No. 14-56755

In the

United States Court Of Appeals

For the

Ninth Circuit

DONALD M. LUSNAK,

Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant-Appellee.

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

APPELLANT'S REPLY BRIEF

Roger N. Heller
Michael W. Sobol
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
(415) 956-1000

Richard D. McCune
Jae K. (Eddie) Kim
MCCUNEWRIGHT, LLP
2068 Orange Tree Lane, Suite 216
Redlands, CA 92374
(909) 557-1250

Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

Regulations

INTRODUCTION

The lynchpin of conflict preemption analysis is congressional intent—the controlling question is whether the state law the plaintiff seeks to enforce substantially interferes with the defendant's federal powers *as Congress intends those powers*. The analysis in this case is a simple one, since in 2010, as part of the Dodd-Frank Act of 2010 ("Dodd-Frank"), Congress expressly provided that all creditors, including national banks, must comply with the exact type of state law that is at issue in this case—*i.e.*, state laws, like California Civil Code § 2954.8(a), that require creditors to "pay interest to the consumer in the amount held in any [mortgage] impound, trust, or escrow account." 15 U.S.C § 1639d(g)(3); Cal. Civ. Code § 2954.8(a) (requiring payment of interest on escrow account balances for properties in California). Congress has made clear that it views application of such state laws as being *consistent with*, and not in conflict with, national banks' exercise of their powers, erasing any uncertainty that may have existed previously on the subject.

Defendant-Appellee Bank of America, N.A. ("BofA"), which unlike its competitors admittedly has not complied with California Civil Code § 2954.8(a), even after the passage of Dodd-Frank, simply adopts the District Court's erroneous premise for disregarding the clarification provided in Dodd-Frank. As set forth in Plaintiffs' Opening Brief, the District Court's reasoning for finding preempted

Plaintiffs' claims under California's Unfair Competition Law[1] and for breach of contract (as premised on BofA's admitted non-compliance with California Civil Code § 2954.8(a)), does not withstand scrutiny.

Central to the District Court's ruling below was its misguided reading of the word "applicable" in Section 1639d(g)(3). According to the District Court, California Civil Code § 2954.8(a) is not an "applicable" law under Section 1639d(g)(3) and is therefore preempted, *because* it is preempted. The District Court supplants the plain meaning and context of the provision's language with its own circular reasoning, rendering Section 1639d(g)(3) superfluous. Clearly, Congress had no such intent.

The District Court's other grounds for finding preemption—that Section 1639d(g)(3) does not specifically use the word "preemption," or that Congress supposedly can only make national banks subject to state law by amending the National Bank Act itself, likewise do not withstand scrutiny.

BofA's alternative argument, that it was free to ignore the stated intent of Congress and decline to pay interest pursuant to California Civil Code § 2954.8(a) until the technical requirements for Section 1639d(g)(3) to become effective occurred, also lacks merit. California Civil Code § 2954.8(a) has been on California's books since 1976. Once Congress made its *original* intent on the

[1] Cal. Bus. & Prof. Code § 17200 *et seq*. ("UCL").

subject clear, no credible argument remained that would prohibit application of Section 2954.8(a) on the grounds that it interferes with national banks' powers, as Congress intends. Congressional intent drives the preemption analysis with respect to Plaintiff's claims premised on violations of state law, and *not* precisely when BofA and other creditors began to have a separate, direct obligation under the federal statute to pay interest.

BofA's other arguments in defense of the District Court's ruling, improperly assume a false universe where Congress has not directly spoken about the state law at issue. BofA's reliance on pre-Dodd-Frank cases and regulatory pronouncements, and on other authorities that do not address the situation where, as here, Congress has expressly weighed in, is misplaced.

The District Court's dismissal order should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The District Court's federal preemption determination and dismissal of Plaintiff's claims are reviewed *de novo*. *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 106 (2012).

II. THE DISTRICT COURT ERRED IN FINDING PLAINTIFF'S UCL CLAIM PREEMPTED.

A. Congressional Intent Controls the Question of Whether a Claim Based on Violations of California Civil Code § 2954.8(a) is Preempted.

The parties agree that the Supreme Court's opinion in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), supplies the pertinent standard for determining whether a claim premised on violations of Section 2954.8(a) is preempted by the National Bank Act ("NBA"). *See* Appellee Br. at 29. Under *Barnett Bank*, preemption should be found only where federal and state law stand in "irreconcilable conflict." *Barnett Bank*, 517 U.S. at 31.[2] Such a conflict may exist where compliance with both state and federal law is impossible, or where "the state law . . . stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks and alteration in original omitted).

Consistent with *Barnett Bank*, this Court has recognized that "the dispositive issue in any federal preemption question [is] congressional intent." *Aguayo*, 653 F.3d at 918; *see also Barnett Bank*, 517 U.S. at 30 ("Th[e] question [of

[2] BofA's suggestion that the Supreme Court has not endorsed the "irreconcilable conflict" standard is directly at odds with *Barnett Bank*. *See* 517 U.S. at 31 ("In this case, we must ask whether or not the Federal and State Statutes are in 'irreconcilable conflict.'"); Appellee Br. at 26.

preemption] is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?").

B. BofA Was Required to Make a Compelling Showing That Congress Intended Section 2954.8(a) to Be Preempted.

BofA does not dispute that it has the burden of proving its federal preemption defense. *See also Jimeno v. Mobil Oil Corp.*, 66 F.3d 1514, 1526 n.6 (9th Cir. 1995). BofA cites *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008), for the proposition that there is no "presumption" against preemption when it comes to state laws affecting national banks. *See* Appellee Br. at 17–18. The presence or absence of any presumption, however, does not change the fact that BofA bears the burden of proving its defense, and certainly there is no presumption *in favor of* NBA preemption here, as BofA seems to incorrectly imply.

Indeed, far from it, in a case like this, where a consumer seeks to enforce a state consumer protection law against a national bank, this Court has confirmed that federal preemption should be found only if the defendant makes a "compelling" showing that Congress intended the state law in question to be preempted:

> Aguayo's claims, rooted in California's consumer-protection laws, fall in an area that is traditionally within the state's police powers to protect its own citizens. Because consumer protection law is a field

> traditionally regulated by the states, *compelling evidence* of an intention to preempt is required in this area.

Aguayo, 653 F.3d at 917 (emphasis added) (internal quotation marks omitted).[3]

C. No Compelling Showing Can Be Made That Congress Intended for Section 2954.8(a) to Be Preempted, Because the Enactment of Dodd-Frank in 2010 Confirmed the Exact Opposite.

Whatever uncertainty might have existed previously as to congressional intent regarding the applicability of state laws like Section 2954.8(a), it was erased in 2010 when Congress enacted Dodd-Frank, which included an express provision—15 U.S.C. § 1639d(g)(3)—requiring all creditors, including national banks, to comply with this exact type of state law:

> 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.

15 U.S.C. 1639d(g)(3); *see also* 15 U.S.C.§ 1602(g) (broadly defining "creditor" in a manner that includes national banks). BofA acknowledges that it is a "creditor" that is subject to the requirements of Section 1639d. *See* Appellee Br. at 39. Moreover, BofA does not, and cannot, dispute that California Civil Code § 2954.8(a) is precisely the type of state escrow-interest law that is addressed by Section 1639d(g)(3). Congress *could* have exempted national banks from Section 1639d(g)(3), but it did not do so.

[3] BofA fails to address, or even cite, *Aguayo* in its Response Brief.

Congress's enactment of Section 1639d(g)(3) made clear that the application of state laws like California Civil Code § 2954.8(a) to national banks is *consistent with* (and not in conflict with) national banks' powers *as Congress intends those powers*. Clearly, no compelling showing can be made that Congress intended for California Civil Code § 2954.8(a) to be preempted, when the language of Dodd-Frank confirms the exact opposite. Where, as here, Congress has indicated a federally regulated entity is subject to state law, there is no conflict preemption. *See Barnett Bank*, 517 U.S. at 34 (decisions finding NBA preemption do not "control the interpretation of federal banking statutes that accompany a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law"); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) ("when Congress has made its intent known through explicit statutory language, the courts' task is an easy one"); *see also First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 130–31 (1969) (no preemption of Florida banking law because Congress made national banks subject to applicable state law in the substantive area); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583–84 (1987) (no preemption of California permit requirement for limestone mining in a national forest, given that Forest Service regulations "expressly contemplate[d] coincident compliance with state law as well as with federal law"); *Luna v. Harris*, 888 F.2d 949, 953 (2d Cir. 1989) (no preemption of New York law setting conditions on patients' ability to

take methadone home, as relevant federal regulations provided that state law applied). BofA failed to address these on-point authorities in its Response Brief.

D. The District Court's Avoidance of Congress' Intent Does Not Withstand Scrutiny.

BofA fails to provide any valid basis for why the expressed intent of Congress, as set forth in Dodd-Frank, should not control. BofA's response on this issue, *see* Appellee Br. at 33–52, is little more than a rehashing of the District Court's erroneous bases for essentially writing Congress' clarification right out of the code.

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

The District Court's preemption finding is grounded in its erroneous conclusion that Section 2954.8(a) is not "applicable" under Section 1639d(g)(3) *because* it is preempted. *See* ER 12. Such conclusion was absolutely fundamental to the result below, since it cannot be reasonably disputed that if Section 1693d(g)(3)'s mandate to comply with state laws regarding escrow interest applies to national banks, as the plain language of the statute indicates, then any argument that Section 2954.8(a) is preempted by the NBA must fail under *Barnett Bank*.

The District Court's reasoning in finding preemption on this basis was not only circular, but its loaded statutory interpretation is completely unsupported by legislative history or anything else. Moreover, such interpretation ignores the plain

meaning of the language in light of the context in which that language is used. As explained in Plaintiff's Opening Brief, only some states, such as California, have laws requiring lenders operating in those states to pay interest on mortgage escrow balances. Opening Br. at 19; *see also* Connecticut, Conn. Gen. Stat. §49-2a(a); Iowa, Iowa Code §524.905(2); Maine, Me. Stat. tit. 9-a, § 9-305; Maryland, Md. Code Ann., Com. Law § 12-1026; Massachusetts, Mass. Gen. Laws ch. 183, § 61; Minnesota, Minn. Stat. § 47.20, subd. 9; New Hampshire, N.H. Rev. Stat. Ann. §§ 384:16-c, 384:16-e; New York, N.Y. Gen. Oblig. Law § 5-601; N.Y. Real Prop. Tax Law § 953(1), (2); N.Y. Banking Law § 6-k(2)(b); Oregon, Or. Rev. Stat. § 86.245(2); Rhode Island, R.I. Gen. Laws § 19-9-2; Utah, Utah Code Ann. § 7-17-3; Vermont, Vt. St. Ann. tit. 8, § 10404; Wisconsin, Wis. Stat. § 138.051(5). Other states have no such law. *See* Opening Br. at 19. Read in this context, it is apparent that the phrase "[i]f prescribed by applicable State . . . law," as used in this provision, is intended to mean: "if the state in which the secured residence in question is located has such a law." Far from "render[ing] the word 'applicable' . . . meaningless," as BofA contends, *see* Appellee Br. at 43, this commonsense interpretation is consistent with the provision's plain language and is logically tied to the nature of the state laws (and lack thereof) at issue.

That the District Court's interpretation of "applicable" is wrong, is further confirmed by the fact that, under such reading, the provision would be rendered

mostly or completely superfluous, which would violate "one of the most basic . . . canons" of statutory interpretation. *Corley v. United States*, 556 U.S. 303, 314 (2009). As noted in Plaintiff's Opening Brief, the District Court's analysis leaves no room for any state law requiring mortgage escrow interest to be enforced against *any* national banking institution. And insofar as state-chartered and other non-federally-regulated mortgage lenders make residential loans in states that require payment of escrow interest to borrowers, those laws *independently* apply to those particular lenders. *See* Opening Br. at 19–21. As a practical matter, what mortgage lenders then *would* be impacted by Section 1639d(g)(3)'s mandate under the District Court's interpretation? Plaintiff posed this question directly, *see* Opening Br. at 19–21, and BofA failed to identify any type of mortgage lender that would be affected under the District Court's reading, *see* Appellee Br. at 39, 42 (invoking 15 U.S.C. § 1602(g)'s definition of "creditor" and conceding that it includes national banks); *see id*. at 43 (nonetheless failing to identify any type of mortgage lender—the only type of creditor that could maintain mortgage escrow accounts—that would be affected under the District Court's reading). Clearly, Congress did not intend to enact a statutory provision that would be completely or mostly without impact, but that would be the logical extension of the District Court's interpretation of the provision's language.

Plaintiff's commonsense interpretation of "applicable" also comports with the Supreme Court's recent examination of the same term in *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61 (2011). In *Ransom*, the word "applicable" in the bankruptcy statute at issue was not defined, and the Court looked to dictionary definitions, holding that "applicable," under its "ordinary meaning" should be interpreted as "appropriate, relevant, suitable, or fit." *Id*. at 69 (citing Webster's Third New International Dictionary 105 (2002); New Oxford American Dictionary 74 (2d ed. 2005); 1 Oxford English Dictionary 575 (2d ed.1989) ("[c]apable of being applied" or "[f]it or suitable for its purpose, appropriate")). Applying the same ordinary meaning here, a state law is "applicable" under Section 1639d(g)(3) where it is relevant and substantively fits the type of law the provision covers.

California has an "applicable" state law under Section 1639d(g)(3), California Civil Code § 2954.8(a). Congress' enactment of Section 1639d(g)(3) makes clear Congress' intent that compliance with such state law is consistent with BofA's powers as a national bank.

2. Congress Did Not Need to Amend the NBA.

The District Court also attributed significance to the fact that Section 1639d was enacted by Congress as part of the Truth in Lending Act, and not the NBA. *See* ER 11. BofA likewise suggests that Congress can only mandate national banks' compliance with state law by amending the NBA itself. *See* Appellee Br. at

36–37. However, it is well established that "where the meaning of a statutory provision is clear," the court should "not rely upon the location the legislature chose for it in its system of codification" as an interpretative aid. *Deutsch v. Turner Corp.*, 324 F.3d 692, 707 (9th Cir. 2003). Where, as is the case with California, a state has a law requiring creditors to pay interest on mortgage escrow balances for properties in that state, Section 1639d(g)(3), by its terms, requires all creditors, including national banks, to comply with those laws, no less so than if Congress had placed this provision elsewhere in the federal code. *See also, e.g.*, 12 C.F.R. § 34.4(b)(9) (saving state laws from NBA preemption that are "made applicable by Federal law," without limitation to where in the U.S. Code such federal law may appear). The inclusion by Congress of Section 1639d in the Truth in Lending Act ("TILA") was completely logical, given that the section relates to the terms of residential mortgages, a form of credit.

The District Court concluded that Section 1639d's inclusion in TILA belies a "sufficient logical connection to the NBA to demonstrate Congressional intent to change the NBA's preemptive scope in this arena." ER 12. However, the question is not, as the District Court apparently believed, whether Congress intended to *change* something. Rather, the controlling question is whether BofA has made a compelling showing that Congress intends for state laws like California Civil Code § 2954.8(a) to be preempted as to national banks. *Aguayo*, 653 F.3d at 917. The

answer to that question must be "no," given that Congress has now expressly stated that *all creditors*, including national banks, must comply with that exact type of state law in states where one exists.

3. Dodd-Frank Contains an "Explicit Statement" That All Creditors, Including National Banks, Must Comply With State Escrow-Interest Laws.

BofA argues that a state law may only apply to national banks if there is an "explicit statement" from Congress saying as much. First of all, while an explicit statement of this sort is clearly sufficient to defeat a defense of NBA preemption,[4] none of the authorities that BofA cites, *see* Appellee Br. at 34–35, stands for the proposition that an explicit statement is *mandatory* to avoid preemption or that the lack of an "explicit statement" obviates the need to analyze congressional intent in adjudicating an NBA preemption defense.

In any event, here, Dodd-Frank *does* contain an "explicit statement" regarding the applicability of the state law at issue. Section 1639d(g)(3) expressly provides that *all creditors*, including national banks, are subject to state escrow-interest laws where such laws exist. 15 U.S.C. § 1639d(g)(3). This case is therefore akin to *Barnett Bank* and the other cases where, like here, Congress has made clear that particular state laws apply to national banks and other federally

[4] *See English*, 496 U.S. at 78–79 ("when Congress has made its intent known through explicit statutory language, the courts' task is an easy one").

regulated entities. *Barnett Bank*, 517 U.S. at 34; *see also Dickinson*, 396 U.S. at 130–31; *Granite Rock Co.*, 480 U.S. at 583–84; *Luna v. Harris*, 888 F.2d at 953.

Franklin National Bank of Franklin Square v. New York, 347 U.S. 373 (1954), cited by BofA, is readily distinguishable from this case. In *Franklin National*, New York sought to enforce its law restricting the use of the word "savings" to describe banks that did not meet criteria specified by the New York law. *See id.* at 374, 376. The Court found that the New York law directly conflicted with federal law which referred to "savings" bank accounts differently, and that there was "no indication that Congress intended to make this phase of national banking subject to local restrictions." *Id.* at 378. Unlike here, there was no statement in that case from Congress regarding compliance with the state law at issue; indeed, there was no congressional statement at all that the state even argued was pertinent.

The other two cases that BofA cites for this argument—*Bank of America* and *Silvas*—are also inapposite. Both of those cases involved the entirely different situation where there was an anti-preemption provision but the effect of such provision was explicitly limited to a particular subchapter. *Bank of Am. v. City & Cnty. of S.F.*, 309 F.3d 551 (9th Cir. 2002); *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001 (9th Cir. 2008). Section 1639d(g)(3), of course, contains no such

limitation. *See* ER 12 (District Court finding *Bank of America* and *Silvas* to be "largely unhelpful" because of this distinction).

Congress' express language in Section 1639d(g)(3) makes clear that the application of such state laws to national banks is consistent with, and does not conflict with, national banks' powers as Congress intends those powers. The fact that the provision does not specifically use the word "preemption," which the District Court apparently also found to be significant, *see* ER 12, does not alter the analysis. BofA cites *Barnett Bank* in trying to argue otherwise, *see* Appellee Br. at 36–37, but, in fact, the Supreme Court in *Barnett Bank* recognized that "[m]ore often, explicit pre-emption language does not appear, or does not directly answer the question." *Barnett Bank*, 517 U.S. at 31 (citation omitted).

Congress' enactment of a statute requiring all creditors to comply with state laws such as California Civil Code § 2954.8(a), without excepting national banks, belies any reasonable argument that Congress intends for the application of such state laws to be preempted.

4. BofA's Alternative Argument, That NBA Preemption Applied Until Section 1639d(g)(3)'s Effective Date, Lacks Merit.

BofA argues that even if it is required to comply with California Civil Code § 2954.8(a), such requirement could only apply to escrow accounts established on or after January 21, 2013, the date when Section 1639d took effect. BofA

incorrectly asserts that the District Court stated this as an alternative basis for dismissing Plaintiff's claims premised on violations of California Civil Code § 2954.8(a). *See* Appellee Br. at 48. That is not true; the District Court's discussion regarding the impact of Section 1639d(g)(3)'s effective date was limited to its analysis of Plaintiff's claim premised on alleged direct violations of the federal statute. *See* ER 12–13.

Moreover, BofA's argument lacks merit. BofA confuses the question of when it began to have a direct, separate obligation under the federal statute to pay escrow interest, with the distinct question of whether it had an obligation to pay interest under California Civil Code § 2954.8(a). Whether Plaintiff's UCL and contract claims premised on violations of California Civil Code § 2954.8(a) are preempted by the NBA, turns on the question of congressional intent regarding national banks' powers, not on the technical question of when the direct federal law requirement ultimately ended up taking effect. *Barnett Bank*, 517 U.S. at 31. Section 2954.8(a) has been part of the California Civil Code since 1976. Whatever uncertainty may have existed previously, Congress made its *intent* clear when it *passed* Dodd-Frank in 2010, putting to rest any reasonable argument that Congress viewed compliance with Section 2954.8(a) and similar state laws as being inconsistent with national banks' powers. Congress' intent was clear when the law

was enacted; it was not "suspended in time" until the various technical requirements for the direct federal obligation to become effective had occurred.

5. The Rest of BofA's Arguments Assume a False Universe Where Congress Has Not Spoken About the Specific State Law in Question.

A substantial portion of BofA's Response Brief essentially ignores the 2010 enactment of Section 1693d(g)(3). BofA includes an extensive discussion regarding the powers of national banks and how those powers historically were interpreted by the Office of the Comptroller of the Currency ("OCC"), including with respect to escrow services. Appellee Br. at 18–20. None of the authorities that BofA cites, however, change the fact that it is the intent of *Congress* that controls the analysis here. Nor do those authorities support BofA's implication that Congress' specific, expressed intention can somehow be trumped by regulators' interpretations that are inconsistent with what Congress itself has said or by generalized statements regarding banks' powers.

This is not a situation where, as BofA implies, state law is seeking to condition a national bank's exercise of its federal powers on compliance with state law (like, for example, in *Parks v. MBNA America Bank, N.A.*, 54 Cal. 4th 376, 278 P.3d 1193 (Cal. 2012), cited by BofA, *see* Appellee Br. at 21). Rather, here, Congress has made clear that all creditors, including national banks, should be complying with these specific state laws, thereby providing pertinent clarity

regarding the scope of national banks' powers as Congress intends those powers. Once Congress' intent on the subject became clear, prior inconsistent interpretations could no longer be valid.

BofA relies on two pre-Dodd-Frank cases that involved state escrow-interest laws. *See* Appellee Br. at 22 (citing *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178 (2d Cir. 2005); *First Fed. Sav. & Loan Ass'n of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979)). Critically, both of these cases predate the enactment of Dodd-Frank, and thus the courts there obviously did not have the benefit of Congress' expression of intent in Section 1639d(g)(3). Now that Congress has provided clarification, through Dodd-Frank, it is *that* expression of intent, and not a court's earlier attempt to discern Congress' intent, divorced from Congress' later express clarification, that controls. Both the *Flagg* and *First Federal* cases are distinguishable for the additional reason that they involved the application of HOLA *field preemption* principles, which are very different from the conflict preemption principles applicable here. *See* ER 9.[5]

BofA's reliance on *Hayes v. Wells Fargo Bank, N.A.*, No. 13cv1707, 2014 WL 3014906 (S.D. Cal. July 3, 2014), is similarly misplaced. In *Hayes*, the

[5] *First Federal* is inapplicable for yet another reason—it involved a federal regulation (no longer in effect) that had specifically regulated the conditions under which federal savings and loan associations were required to pay interest on certain mortgage escrow balances. *First Fed.*, 591 F.2d at 420, 425.

plaintiff alleged that the defendant intentionally set up her escrow account so she would incur a large negative escrow balance, which the plaintiff asserted was a violation of the Real Estate Settlement Procedures Act ("RESPA"), and thus actionable under the UCL's "unlawful" prong. Unlike here, the plaintiff in *Hayes* pointed to no statement by Congress specifically addressing the need for all lenders to comply with the specific state law at issue in that case.

The other post-Dodd-Frank cases BofA relies upon, as evidence of what BofA calls the "broad preemptive force" of 12 C.F.R. § 34.4, Appellee Br. at 23–24, are also inapposite. None of those cases involved a situation, like here, where Congress has expressly indicated compliance with the state law at issue is *consistent* with the scope of a national bank's power.

Like the pre-Dodd-Frank cases that BofA cites, pronouncements by regulators that conflict with the expressed intent of Congress merit no weight. Pre-Dodd-Frank regulatory actions or interpretations do not apply if they conflict with the intent of Congress. *See* 76 Fed. Reg. 43549, 43557 (July 21, 2011) ("the continued validity of [prior regulatory actions and regulations] applicable to state consumer financial laws is subject to the standards of [section 25b(b)(1)]"). BofA cites *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), for the proposition that federal regulations have the same preemptive effect as federal statutes. That does *not* mean, however, that the OCC or any other regulator

can issue regulations or governing interpretations that conflict with the expressed intent of Congress. Congress' intent controls, and the extent of the regulators' authority is necessarily constrained by congressional intent. *See Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter . . . ."); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 42–43 (1990) (deference to interpretation of the Paperwork Reduction Act by the Office of Management and Budget was foreclosed by finding interpretation was inconsistent with clear congressional intent).

Any suggestion that 12 C.F.R. § 34.4 preempts the application of California Civil Code § 2954.8(a) must fail in light of the fact that as part of Dodd-Frank: (1) the *Barnett Bank* standard was expressly incorporated into 12 C.F.R. § 34.4 as the applicable standard;[6] and (2) Congress has expressly clarified that all creditors, including national banks, are subject to such state laws. 15 U.S.C. § 1639d(g)(3); *see also* 12 C.F.R. § 34.4(b)(9) (state laws are not preempted where they are "made

[6] *See* 76 Fed. Reg. 43549, 43556 (July 21, 2011) (explaining that the language changes "will remove any ambiguity that the conflict preemption principles of the Supreme Court's *Barnett* decision are the governing standard for national bank preemption").

applicable by Federal law"). To the extent BofA suggests California Civil Code § 2954.8(a) BofA can be held preempted based on general language of 12 C.F.R. § 34.4(a), alone, without any consideration of congressional intent regarding the specific state law in question, such argument lacks merit. *See Sacco v. Bank of Am., N.A.*, No. 5:12-cv-00006, 2012 WL 6566681, at *8 (W.D.N.C. Dec. 17, 2012) ("to deem as preempted under 12 C.F.R. § 34.4 any state regulation of a means utilized by the bank to pursue its right to recover a debt—at least absent an additional determination by the OCC or Congress pursuant to section 34.4(b)(9)—would essentially be to substitute the *Barnett Bank* directive with a more wide-ranging preemption standard").

A. There Was No Evidence Supporting the District Court's Determination That Compliance With Section 2954.8(a) Would Significantly Interfere With BofA's Powers or Operations.

As discussed above, following Dodd-Frank's passage, there can be no credible argument that Section 2954.8(a) "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Barnett Bank*, 517 U.S. at 31 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks and alteration in original omitted). Nor has BofA attempted to argue the other basis for finding conflict preemption—*i.e.*, that it is "impossib[le]" to comply with both federal and state requirements. *Id.* As such, any finding of preemption cannot withstand scrutiny under *Barnett Bank*.

But even if one were to accept, *arguendo*, the District Court's interpretation of BofA's federal lending powers and its flawed interpretation of Section 1639d(g)(3), there was no evidence in the record below to support the District Court's determination that application of Section 2954.8(a) here would "significant[ly] interfere[]" with BofA's lending activities. ER 10. In fact, such conclusion runs contrary to Plaintiff's allegations, which the District Court was obligated to accept as true. *See Ass'n for L.A. Deputy Sheriffs v. Cnty. of L.A.*, 648 F.3d 986, 991 (9th Cir. 2011); *see also, e.g.*, ER 107–08 (alleging that BofA's competitor complies with Section 2954.8(a)). Presumably aware of the lack of an evidentiary record, BofA now chides Section 2954.8(a) as requiring lenders to pay "above market" interest rates. Appellee Br. at 24–28. However, the 2% per annum rate provided for in § 2954.8(a) is a fixed rate, one that is modest and, if anything, is easier to administer than a rate that changes. It is also a rate that at various times since the section's 1976 enactment has been significantly *lower* than prevailing market interest rates.[7] Moreover, BofA's speculation that having to comply with Section 2954.8(a) might cause some banks to refuse to make some loans, *see* Appellee Br. at 22, falls well short of actual evidence supporting a

[7] Congress was clearly aware of the distinctions between states' escrow-interest laws (for those states that have them), specifying in Dodd-Frank that creditors pay such interest "in the manner as prescribed by" the particular state law (if any) for the state in question. 15 U.S.C. § 1639d(g)(3).

finding of significant interference. At the very least, it was premature for the District Court to find significant interference before discovery has even commenced.[8]

III. THE DISTRICT COURT ERRED IN FINDING PLAINTIFF'S BREACH OF CONTRACT CLAIM PREEMPTED.

The District Court also erred by finding Plaintiff's breach of contract claim was preempted. Plaintiff's operative agreement with BofA provided that BofA would pay interest on Plaintiff's escrow account balances if "Applicable Law requires interest to be paid on the Funds . . . ." ER 25. Because California Civil Code § 2954.8(a) requires BofA to pay such interest, *see supra* Section II, Plaintiff's claim that BofA breached the agreement, by failing to do so, is well pled and was improperly dismissed.[9]

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

The District Court also erred in dismissing Plaintiff's claims to the extent those claims are premised on a direct violation of 15 U.S.C. § 1639d(g)(3).

---

[8] BofA's argument that Plaintiff waived this point, *see* Appellee Br. at 25, is misguided. Plaintiff correctly argued below that his allegations must be accepted as true at the pleading stage. *See* Dkt. No. 28 at 6. That the District Court nevertheless made findings that were contrary to those allegations, supported by no evidence, was clear to Plaintiff only when the District Court issued the order on which this appeal was taken.

[9] BofA's direct violation of the federal statute, 15 U.S.C. § 1639d(g)(3), since 2013 is a separate valid basis for Plaintiff's breach of contract claim. *See infra* Section IV.

Plaintiff has alleged continuing violations by BofA of Section 1639d(g)(3), as to Plaintiff and the other borrowers in the putative class, after the direct interest requirement under the federal statute took effect. *See* ER 106–07, 111, 116.

CONCLUSION

The District Court's dismissal order should be reversed.

Respectfully submitted,

Dated: September 14, 2015

/s/ Michael W. Sobol

Michael W. Sobol
Roger N. Heller
LIEFF CABRASER HEIMANN
& BERNSTEIN, LLP

Richard D. McCune
Jae K. (Eddie) Kim
MCCUNEWRIGHT, LLP

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii), because it contains 5,543 words, as determined by Microsoft Word 2010, including the headings and footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The text appears in 14-point Times New Roman, a proportionally spaced serif typeface.

Dated: September 14, 2015

/s/ Michael W. Sobol
Michael W. Sobol

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, via the appellate CM/ECF system. Case participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: September 14, 2015

/s/ Michael W. Sobol
Michael W. Sobol

Counsel for Plaintiff-Appellant

1271754.13