No. S183703

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARKS, ET AL.,

PLAINTIFFS AND APPELLANTS,

vs.

MBNA AMERICA BANK, N.A.,

DEFENDANT AND RESPONDENT.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G040798
REVERSING A JUDGMENT OF THE
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
CASE NO. 04CC00598
THE HONORABLE GAIL S. ANDLER, JUDGE

RESPONDENT'S OPPOSITION TO PLAINTIFF/APPELLANT'S REQUEST FOR JUDICIAL NOTICE NO. 1

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SERVICE ON THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEY REQUIRED BY CAL. BUS. & PROF. CODE § 17209 AND CAL. RULES OF COURT, RULE 8.29(b)

Defendant and Respondent MBNA America Bank, N.A. ("MBNA")[1] hereby opposes the request of Plaintiff and Appellant Allan Parks ("Parks") that this Court take judicial notice of "the content of the National Bank Act, as originally enacted, February 25, 1863, Sess. 3, Ch. 67 (the 'NBA'), *and* the fact that the NBA contained no provisions whatsoever regulating the operational activities of national banks." (Plaintiff/Appellant's Request for Judicial Notice ("RJN") No. 1, § I, footnote omitted.)

The request essentially consists of two severable parts. MBNA does not object to the Court's review of the original version of the NBA, although MBNA questions whether a request for judicial notice is a necessary vehicle to enable the Court to do so. However, MBNA does object to the remainder of the request which essentially asks the Court to take judicial notice of Parks' legal arguments and contentions regarding the original version of the NBA.

That latter request should be denied because it seeks judicial notice of a party's argument or proffered legal conclusion, rather than of a fact; because the matter sought to be judicially noticed is not relevant to any material issue before the Court; and because Parks did not present the request to either the trial court or the Court of Appeal.

A. A Legal Interpretation Is Not a Matter for Judicial Notice.

As a purported basis for his request for judicial notice of the asserted "fact" that the NBA, as originally enacted, "contained no provisions whatsoever regulating the operational activities of national banks," Parks invokes Evidence Code § 452(b) and (c). (RJN No.1, § II.) Neither portion

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[1] Respondent MBNA America Bank, N.A. is now known as FIA Card Services, N.A.

of the statute properly pertains to or covers the disputed request. Under Evidence Code § 452(b) and (c), respectfully, judicial notice may be taken of "legislative enactments" of the United States and "official acts of the legislative ... departments of the United States." Those provisions allow the Court to take judicial notice of the *enactment* of the NBA, and MBNA does not oppose the Court's examining the NBA or its provisions insofar as they pertain to issue before the Court in this proceeding. However, nothing in Evidence Code § 452 or any other section of the Evidence Code provides for judicial notice of a party's arguments or conclusions about the perceived *content* of legislative enactments or the alleged effect of such enactments' provisions.

Evidence Code § 452 does permit judicial notice of "[f]acts and propositions" that either (i) "are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute" or (ii) "are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evidence Code §§ 452(g), (h).) The purported "fact" that the NBA, as originally enacted, "contained no provisions whatsoever regulating the operational activities of national banks" does not satisfy either definition: It is neither "common knowledge" nor indisputable. Indeed, it is not a "fact" at all but, rather, a contention or conclusion, neither of which is subject to judicial notice under Evidence Code § 452

First, the definition of "operational activities" of national banks is itself subject to dispute. With no citation to authority, but only to his own brief in this case, Parks posits a definition of "operational activities" of national banks as "a bank's formation of contracts and transactions with its customers, including the rights, obligations, and remedies attached to the formation of those agreements and performance of those transactions."

(*Id.*, n.1.) The identification of such "operational activities" is not a "fact," much less the type of universally accepted or readily verifiable "fact" that supports judicial notice under Evidence Code § 452.

Second, whether the NBA, as originally enacted, contained provisions "regulating the operational activities of national banks" is a matter of statutory interpretation, which is also not subject to judicial notice. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal. App. 4th 97, 113 ["Although the *existence* of a document may be judicially noticeable, . . . its proper interpretation [is] not subject to judicial notice . . . ."], internal citation omitted; *cf. Post v. Prati* (1979) 90 Cal. App. 3d 626, 634-35 ["Interpretation of a statute, however, remains a matter of law . . . ."].)

Parks' request that the Court take judicial notice of what the NBA, as originally enacted, may be construed to regulate with respect to the "operational activities" of national banks should therefore be denied.

B. Judicial Notice Is Properly Taken Only of Matters Relevant to a Material Issue.

Parks' request for judicial notice of his interpretation of the NBA, as originally enacted, should also be rejected because that interpretation is not relevant to any issue under review. "[A]ny matter to be judicially noticed must be relevant to a material issue." (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal. 4th 415, 422; see also *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063 ["[J]udicial notice, since it is a substitute for proof, is always confined to those matters which are relevant to the issue at hand."], overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal. 4th 1257.)

Parks asserts that the "fact" of what he contends the NBA, as originally enacted, regulated is relevant because "(1) it demonstrates that Congress intended that national banks' operational activities would be

regulated by State law; and (2) it refutes MBNA's contention ... that national banking has always been the subject of comprehensive federal regulation." (Parks' RJN No. 1, § I.) But MBNA does not contend, as Parks erroneously suggests, that national banks have only been regulated by federal law or, conversely, that all state law is inapplicable to all national bank "operational activities."

The narrow issue before this Court is whether a *certain* state law – specifically, Civil Code § 1748.9 – is preempted by federal law. Thus, even if Civil Code § 1748.9 could be characterized as regulating a bank's "operational activities" – within the ambiguous meaning of that term assigned to it by Parks – the "fact" that Congress intended that *some types* of state law regulate *certain* "operational activities" of national banks would not be relevant to the specific issue presented here.

Furthermore, Parks seeks judicial notice of this asserted "fact" to counter MBNA's argument that, under *Barnett Bank v. Nelson* (1996) 517 U.S. 25, and its progeny, no presumption against preemption applies to the NBA. Parks implicitly contends that unless federal law completely or comprehensively governed banking, the presumption against preemption should apply, despite *United States v. Locke* (2007) 529 U.S. 89. However, Parks posits the wrong standard: under *Locke*, the presumption against preemption does not apply as long as there has been a history of significant federal presence in banking, as numerous courts, federal and state, have found there has been. (MBNA Reply Brief on the Merits at 2-3.) Parks' proffered fact is not germane to application of the relevant standard and, consequently, is irrelevant from any standpoint.

C. A Reviewing Court May Properly Deny a Request for Judicial Notice Not Presented to the Courts Below.

Finally, Parks' request for judicial notice should be denied because he failed to raise it in the trial court or the Court of Appeal. This Court

reviews "the judgment of the Court of Appeal. In deciding the question raised by an appeal, a reviewing court will ordinarily look only to the record made in the trial court." (*Brosterhous v. State Bar of California* (1996) 12 Cal. 4th 315, 325.) Indeed, Parks is purporting to seek judicial notice of a "fact." But "facts" need to be in the record from the proceedings below so they can be considered by the lower courts; "facts" are ordinarily not introduced for the first time on appeal.

Parks acknowledges that he did not make his request for judicial notice to the trial court or the Court of Appeal, but offers no explanation why. (See RJN No. 1, § I.) It is therefore proper for this Court to deny Parks' request. (See *Brosterhous*, 12 Cal. 4th at 325-326 [denying request for judicial notice pursuant to California Evidence Code sections 452 and 459 where the party requesting the Court take judicial notice "put[] forth no reason for its failure to request the trial court and Court of Appeal to take judicial notice"].) As it did in *Brosterhous*, this Court should "properly decline to take judicial notice under Evidence Code sections 452 and 459 of a supposed matter of "fact" which should have been presented to the trial court for its consideration in the first instance." (*Id.* at 325-326.)

For the foregoing reasons, the Court should deny Parks' request for judicial notice to the extent it seeks anything other than judicial notice of the enactment of the original version of the NBA.

DATED: April 4, 2011

ARNOLD & PORTER LLP

By: _____
LAURENCE J. HUTT
Attorneys for Respondent

PROOF OF SERVICE

Parks, et al. v. MBNA America Bank, N.A. (USA)

I am employed in the County of San Francisco , State of California. I am over the age of 18 and not a party to the above-entitled action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017

On April 4, 2011, I served the foregoing document described as a **RESPONDENT'S OPPOSITION TO PLAINTIFF/APPELLANT'S REQUEST OR JUDICIAL NOTICE NO. 1** by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Michael Vachon Law Office of Michael Vachon 16935 West Bernardo Drive, Suite 175 San Diego, CA 92127-1100 *Counsel for Plaintiffs and Appellants*	District Attorney for the County of Orange 401 Civic Center Drive Santa Ana, CA 92701
Sheldon H. Jaffe Deputy Attorney General Department of Justice 455 Golden Gate Ave., Suite 1000 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
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Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	David M. Arbogast Arbogast & Berns 6303 Owensmouth Avenue 10th Floor Woodland Hills, CA 91367-2262
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☒ **By U.S. mail**. I enclosed the document in a sealed envelope or package addressed to the persons at the addresses above and

☑ 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 county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

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

Executed on April 4, 2011, at Los Angeles, California.