ARNOLD & PORTER LLP

Laurence J. Hutt

State Bar No. 06629
Laurence.Hutt@aporter.com
+1 213.243.4100
+1 213.243.4199 Fax
777 South Figueroa Street
Forty-Fourth Floor
Los Angeles, CA 90017-5844

May 25, 2012

The Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: ***Allan Parks v. MBNA America Bank N.A.*, Case No. S183703**

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Respondent MBNA America Bank, N.A. ("MBNA") hereby replies to the letter briefs filed by Appellant Allan Parks ("Parks") and California Attorney General Kamala D. Harris, respectively, regarding the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA") (Pub. L. No. 111-203 (July 21, 2010) 124 Stat. 1376) and the regulatory response of the Office of the Comptroller of the Currency ("OCC").

As MBNA explained in its supplemental letter brief filed on May 16, 2012 ("MBNA's Letter Brief"), the DFA provisions relating to preemption of state law by the National Bank Act ("NBA") (12 U.S.C. § 21 *et seq.*) and the implementing regulations of the OCC became effective prospectively on July 21, 2011, more than seven years after Parks filed his claim against MBNA. The DFA therefore does not apply to this case. (See MBNA Letter Br. at 1-4.)

Nevertheless, both Parks and the Attorney General attempt to use the DFA to argue that, under its provisions, Parks' claim is not preempted by the NBA or the applicable OCC preemption regulation, 12 C.F.R. § 7.4008 ("Section 7.4008"), promulgated in 2004. According to Parks and the Attorney General, the DFA is significant because it creates *new* standards and rules, which they contend somehow govern actions taken *before* the DFA existed. Specifically, they argue that the DFA both (i) established a substantive standard for NBA preemption that insulates Parks' claim from preemption, and (ii) mandated special steps for the OCC to follow in making NBA preemption determinations that render the OCC's *preexisting* preemption regulation invalid.

These arguments lack both textual support and analytic coherence.

First, with respect to the DFA's substantive standard for NBA preemption, as MBNA explained in its supplemental letter brief, the DFA codified the standard of the decision of the United States Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson* (1996) 517 U.S. 25. (See MBNA Letter Br. at 2-4.) *Barnett Bank* has always been the applicable NBA preemption standard here, and under that standard, Parks' claim is preempted, as the trial court held. (See *Rose v. Chase Bank USA, N.A.* (9th Cir. 2008) 513 F.3d 1032.)

Second, with respect to the new rules the DFA established for the OCC to follow in making preemption determinations, those rules obviously have no application here because they concern preemption determinations the OCC has *yet to make* – not the preemption regulation governing Parks' claim, Section 7.4008, which predates the effective date of the DFA preemption provisions by seven years. The suggestions of Parks and the Attorney General that the *new* DFA rules governing *future* OCC preemption determinations somehow affect this Court's application of a regulation promulgated in 2004 are nothing but a distraction.

To the extent the DFA and the OCC's regulatory response *do* have any significance in this case, it is because they confirm that:

1. The OCC had authority to issue the 2004 preemption regulations;

2. The OCC's 2004 preemption regulations were and remain valid; and

3. Congress views the OCC as an essential source of law governing NBA preemption.

I. *Barnett Bank* Provides the Applicable Standard for Preemption

A. Parks Acknowledges That Congress Codified the *Barnett Bank* Standard as Understood by the OCC

Parks explicitly acknowledges that the DFA did not change the standard for preemption relied on by MBNA, *i.e.*, the standard articulated by the U.S. Supreme Court in *Barnett Bank of Marion County, N.A. v. Nelson* (1996) 517 U.S. 25. (Parks' Letter Br. at 3, 7-8.) As he specifically notes, DFA Section 1044 (124 Stat. at 2014-17), now 12 U.S.C. § 25b ("Section 25b"), codifies the decision of *Barnett Bank* as the standard for NBA preemption of State consumer financial laws. (Parks' Letter Br. at 3, 7-8; 12 U.S.C. § 25b(b)(1)(B) [prescribing NBA preemption of such laws "in accordance with the legal standard for preemption in the decision of *Barnett Bank of Marion County, N.A. v. Nelson*"].)

Parks also cites to the legislative history of the DFA, noting that both the House and Senate versions of the legislation, as well as the report of the House-Senate Conference Committee, "leave no doubt that Congress intended to codify the *Barnett Bank* standard for preemption." (Parks' Letter Br. at 7.) In addition, Parks notes the colloquy between Senator Thomas Carper, one of the legislation's key sponsors, and Senator Chris Dodd, the Chairman of the Senate Banking Committee and leader of the

negotiations for the Senate in the House-Senate Conference Committee, which he acknowledges "confirms that the Dodd-Frank Act is a codification of the *Barnett Bank* preemption standard." (*Id.* at 7-8, quoting 156 Cong. Rec. S5902 (daily ed. July 15, 2010) [2010 WL 2788025].)

B. The Attorney General's Contention Regarding the *Barnett Bank* Preemption Standard Are Refuted by the DFA and Its Legislative History

The Attorney General ignores this legislative history. She contends that the DFA's "significance in this case is that it reaffirms that the preemptive scope of the National Bank Act is narrow, and that a state law is preempted only when it prevents or significantly interferes with a national bank's exercise of its banking powers." (Attorney General ("AG") Letter Br. at 1; see also *id.* at 4 ["[C]onflict preemption exists *only* when the state consumer law statute either forbids or impairs significantly the national bank's exercise of its lending powers."].) The Attorney General thus reduces Justice Breyer's eight-page explanation of the history and context of NBA preemption in *Barnett Bank* to a mere four words. If that was Congress' intent in the DFA, then the DFA's preemption standard materially alters preexisting law and the DFA's preemption standard can only be applied prospectively to conduct occurring after its effective date.

The Attorney General fails to explain why, if Congress intended that the *only* basis for determining the NBA preempts state law is a "prevents or significantly interferes" finding, the DFA expressly provides that the NBA preempts state law "in accordance with the legal standard for preemption *in the decision* of the Supreme Court of the United States in *Barnett Bank*." (12 U.S.C. § 25b(b)(1)(B); see also *id.* § 25b(c) [referring solely to "preemption [of state law] in accordance with the legal standard of the decision of the Supreme Court of the United States in *Barnett Bank*"].) If Congress had intended that the *only* test for NBA preemption of a State consumer financial law was whether the law "prevents or significantly interferes" with a national bank's exercise of its banking powers, it would have simply prescribed that test by reference to it alone. But that is not what Congress did. Instead, it deliberately included in the DFA the prescription for NBA preemption "*in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in Barnett Bank.*" (12 U.S.C. § 25b(b)(1)(B), emphasis added.)

The Attorney General's suggestion that the "*Barnett Bank*" prescription is mere surplusage cannot be squared with well-established principles of statutory construction, under which every word in a statute is to be accorded significance. (*Reiter v. Sonotone Corp.* (1979) 442 U.S. 330, 339 ["In construing a statute we are obliged to give effect, if possible, to every word Congress used."].) Her construction of the statute is erroneous.

Moreover, the DFA's legislative history (see, e.g., Parks' Letter Br. at 7-8) refutes the Attorney General's argument. As confirmed by the key Senate sponsors of the DFA amendment containing the text of Section 25b, Senators Thomas Carper and Mark Warner, Congress deliberately referred to *Barnett Bank* to mean all of the NBA

preemption tests it articulates, not just the "prevents or significantly interferes" test. As those Senators explained:

> The House-passed version of th[e] legislation did not clearly incorporate the preemption principles enunciated by the Supreme Court in the *Barnett Bank v. Nelson* case. This would have created an uncertain legal environment in which it would not be clear what laws applied to national banks. In order to address this problem and to assure legal certainty for all parties, *we insisted that a direct reference to the Barnett Bank case be included in the bill to ensure that the preemption principles in the Barnett Bank case were preserved.* This point was clarified further during the Senate floor debate on the Conference report. During that debate, we noted that the Conference report maintained the *Barnett Bank* standard as the basic legal standard for preemption. Senator Dodd, the Chairman of the Senate Banking, Housing and Urban Affairs Committee, agreed with our view, and confirmed that the legislation codifies the preemption standard of the *Barnett Bank* case. As you know *that standard is not simply the short-hand phrase "prevent or significantly interfere", but rather the traditional conflict preemption standard as explained by the Court in its holding in the Barnett Bank case.*

(Letter from Senator Thomas R. Carper and Senator Mark Warner to Acting Comptroller John Walsh (April 4, 2011), at 1-2 [hereinafter "Carper-Warner Letter of April 4, 2011"], Ex. 1 to MBNA's Request for Judicial Notice in Support of Answer to the *Amicus Curiae* Brief of the Consumer Attorneys of California, footnote omitted.)[1]

These explicit statements by the key legislators involved plainly confirm that Section 25b incorporates *Barnett Bank*'s preemption framework *in its entirety*, and that the statute's reference to *Barnett Bank*'s "prevents or significantly interferes" language is not intended to single out that particular indicium of preemption as determinative on its own or to the exclusion of *Barnett Bank*'s other preemption criteria.

Moreover, this understanding is implicit in the context of the DFA's enactment. In enacting Section 25b, Congress was aware of its own prior reference to *Barnett Bank* in another federal banking statute, the Gramm-Leach-Bliley Act of 1999 ("GLBA") (Pub. L. No. 106-102, 113 Stat. 1338). The GLBA, which generally preempts any state law that interferes with bank sales of insurance, refers to *Barnett Bank* as follows:

---

[1] The Carper-Warner amendment was adopted by the Senate by a vote of 80 to 18 and enacted as Dodd-Frank Act Title X, Subtitle D (DFA Sections 1042 through 1047). (See 156 Cong. Rec. S5888-S5889 (daily ed. July 15, 2010) [2010 WL 2788025] [statement of Sen. Johnson]; 156 Cong. Rec. S3916-S3918 (daily ed. May 18, 2010) [2010 WL 1978134] [text of amendment].)

> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.

(15 U.S.C. § 6701(d)(2)(A).) The courts and the OCC have understood this GLBA preemption standard, which, like Section 25b, expressly mentions the "prevent or significantly interfere with" indicia of preemption, as incorporating the full reasoning and principles underlying *Barnett Bank* – not as simply dictating a shorthand "prevent or significantly interfere with" test for preemption. (See, e.g., *Ass'n of Banks in Ins., Inc. v. Duryee* (6th Cir. 2001) 270 F.3d 397, 405, 409 [applying the GLBA preemption provision by, *inter alia*, considering *Barnett Bank*'s reference to preemption of state laws that " 'impair the efficiency of national banks,' " or " 'destro[y]' " or " 'hampe[r]' national bank[] functions," or " 'interfere with or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] government' "]; OCC Preemption Opinion, 66 Fed. Reg. 51,502, 51,504 (Oct. 9, 2001) [same].)

These pre-DFA interpretations of the GLBA preemption standard are further confirmation that Congress intended Section 25b to prescribe preemption in accordance with *Barnett Bank in its entirety*, not merely under a "prevents or significantly interferes with" test. As the Supreme Court has "often observed . . . , when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.' " (*Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA* (2010) 130 S. Ct. 1605, 1616, quoting *Bragdon v. Abbott* (1998) 524 U.S. 624, 645.) Because Congress enacted Section 25b against the backdrop of judicial – as well as OCC – interpretations of the similar references to *Barnett Bank* in the GLBA, that reference cannot be artificially cabined into a reading that would limit NBA preemption analyses to a focus merely on whether state law "prevents or significantly interferes with" the exercise of national bank powers.

Post-DFA case law, including that cited by Parks, further confirms this point. In *Cline v. Bank of America, N.A.* (S.D. W. Va. 2011) 823 F. Supp. 2d 387 (cited in Parks' Letter Br. at 8), the court analyzed preemption under Section 25b, and applied the *principles articulated in Barnett Bank* – not simply a "prevents or significantly interferes" test. After discussing Section 25b and Section 7.4008, as amended by the OCC in 2011, the *Cline* court stated:

> Inasmuch as section 25b and section 7.4008 are deemed applicable to this case, both must be scrutinized in order to resolve the preemption controversy. At the outset, it is

> noted that both provisions explicitly reference the Supreme Court's decision in *Barnett Bank*. An understanding of that case is thus essential in assessing the present scope of NBA preemption.

(*Id.* at 396-97.) The court went on to quote the following passage from *Barnett Bank*:

> "In this case we must ask whether or not the Federal and State Statutes are in 'irreconcilable conflict.' The two statutes do not impose directly conflicting duties on national banks . . . . Nonetheless, . . . [the State Statutes] . . . would seem to 'stan[d] as an obstacle to the accomplishment' of one of the Federal Statute's purposes . . . ."

(*Id.* at 397, quoting *Barnett Bank*, 517 U.S. at 31.)

The *Cline* court did *not* focus on the "prevent or significantly interfere" phrase in *Barnett Bank*. Instead, the court cited *Barnett Bank*'s references to the *various* linguistic formulations that the *Barnett Bank* Court found independently and alternatively indicative of a preempted impact of a state law on a national bank's exercise of its banking powers, including but not limited to the "prevent or significantly interfere" phrase. (See *id.* [quoting *Barnett Bank*'s reference to preemption of state laws that "*unlawful[ly] encroac[h]* on the rights and privileges of national banks"; or "*destro[y] or hampe[r]*" national banks' functions; or "*interfere with, or impair [national banks'] efficiency* in performing the functions by which they are designed to serve [the Federal] Government" (517 U.S. at 33-34), emphases added, internal citations and quotation marks omitted].)

Recognizing that all of these indicators of preemption are part of a proper NBA preemption analysis under Section 25b, the *Cline* court stated that: "the inquiry under *Barnett Bank* distills to whether the state measure either (1) imposes an obligation on a national bank that is in direct conflict with federal law, or (2) stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.* at 397-98; see also *Baptista v. JPMorgan Chase Bank, N.A.* (11th Cir. 2011) 640 F.3d 1194, 1197 [analyzing an NBA preemption question post-DFA and citing *Barnett Bank*'s statement that the NBA preempts state law that "impairs" the exercise of national bank powers].)[2]

Before and after Section 25b's effective date, state law is preempted by the NBA in accordance with the principles articulated in the entirety of the *Barnett Bank* decision.

---

[2] The Attorney General is simply wrong in stating that the Eleventh Circuit in *Baptista* "recognized that conflict preemption exists *only* when the state consumer law statute either forbids or impairs significantly the national bank's exercise of its lending powers." (AG Letter Br. at 4.) The Eleventh Circuit did not make any statement to that effect; nor did it suggest any such conclusion. (See *Baptista*, 640 F.3d at 1197.)

As MBNA has shown, a proper application of those principles requires consideration of the *Barnett Bank* decision in its entirety. (See, e.g., MBNA's Letter Br. at 4-5.) Thus, in this case, the NBA requires an evaluation of whether, under any or all of the various linguistic formulations for preemption referred to in *Barnett Bank*, the application of Cal. Civ. Code § 1748.9 to MBNA would "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Barnett Bank*, 517 U.S. at 31, citation and internal quotation marks omitted.) As the trial court correctly determined, consistent with the Ninth Circuit's ruling in *Rose*, such an evaluation compels the conclusion that Parks' claim is preempted. (See *Rose*, 513 F.3d at 1038; MBNA's Opening Br. at 12-23; Reply Br. at 3-12.)

II. The Arguments Advanced by Parks and the Attorney General Regarding the Significance of the OCC's Regulatory Response Ignore the Text and Evident Purpose of the DFA

A. The OCC Appropriately Modified Its Preemption Regulations to Take Account of the DFA

As MBNA explained in its supplemental letter brief, in response to the DFA, the OCC reviewed and slightly modified its 2004 preemption regulations, including Section 7.4008. (See Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549 (July 21, 2011) [final rule].) Those modifications expressly and explicitly were designed to eliminate any doubt that 2004 regulations, including Section 7.4008, implement the preemption principles articulated in *Barnett Bank* – consistent with Section 25b. Pursuant to its 2011 DFA rulemaking, the OCC (i) added to the preemption regulations an express reference to "the decision of the Supreme Court in *Barnett Bank*," and (ii) removed the regulations' reference to preemption of state laws that "obstruct, impair, or condition" a national bank's ability to exercise fully its federally granted powers. (See *id.* at 43,555-56.) Particularly because of apparent confusion about the latter reference, the OCC determined that these modifications would "remove any ambiguity that the conflict preemption principles of the Supreme Court's *Barnett* decision are the governing standard for national bank preemption." (*Id.*)

Parks and the Attorney General incongruously argue that by *confirming* that the *Barnett Bank* preemption principles are the governing NBA preemption standard, the OCC *ignored* the DFA's codification of those very principles. These arguments are nonsensical and ask this Court to ignore (1) the text of the DFA; (2) the DFA's legislative history that Parks himself quotes; and (3) the OCC's detailed explanations of both the 2004 preemption regulations and the modifications to those regulations in 2011. As those explanations clearly confirm, the OCC grounded its 2004 rules on the preemption principles articulated in *Barnett Bank*. (See Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910-11 (Jan. 13, 2004); 76 Fed. Reg. at 43,556-57.) In the 2011 modifications to those rules, the OCC properly responded both to the DFA's express codification of the *Barnett Bank* principles and comments it had received reflecting confusion caused by the "obstruct, impair, or condition" terminology in the 2004 rules. (See 76 Fed. Reg. at 43,556.) The OCC's 2011 DFA rulemaking relating to Section 25b was plainly appropriate.

The OCC's 2011 DFA rulemaking also has no impact on this case. The resolution of the preemption questions here does not turn on, and never has turned on, the reference to "obstruct, impair, or condition" in Section 7.4008. Cal. Civ. Code § 1748.9 is preempted in this case because it has an impermissible effect on MBNA under the *various* formulations for preemption articulated in *Barnett Bank*, including *but not limited to* the decision's reference to preemption of state law that would "impair" or "condition" a national bank's ability to exercise fully its federally granted banking powers. (*Barnett Bank*, 517 U.S. at 33-34.) Those multiple and various *Barnett Bank* formulations are the fundamental underpinnings of Section 7.4008, both as originally promulgated in 2004 and as amended in 2011. (69 Fed. Reg. at 1910-11; 76 Fed. Reg. at 43,556-57.)

B. Section 25b's Requirements for the OCC In Making Preemption Determinations Have No Significance for This Case

Parks and the Attorney General further advance the separate and wholly untenable argument that Section 25b's new mandates for the OCC to follow in making preemption determinations have significance for this case. Those mandates prescribe steps to be taken by the OCC in making *future* determinations that State consumer financial laws are preempted. Because these requirements are plainly only prospective in application and could not retroactively nullify Section 7.4008 or otherwise affect this case, MBNA did not address them in its supplemental letter brief in response to the Court's request for briefing on the "significance" of the DFA and the OCC's regulatory response. (Order of April 25, 2012.)

Both Parks and the Attorney General, however, latch on to the new requirements for OCC preemption determinations under Section 25b to suggest that, in undertaking its 2011 DFA rulemaking, the OCC was somehow obligated to repeal its 2004 preemption regulations, including Section 7.4008. To advance this argument, Parks and the Attorney General attempt to characterize the OCC's 2011 DFA rulemaking as involving new "preemption determinations" with respect to "State consumer financial laws."

Parks himself anticipates that this argument is doomed: "a refusal to repeal a regulation is not a 'preemption determination' under 12 U.S.C. § 25b(b)(1)." (Parks' Letter Br. at 13.) In the 2011 DFA rulemaking, the OCC did not purport to, and did not, make any preemption determinations: it reviewed its *prior* preemption determinations made in 2004, confirmed their consistency with the principles of *Barnett Bank*, added the express reference to *Barnett Bank*, and removed one phrase that apparently had caused confusion with respect to the regulations' relationship to *Barnett Bank*.

And even if the OCC *had* made new preemption determinations pursuant to the DFA that entailed a repeal of Section 7.4008, that still would not have affected this case, because it would have effected a *change*, not a clarification, in the law applicable to Parks' claim, and impermissibly attached a new and adverse consequence to past conduct. A new statute may apply to cases pending at the time the statute takes effect only that is the legislature's clear intent or if the statute merely clarifies, and does not materially alter, the law governing the conduct at issue. (*Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 280 ["If the statute would operate retroactively, our traditional

presumption teaches that it does not govern absent clear congressional intent *favoring* such a result." (emphasis added)].); *W. Sec. Bank, N.A. v. Superior Court* (1997) 15 Cal. 4th 232, 243 [holding that only a "mere[] *clarif[ication*], as opposed to a "change[]," can be applied retroactively absent clear congressional intent].)

Congress' clear intent was that the DFA, and in particular Section 25b, apply prospectively only, as its text and legislative history confirm.

1. The DFA's Requirements for OCC Preemption Determinations Plainly Are Prospective Only

There are two principal new requirements the DFA establishes for the OCC to follow in making determinations that State consumer financial laws are preempted. First, the DFA provides that "any preemption determination [with respect to such state laws] may be made by . . . regulation or order of the Comptroller of the Currency on a case-by-case basis." (12 U.S.C. § 25b(b)(1)(B).) A determination on a "case-by-case" basis means a determination with respect to a particular State consumer financial law – or, following certain consultations, a determination with respect to multiple substantially equivalent State consumer financial laws. (*Id.* § 25b(b)(3).) Second, OCC determinations that State consumer financial laws are preempted under Section 25b must be based on "substantial evidence." (*Id.* § 25b(c).)

Contrary to the suggestions of Parks and the Attorney General, these prescriptions for OCC action have no relevance to Section 7.4008, which was promulgated seven years before the new rules took effect. On their face, the new rules could only apply prospectively, and nothing in the DFA indicates any intent to repeal preexisting preemption regulations as applied to past conduct.

Section 25b expressly states that the "case-by-case" requirement is for a "preemption determination *under this subparagraph*" – *i.e.*, under subparagraph (B) of paragraph (1) of subsection (b) of Section 25b. (*Id.* § 25(b)(1)(B).) The DFA *created* Section 25b. It could not possibly dictate the requirements for adopting a previously promulgated regulation.

The prospective nature of the "case-by-case" requirement is further confirmed by several other Section 25b provisions. For example, Section 25b(b)(3), which defines the term "case-by-case basis," provides that:

> 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 substantially equivalent terms.

(*Id.* § 25b(b)(3)(A), emphasis added.) Again, "this section" – *i.e.*, Section 25b – did not exist when Section 7.4008 was promulgated. By its very definition, the "case-by-case

basis" requirement is for OCC preemption determinations made *pursuant to a statutory section not in existence* when Section 7.4008 was promulgated.

The following subparagraph underscores the point:

> 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.

(*Id.* § 25b(b)(3)(B).) Like Section 25b itself, the Consumer Financial Protection Bureau is a creation of the DFA. The OCC could hardly have consulted with a non-existent body when promulgating Section 7.4008.

Likewise, the new requirement that OCC preemption determinations regarding State consumer financial laws be based on "substantial evidence," also is expressly limited to OCC regulations or orders "prescribed under subsection (b)(1)(B)" of Section 25b. (*Id.* § 25b(c); see also *id.* § 25b(b)(6).)

Quite obviously, these are changes to rather than clarifications of law. (*W. Sec. Bank*, 15 Cal. 4th at 243.) Thus, they have no application here. (See *Landgraf*, 511 U.S. at 270-73.)

2. Congress Intended the DFA to Preserve Section 7.4008

Not only did Congress in the DFA plainly create, rather than clarify, rules for future OCC preemption determinations regarding State consumer financial laws, but it also confirmed that the OCC's 2004 preemption regulations are valid law – contrary to Parks' and the Attorney General's unsupported assertions. As MBNA noted in its supplemental letter brief, if Congress had wanted to invalidate the OCC's 2004 preemption regulations through the DFA, it would have said so expressly. Instead, Congress left those rules intact. (See MBNA Letter Br. at 3-4.)

Indeed, this was confirmed by Senators Carper and Warner in their explanation of the relationship of Section 25b to the OCC's 2004 preemption regulations. In discussing the legislation's "case-by-case" requirement for future OCC preemption determinations, the Senators specifically observed:

> [A]ny form of retroactive legislative repeal of [the 2004 preemption regulations] would disrupt settled expectations and create considerable uncertainty as to the legal status of prior preemption determinations, including case law. Instead, the case-by-case provision is to be applied to *any new OCC preemption determinations made after the effective date of the amendment*. Throwing the 2004

> regulation and other prior administrative and judicial determinations into doubt would not bring certainty to the marketplace, but instead would be disruptive and create untold potential liability by effectively retroactively changing the law for regulated institutions.

(Carper-Warner Letter of April 4, 2011, at 2, emphasis added.) This express confirmation by the authors of Section 25b defeats any suggestion that the OCC's 2004 preemption regulations are no longer valid. (See, e.g., *Cnty. of Wash. v. Gunther* (1981) 452 U.S. 161, 187 fn.2 [treating statements made by the sponsors of legislation as a guide to interpreting the statute], quoting *Fed. Energy Admin. v. Algonquin SNG, Inc.* (1976) 426 U.S. 548, 564; *Ste. Marie v. Riverside Cnty. Reg'l Park & Open-Space Dist.* (2009) 46 Cal. 4th 282, 292 [finding that legislative documents expressing the views of a bill's sponsor made clear what "must have been the Legislature's understanding"]; *Quarterman v. Kefauver* (1997) 55 Cal. App. 4th 1366, 1373 [finding statements by the sponsor of legislation instructive as to legislative intent].)

Moreover, even if the intent of Congress were not so clear, fundamental principles regarding the retroactive application of statutes would preclude any interpretation of Section 25b that would invalidate or undermine the OCC's 2004 preemption regulations. Absent clear congressional intent, statutes cannot be construed in a way that "increase[s] a party's liability for past conduct." (*Landgraf*, 511 U.S. at 280; accord *Bowen v. Georgetown Univ. Hosp.* (1988) 488 U.S. 204, 208 ["[C]ongressional enactments and administrative rules will *not* be construed to have retroactive effect unless their language *requires* this result." (emphasis added)]; *Nat'l Mining Ass'n v. Dep't of Labor* (D.C. Cir. 2002) 292 F.3d 849, 859 [same]; see also 76 Fed. Reg. at 43,557 ["Actions and regulations in effect prior to the effective date [of Section 25b] are not subject to the case-by-case requirement, ... [Only] [f]uture preemption determinations would be subject to the new Dodd-Frank Act procedural provisions."].) Not only did Congress *not* clearly or explicitly provide that the DFA would have retroactive application, but it specifically made the effective date of Section 25b one year after enactment.

3. Recent Case Law Confirms the Continuing Validity of the OCC's 2004 Preemption Regulations

Consistent with the DFA's text and legislative history, courts that have considered the implications of Section 25b for the OCC's 2004 rules, including as amended in 2011, have treated them as still valid on an ongoing basis. For example, in the *Cline* case cited by Parks and discussed above, the court analyzed both preemption under Section 25b itself and Section 7.4008, as amended in 2011. The court observed that "section 25b and the amended version of Section 7.4008 found in the Dodd-Frank Final Rule became effective after the institution of this civil action, . . . [and] both must be scrutinized in order to resolve the preemption controversy." (*Cline*, 823 F. Supp. 2d at 395-96.) There was no suggestion that Section 7.4008 was improperly amended in 2011 or somehow lost legal force at that time.

Likewise, in its recent decision in *Epps v. JP Morgan Chase Bank, N.A.* (4th Cir. 2012) 675 F.3d 315, the Court of Appeals for the Fourth Circuit applied Section 7.4008 after explicitly noting its amendment in 2011. (See *id.* at 321 [focusing on the pre-amendment version of Section 7.4008].) Numerous other courts since the effective date of Section 25b have continued to apply Section 7.4008 and its companion preemption regulations without questioning their ongoing validity. (See, e.g., *Williams v. Wells Fargo Bank N.A.* (S.D. Fla. Oct. 14, 2011, No. 11-21233-CIV) 2011 WL 4901346, at *6-7; *Bohnhoff v. Wells Fargo Bank, N.A.* (D. Minn. Apr. 3, 2012, Civil No. 11-3408) __ F. Supp. 2d __ [2012 WL 1110585, at *6]; *Denton v. Dep't Stores Nat'l Bank* (W.D. Wash. Aug. 1, 2011, No. C10-5830) 2011 WL 3298890, at *3-5; *Decohen v. Abbasi, LLC* (D. Md. July 26, 2011, Civil No. 10-3157) 2011 WL 3438625, at *5-6.)

In sum, as the courts have recognized, nothing in the DFA disturbs the validity of the OCC's 2004 preemption regulations. Indeed, the DFA underscores and confirms the validity of Section 7.4008 as applied in this case.

III. The Extraneous Arguments Parks and the Attorney General Tack on to Their Letter Briefs Are Devoid of Merit

Near the end of their respective briefs, both Parks and the Attorney General tack on arguments that are not only wholly extraneous to the Court's request for supplemental briefing, but also plainly misguided. Those arguments merit no consideration by the Court.

A. Parks' Argument on the "Subject to Law" Phrase in the NBA Is Baseless

With only a passing attempt at a connection to the DFA, Parks repeats in his supplemental letter brief an argument he has made at various points in this litigation regarding the "subject to law" reference in 12 U.S.C. § 24(Seventh). (See Parks' Letter Br. at 14-15.) According to Parks, that reference to "law" means *state* law and, therefore, "[b]ecause Congress created national banks to exercise their powers subject to the laws of the States in which they do business, complying with State laws is not an 'interference' with federally granted powers." (*Id.* at 15.)

This argument has no foundation, and Parks suggests none. To the extent he is implying that MBNA's (or the OCC's) position is that national bank compliance with *any* state law is an interference with federally granted powers, he is simply fabricating. MBNA has never argued, and the OCC's preemption rules do not provide, that *all* state law is preempted as applied to national banks.

The legislative history of 12 U.S.C. § 24(Seventh) merits clarification, as it refutes Parks' assertion that "subject to law" in the statute must mean *state* law.

As originally enacted in 1863, the NBA provided that national banks' powers were "for the purposes authorized by this act" and "not inconsistent with the laws of the United States or the provisions of this act." (§ 11, 12 Stat. 665, 668.) As reenacted in 1864, those references became "exercise under this act all such incidental powers" and

"not inconsistent with the provisions of this act." (§ 8, 13 Stat. 99, 101.) In 1874, Congress enacted the current language through the original Revised Statutes, with "*under this act* all such incidental powers" restated as "*subject to law*, all such incidental powers" and "not inconsistent with *the provisions of this act*" restated as "not inconsistent with *law*." (§ 5136, 1 Rev. Stat. 998, 999 (1875), emphasis added.) Congress intended the Revised Statutes "to revise, simplify, arrange, and consolidate all statutes of the United States" – not to effect substantive changes to those statutes. (Act of June 27, 1866, 14 Stat. 74, 74 [stating the goals of the Revised Statutes].)

Congress used "subject to law" as a "revise[d], simplif[ied]" form of "under this act," meaning *federal*, not *state*, law. There is, therefore, no basis for Parks' contention that Congress sought to subject to state law the exercise by national banks of their federally-granted banking powers, a position that would effectively nullify all NBA "conflict" preemption, including that found in *Barnett Bank*.

B. The Attorney General's Contention About the DFA's Implications for Federal Savings Associations Is Illogical

The Attorney General also tacks on an equally unsupportable argument to her letter brief. In the penultimate paragraph of her letter brief, the Attorney General argues that the DFA, by establishing a single set of rules for the OCC to follow in making preemption determinations under the Home Owners' Loan Act ("HOLA") (12 U.S.C. § 1461 *et seq.*) and under the NBA, somehow nullified the analytic force of the U.S. Supreme Court's case law regarding the preemption authority of the former Office of Thrift Supervision ("OTS") (which the DFA eliminated and whose HOLA implementation responsibilities the DFA transferred to the OCC). (See AG Letter Br. at 7-8.)

This argument is simply illogical. The DFA has absolutely no implications for the U.S. Supreme Court's rulings regarding the preemptive powers granted to the OTS (formerly the Federal Home Loan Bank Board) in the HOLA. Those rulings are relevant to this Court's decision because they found the HOLA implicitly granted the OTS broad power to preempt state law by regulation, just as the NBA implicitly grants such power to the OCC. (See MBNA Opening Br. at 31-39; MBNA Reply Br. at 14-19.)

The DFA's transfer of OTS responsibilities to the OCC, including the responsibility to make preemption determinations under the HOLA, cannot possibly have any implications for the Court's consideration of when a statute may be construed as implicitly granting an agency the power to preempt state law. (The DFA, of course, like 12 U.S.C. § 43(a), *expressly* confirms the OCC's authority to determine when state law is preempted under the NBA.)

IV. Conclusion

This Court need not consider the DFA in deciding the preemption questions presented in this case. Parks' and the Attorney General's suggestions to the contrary are baseless. To the extent the DFA and the OCC's regulatory response have any

significance here, it is because they underscore that, consistent with *Rose*, Parks' claim is preempted under *Barnett Bank*.

ARNOLD & PORTER LLP

By: _____
LAURENCE J. HUTT
Counsel for Respondent MBNA America Bank, N.A., now known as FIA Card Services, N.A.

PROOF OF SERVICE

Allan Parks v. MBNA America Bank, N.A.

I am employed in the State of California. I am over the age of 18 and not a party to the above-entitled action. My business address is Three Embarcadero Center, San Francisco, CA, 94111.

On May 25, 2012, I served the foregoing document described as **RESPONDENT'S LETTER REPLY BRIEF**, by delivery of a true copy thereof in sealed envelopes addressed as follows:

Michael R. Vachon Law Office of Michael Vachon, Esq. 17150 Via del Campo, Suite 204 San Diego, CA 92127 *Counsel for Plaintiff and Appellant*	District Attorney for the County of Orange 401 Civic Center Drive Santa Ana, CA 92701
Sheldon H. Jaffe Deputy Attorney General California Department of Justice 455 Golden Gate Ave., Suite 11000 San Francisco, CA 94102-7004	Clerk of the Court California Superior Court, County of Orange Civil Complex Center 751 West Santa Ana Blvd. Santa Ana, CA 92701
Clerk of the Court California Court of Appeal Fourth Appellate District Division Three 601 West Santa Ana Blvd Santa Ana, CA 92701	Office of the Comptroller of the Currency Litigation Department Attn: Douglas Jordan, Senior Counsel 250 E Street SW Washington, D.C. 20219-4515
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	David M. Arbogast Arbogast Bowen LLP 11400 W. Olympic Boulevard, 2nd Floor Los Angeles, CA 90064
J. Mark Moore Spiro Moss LLP 11377 W. Olympic Boulevard, Fifth Floor Los Angeles, CA 90064-1683	James R. McGuire Rita F. Lin Aaron D. Jones Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105
Bruce E. Clark Sullivan & Cromwell LLP 125 Broad Street New York, NY 10004	Achyut J. Phadke Sullivan & Cromwell LLP 1870 Embarcadero Road Palo Alto, CA 94303

☒ **By U.S. mail**. I enclosed the document in an envelope or package addressed to the persons at the addresses above and sealed for delivery

☑ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am employed in the State of California where the mailing occurred. The envelope or package was placed in the mail at San Francisco, CA.

☒ ☑ **STATE**: I, **Bonnie Hastings**, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 25, 2012, at San Francisco, CA.

Bonnie Hastings