \*1

1 (W.D. Wash. Mar. 8, 2006). The court distinguished the causes of action. It dismissed the breach  
 2 of contract claim for failure to satisfy the notice provision, since the very purpose of the provision  
 3 was “to promote the resolution of contractual disputes without the expense of litigation.” *Id.* at \*2.  
 4 In contrast, it found that the state statutory cause of action “involves allegations of deceptive  
 5 business practices, clearly exists independent of any contract between the parties,” and was thus  
 6 not barred by the plaintiff’s failure to give notice. *Id.* at \*3. Next, the court in *Kim v. Shellpoint*  
 7 *Partners, LLC*, held that the notice and cure provision in the plaintiff’s deed of trust did not  
 8 require dismissal of plaintiff’s claims under the UCL and the California Homeowners’ Bill of  
 9 Rights because those claims, which challenged mortgage servicing fees, “arise under statute, not  
 10 the agreement.” No. 15CV611-LAB (BLM), 2016 WL 1241541, at \*7 (S.D. Cal. Mar. 30, 2016).  
 11 And in *Beyer v. Countrywide Home Loans Servicing LP*, the court considered claims similar to  
 12 those in *Gerber* and concluded the plaintiff’s “unjust enrichment and [Washington Consumer  
 13 Protection Act] claims exist independently of the parties’ mortgage contract” and therefore are not  
 14 foreclosed by his failure to notify the defendant. No. C07-1512MJP, 2008 WL 1791506, at \*3  
 15 (W.D. Wash. Apr. 18, 2008), *aff’d*, 359 F. App’x 701 (9th Cir. 2009).<sup>2</sup>

16 In *Gerber*, *Kim*, and *Beyer*, the plaintiffs were challenging fees that were allegedly not  
 17 specified in their loan agreements, so the mortgage lenders’ attempts to impose the fees were  
 18 clearly not “actions pursuant to” the agreements. *See Gerber*, 2006 WL 581082, at \*1; *Kim*, 2016  
 19 WL 1241541, at \*7; *Beyer*, 2008 WL 1791506, at \*3. While the nature of Plaintiffs’ claim in this  
 20 case is somewhat more complicated, the Court agrees with Plaintiffs that they were not required to  
 21

---

22  
 23 <sup>2</sup> The other cases cited by Plaintiffs are distinguishable because they involved claims under the  
 24 federal Truth in Lending Act (“TILA”). *See Opp.* at 3–4 (citing *Taub v. World Fin. Network*  
 25 *Bank*, 950 F. Supp. 2d 698 (S.D.N.Y. 2013); *Schwartz v. Comenity Capital Bank*, No. 13 CIV.  
 26 4869 JGK, 2015 WL 410321 (S.D.N.Y. Feb. 2, 2015)). The central purpose of TILA is “to assure  
 27 a meaningful disclosure of credit terms” to a consumer before he commits to a contract. 15 U.S.C.  
 28 § 1601(a). In light of this purpose, “enforcement of the notice and cure provision . . . would  
 essentially amount to a waiver of TILA’s initial account-opening disclosure requirements, because  
 Defendant would be able to provide deficient initial disclosures and remedy them only after the  
 contract was signed.” *Taub*, 950 F. Supp. 2d at 702. Providing notice and an opportunity to cure  
 in the context of nonpayment of interest on escrow accounts does not wholly undermine the  
 purpose of § 2954.8 and the UCL in the same way.



1 give notice to Chase.

2 Per the notice and cure provision, Plaintiffs are obligated to give notice in two  
3 circumstances: first, where their grievance “arises from” Chase’s “actions pursuant to” the Deeds  
4 of Trust, and second, where they “allege[] that [Chase] has breached any provision of, or any duty  
5 owed by reason of,” the Deeds of Trust. Docket No. 38-2, Exhs. A–F § 20. As to the first prong,  
6 the Deeds of Trust provide that, “Unless an agreement is made in writing or Applicable Law  
7 requires interest to be paid on the Funds [in the escrow account], Lender shall not be required to  
8 pay Borrower any interest or earnings on the funds.” Docket No. 38-2, Exhs. A–F § 3. The  
9 “Applicable Law” here is § 2954.8, which requires lenders to pay two percent interest on escrow  
10 funds. Cal. Civ. Code § 2954.8(a). The Deeds of Trust, by incorporating § 2954.8, arguably  
11 require Chase to pay escrow interest to Plaintiffs. Thus, there is a fair argument that Chase’s  
12 alleged non-payment of escrow interest is not “pursuant to” the Deeds of Trust, and Plaintiffs were  
13 therefore not required to give notice before bringing this suit.

14 As to the second prong, Plaintiffs allege that Chase is not complying with its duty to pay  
15 escrow interest under § 2954.8 and the UCL. This statutory duty “exists independent of any  
16 contract between the parties.” *Gerber*, 2006 WL 581082, at \*3. It is therefore not “owed by  
17 reason of” the Deeds of Trust. This conclusion comports with the purpose of the notice and cure  
18 provision, which is to give the defendant an opportunity to correct conduct that is violating the  
19 terms of a contract. As in *Gerber*, *Kim*, and *Beyer*, the Plaintiffs’ claim has an independent basis  
20 in statute, not the contract.

21 Further, to the extent there is any ambiguity regarding the scope of the notice and cure  
22 provision, it must be construed against Chase, the drafter of the contract. *See* Cal. Civ. Code  
23 § 1654 (“In cases of uncertainty not removed by the preceding rules, the language of a contract  
24 should be interpreted most strongly against the party who caused the uncertainty to exist.”). To  
25 deprive Plaintiffs of recourse to their statutory rights based on an ambiguous contractual provision  
26 would also frustrate the consumer protection purposes of those statutes.

27 Accordingly, Plaintiffs’ failure to comply with the notice and cure provisions does not  
28 foreclose their claims.



1 C. HOLA Preemption

2 Plaintiffs' UCL claim is premised on the allegation that Chase's failure to pay interest on  
3 Plaintiffs' mortgage escrow accounts violates California Civil Code § 2954.8 and 15 U.S.C.  
4 § 1639d(g), a provision of the Dodd–Frank Wall Street Reform and Consumer Protection Act  
5 (“Dodd-Frank”) governing the administration of mandatory escrow accounts. Under the Ninth  
6 Circuit's *Lusnak* ruling, however, Plaintiffs cannot rely on 15 U.S.C. § 1639d(g), because their  
7 mortgages all predate the enactment of § 1639d(g). *See Lusnak*, 883 F.3d at 1197 (“Congress  
8 intended the detailed requirements in section 1639d to apply to accounts established pursuant to  
9 that section after it took effect in 2013.”). Plaintiffs must therefore rest their UCL claims upon  
10 § 2954.8.

11 Section 2954.8(a) “requires financial institutions [making mortgage loans] to pay  
12 borrowers at least two percent annual interest on the funds held in the borrowers' escrow  
13 accounts.” *Lusnak*, 883 F.3d at 1188. The Ninth Circuit recently ruled that national banks are  
14 “required to follow” § 2954.8(a) because the National Banking Act (“NBA”) does not preempt  
15 state escrow interest laws. *Id.* at 1196–97. Chase, however, contends that § 2954.8(a) is  
16 preempted by the Home Owners' Loan Act (“HOLA”) because the loan was originated by WaMu,  
17 a federal savings bank governed by HOLA, not the NBA. *See Mot.* at 6.

18 “HOLA empowered the regulatory body, which became the [Office of Thrift Supervision  
19 (“OTS”)], to authorize the creation of federal savings and loan associations, to regulate them, and,  
20 by its regulations, to preempt conflicting state law.” *Campidoglio LLC v. Wells Fargo & Co.*, 870  
21 F.3d 963, 971 (9th Cir. 2017). By their terms, the regulations promulgated by OTS “occup[y] the  
22 entire field of lending regulation for federal savings associations,” 12 C.F.R. § 560.2(a), and  
23 preempt “state laws purporting to impose requirements regarding . . . [e]scrow accounts,” 12  
24 C.F.R. § 560.2(b)(6). Chase argues that Plaintiffs' loans fall within the coverage of HOLA  
25 because they originated with WaMu, a federal savings bank. *See Mot.* at 6. Therefore, Chase  
26 reasons, California's escrow interest law is preempted by 12 C.F.R. § 560 with respect to  
27 Plaintiffs' loans, and Chase does not have to pay Plaintiffs the escrow interest mandated by  
28 § 2954.8(a). Plaintiffs disagree, arguing that their complaint pertains only to Chase's non-

1 payment of escrow interest *after* it acquired WaMu’s assets, and “HOLA preemption does not  
 2 apply to conduct of a national bank that acquires a loan originated by a federal savings bank.”  
 3 Opp. at 7–8.

4 “Whether, and to what extent, HOLA applies to claims against a national bank when that  
 5 bank has acquired a loan executed by a federal savings association is an open question” in the  
 6 Ninth Circuit. *Campidoglio*, 870 F.3d at 970–71. Chase cites a line of cases supporting its  
 7 assertion that HOLA extends to loans held by national banks which originated with federal  
 8 savings banks. *See, e.g., Poyorena v. Wells Fargo Bank, N.A.*, No. CV 14–683 GAF (Ex), 2014  
 9 U.S. Dist. LEXIS 49319, at \*16 (C.D. Cal. Apr. 3, 2014); *Nguyen v. JP Morgan Chase Bank N.A.*,  
 10 No. 12-CV-04183, 2013 WL 2146606, at \*6 (N.D. Cal. May 15, 2013); *Appling v. Wachovia*  
 11 *Mortg., FSB*, 745 F. Supp. 2d 961, 971 (N.D. Cal. 2010). Plaintiffs counter with a line of cases  
 12 maintaining the opposite position. *See, e.g., Davis v. Wells Fargo, N.A.*, No. 2:16-CV-00890 JAM  
 13 AC, 2016 WL 7116681, at \*7 (E.D. Cal. Dec. 6, 2016), *report and recommendation adopted*, No.  
 14 2:16-CV-00890-JAM-AC, 2017 WL 729541 (E.D. Cal. Feb. 23, 2017); *Pimentel v. Wells Fargo,*  
 15 *N.A.*, No. 14-CV-05004-EDL, 2015 WL 2184305, at \*3 (N.D. Cal. May 7, 2015); *Penermon v.*  
 16 *Wells Fargo Bank, N.A.*, 47 F. Supp. 3d 982, 995 (N.D. Cal. 2014). The divergence between the  
 17 parties reflects “a growing divide in the district courts’ treatment of this issue,” as Judge Davila  
 18 delineated in *Kenery v. Wells Fargo Bank, N.A.*:

19 [D]istrict courts have taken three distinct positions on this issue. The  
 20 first position is [that HOLA preemption applies to all conduct  
 21 relating to a loan originating with a federal savings bank]. The  
 22 second position . . . is that HOLA preemption does not apply to . . .  
 23 national bank[s]. . . . The third position is that whether HOLA  
 24 preemption applies depends on whether the claims arise from  
 25 actions taken by the federal savings association or from actions  
 26 taken by the national bank. Under the third line of cases, only those  
 27 claims arising from actions taken by the federal savings association  
 28 would be subject to a HOLA preemption analysis. If the loan is later  
 sold to a national bank and the plaintiff’s claims arise from actions  
 taken by the national bank, those claims would not be subject to a  
 HOLA preemption analysis.

No. 5:13-CV-02411-EJD, 2014 WL 129262, at \*4 (N.D. Cal. Jan. 14, 2014).<sup>3</sup>

<sup>3</sup> In some instances, courts have also held that “where the terms of a loan expressly incorporate federal regulations governing federal savings associations, those regulations apply to the conduct

1 According to Chase, most district courts in this Circuit take the first position.<sup>4</sup> See Mot. at  
 2 10. Indeed, this Court ruled in 2012 that claims regarding loans that originated with a federal  
 3 savings bank were “still generally covered by HOLA,” even if they were subsequently controlled  
 4 by a national bank. *Castillo v. Wachovia Mortg.*, No. C-12-0101 EMC, 2012 WL 1213296, at \*5  
 5 (N.D. Cal. Apr. 11, 2012) (Chen, J.) (observing that “Courts have held that a successor entity may  
 6 properly assert HOLA preemption even if the successor entity is not a federally chartered savings  
 7 bank”). But Plaintiffs respond that the authorities relied on by Chase are outdated, and that “the  
 8 \_\_\_\_\_  
 9 of a successor to the loan, even where the successor is not a federal savings association.” *Romero*  
 10 *v. Wells Fargo Bank, N.A.*, No. LACV1504707JAKJEMX, 2015 WL 12781210, at \*5 (C.D. Cal.  
 11 Dec. 22, 2015). However, the loan agreements in this case provide that the loan “shall be  
 governed by federal law *and* the law of the jurisdiction in which the Property is located,” Docket  
 No. 38-2 at 12 (emphasis added), so this analysis is not dispositive.

12 In addition, one recent case cited by neither party declined to apply HOLA preemption on a  
 13 different rationale to those summarized in *Kenery*. In *Smith v. Flagstar Bank, FSB*, the court  
 14 determined that Dodd-Frank, which “effectively dissolved the OTS” and “creat[ed] a uniform  
 15 body of law to govern all federal financial regulatory agencies,” is now the controlling law when it  
 16 comes to preemption. No. C 18-02350 WHA, 2018 WL 3995922, at \*2 (N.D. Cal. Aug. 21,  
 17 2018). Dodd-Frank modified the preemption scheme such that “[a]ny determination by a court . . .  
 18 regarding the relation of State law to a provision of this chapter or any regulation or order  
 19 prescribed under this chapter shall be made in accordance with the laws and legal standards  
 20 applicable to national banks regarding the preemption of State law.” 12 U.S.C. § 1465(a). And  
 21 since “*Lusnak* held that the National Bank Act that then governed national banks via the Office of  
 22 the Comptroller of the Currency, did not preempt Section 2954.8,” the Dodd-Frank reform means  
 23 that the same conclusion holds for HOLA and federal savings banks. *Id.* (citing *Lusnak*, 883 F.3d  
 24 at 1197). However, *Smith* does not contend explicitly with a Dodd-Frank provision instructing  
 that “[t]his title . . . shall not be construed to alter or affect the applicability of any regulation,  
 order, guidance, or interpretation prescribed, issued, and established by . . . the Director of [OTS]  
 regarding the applicability of State law under Federal banking law to any contract entered into on  
 or before July 21, 2010, by national banks, Federal savings associations.” 12 U.S.C. § 5553  
 (emphasis added). This provision on its face preserves the application of the original HOLA  
 preemption scheme established by OTS at 12 C.F.R. § 560.2 to contracts, such as the mortgage  
 agreement between Plaintiffs and Chase here, entered into before July 21, 2010. Therefore, the  
 reasoning of *Smith* does not apply in this case.

25 <sup>4</sup> Chase also cites *Flagg v. Yonkers Savings & Loan Association, FA*, 396 F.3d 178 (2d Cir. 2005),  
 26 in support. In *Flagg*, the Second Circuit did not directly address the merits of the preemption  
 27 question. The district court below had held that a New York law requiring lending institutions to  
 28 credit mortgagors for interest on mortgage escrow accounts was preempted by 12 C.F.R.  
 § 560.2(b)(6), a ruling that was not challenged on appeal. See *Flagg*, 396 F.3d at 182. But *Flagg*  
 concerned a federal savings association, so does not speak to whether the preemptive effect of  
 HOLA extends to national banks. See *id.* at 181.

1 virtually universal trend in this circuit in the last four years is for district courts” to adopt the third  
 2 position. Opp. at 6; *see, e.g., Grigsby v. Wells Fargo Bank, N.A.*, No. CV 17-9249-GW(ASX),  
 3 2018 WL 1779338, at \*8 (C.D. Cal. Apr. 12, 2018); *Wieck v. CIT Grp., Inc.*, 308 F. Supp. 3d  
 4 1093, 1118 (D. Haw. 2018); *Davis*, 2016 WL 7116681, at \*7; *Chu v. Fay Servicing, LLC*, No. 16-  
 5 CV-04530-KAW, 2016 WL 5846990, at \*3 (N.D. Cal. Oct. 6, 2016); *Pimentel*, 2015 WL  
 6 2184305, at \*3; *Penermon*, 47 F. Supp. 3d at 995; *Rijhwani v. Wells Fargo Home Mortg., Inc.*,  
 7 No. C 13-05881 LB, 2014 WL 890016, at \*7 (N.D. Cal. Mar. 3, 2014); *Leghorn v. Wells Fargo*  
 8 *Bank, N.A.*, 950 F. Supp. 2d 1093, 1107 (N.D. Cal. 2013).

9 Having surveyed the case law and considered the parties’ supplemental briefing on the  
 10 legislative history of HOLA, the Court concludes, notwithstanding its earlier decision in *Castillo*,  
 11 that the third position represents the current trend of court rulings<sup>5</sup> and is the most persuasive;  
 12 thus, “HOLA preemption [applies] only to conduct occurring before the loan changed hands from  
 13 the federal savings association or bank to the entity not governed by HOLA.” *Rijhwani*, 2014 WL  
 14 890016, at \*7. While it is true that many pre-2015 decisions went the other way,<sup>6</sup> in most of those  
 15 cases “the plaintiffs either failed to argue otherwise or conceded the issue,” with the result that  
 16 “the courts simply concluded, without much analysis, that HOLA preemption applied.”  
 17 *Penermon*, 47 F. Supp. 3d at 994 (citation and internal quotation marks omitted); *Pimentel*, 2015  
 18 WL 2184305, at \*3 (N.D. Cal. May 7, 2015) (“[T]hese cases do not appear to have grappled in a  
 19 substantive way with the question of whether HOLA preemption extends to claims against a  
 20 national bank based on its own conduct that post-dates its merger with a federally chartered savings  
 21 bank . . .”). In recent years, after more thoroughly considering the question, “[a] growing number  
 22 of courts . . . have found that HOLA preemption applies after a[] [federal savings association]’s

23 \_\_\_\_\_  
 24 <sup>5</sup> In contrast, at the time this Court decided *Castillo*, it was “unable to locate any cases” deviating  
 from the first position. 2012 WL 1213296, at \*5.

25 <sup>6</sup> Chase points out that some recent decisions continue to so hold. *See, e.g., Heagler v. Wells*  
 26 *Fargo Bank, N.A.*, No. 216CV01963MCEKJN, 2017 WL 1213370, at \*4 (E.D. Cal. Mar. 31,  
 27 2017); *Chavez v. Wells Fargo Bank, N.A.*, No. CV 16-1402 PA (PLAx), 2016 U.S. Dist. LEXIS  
 86850, at \*12–13 (C.D. Cal. July 5, 2016); *Houman v. Wells Fargo Bank, N.A.*, No.  
 28 CV1508740ABPLAX, 2016 WL 7444869, at \*5 (C.D. Cal. Feb. 5, 2016). The Court respectfully  
 disagrees with the holdings in these cases.

1 merger with a national bank only to claims arising from the conduct of the [federal savings  
2 association].” *Davis*, 2016 WL 7116681, at \*6; *see id.* at \*6 & n.4 (citing numerous cases). This  
3 line of cases reflects the courts’ increasing recognition that “HOLA was intended to ensure the  
4 stability of federal savings and loan associations, not to protect national banks from liability for  
5 their own conduct.” *Id.* at \*7.

6 The emerging line of cases is persuasive for several reasons. First, “[p]reemption analysis  
7 ‘start[s] with the assumption that the historic police powers of the States were not to be superseded  
8 by the Federal Act unless that was the clear and manifest purpose of Congress.’” *City of*  
9 *Columbus v. Ours Garage & Wrecking Service, Inc.*, 536 U.S. 424, 438 (2002) (quoting  
10 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Claims “rooted in California’s consumer-  
11 protection laws[] fall in an area that is traditionally within the state’s police powers to protect its  
12 own citizens.” *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011); *see Greenwood Trust Co.*  
13 *v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992) (“[T]he state statute here at issue visits two  
14 areas which are squarely within the ambit of the states’ historic powers . . . banking . . . and  
15 consumer protection.”). And while “the presumption against preemption is [generally] not  
16 applicable in the realm of national bank regulation” because of the “history of significant federal  
17 presence in national banking,” *Aguayo*, 653 F.3d at 917 n.1 (citation omitted), congressional intent  
18 remains the “ultimate touchstone” of preemption inquiry, *Medtronic*, 518 U.S. at 485.  
19 Congressional intent may be “explicitly stated in the statute’s language or implicitly contained in  
20 its structure and purpose.” *de la Cuesta*, 458 U.S. at 152–53.

21 It is not clear from either the language or legislative history of HOLA that Congress  
22 intended the Act’s preemptive effect to attach to a loan even after it is sold by a federal savings  
23 association. The parties do not seriously dispute that at the time HOLA was enacted in 1933,  
24 nothing in its text or legislative history expressly indicated Congress expected that federal savings  
25 associations would sell their residential mortgage loans on a secondary market to entities not  
26 governed by HOLA, much less intended for HOLA preemption to attach to any such loans. *See*  
27 Docket No. 52 at 1 (Chase conceding that “Congress did not discuss the sale of HOLA-governed  
28 loans” when enacting HOLA in 1933). It was not until 1938 that Congress created the Federal

1 National Mortgage Association (“Fannie Mae”) to purchase mortgage loans from federal savings  
 2 associations to resell to investors. Shelley Smith, *Reforming the Law of Adhesion Contracts: A*  
 3 *Judicial Response to the Subprime Mortgage Crisis*, 14 Lewis & Clark L. Rev. 1035, 1065 (2010).  
 4 It is no surprise that the legislative history is devoid of any references to a secondary market for  
 5 mortgage loans and of any expressed intent for HOLA to govern the operations of entities other  
 6 than federal savings associations. See *Penermon*, 47 F. Supp. 3d at 995 (“[I]t is unlikely that  
 7 HOLA contemplated the . . . mortgage crisis” that started in December 2007 “and the resulting  
 8 mergers of federal savings banks into national banks or loan servicing as it exists today.”).  
 9 Generally, “HOLA is strictly limited to federal savings institutions and is not intended to affect the  
 10 operations of national banks,” and “OTS only regulates federal savings associations.” *Id.* at 993–  
 11 94 (citing 12 C.F.R. § 560.2).

12 Chase points to a number of legislative and regulatory actions taken after HOLA was  
 13 enacted as evidence that “Congress has long recognized the power of federal [savings  
 14 associations] to sell residential mortgage loans.” Docket No. 52 at 5. Specifically, the  
 15 predecessor agency to OTS “promulgated regulations as early as 1938 recognizing the ability of  
 16 federal [savings associations] to sell mortgage loans”; Congress in 1970 enacted the Federal Home  
 17 Loan Mortgage Corporation Act to authorize Freddie Mac to purchase and sell residential  
 18 mortgages from any Federal home loan bank; and Congress in 1978 amended HOLA to affirm the  
 19 ability of federal savings associations to sell mortgage loans. See *id.* at 2–4. A statute’s  
 20 subsequent amendment and its legislative history may be entitled to some limited weight in  
 21 construing the earlier law, *In re Adams*, 761 F.2d 1422, 1426 (9th Cir. 1985), but generally “the  
 22 views of subsequent Congresses cannot override the unmistakable intent of the enacting one,”  
 23 *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). The problem for Chase is  
 24 that even if Congress and OTS, subsequent to HOLA’s enactment, contemplated federal savings  
 25 associations’ selling of mortgage loans in the secondary market, there is no indication in the  
 26 subsequent legislative history that Congress intended HOLA preemption to continue to apply to  
 27 loans sold to non-HOLA entities.

28 Second, finding preemption here would “run[] afoul of one of the original purposes of



1 HOLA enactment: consumer protection.” *Penermon*, 47 F. Supp. 3d at 995. “Congress enacted  
2 HOLA to regulate savings associations or banks ‘at a time when record numbers of homes were in  
3 default and a staggering number of state-chartered savings associations were insolvent.’” *Id.* at  
4 990 (quoting *Silvas v. E\*Trade Mortg. Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008)). The  
5 legislative history makes clear that the goal of HOLA and its implementing regulations was to  
6 “encourage lending” and “ensure stability in federal savings loans” while providing “consumer  
7 protection.” *Id.* at 995. If HOLA indeed gave national banks a preemption defense for any loan  
8 that originated with a federal savings bank, then homeowners would be deprived of state law  
9 protections “based solely on their original lender” and national banks would be allowed to  
10 “engag[e] in the otherwise illegal conduct.” *Id.* at 995. The Act was designed to “provide  
11 emergency relief with respect to home mortgage indebtedness” and “provide for the relief of the  
12 man who is about to lose his home.” *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141,  
13 159, 164 (1982) (quoting H.R. Conf. Rep. No. 210, 73d Cong., 1st Sess., 1 (1933)). It was “not  
14 enacted to provide a defense to actions that would otherwise violate consumer protection laws.”  
15 *Penermon*, 47 F. Supp. 3d at 995. Allowing preemption may run contrary to HOLA’s purpose and  
16 “could result in a gross miscarriage of justice.” *Id.*

17 Chase argues that extending HOLA preemption to loans acquired by national banks  
18 “provides continuity and certainty that increases the marketability of thrift-originated loans on the  
19 secondary market,” in part because, in the event a federal savings bank fails, a purchasing bank  
20 can “take stock . . . of the exposure it is accruing upon its assumption of the failed bank’s  
21 liabilities.” Mot. at 12–13. Although one of the goals of HOLA is to “ensure the stability of  
22 federal thrifts,” *Penermon*, 47 F. Supp. 3d at 990, nothing in the record before the Court suggests  
23 that requiring national banks to comply with state laws such as the escrow interest law here would  
24 threaten the stability of the secondary mortgage loan market for federal savings associations. At  
25 most, non-preemption would make the loans slightly less attractive to prospective buyers, putting  
26 them on a par, in terms of regulation, with national bank loans. Nothing suggests exposure to state  
27 regulations undermines the secondary market for loans originating under the NBA.

28 Accordingly, HOLA does not preempt § 2954.8(a) with respect to Plaintiffs’ loans.



1 D. Stay Pending Resolution of *Lusnak*

2 In the event the Court denies the motion to dismiss, Chase requests a stay of the case  
3 pending the Supreme Court’s resolution of *Lusnak*. The Supreme Court denied the petition for  
4 writ of certiorari on November 19, 2018, so this issue is now moot. *See Lusnak v. Bank of*  
5 *America, N.A.*, 883 F.3d 1185 (9th Cir. 2018), *cert. denied*, (U.S. Nov. 19, 2018) (No. 18-212).

6 **III. CONCLUSION**

7 For the foregoing reasons, the motion to dismiss is **DENIED** and the motion to stay is  
8 **DENIED as moot.**

9 This order disposes of Docket No. 38.

10  
11 **IT IS SO ORDERED.**

12  
13 Dated: December 7, 2018

14  
15   
16 \_\_\_\_\_  
17 EDWARD M. CHEN  
18 United States District Judge  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

United States District Court  
Northern District of California