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No. 09-56679

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE AGUAYO, an individual,
Plaintiff-Appellant,

v.

U.S. BANK, a business entity form unknown,
and DOES 1-30, inclusive,
Defendants-Appellees.

Appeal from the U.S. District Court for the Southern District of California
No. 08-cv-2139-W-BLM

APPELLANT'S OPENING BRIEF

F. Paul Bland, Jr.
Claire Prestel
Melanie Hirsch
PUBLIC JUSTICE, P.C.
1825 K Street NW, Suite 200
Washington, DC 20006
(202) 797-8600

Andrew J. Ogilvie
Carol M. Brewer
ANDERSON, OGILVIE & BREWER LLP
600 California Street, 18th Floor
San Francisco, CA 94108
(415) 651-1950

Leslie A. Brueckner
PUBLIC JUSTICE, P.C.
555 12th Street, Suite 1620
Oakland, CA 94607
(510) 622-8150

Michael E. Lindsey
4455 Morena Boulevard, Suite 207
San Diego, CA 92117
(858) 270-7000

Counsel for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34, Plaintiff-Appellant Jose Aguayo respectfully requests that the Court hear oral argument. This case presents an important issue for California consumers: whether consumer protections afforded by California debt-collection law are preempted by the National Bank Act, 12 U.S.C. §1 *et seq*. ("NBA").

Mr. Aguayo alleges that Defendant-Appellee U.S. Bank ("the Bank") routinely violates the Rees-Levering Motor Vehicle Sales and Finance Act ("Rees-Levering"), Cal. Civ. Code §2981 *et seq.*, which regulates the collection of debts secured by cars. The Bank violates Rees-Levering by failing to provide consumers with post-repossession notice that adequately informs them of their rights, *see* Civ. Code §2983.2, and by demanding that consumers make debt payments to which the Bank is not actually entitled. *See id.* As a result of this wrongful conduct, many consumers—including Mr. Aguayo—have paid money to the Bank that it had no right to collect.

Mr. Aguayo sued U.S. Bank for unlawful, unfair and fraudulent business practices in violation of California's Unfair Competition Law, Bus. & Prof. Code §17200 *et seq*. The district court dismissed Mr. Aguayo's class-action complaint because it concluded that Rees-Levering's debt-collection provisions are preempted by the NBA.

This holding was wrong for two independent reasons, both of which present important questions of federal law. First, the district court's decision violates the settled rule that federal law does not preempt a party's voluntarily assumed contractual obligations. *See, e.g.*, *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228–33 (1995). Mr. Aguayo's contract with his California car dealer included an express promise that he would be provided with "all" post-repossession notice required by law—a promise that encompassed the requirements of Rees-Levering. U.S. Bank voluntarily assumed the obligation to comply with this promise when it purchased Mr. Aguayo's contract and became the car dealer's assignee. But the district court's decision allows U.S. Bank to disregard both its promise and the terms of Mr. Aguayo's contract, creating a conflict with *American Airlines* and similar cases.

Second, the district court erred in holding that Rees-Levering's requirements are preempted by a federal regulation, 12 C.F.R. §7.4008, promulgated by the Office of the Comptroller of the Currency. The district court's holding is inconsistent with the language of the regulation itself, which expressly saves state debt-collection law from preemption. It is also inconsistent with more than 100 years of Supreme Court precedent holding that the NBA leaves debt-collection regulation to the States.

The district court's decision has widespread implications for California consumers. It allows national banks to violate contracts without consequence, and it means that contractual promises made to consumers may be disregarded simply because the consumers' contracts are assigned to third parties—assignments over which consumers have no control. The district court's decision also allows national banks to assert all of their affirmative rights as creditors under California law, while simultaneously evading the state's corresponding consumer protections. These effects of the district court's decision would be significant in any economy, but they are particularly troubling now, as many consumers struggle to work their way out of debt and as national banks increase their role in consumer transactions.

In light of the important issues presented by this case and the complex nature of the preemption question raised on appeal, Mr. Aguayo respectfully requests that the Court hear oral argument.

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JURISDICTIONAL STATEMENT

Jurisdiction in the district court was based on diversity of citizenship under 28 U.S.C. §1332(d)(2)(A). In removing Mr. Aguayo's complaint to federal court, U.S. Bank alleged that it is a citizen of Ohio, that Mr. Aguayo is a citizen of California, and that the amount in controversy exceeds $5,000,000, exclusive of interest and costs. *See* Excerpts of Record ("ER") 52–53.

This is an appeal from a final judgment disposing of all parties' claims, which gives this Court jurisdiction under 28 U.S.C. §1291. The district court entered judgment for U.S. Bank on September 24, 2009. ER 3. Mr. Aguayo filed a timely notice of appeal on October 19, 2009. ER 1; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Did the district court err in holding that the debt-collection provisions in California's Rees-Levering Motor Vehicle Sales and Finance Act ("Rees-Levering" or "Rees-Levering Act"), Cal. Civ. Code §2981 *et seq.*, are preempted when (a) U.S. Bank assumed a contractual obligation to comply with Rees-Levering's requirements; and (b) the federal regulation on which the district court relied, 12 C.F.R. §7.4008, expressly preserves state debt-collection law from preemption?

2. Did the district court err in dismissing those aspects of Mr. Aguayo's claim that do not even rely on Rees-Levering's requirements?

STATEMENT REGARDING ADDENDUM

An addendum setting out relevant statutory and regulatory provisions is bound together with this brief and begins at page 65.

STATEMENT OF THE CASE

This is a putative consumer class action against U.S. Bank under California's Unfair Competition Law ("UCL"), which prohibits unlawful, unfair and fraudulent business practices. *See* Cal. Bus. & Prof. Code §17200. Plaintiff-Appellant Jose Aguayo alleges that U.S. Bank's debt-collection practices are unlawful under the UCL because they violate Rees-Levering, a California statute that regulates the collection of debts secured by cars. He also alleges that the Bank's debt-collection practices are unfair because they breach contractual promises and that the Bank's debt-collection practices are fraudulent because the Bank makes false and misleading statements about what consumers owe and about its right to collect consumers' debts.

U.S. Bank removed Mr. Aguayo's complaint to federal court and moved to dismiss. The district court granted the Bank's motion, holding that Rees-Levering's debt-collection provisions are preempted by 12 C.F.R. §7.4008, a regulation promulgated by the Office of the Comptroller of the Currency ("OCC") under the National Bank Act ("NBA"), 12 U.S.C. §1 *et seq*. The district court did not address Mr. Aguayo's separate allegations—independent of Rees-Levering—that the Bank's conduct is unfair and fraudulent, in addition to being unlawful.

Mr. Aguayo appeals the district court's decision.

STATEMENT OF FACTS

I. FACTUAL AND PROCEDURAL BACKROUND

A. U.S. Bank's Wrongful Conduct

In August 2003, Jose Aguayo purchased a car from Star Ford in Glendale, California. ER 46–49. After the purchase, Star Ford assigned its interest in Mr. Aguayo's contract to U.S. Bank. ER 49.

Mr. Aguayo made payments on his car for several years, but he eventually fell behind and defaulted on his contract. U.S. Bank repossessed Mr. Aguayo's car and sent him a notice stating its intent to dispose of his vehicle by sale. ER 43–45. The Bank's notice informed Mr. Aguayo of his right under California law to recover his car and reinstate his contract within a specific period. *See* Cal. Civ. Code §2983.2(a)(2). But the Bank's notice was significantly incomplete because it did not list all the payments that Mr. Aguayo would have to make in order to exercise this right: it did not include payments and fees that would come due during the reinstatement period, and it did not tell Mr. Aguayo that he would have to make additional payments to third parties, such as law enforcement. *See* ER 45. The Rees-Levering Act requires that all this information be provided so that consumers know exactly what they must do to recover their cars. *See Juarez v. Arcadia Fin., Ltd.*, 61 Cal. Rptr. 3d 382, 391–98 (Cal. Ct. App. 2007).

After sending its inadequate notice, U.S. Bank sold Mr. Aguayo's car. The

Bank then demanded that Mr. Aguayo make deficiency payments to cover the difference between the vehicle's sale price and his total contract obligation. ER 24, 59. The Bank's demands were unlawful: by sending inadequate notice, the Bank had forfeited its right to collect any deficiency debt. *See* Cal. Civ. Code §§2983.2(a), 2983.8(b); *Fireside Bank v. Superior Court*, 155 P.3d 268, 282 (Cal. 2007) (demand made after inadequate notice was "unlawful").

The Bank made similarly unlawful demands of other class members. After sending them inadequate notices, and thereby forfeiting its right to collect deficiencies, the Bank demanded that they make payments in violation of Rees-Levering. ER 61. The Bank's collection activity has included dunning notices, calls and letters from collection agencies, transmission of derogatory information to credit reporting companies, and even collection lawsuits—all in pursuit of deficiency payments that the Bank has no right to collect. *Id*. In support of its collection lawsuits, the Bank has also filed affidavits wrongly claiming that the Bank has complied with Rees-Levering's requirements. *Id*.

B. Relevant Terms of Mr. Aguayo's Contract

Mr. Aguayo's car-purchase contract includes several provisions relevant to this appeal. With respect to post-repossession notice, the contract makes the following promise: "If we repossess the vehicle, you may pay to get it back (redeem). . . . We will provide you all notices required by law to tell you when and

how much to pay and/or what action you must take to redeem the vehicle." ER 49. The contract states that it is governed by "[f]ederal law and California law." ER 48.

The contract also states that its terms cannot be changed simply by virtue of an assignment. The contract provides that the consumer must agree in writing to any change in terms. ER 47. In addition, the contract states that any subsequent holder of the agreement is "subject to all claims and defenses which the debtor could assert against the [original] seller . . . ." ER 49.

C. Mr. Aguayo's Complaint

Mr. Aguayo has pled a single claim for relief under California's UCL. He alleges that the Bank's debt-collection practices are unlawful under Business and Professions Code §17200 because they violate Rees-Levering: the Bank routinely sends post-repossession notices that fail to comply with Rees-Levering's requirements, and the Bank makes unlawful demands for deficiency payments that it has forfeited its right to collect. ER 61. Mr. Aguayo's complaint also alleges that the Bank's debt-collection practices are unfair and fraudulent, in addition to being unlawful. ER 61–62.

Mr. Aguayo's complaint seeks a classwide injunction prohibiting U.S. Bank from collecting invalid deficiency claims, as well as restitution of deficiency payments made in response to the Bank's unlawful demands. ER 62–63.

D. The District Court's Decision

The district court dismissed Mr. Aguayo's complaint on the ground that Rees-Levering's post repossession notice requirements fall within an OCC regulation promulgated under the NBA, which preempts state laws that interfere with bank lending by dictating the content of "credit-related documents." 12 C.F.R. §7.4008(d)(2)(viii); ER 4–16 (district court decision).

In so ruling, the district court disregarded the express promise in Mr. Aguayo's contract that he would be provided with "all" post-repossession notice required by law—a promise that necessarily encompassed Rees-Levering's requirements. By holding that U.S. Bank could violate this promise, and ignore Rees-Levering's requirements, the district court refused to give effect to controlling Supreme Court precedent, which dictates that federal law cannot preempt a party's "own, self-imposed undertakings." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995).

The district court's analysis was incorrect in a second respect as well. In interpreting and applying the OCC's regulation, the district court failed even to consider the effect of its savings clause, which expressly preserves state debt-collection law from preemption. *See* 12 C.F.R. §7.4008(e)(4). Because Rees-Levering's post-repossession notice requirements regulate debt collection, they are saved from preemption under the OCC's own rule.

The district court also did not address Mr. Aguayo's separate allegations that U.S. Bank's debt-collection practices are unfair and fraudulent under the UCL, in addition to being unlawful.

II. STATUTORY AND REGULATORY BACKGROUND

A. California Statutes

This appeal implicates three California statutes: Rees-Levering, the UCL, and California's Uniform Commercial Code.

1. The Rees-Levering Act

Mr. Aguayo alleges that U.S. Bank's debt-collection practices are unlawful under the UCL because they violate Rees-Levering. The California Legislature enacted Rees-Levering in 1961 to protect motor-vehicle consumers. *See Juarez*, 61 Cal. Rptr. 3d at 389. Several sections of Rees-Levering govern the manner in which a deficiency debt may be collected after a consumer's repossessed car is sold. *See, e.g.*, Cal. Civ. Code §§2983.2(a), 2983.8.

Section 2983.2(a) (on which Mr. Aguayo relies) requires a creditor who has repossessed a car to send notice to the car's owner before it is sold. The notice must inform the consumer of his or her right, within a specified period, to recover the car and reinstate the car-purchase contract. The notice must state all amounts that the consumer will have to pay in order to exercise this right, including any payments or fees that will become due during the reinstatement period and any

payments that must be made to third parties. *See Juarez*, 61 Cal. Rptr. 3d at 391–98.

Rees-Levering requires creditors to provide this notice so that consumers have the information they need to exercise their right to reinstate. *Id.* When incomplete notice is provided, many consumers lose this right altogether because they do not have the information they need to calculate how much to pay—even though creditors have that information easily at hand. *See id.* at 386, 393 (consumer-plaintiff unable to reinstate because of inadequate notice that did not list all amounts due). An incomplete notice also "makes it more difficult" for consumers to act, and "effectively reduces the time the [statute] provides to buyers to remedy any defaults," because consumers are often forced to contact their creditors for more information about how much to pay. *Id.* at 393. Consumers are then left to their creditors' mercy: creditors may evade consumers' calls, refuse to answer, or give incorrect answers. *Id.* at 393–94.

Because adequate notice is essential to Rees-Levering's statutory scheme, the Act provides that if a creditor fails to send proper notice, it forfeits its right to collect any subsequent deficiency debt—that is, the difference between the sale price of a repossessed car and the total amount due under a consumer's car-purchase contract. *See* Cal. Civ. Code §§2983.2(a), 2983.8(b). As the California Supreme Court explained in *Bank of America v. Lallana*, 960 P.2d 1133 (1998):

"The rule and requirement are simple. If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment." *Id*. at 1141 (citation omitted).

2. California's Unfair Competition Law

Mr. Aguayo states his single claim for relief under California's Unfair Competition Law. The UCL creates a cause of action for consumers harmed by "unlawful, unfair or fraudulent" practices. Cal. Bus. & Prof. Code §17200. For purposes of its "unlawful" prong, the statute "borrows violations of other laws and treats them as unlawful practices" that are "independently actionable." *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1036 (9th Cir. 2003) (citation omitted). Consumers routinely pursue Rees-Levering violations through the mechanism of §17200. *See, e.g.*, *Fireside Bank*, 155 P.3d at 272–73; *Juarez*, 61 Cal. Rptr. 3d at 387.

The UCL also prohibits business practices that are unfair or fraudulent—whether or not they are otherwise unlawful. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999). The "unfair" prong of §17200 is "intentionally broad" and requires courts to weigh any utility in the defendant's conduct against its impact on consumers. *Podolsky v. First Healthcare Corp.*, 58 Cal. Rptr. 2d 89, 98 (Cal. Ct. App. 1996). A business's statement is "fraudulent"

under the UCL if it is likely to mislead or deceive. *See, e.g.*, *Mass. Mut. Life Ins. Co. v. Superior Court*, 119 Cal. Rptr. 2d 190, 194 (Cal. Ct. App. 2002).

3. California's Uniform Commercial Code

In its order dismissing Mr. Aguayo's complaint, the district court cited a third statute as relevant: the Uniform Commercial Code ("UCC"). *See* ER 8. Although the district court cited the UCC as an example of "federal" law, the UCC is a model code that applies only to the extent it is enacted by the States. *See, e.g.*, OCC Interpretive Letter No. 1005, at 2 (Sept. 2004) (agreeing that the UCC is a "body of state law"), *available at* http://www.occ.treas.gov/interp/sep04/int1005.pdf. California has enacted a version of the UCC in its Commercial Code. *See* Cal. Comm. Code §1101 *et seq*. Division 9 of the California UCC regulates secured transactions generally; it does not focus specifically on motor vehicle sales.

California's UCC—like the model UCC and like Rees-Levering—requires creditors to provide notice before disposing of collateral. *See id*. §9614; *see also* UCC §9-614. Rees-Levering and the UCC require different content in their notices and, in the automobile context, the California UCC incorporates the more specific requirements imposed by Rees-Levering. *See* Cal. Comm. Code §9201(b)–(c) (stating that a transaction subject to the UCC is also subject to Rees-Levering, and that in the case of any conflict, Rees-Levering controls); *see also* UCC §9-201(b)–

(c) (model code, stating that a transaction subject to the UCC is also subject to any statute that provides a different rule for consumers, and that in the case of conflict, the consumer law controls). This means that a creditor like U.S. Bank cannot comply with the UCC unless it also complies with Rees-Levering's requirements.

B. Federal Law

In finding Mr. Aguayo's claim preempted, the district court relied on the NBA and on an OCC regulation promulgated under that statute. In moving to dismiss, U.S. Bank also cited an additional federal regulation promulgated by the Federal Trade Commission ("FTC").

1. The National Bank Act

Congress enacted the NBA in 1864 to encourage the creation of federally chartered banks. *See Atherton v. FDIC*, 519 U.S. 213, 222 (1997). The NBA vests in national banks a series of enumerated powers—powers thought essential to the business of banking. *See* 12 U.S.C. §24 (Seventh). The Act also authorizes federally chartered banks to exercise "such incidental powers as shall be necessary to carry on the business of banking." *Id*.

The NBA authorizes national banks to engage in the business of banking, but it does not—and was not intended to—free banks from state regulation. As the Supreme Court has explained, the NBA leaves national banks "subject to the laws of the State," and banks "are governed in their daily course of business far more by

the laws of the State than of the nation." *Atherton*, 519 U.S. at 222 (quoting *Nat'l Bank v. Commonwealth*, 75 U.S. 353, 362 (1869)). In particular, the NBA leaves national banks' contractual obligations to be governed and construed according to state law, *Nat'l Bank*, 75 U.S. at 362, and the Act has always been interpreted as leaving debt-collection regulation in state control. *See, e.g.*, *id.*

Congress has amended the NBA several times since its enactment; in so doing, it has recognized states' legitimate role in regulating national banks. In 1994, in a conference report to the Riegle-Neal Interstate Banking and Branching Efficiency Act, Congress emphasized that "national banks are subject to State law in many significant respects" and that the "States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions . . . ." H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074. Congress addressed state consumer-protection regulation specifically, explaining that the "States have a legitimate interest in protecting the rights of their consumers . . . ." *Id.*

In light of the States' traditional role in regulating national banks, Congress and the Supreme Court have acted to restrain agency interpretations or lower-court decisions that go too far in displacing state law under the NBA. Again in the Riegle-Neal Conference Report, Congress expressed its concern about over-aggressive OCC preemption regulations:

> [T]he Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive . . . . It is of utmost concern to the Conferees that the agencies issue opinion letters and interpretive rules concluding that Federal law preempts state law regarding . . . consumer protection . . . only when the agency has determined that the Federal policy interest in preemption is clear.

Id. Congress also endorsed a "rule of construction" that "avoids" finding state law preempted when possible. *Id*.[1]

More recently, in *Cuomo v. The Clearing House Ass'n, L.L.C.*, --- U.S. ----, 129 S. Ct. 2710 (2009), the Supreme Court held that the OCC exceeded the scope of its authority in issuing 12 C.F.R. §7.4000, which had the effect of preempting state enforcement of state law. The Court reminded the agency that the States "have always enforced their general laws against national banks—and have enforced their banking-related laws against national banks for at least 85 years . . . ." *Id*. at 2720–21 (citing cases). As the Court explained many years ago in *McClellan v. Chipman*, 164 U.S. 347 (1896), valid state regulation of banks is the "rule," not the "exception." *Id*. at 357.

[1] Congress has also expressed a particular intent to preserve state debt-collection law from preemption. When Congress imposed some requirements on third-party debt collectors in the Fair Debt Collection Practices Act ("FDCPA"), it included a savings clause that expressly preserves stronger state debt-collection laws. *See* 15 U.S.C. §1692n.

2. The OCC's Regulation

In 2004, the OCC promulgated 12 C.F.R. §7.4008 to state the OCC's conclusions regarding the scope of NBA preemption. The OCC intended §7.4008 to protect banks' statutorily authorized power to "loan[] money," 12 U.S.C. §24 (Seventh), and it preempts state laws that interfere significantly with banks' "non-real estate lending powers." 12 C.F.R. §7.4008(d)(1).

Section 7.4008 includes an express preemption provision, paragraph (d)(2), that preempts certain categories of state law to the extent they affect banks' ability to lend. Paragraph (d)(2) provides, in relevant part, that a national bank may "make non-real estate loans" without regard to state-law limitations concerning "[d]isclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts or other credit-related documents." 12 C.F.R. §7.4008(d)(2)(viii).

Section 7.4008 also includes a savings clause, paragraph (e), that lists categories of state law—including debt-collection law—that are not preempted by the NBA. Paragraph (e) provides in relevant part:

> State laws that are not preempted. State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:
>
> (1) Contracts;

> (2) Torts;
>
> . . .
>
> (4) Rights to collect debts;
>
> . . .
>
> (8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

12 C.F.R. §7.4008(e).

In promulgating §7.4008, the OCC made clear that it intended to preempt only those state laws "for which substantial precedent existed" to support a finding of preemption. OCC Interpretive Letter No. 1005, at 1. The OCC also explained that it intended its regulation to be "entirely consistent with" the Supreme Court's conflict-preemption case law under the NBA; the regulation was not intended as a new preemption standard but merely as a "distillation" of controlling case law. Final Rule, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1910 (Jan. 13, 2004) [hereinafter Final Rule].

3. The FTC's Regulation

In moving to dismiss Mr. Aguayo's claim, U.S. Bank also addressed a second federal regulation, 16 C.F.R. §433.2, promulgated by the FTC. This regulation, known as the FTC Holder Rule, is relevant to Mr. Aguayo's case

because it protects consumers whose contracts are assigned to third parties, as happened here when Mr. Aguayo's contract was assigned to U.S. Bank.

The FTC Holder Rule requires that the following language be included as a "Notice" in any consumer credit contract: "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof." 16 C.F.R. §433.2; ER 49 (Mr. Aguayo's contract, including this language).

The FTC promulgated the Holder Rule in 1975 to ensure that consumers are able to assert any claims or defenses against contract assignees that they could assert against their original sellers. *See* Final Rule, Preservation of Consumers' Claims and Defenses: Promulgation of Trade Regulation Rule and Statement of Basis and Purpose, 40 Fed. Reg. 53,506, 53,524 (Nov. 13, 1975) [hereinafter FTC Final Rule] (consumer may assert his claims and defenses "against any holder of the credit obligation"). Under the Holder Rule, a contract assignee, like U.S. Bank, "stands in the shoes" of the original seller, without any "superior" rights or obligations. Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20,022, 20,023 (May 14, 1976) [hereinafter FTC Guidelines]; FTC Final Rule, 40 Fed. Reg. at 53507. For example, an assignee is not entitled to payment under a consumer's contract unless

the contract's promises to the consumer are fulfilled and the original seller would also be entitled to payment. See FTC Final Rule, 40 Fed. Reg. at 53,507, 53,522–23.

SUMMARY OF ARGUMENT

The district court's conclusion that federal law preempts Mr. Aguayo's claim permits U.S. Bank to disregard, without consequence, the express promise in Mr. Aguayo's contract to provide "all" post-repossession notice required by law. The district court's decision also permits U.S. Bank to enforce all of its affirmative rights as a creditor under California's debt-collection law, while simultaneously evading the state's corresponding consumer protections. Not only does this ruling lead to patently unfair results, it is also wrong as a matter of law.

First, the district court erred in failing to apply a strong presumption against preemption. In *Wyeth v. Levine*, --- U.S. ----, 129 S. Ct. 1187 (2009), the Supreme Court held that the presumption against preemption must be applied in any field in which there is a history of state regulation. *Id*. at 1195 n.3. Here, Mr. Aguayo's claim challenges U.S. Bank's practices with respect to debt collection, which is a quintessentially state concern. Thus, the presumption against preemption should have been applied.

Second, the district court erred in holding Rees-Levering's post-repossession notice requirements preempted by federal law because U.S. Bank agreed

voluntarily to comply with those requirements. The Bank's contractual promise, standing alone, is sufficient to defeat any preemption argument here. *See, e.g.*, *Am. Airlines*, 513 U.S. at 228 (federal law does not preempt a party's "self-imposed undertakings").

Third, the district court erred in holding that the Rees-Levering Act's post-repossession notice requirements are preempted by 12 C.F.R. §7.4008. Consistent with case law interpreting the NBA, the OCC's regulation distinguishes sharply between state laws that regulate lending and state laws that regulate debt collection; while many state lending laws are preempted, state debt-collection laws are expressly preserved from preemption by the regulation's savings clause. Because Rees-Levering's notice requirements regulate debt collection, rather than lending, they are saved from preemption under §7.4008.

Finally, the district court erred because it focused only on the "unlawful" prong of Mr. Aguayo's claim, which depends on Rees-Levering, without separately considering Mr. Aguayo's allegations of "unfair" and "fraudulent" conduct, which turn the Bank's breaches of contract and its misleading statements. Similar claims for unfair and misleading conduct are routinely upheld against NBA preemption challenges. *See, e.g.*, *Davis v. Chase Bank U.S.A., N.A.*, 650 F. Supp. 2d 1073, 1085–86 (C.D. Cal. 2009); *Gutierrez v. Wells Fargo Bank, N.A.*, 2008

WL 4279550, *9–*12 (N.D. Cal. Sept. 11, 2008); *Jefferson v. Chase Home Fin.*, 2008 WL 1883484, *9 (N.D. Cal. Apr. 29, 2008).

ARGUMENT

The district court dismissed Mr. Aguayo's claim on grounds of federal preemption. The district court's decision is reviewed de novo. *See Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1055 (9th Cir. 2008).

I. THE DISTRICT COURT ERRED BY NOT APPLYING A STRONG PRESUMPTION AGAINST PREEMPTION.

Preemption is an affirmative defense for which U.S. Bank bears the burden of proof. *See, e.g.*, *Wyeth*, 129 S. Ct. at 1199; *Jimeno v. Mobil Oil Corp.*, 66 F.3d 1516, 1526 n.6 (9th Cir. 1995). In determining whether the Bank met its burden, the Court must start, as "in all pre-emption cases," with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 129 S. Ct. at 1194–95 (citation omitted).

The district court declined to apply this presumption against preemption because of the federal government's historical involvement in banking regulation. ER 5. This analysis was incorrect: in *Wyeth*, decided after briefing below, the Supreme Court rejected an argument that the presumption did not apply because "the Federal Government [had] regulated [in the relevant area] for more than a century." 1129 S. Ct. at 1195 n.3. The Court explained that the presumption

"accounts for the historic presence of state law but does *not* rely on the absence of federal regulation." *Id.* (emphasis added). In other words, the "presumption against preemption applies in any field in which there is a history of state law regulation, even if there is also a history of federal regulation." *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 178 (1st Cir. 2009) (*Wyeth* "clarified" this point).

Wyeth's holding is consistent with the approach taken by this Court in *Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005), a preemption case decided under the NBA. *Kroske* noted that the Ninth Circuit has not always applied the presumption against preemption in NBA cases, but it held that the presumption did apply there, because the state statute that formed the basis for the plaintiff's claim addressed an area traditionally left to state regulation. *See* 432 F.3d at 981–82. In *Kroske*, as later required by *Wyeth*, the determining factor in deciding that the presumption applied was the subject matter of the state law at issue and the history of state regulation in that area. *Id.*

In this case, Mr. Aguayo alleges a violation of the post-repossession notice requirements in California's Rees-Levering Act. *See* Cal. Civ. Code §§2983.2(a), 2983.8. Those requirements regulate creditors' right to collect consumer debts, and debt collection is a quintessentially state concern: the right to collect debts is created by state law, and the Supreme Court has held for more than 100 years that

debt-collection regulation is an area left to state control, even in cases involving national banks. *See, e.g.*, *Atherton*, 519 U.S. at 223 (national banks remain subject to state law regulating their "right to collect debts") (quoting *Nat'l Bank*, 76 U.S. at 362); *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 963 (9th Cir. 2005) (same). Because Rees-Levering regulates debt collection, an area where there is an "historic presence of state law," *Wyeth*, 129 S. Ct. at 1195 n.3, the presumption against preemption applies.[2]

Application of the presumption is particularly appropriate here because the NBA has long been interpreted as leaving state debt-collection regulation in place, *see, e.g.*, *Nat'l Bank*, 76 U.S. at 362, and Congress—although it has amended the statute many times—has never indicated any disagreement with that case law. In *Wyeth*, the Supreme Court held that the case for preemption is "particularly weak" when Congress has not amended a statute to preempt state law expressly, despite a long history of state regulation. 129 S. Ct. at 1200 (citation omitted).

Application of the presumption is also particularly appropriate here because the NBA does not address banks' debt-collection practices and does not provide

[2] Rees-Levering also addresses two other areas of historic state presence, in addition to debt collection. The California Legislature enacted the statute for the purpose of protecting consumers, *Juarez*, 61 Cal. Rptr. 3d at 389, and many of the statute's provisions regulate car-purchase contracts. "Contract and consumer protection laws"—like debt-collection laws—"have traditionally been in state law enforcement hands." *Chae v. SLM Corp.*, --- F.3d ----, 2010 WL 253215, *6 (9th Cir. Jan. 25, 2010).

consumers with any remedies for those practices. Nor do OCC regulations address this area or provide consumer remedies. If state law on these topics is preempted, there is no federal law to fill the void.

The Supreme Court has applied a heavy presumption against preemption in this type of situation—when federal law does not address the subject regulated by state law, and when preemption would leave injured plaintiffs without a remedy. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (plurality op.) (finding it "difficult to believe" that Congress would "remove all means of judicial recourse for those injured by illegal conduct") (citation omitted); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286–90 (1995) (claims involving a manufacturer's failure to install antilock brakes were not preempted because "[t]here is no express federal standard addressing [antilock brakes] for trucks or trailers"); *Poskin v. TD Banknorth, N.A.*, --- F. Supp. 2d ----, 2009 WL 2981963, *21 (W.D. Pa. Sept. 11, 2009) (declining to find preemption where state-law claim challenged allegedly wrongful conduct not addressed by the NBA, emphasizing the federal law's lack of any "duplicative . . . protections").

II. THE REES-LEVERING ACT'S POST-REPOSSESSION NOTICE REQUIREMENTS ARE NOT PREEMPTED BECAUSE U.S. BANK AGREED TO COMPLY WITH THEM.

When Mr. Aguayo purchased his car from Star Ford, his contract with the car dealer included an express promise that he would be provided with "all" post-

repossession notice required by law. At the time of contracting, this promise could have meant only one thing: that Mr. Aguayo would be given the post-repossession notice required by Rees-Levering. U.S. Bank voluntarily assumed this contractual obligation when it purchased Mr. Aguayo's agreement, and the Supreme Court has consistently held that federal law does not preempt a party's "own, self-imposed undertakings." *Am. Airlines,* 513 U.S. at 228. The district court erred in reaching the opposite conclusion.

Moreover, by allowing U.S. Bank to evade its contractual promise and to collect deficiency payments from Mr. Aguayo even though he was not provided the notice promised by his agreement, the district court created an unnecessary conflict with the FTC's Holder Rule. Under the Holder Rule, U.S. Bank became subject to all the claims and defenses that Mr. Aguayo could assert against his original car dealer—such as his claim in this case for failing to provide promised post-repossession notice.

A. Mr. Aguayo's Contract Promised Compliance with Rees-Levering.

Mr. Aguayo's contract includes the following specific promise: "If we repossess the vehicle, you may pay to get it back (redeem). . . . We will provide you *all notices required by law* to tell you when and how much to pay and/or what action you must take to redeem the vehicle." ER 49 (emphasis added).

In interpreting what the parties meant by this promise, the Court must apply California contract law. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007) ("[C]ontracts made by national banks are governed and construed by State laws[.]") (citation omitted); *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 474 (1989) ("the interpretation of private contracts is ordinarily a question of state law"). Under California law, contract terms are given their plain and ordinary meaning. *See In re K F Dairies, Inc. & Affiliates*, 224 F.3d 922, 925 (9th Cir. 2000). Contract terms are also given the meaning they would have had for the parties at the "time of contracting." Cal. Civ. Code §1636; *Bldg. Indus. Ass'n of Cent. Cal. v. City of Patterson*, 90 Cal. Rptr. 3d 63, 71 (Cal. Ct. App. 2009).

Applying these principles to Mr. Aguayo's contract, it is clear that the promise to provide "all notices required by law" was a promise to comply with California's statutory requirements. The parties could not have intended to invoke federal law because there is no federal statute that requires post-repossession notice. This means that parties must have had state law in mind, and the contract provides that "California law" applies. ER 48.

It is also clear that the promise to provide "all" required notices was a promise to comply with Rees-Levering. The California Supreme Court has held that in order to collect a deficiency, a creditor on a car-purchase contract must comply with "any relevant provisions" in California's UCC *and* with "all the

provisions of the Rees-Levering Act." *Lallana*, 960 P.2d at 1138; *see also* Cal. Comm. Code §9201(b) (incorporating Rees-Levering's requirements into the UCC). Thus, the only reasonable way to interpret a promise to provide "all" required notices is as a promise to comply with both statutes.

This is further confirmed by the principle that Mr. Aguayo's agreement must be given the meaning it would have had for the parties at "the time of contracting." Cal. Civ. Code §1636; *Bldg. Indus. Ass'n*, 90 Cal. Rptr. 3d at 71. Mr. Aguayo entered into his contract with a California car dealer, subject to California law, which had no conceivable claim to any federal-preemption defense. This means that at the "time of contracting," the promise in Mr. Aguayo's contract to provide "all" required notices meant all notices required of a California car dealer under California law—including notices required by California's UCC and by Rees-Levering.

B. U.S. Bank Voluntarily Assumed the Promise to Comply with Rees-Levering.

Mr. Aguayo originally entered into his contract with Star Ford. But when Star Ford assigned his contract to U.S. Bank, the Bank assumed all of dealership's contractual promises—including the promise to comply with Rees-Levering.

This conclusion is mandated by hornbook contract law. An assignee "stands in the shoes" of the assignor and assumes responsibility for all of the assignor's rights *and* obligations. *See, e.g.*, *Gen. Motors Acceptance Corp. v. Kyle*, 54 Cal.

2d 101, 113 (1960) (applying this rule to an auto dealer's assignee); *Parker v. Funk*, 185 Cal. 347, 352 (1921) (also applying the rule to an auto seller's assignee); Cal. Comm. Code §9404(a)(1) (creditor's assignee is subject to "[a]ll terms of the agreement between the account debtor and assignor."); *see also, e.g.*, *In re Boyajian*, 564 F.3d 1088, 1091 (9th Cir. 2009) (stating the "general principle[] of assignment law" that "an assignee steps into the shoes of the assignor"); *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 288 (7th Cir. 2005) ("assignee steps into the shoes of the assignor, assuming his rights as well as his duties").[3] As the Seventh Circuit has explained, this is the rule because otherwise, "assignment would be a method of shucking off contractual obligations without the consent of the obligee," *In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d 951, 956–57 (7th Cir. 2003)—exactly what the district court allowed to happen here.

To put the rule another way, an assignor cannot assign more rights than it has under an agreement. *See, e.g.*, *id.* at 956 ("An assignor can assign only what he has[.]"); *Brienza v. Tepper*, 42 Cal. Rptr. 2d 690, 696 (Cal. Ct. App. 1995) (assignor "could assign . . . no greater rights than [it] possessed"). Here, Star Ford had the right to collect a deficiency debt—a right provided by state law—only to the extent that it sent post-repossession notice in compliance with Rees-Levering.

[3] In this case, U.S. Bank also became obliged to fulfill all of the contract's promises when it accepted payments under the agreement as a contractual benefit. *See, e.g.*, *Aeronaves de Mexico, S.A. v. McDonnell Douglas Corp.*, 677 F.2d 771, 773 (9th Cir. 1982); Cal. Civ. Code §1589.

Star Ford could not assign any right to collect deficiency payments without adequate notice because it never had that right under Mr. Aguayo's contract in the first place.

The language in Mr. Aguayo's agreement also compels the conclusion that U.S. Bank assumed Star Ford's promise to comply with Rees-Levering. The contract provides that any "change" to its terms "must be in writing" and signed by both parties. ER 47. Under this provision, the contract's assignment to U.S. Bank must have included an assignment of the promise to comply with Rees-Levering because Mr. Aguayo never agreed to any alteration of the contract's rights and duties.

Indeed, even U.S. Bank does not appear to have had any doubt—before this litigation—about its duty to comply with Rees-Levering's requirements. The Bank sent Mr. Aguayo a post-repossession notice that was labeled as "California" specific, and that gave Mr. Aguayo the right to reinstate his contract—a right provided by Rees-Levering. *Compare* ER 45 *with* Cal. Civ. Code §2983.3(b). The notice also included a verbatim warning required by Rees-Levering. *Compare* ER 45 *with* Cal. Civ. Code §2983.2(a)(8). Although the Bank's notice was ultimately deficient because it did not provide Mr. Aguayo with all the information he needed to exercise his rights, the fact of the notice and its terms demonstrate that U.S. Bank knew it had to comply with Rees-Levering's requirements.

C. Federal Law Does Not Preempt U.S. Bank's Voluntary Promise to Comply with Rees-Levering.

The district court did not disagree with Mr. Aguayo's argument that his contract promised compliance with Rees-Levering and that U.S. Bank voluntarily assumed the obligation to comply with that promise. Nonetheless, the district court held that U.S. Bank could disregard its promise because it was "overrid[den]" by federal law. ER 15. This holding cannot be squared with controlling precedent.

1. Under *American Airlines* and Similar Cases, the Bank's Voluntary Promise Is Not Preempted.

The Supreme Court has explained that the purpose of preemption doctrine is to ensure that the States do not regulate in a manner that conflicts with federal law. *See, e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The doctrine is concerned with obligations imposed by state law; it does not apply to a party's voluntary promises because such promises are "self-imposed undertakings." *Am. Airlines,* 513 U.S. at 228; *see also, e.g.*, *Cipollone*, 505 U.S. at 526 n.24 (plurality op.) ("a contractual requirement, although only enforceable under state law, is not 'imposed' by the State, but rather is 'imposed' by the contracting party upon itself"); *Ass'n of Int'l Auto. Mfrs., Inc. v. Comm'r, Mass. Dep't of Envtl. Prot.*, 208 F.3d 1, 7 (1st Cir. 2000) ("federal preemption is generally . . . not applicable to . . . voluntary agreements"); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir.

1996) ("courts usually read preemption clauses to leave private contracts unaffected").

The Supreme Court applied this principle in *American Airlines*, when it held that the plaintiffs could sue American for violating a promise regarding the airline's frequent-flyer program, regardless of whether the plaintiffs' claim might otherwise have been preempted by the Airline Deregulation Act ("ADA"). The Court explained that airlines are capable of making their own "business judgments" about what contracts to enter into and may be held "to their agreements." *Am. Airlines*, 513 U.S. at 229. The Court declined to read the ADA's preemption clause as sheltering American Airlines from a suit

> seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. . . . [P]rivately ordered obligations . . . do not amount to a State's enactment or enforcement of any law, rule, regulation, standard or other provision having the force and effect of law within the meaning [of the ADA].

Id. at 228–29 (citation and internal quotation marks omitted).

Although the decision in *American Airlines* involved the Airline Deregulation Act, the principle articulated by the Court is not limited to that statute. Many federal and state courts have applied the Supreme Court's teaching to reject preemption arguments based on other federal laws. For example, in *Smith v. Wells Fargo Bank, N.A.*, 38 Cal. Rptr. 3d 653 (Cal. Ct. App. 2005), the California Court of Appeal held that a consumer's §17200 claim against a national

bank was not preempted by the NBA when the plaintiff breached its own voluntary promise. *Id*. at 672–73.[4]

Here, just as in *American Airlines* and *Smith*, U.S. Bank voluntarily assumed its contractual obligations—including the obligation to provide Mr. Aguayo with post-repossession notice in compliance with Rees-Levering. The Bank could have decided that the requirements of Rees-Levering made Mr. Aguayo's contract a poor investment; it was not required to buy any contracts from Star Ford. But the Bank decided to proceed and to accept the terms of the Mr. Aguayo's agreement as written. It should not be permitted to use federal preemption as an excuse for breaching its own voluntarily assumed contractual promises.

2. The District Court Erred in Rejecting the *American Airlines* Rule.

The district court gave two reasons for rejecting Mr. Aguayo's argument based on *American Airlines* and for holding that he could not enforce Rees-Levering. First, the district court emphasized that the OCC has authorized national banks to purchase retail installment contracts ("RICs") like Mr. Aguayo's.

[4] *See also, e.g.*, *Ass'n of Int'l Auto. Mfrs.*, 208 F.3d at 7 (provisions in memoranda of agreement were not state standards preempted by Clean Air Act); *ProCD*, 86 F.3d at 1454 (enforcement of private contracts not preempted by Copyright Act); *Cent. States, Southeast and Southwest Areas Health & Welfare Fund v. Pathology Labs.*, 71 F.3d 1251, 1254 (7th Cir. 1995) (similar analysis under ERISA); *Wells v. Chevy Chase Bank, F.S.B.*, 832 A.2d 812, 815, 823–33 (Md. 2003) (breach-of-contract and unfair practices claims against federal thrift not preempted where plaintiffs alleged that thrift violated promise to comply with a particular state law).

ER 15. Second, the court held that even if Mr. Aguayo has a non-preempted claim under *American Airlines*, he should have pled his claim on a breach-of-contract theory. *Id.* Neither of these reasons supports the district court's dismissal.

The district was correct to note that the OCC has authorized national banks to purchase RICs. *Id.* (citing OCC Interpretive Letter No. 1095 (March 2008), *available at* http://www.occ.treas.gov/interp/mar08/int1095.pdf). But nothing about Mr. Aguayo's claim challenges that authority: he does not dispute U.S. Bank's right to purchase his contract, to assume its terms as assignee, to collect under the agreement, or even to repossess his car. Instead, the only question presented by Mr. Aguayo's appeal is whether—having purchased his contract—U.S. Bank was free to disregard one of the agreement's express promises. Nothing in the OCC's letter authorizing banks to purchase RICs suggests that banks may ignore their contracts' terms.

The district court's contrary conclusion is not only inconsistent with *American Airlines* but also would expand the scope of NBA preemption far beyond what Congress intended. Under the district court's decision, Mr. Aguayo's contractual right to receive a Rees-Levering notice was eliminated simply by virtue of his contract's assignment to U.S. Bank—even though the assignment was an event over which Mr. Aguayo had no control. There is no doubt that Mr. Aguayo's car dealer would have been required by the contract's promise to provide

Rees-Levering notice; the district court's ruling effectively eliminates that contractual promise made to Mr. Aguayo without his consent. This result cannot be squared either with the settled rule that an assignment does not change a contract's terms, or with the contract itself, which provides that its terms may be changed only with Mr. Aguayo's agreement. There is simply no basis in the NBA or elsewhere to conclude that Congress intended to set aside settled contract law, to permit national banks to disregard voluntarily assumed contractual obligations, or to permit them unilaterally to change consumers' contracts without their knowledge or consent.

The district court's second reason for dismissing Mr. Aguayo's claim—that he should have pursued a breach-of-contract theory to avoid federal preemption—is equally without merit. The court cited *American Airlines* for this proposition, but nothing in the Supreme Court's analysis supports the district court's view. *American Airlines* involved a challenge to retroactive changes in a frequent-flier program. The plaintiffs alleged that by changing its program, American breached contractual promises. Separately, the plaintiffs alleged that the airline violated an Illinois consumer fraud statute.

The Supreme Court held that the plaintiffs could enforce the terms of the parties' agreement and could proceed with their breach-of-contract claim. It held the plaintiffs' statutory claim preempted, but only because that claim sought to

impose duties and obligations on the airline *beyond* what it had agreed to in its contract. *See Am. Airlines*, 513 U.S. at 233 (plaintiffs could not go beyond the "parties' bargain"). There was no allegation in *American Airlines* that the defendant had agreed to comply with the statutory requirements that formed the basis for the plaintiffs' second claim. *See id.*

In this case, by contrast, U.S. Bank agreed to comply with the precise statutory requirements that it now claims are preempted—the post-repossession notice requirements imposed by California law. Mr. Aguayo's claim of unlawful conduct does not go beyond what the Bank agreed to; it relies entirely on the Bank's failure to provide the notice promised by his contract. In this situation, the applicable principle from *American Airlines* is that the States are not barred from "affording relief to a party who claims and proves that [a defendant] dishonored a term [that it] itself stipulated." 513 U.S. at 232–33. Because the dishonored term in this case was a promise to comply with Rees-Levering, *American Airlines* dictates that Mr. Aguayo should able to state a claim for the Bank's violations of that statute.

Furthermore, even if the district court were correct in requiring that Mr. Aguayo plead his case via a breach-of-contract theory, his complaint should have been deemed sufficient. The district court failed to recognize that Mr. Aguayo *did* argue that U.S. Bank's conduct violated the UCL because it breached the Bank's

contractual promises. ER 22, 32–34. This is simply a breach-of-contract claim pled through the mechanism of the UCL. *See Smith*, 38 Cal. Rptr. 3d at 672 (systematic breach of contract violates the UCL). At a minimum the district court should have allowed this aspect of Mr. Aguayo's §17200 claim to proceed.

Finally, to the extent the district court believed that Mr. Aguayo should have pled his claim slightly differently, it also erred in refusing to grant him leave to amend. ER 23 (requesting leave to amend); *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) ("leave to amend should be granted unless" the plaintiff "could not possibly cure the deficiency").

For all these reasons, the district court erred in holding that U.S. Bank's voluntary agreement to comply with Rees-Levering is preempted by federal law.

D. The FTC Holder Rule Provides Further Support for Mr. Aguayo's Claim.

The district court's decision should also be reversed because it creates an unnecessary conflict with the FTC Holder Rule, 16 C.F.R. §433.2, which supports Mr. Aguayo's claim. Pursuant to the FTC's Rule, Mr. Aguayo's contract included language stating that any subsequent holder of the agreement would be "subject to all claims and defenses which the debtor could assert against the seller[.]" ER 49. This language is an explicit articulation of the contract-law principles discussed above: namely, that U.S. Bank "stands in the shoes" of Star Ford and cannot assert

any rights "superior" to the car dealer's rights. FTC Guidelines, 41 Fed. Reg. at 20,023; FTC Final Rule, 40 Fed. Reg. at 53,507.

The FTC promulgated the Holder Rule to ensure that a consumer like Mr. Aguayo can assert any claims against his contract's assignee that he would have been able to assert against his original seller—such as the claim, in this case, for inadequate post-repossession notice and unlawful debt collection. *See* FTC Final Rule, 40 Fed. Reg. at 53,524 (consumer may asserts his claims or defenses "against any holder of the credit obligation"); *see also id*. at 53,510, 53,512 (purposes of the rule included ensuring that assignees are not "insulate[d]" from consumer claims and that consumers do not "waive[] . . . rights" without their knowledge or consent).

The Holder Rule also ensures that a contract's assignee cannot demand payment from a consumer unless contractual promises made to the consumer are fulfilled and the original seller would also be entitled to payment. *Id*. at 53,507, 53,523 (assignee has no rights "superior" to those of the original seller, and "a consumer's duty to pay for goods or services must not be separated from a seller's duty to perform as promised, regardless of the manner in which payment is made"). As applied here, this means that U.S. Bank could not demand that Mr. Aguayo make deficiency payments because his contract's promise of lawful post-

repossession notice was unfulfilled and because Star Ford would not have been entitled to demand such payments under California law.

Under settled principles of construction, the FTC's Holder Rule should be read consistently with the OCC's Interpretive Letter authorizing national banks to purchase RICs—particularly because nothing in the OCC's Letter indicates any intent to free banks from the FTC's requirements. *See, e.g.*, *N. Mariana Islands v. United States*, 279 F.3d 1070, 1074 (9th Cir. 2002) (courts have an "obligation" to "construe federal statutes so that they are consistent with each other") (citation omitted). Reading the Holder Rule and the OCC's Letter consistently provides further support for Mr. Aguayo's claim, because it leads to the conclusion that while U.S. Bank was free to purchase Mr. Aguayo's contract, it did so as any other assignee—subject to the contract's obligations and to Mr. Aguayo's claims.

III. THE REES-LEVERING ACT'S POST-REPOSSESSION NOTICE REQUIREMENTS ARE NOT PREEMPTED BY 12 C.F.R. §7.4008.

The district court's preemption ruling was also incorrect for another, independent reason. The OCC regulation on which the district court relied, 12 C.F.R. §7.4008, preempts state laws only to the extent that they regulate bank lending. The regulation's "savings clause" expressly *preserves* state debt-collection law from preemption. *See* 12 C.F.R. §7.4008(e)(4). Because Rees-Levering's post-repossession notice requirements regulate debt collection, rather

than lending, the district court erred in holding them preempted under the OCC's rule.

A. Rees-Levering's Notice Requirements Do Not Fall within the Terms of the OCC's Express Preemption Clause.

In finding Rees-Levering's notice requirements preempted, the district court focused on the express preemption provision in §7.4008(d)(2)(viii), which preempts state laws that limits banks' ability to "make non-real estate loans" by regulating the content of "credit-related documents." As explained below, Rees-Levering's notice requirements do not fall within paragraph (d)(2)(viii) because they do not interfere with banks' ability to "make . . . loans" and because post-repossession notice is not a "credit-related" document.

1. Rees-Levering's Notice Requirements Do Not Interfere with Bank Lending.

The OCC promulgated 12 C.F.R. §7.4008 to protect banks' enumerated power to "loan[] money on personal security." 12 U.S.C. §24 (Seventh). For this reason, all the types of state law listed as preempted in §7.4008(d)(2) are preempted only to the extent that they affect banks' ability to "make non-real estate loans." 12 C.F.R. §7.4008(d)(2); *see also* OCC Interpretive Letter No. 1005, at 1 (describing §7.4008(d)(2) as preempting certain state laws "pertaining to making loans"). The Rees-Levering Act's notice requirements do not fall within this category because they regulate debt collection, not lending.

Section 7.4008 draws a sharp distinction between debt collection and lending: much of state lending regulation is preempted, *see* §7.4008(d), while debt-collection laws are expressly preserved from preemption by the regulation's savings clause. *See* 12 C.F.R. §7.4008(e)(4) (state law that regulates banks' "rights to collect debts" is not preempted); *see also* Statement of John D. Hawke, Jr., Comptroller of the Currency, before the S. Comm. on Banking, Hous. and Urban Affairs, on Federal Preemption of State Laws, Washington, D.C., April 7, 2004, 23 OCC Q.J. 69, 2004 WL 3418806, *2, *3 [hereinafter Hawke Statement] (the OCC's rules preempt some state laws that apply to national banks' "lending and deposit-taking activities" but "state laws . . . on rights to collect debts" are not preempted). As one district court recently explained, a debt-collection regulation, unlike a lending regulation, "does not come into play until after a loan is made or credit otherwise extended, and . . . does not affect the manner in which the lender services or maintains the loan." *Alkan v. Citimortgage, Inc.*, 336 F. Supp. 2d 1061, 1064 (N.D. Cal. 2004) (citation omitted); *see also Flanagan v. Germania, F.A.*, 872 F.2d 231, 234 (8th Cir. 1989) (also distinguishing between lending regulation and regulation of "collection practices").

The distinction drawn in §7.4008 between debt-collection regulation and lending regulation makes sense because lending is among banks' enumerated powers, *see* 12 U.S.C. §24 (Seventh), while banks' debt-collection practices are

not regulated by the NBA and have always been left to the control of state law. *See, e.g.*, *Atherton*, 519 U.S. at 222–23 (national banks remain subject to state law regulating their "right to collect debts") (quoting *Nat'l Bank*, 76 U.S. at 362); *Boutris*, 419 F.3d at 963 (same); *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002) (same); *Hood v. Santa Barbara Bank & Trust*, 49 Cal. Rptr. 3d 369, 382 (Cal. Ct. App. 2006) (same); *Merchants' Nat'l Bank v. Ford*, 99 S.W. 260, 262 (Ky. 1907) ("As regards . . . the collection of debts, . . . national banks are subject to the control of the state where they are situated."). In promulgating §7.4008, the OCC intended to preempt only those types of state law for which there was "substantial precedent" to support a finding of conflict with the NBA—not categories of state law, like debt collection, where all precedent goes the other way. OCC Interpretive Letter No. 1005, at 1; Hawke Statement, 2004 WL 3418806, *2.

With these principles in mind, it is clear that the Rees-Levering Act's post-repossession notice requirements regulate debt collection, not lending. They do not regulate any aspect of the offer of credit, the terms of credit, or the parties' pre-default credit relationship. *Cf., e.g.*, *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008) (holding a state statute preempted that regulated banks' offer of credit). Instead, they apply to post-repossession notice, which is sent long after credit has been extended—indeed, after the consumer has defaulted under his

contract, when the parties' credit relationship has broken down and the contract's creditor is trying to collect what it is owed. *See* Cal. Civ. Code §2983.2; *see also* ER 47, 49 (Mr. Aguayo's contract, making clear that post-repossession notice is sent only after the consumer has "default[ed]," when the creditor is trying to "collect what you owe"—*i.e.*, the consumer's "indebtedness"); Robert S. Goldberg & Marvin G. Goldman, *The Rees-Levering Motor Vehicle Sales and Finance Act*, 10 UCLA L. Rev. 125, 154 (1962) (Civil Code §2983.2 governs "remedies upon default").

Furthermore, the sections of Rees-Levering on which Mr. Aguayo relies—California Civil Code §§2983.2 and 2983.8—require creditors to provide post-repossession notice as a condition of collecting deficiency debts and deficiency judgments. *See* Cal. Civ. Code §§2983.2(a), 2983.8(b); *Lallana*, 960 P.2d at 1141 (if a creditor fails to comply, it may not collect a deficiency). The entire purpose of these sections is to regulate creditors' ability to collect. *See, e.g.*, *Lallana*, 960 P.2d at 1137–38 (describing Rees-Levering as a statute that regulates the right of a "creditor" to collect a "deficiency" from a "debtor"). Indeed, the principal relief sought by Mr. Aguayo's complaint is a return of deficiency debts collected by the Bank, as well as an order preventing it from collecting others. ER 63.

In short, because Rees-Levering's post-repossession notice requirements regulate debt collection, rather than lending, they do not affect banks' power to

"make . . . loans" within the meaning of §7.4008(d)(2) and are not preempted by that section.

The district court rejected this conclusion because it refused to draw any distinction between debt collection and lending, describing them as "inseparable." ER 12. The court cited no authority for this view, which cannot be squared with §7.4008 itself: the regulation distinguishes between lending and debt-collection by preempting many state laws that regulate banks' power to "make . . . loans" while preserving state laws that regulate banks' "rights to collect debts." *See* §7.4008(d), (e)(4). Nor can the district court's analysis be squared with the NBA, which explicitly addresses lending but has always been interpreted as leaving debt-collection regulation to the States. *See* cases cited *supra* p.41.

2. Rees-Levering's Notice Requirements Also Do Not Regulate "Credit-Related Documents."

The district court's application of §7.4008(d)(2) was flawed in a second respect as well. The district court focused on paragraph (d)(2)(viii), which preempts state laws that affect lending by regulating the content of "credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents." Contrary to the district court's ruling, ER 8, post-repossession notices are not "credit-related documents" within the meaning of this paragraph.

It is axiomatic that "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (citation omitted); *see also, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 61 (2002) ("a word is known by the company it keeps") (citation omitted). All of the documents listed in §7.4008(d)(2)(viii)—"credit application forms, credit solicitations, billing statements, credit contracts"—pertain either to banks' initial extension of credit or to the terms of credit. A post-repossession notice, by contrast, has nothing to do with an application for credit or the terms of credit: it is part of the debt-collection process, which begins only after default and after the parties' credit relationship has broken down. None of the documents listed in §7.4008(d)(2)(viii) has anything to do with debt collection.

Section 7.4008 does include one specific reference to state debt-collection regulation—but only in its savings clause, which expressly preserves state debt-collection law from preemption. 12 C.F.R. §7.4008(e)(4). This specific reference to debt collection demonstrates that the OCC knows exactly how to refer to state debt-collection law and that it could easily have mentioned collection-related documents by name in §7.4008(d)(2)(viii). *Cf.* 12 C.F.R. §590.4(h) (another federal regulation, governing thrifts, which refers explicitly to repossession notice in the housing context). The fact that it did not confirms that such documents are not covered by paragraph (d)(2)(viii). *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S.

692, 711 n.9 (2004) (declining to give statute meaning not clearly expressed when "Congress knew how" to convey that meaning if "it wanted to").

The OCC's own statements confirm that §7.4008(d)(2)(viii) does not apply to post-repossession notice. The OCC has said that state laws incorporating the Uniform Commercial Code are not preempted, *see* OCC Interpretive Letter No. 1005, at 2, and California's UCC—just like the model UCC and like Rees-Levering—regulates the contents of post-repossession notice. *See* Cal. Comm. Code §§9613, 9614 (dictating the contents of post-repossession notice); UCC §§9-613, 9-614 (model code, same). If the post-repossession notice requirements in California's UCC are not preempted (as the OCC, U.S. Bank, ER 18–19, and the district court, ER 11, all agree), then the OCC could not possibly have intended post-repossession notice to fall within the category of "other credit-related documents" for which all such content regulation *is* preempted.

In nonetheless concluding that post-repossession notice is a "credit-related document[]," the district court cited only one case: *Crespo v. WFS Financial Inc.*, 580 F. Supp. 2d 614 (N.D. Ohio 2008). *Crespo*'s analysis is inapplicable here because that case involved a different regulation, 12 C.F.R. §560.2, promulgated by a different agency, the Office of Thrift Supervision ("OTS"), operating under a different preemption framework. OTS's regulation governs federal thrifts, not national banks, and it implements a statute—the Home Owners' Loan Act

("HOLA"), 12 U.S.C. §1461 *et seq*.—that preempts the entire field of regulation, whereas the NBA leaves much bank regulation to the States. *Compare* 12 C.F.R. §560.2(a) (occupying the field) *with, e.g.*, Final Rule, 69 Fed. Reg. at 1910–11 (declining to occupy the field), *and Cuomo*, 129 S. Ct. at 2720–21 (states have always regulated national banks, and continue to do so). Most importantly, the OTS's regulation does not draw the same distinction between lending regulation and debt-collection regulation that is clear in §7.4008. *See* 12 C.F.R. §560.2(c) (OTS savings clause, which does not explicitly preserve debt-collection law). Given this key difference, *Crespo*'s application of 12 C.F.R. §560.2 has no bearing on §7.4008. *See, e.g.*, *Davis*, 650 F. Supp. 2d at 1083–84 (precedent under the HOLA/OTS regime does not control under the NBA) (citing cases).

In summary, the Rees-Levering Act's post-repossession notice requirements are not preempted by §7.4008(d)(2) and (d)(2)(viii) because they do not regulate lending and because post-repossession notice is not a "credit-related" document.[5]

[5] U.S. Bank also argued to the district court that the Rees-Levering Act's notice requirements are preempted by §7.4008(d)(2)(iv), which refers to state laws regulating "terms of credit," and (d)(2)(vi), which refers to state laws regulating "security property." The district court did not reach these arguments, which are without merit. Mr. Aguayo does not contend that U.S. Bank violated any state law governing his "terms of credit." Nor does he challenge the Bank's right to repossess his car or to use cars as security. *See* Hawke Statement, 2004 WL 3418806, *2 (describing §7.4008(d)(2)(vi) as preempting state laws that "restrict or prescribe . . . permissible security property").

B. Rees-Levering's Notice Requirements Fall Squarely within the OCC's Savings Clause.

The district court made an additional mistake in applying §7.4008. It declined even to consider the regulation's savings clause, referred to above, which expressly preserves state laws that (1) regulate debt collection and (2) "only incidentally affect" bank lending. 12 C.F.R. §7.4008(e). Both of these prongs of the savings clause are satisfied here.[6]

1. Rees-Levering's Notice Requirements Regulate Debt Collection and Only Incidentally Affect Lending.

In promulgating §7.4008, the OCC expressly preserved state laws that regulate banks' "rights to collect debts." 12 C.F.R. §74008(e)(4). The purpose of this clause was to ensure consistency with more than 100 years of case law: the Supreme Court, this Court, and others have all held repeatedly that state debt-collection regulation is not preempted by the NBA. *See, e.g.*, cases cited *supra* p.41. As these cases explain, the right to collect debts is traditionally regulated by state law, *see, e.g.*, *Nat'l Bank*, 76 U.S. at 362, and state debt-collection regulation

[6] In his Statement to the Senate, Comptroller Hawke suggested that the "incidentally affect" language in the OCC's savings clause was not intended to impose an additional or separate requirement on the categories of state law listed as preserved from preemption in §7.4008(e). *See* Hawke Statement, 2004 WL 3418806, *3 (describing debt-collection law as simply "not preempted" and describing the "incidentally affect" language as preserving "other law," not explicitly listed in the regulation, that also does not discriminate against banks or bank powers). But even if the Court considers the "incidentally affect" language as imposing an additional requirement, it is satisfied here.

does not interfere with any of the powers granted to national banks by the NBA. *See, e.g.*, *Bank of Am.*, 309 F.3d at 558–59.

California's Rees-Levering Act undoubtedly regulates creditors' "rights to collect debts" within the meaning of the OCC's savings clause. As discussed above, *see supra* pp.41–43, California Civil Code §§2983.2 and 2983.8 impose requirements on creditors with which they must comply in order to collect deficiency debts. *See also, e.g.*, *Lallana*, 960 P.2d at 1141. These provisions are nothing if not regulations of creditors' right to collect.

It is equally clear that Rees-Levering's notice requirements at most "only incidentally affect" bank lending within the meaning of the second prong of the OCC's savings clause. Shortly after the OCC promulgated §7.4008, the Comptroller explained that the regulation's savings clause was intended to preserve "undiscriminating" state laws "that form the legal infrastructure for conducting a banking or other business"—*i.e.*, state laws that do not discriminate against banks and that instead apply equally to banks and other businesses. Hawke Statement, 2004 WL 3418806, *3; *see also* Final Rule, 69 Fed. Reg. at 1910–11, 1913.[7] Under this test, a state statutory provision is not preempted if its impact on

[7] In *Cuomo*, the Supreme Court recently held that this test actually overstates the scope of permissible NBA preemption. *See* 129 S. Ct. at 2719–20 (rejecting similar language used by the OCC when explaining 12 C.F.R. §7.4000). The fact that Rees-Levering's notice requirements satisfy even the OCC's overreaching test provides further confirmation that they are not preempted.

banks or bank lending "is incidental to the [state] statute's primary purpose." *Binetti v. Wash. Mut. Bank, FA*, 446 F. Supp. 2d 217, 221 (S.D.N.Y. 2006) (construing another regulation that uses the same language).[8]

The Rees-Levering Act's post-repossession notice requirements fit easily within the OCC's "incidentally affect" language. They do not discriminate against banks: they apply equally to all businesses, of whatever form, that sell motor vehicles or hold an auto-sale contract—including, for example, Mr. Aguayo's car dealer. *See* Cal. Civ. Code §2983.2 (statute's debt-collection provision, applicable to any "seller or holder of the contract"); *see also* Cal. Civ. Code §2981(b) (defining "seller[s]" governed by the statute to include any "person engaged in the business of selling or leasing motor vehicles under conditional sale contracts"). Nor are Rees-Levering's post-repossession notice requirements intended to target any statutorily authorized bank power: they regulate debt collection, not lending, and the NBA has always been interpreted to leave banks' debt-collection practices subject to state control.

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[8] This understanding of "incidentally affect" is consistent with case law in a variety of other contexts where the same phrase has been interpreted and applied. *See, e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275 (1993) (conspiracy "incidentally affects" a protected right if it is not "aimed at" that right); *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995) (state law only "incidentally affects" interstate commerce if it does not "discriminate" against out-of-state interests and if its "primary purpose" was instead to address a legitimate local concern).

Ultimately, Rees-Levering's notice requirements have the kind of tangential relationship to banks and banking that is the very definition of "incidentally affect." They may ultimately affect some banks because they apply generally to all contract holders, but that is true of any state law that forms part of the "legal infrastructure." Final Rule, 69 Fed. Reg. at 1912; *see also McClellan*, 164 U.S. at 358 (national banks remain subject to generally applicable contract law even though such law, "in the broadest sense," may impose a "restraint upon the power of a national bank").

For all these reasons, the Rees-Levering Act's notice requirements are excluded from preemption by the plain terms of the savings clause: they regulate creditors' rights to collect debts and, at most, only incidentally affect bank lending. That fact alone trumps any other conclusions reached by the district court regarding the preemptive reach of the OCC's regulation.

2. The District Court Erred in Refusing Even To Consider the Savings Clause.

In applying §7.4008 to preempt Mr. Aguayo's claim, the district court declined even to consider the regulation's savings clause. ER 13. The district court took this approach because of a statement made by OTS when it promulgated one of its own preemption regulations under HOLA. OTS wrote that if a state law falls within the paragraph in its regulation that lists preempted state laws, then OTS will not go on to consider whether the state law might be preserved by the

regulation's savings clause. *See* Final Rule, Lending and Investment, 61 Fed. Reg. 50,951, 50,966 (Sept. 30, 1996) (promulgating 12 C.F.R. §560.2).

There are several reasons why the district court erred in applying OTS's guidance to OCC's regulation. As an initial matter, the Rees-Levering Act's notice requirements do not fall within the preemption section in OCC's regulation, §7.4008(d), so OTS's guidance should never have come into play. *See supra* pp.39–46.

The district court also erred in following OTS's approach because OTS, unlike the OCC, has occupied its entire field of regulation. *See* 12 C.F.R. §560.2(a). Even if one assumes that it is appropriate to disregard a savings clause in a field-preemption context, where the presumption is that federal law leaves no room for state regulation, it is not appropriate to do so under the NBA, which leaves much of national banks' conduct subject to state control. *See, e.g.*, *Cuomo*, 129 S. Ct. at 2720–21; *see also Davis*, 650 F. Supp. 2d at 1083 (for this reason, courts have "cautioned against wholesale application of an OTS/HOLA analysis" to cases involving NBA preemption).

The district court's application of OTS's guidance was improper for an additional reason as well. OCC made explicit reference to OTS's regulations when it promulgated its final rule, *see* Final Rule, 69 Fed. Reg. at 1905, but the OCC did not give any analytical guidance similar to OTS's when it issued §7.4008. This

silence militates strongly against reading OTS's approach into the OCC's regulation—particularly here, where that approach would require ignoring the regulation's savings clause entirely, and would therefore run counter to the settled rule that statutes and regulations should be read as a whole, giving effect to all of their provisions. *See, e.g.*, *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 376 (1999) (rejecting an interpretation that would "virtually read the savings clause out of ERISA"); *Ariz. Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1250 (9th Cir. 2007) (court should "look to the language and design of the [regulation] as a whole" and read "specific words with a view to their place in the overall [regulatory] scheme"). Absent any instruction from the OCC, the district should not have set aside the traditional rule and ignored the savings clause in §7.4008(e).[9]

Finally, it was inappropriate to apply OTS's guidance because it amounts to a presumption *in favor of* preemption. There is no basis in either the NBA or §7.4008 for presuming preemption of state law; valid state regulation of banks is the "rule," not the "exception." *McClellan*, 164 U.S. at 357; *Young v. Wells Fargo*

[9] Indeed, there is a second savings clause to consider here. When Congress enacted the FDCPA, it expressly preserved stronger state debt-collection laws from preemption. 15 U.S.C. §1692n. This intent to preserve state law should be read consistently with the NBA and its implementing regulations. *See Am. Airlines,* 513 U.S. at 232 (reading a preemption provision in one statute to be consistent with a savings clause in another).

& Co., --- F. Supp. 2d ----, 2009 WL 3450988, *9 (S.D. Iowa Oct. 27, 2009) ("[T]here is no presumption that the NBA preempts state law.").

C. The District Court Also Erred in Holding Rees-Levering's Notice Requirements Preempted Under §7.4008 Because Those Requirements Are Not Preempted by the NBA Itself, Applying Traditional Conflict-Preemption Principles.

The conclusion that Rees-Levering's notice requirements are not preempted is further confirmed by applying traditional conflict-preemption principles under the National Bank Act itself. *See* Final Rule, 69 Fed. Reg. at 1910 (12 C.F.R. §7.4008 was not intended to establish a new preemption standard but instead to be "entirely consistent with," and as a "distillation" of, conflict-preemption case law); Hawke Statement, 2004 WL 3418806, *2 (same).[10] The district court held that even if "express preemption was unavailable," Rees-Levering's notice requirements would be conflict-preempted. ER 12. But controlling case law demonstrates that this holding was incorrect.

[10] As these citations demonstrate, OCC did not intend §7.4008 to preempt any state laws that would not also be preempted under a conflict-preemption analysis. This makes sense, because Congress has never given OCC independent authority to preempt state law. *Compare, e.g.*, 47 U.S.C. §253 (authorizing the FCC to preempt state law) *with* 12 U.S.C. §§43(a), 93a (referring to preemption and authorizing OCC to promulgate rules, but not authorizing it to preempt); *see also Watters*, 550 U.S. at 38–39 (Stevens, J., dissenting) (OCC is not authorized to preempt state law); Remarks of Comptroller John D. Hawke, Jr., Before Women in Hous. & Fin. (Feb. 12, 2002) (the OCC "has no self-executing power to preempt state law"), *reprinted in* 2 OCC Q.J. 23. In *Wyeth*, 129 S. Ct. 1200–01, the Supreme Court explained that when an agency is not authorized to preempt state law, courts need not defer to the agency's "conclusion[s]" regarding preemption but should instead conduct their own conflict-preemption analysis.

A state statute is conflict-preempted if compliance with both state and federal law is physically impossible, or if the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Kroske*, 432 F.3d at 981 (citation omitted). In the banking context, state law is preempted if it "forbid[s]" or "impair[s] significantly" the "exercise of a power that Congress explicitly granted." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). The state law must create an "irreconcilable conflict" with the NBA. *Id*. at 31.

There is no basis for concluding that the Rees-Levering Act's post-repossession notice requirements impair significantly (or at all) national banks' enumerated power to "loan[] money on personal security." 12 U.S.C. §24 (Seventh). Rees-Levering's notice requirements leave banks free to make loans, to set loan terms, to purchase retail installment contracts, to collect payments, and even to repossess collateral. *See* Cal. Civ. Code §2983.2. Rees-Levering regulates banks' right to claim and collect deficiency debts and judgments, *see id*., but that is a right created by state law, and the NBA leaves debt-collection regulation in state control. *See, e.g.*, cases cited *supra* p.41. Furthermore, this case is also entirely unlike those where state laws have been held preempted by the NBA—cases where state statutes forbade the exercise of an explicitly authorized bank power or imposed a burden directly on bank lending. *See, e.g.*, *Barnett Bank*, 517 U.S. at 31

(state statute prohibited national banks from selling insurance, which they were explicitly authorized to do); *Rose*, 513 F.3d at 1035 (state statute regulated banks' initial offer of credit).

The conclusion that Rees-Levering is not preempted under the Supreme Court's conflict-preemption jurisprudence is confirmed by a comparison to the Court's decision in *McClellan*, which considered a Massachusetts statute that had the effect of prohibiting a national bank from retaining real property conveyed to it as security for a loan. 164 U.S. at 348–49. The Court noted that national banks are authorized to hold real estate as security, but it concluded that there was no conflict in requiring banks to exercise that power "under the same conditions and restrictions to which all other citizens of the state are subject." *Id*. at 358. The statute at issue in *McClellan* fell much closer to an explicitly authorized bank power than Rees-Levering does, and it actually had the effect of preventing a bank from keeping its collateral. *See id*. If the statute at issue in *McClellan* was not preempted, then *a fortiori*, Rees-Levering's notice requirements also cannot be preempted.

The district court found a conflict with the NBA because complying with Rees-Levering's requirements might impose some minimal "costs" on national banks and because national banks should operate under "uniform standards." ER 12. But these are not—and have never been—the correct tests for preemption. As

an initial matter, compliance with any state-law requirement is likely to impose some costs (as in *McClellan*), but the dispositive inquiry is whether the state law at issue significantly impairs a protected bank power. *See Barnett Bank*, 517 U.S. at 33. Rees-Levering's post-repossession notice requirements do not have that effect.[11] The Supreme Court in *Atherton* also rejected the argument that state laws are preempted simply because they are not "uniform standards." *See Atherton*, 519 U.S. at 219–23. Carried to its logical extreme, that test for preemption would preempt *all* state-law requirements, and the Supreme Court has repeatedly held that many state laws—including debt-collection laws—apply to national banks. *See id.* at 223; *see also Cuomo*, 129 S. Ct. at 2720–21.

Simply put, there is nothing about Rees-Levering's post-repossession notice requirements that frustrates Congress' purpose in authorizing national banks to make loans. Nor is there any reason to conclude that Congress intended to free national banks from state debt-collection regulation. Because Rees-Levering does not stand as an obstacle to congressional purpose, or forbid or impair significantly any protected bank power, Mr. Aguayo's claim is not preempted by the NBA.

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[11] For other cases upholding state laws or state-law claims that would inevitably impose some costs on national banks, see: *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 236 (1944) (state escheat law that required bank to turn over deposits); *Young*, 2009 WL 3450988, *1–*2 (state-law claims that challenged banks' ability to impose certain fees); *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358, 1361–62 (N.D. Ga. 2008) (similar); *Gutierrez*, 2008 WL 4279550, *3–*4 (similar). *See also, e.g.*, *Cuomo*, 129 S. Ct. at 2720–21 (citing additional cases).

IV. THE "UNFAIR" AND "FRAUDULENT" PRONGS OF MR. AGUAYO'S CLAIM ARE NOT PREEMPTED, REGARDLESS OF WHETHER REES-LEVERING'S NOTICE REQUIREMENTS ARE PREEMPTED.

California's Unfair Competition Law prohibits business practices that are unlawful, unfair or fraudulent, *see* Bus. & Prof. Code §17200, and Mr. Aguayo pled his claim under all three prongs of the UCL. ER 61–62. The "unlawful" aspect of his claim focused on U.S. Bank's violations of Rees-Levering, and the district court rejected that part of his claim by holding (incorrectly) that Rees-Levering's post-repossession notice requirements are preempted by the NBA. But the district court never addressed Mr. Aguayo's allegations—separate from U.S. Bank's violations of Rees-Levering—that the Bank's conduct is unfair and fraudulent. Regardless of whether Rees-Levering's notice requirements are preempted, Mr. Aguayo's allegations of unfair and fraudulent conduct should not have been dismissed.

A. Mr. Aguayo Alleged Unfair and Fraudulent Conduct Independent of U.S. Bank's Violations of Rees-Levering.

With respect to unfair conduct, Mr. Aguayo argued in the district court that U.S. Bank violates the UCL by breaching its own contractual promises to provide "all" required notice. ER 22, 32–34. With respect to fraudulent conduct, Mr. Aguayo alleged that U.S. Bank makes false statements to consumers and California courts about whether it has complied with Rees-Levering's requirements. ER 61–

62. He also alleged that the Bank's post-repossession notices are likely to mislead consumers, *see id*., such as by stating a "total" amount due that does necessarily reflect all payments consumers will have to make.

These allegations are independent of the "unlawful" prong of Mr. Aguayo's claim because they do not depend on duties or obligations created by Rees-Levering. *See Rose*, 513 F.3d at 1038 (test for determining whether unfair and fraudulent UCL claims stand independently of unlawful claim is whether the claims depend on different "legal dut[ies]"). U.S. Bank, like all businesses, has a common-law duty to abide by contractual promises—independent of Rees-Levering or any other statute. *See, e.g.*, *Davis*, 650 F. Supp. 2d at 1084 (referring to "generally applicable" duty to fulfill "contractual obligations"). Similarly, U.S. Bank has a generally applicable duty not to mislead. *See id*. That duty is based in common law and in §17200, not on any provisions in Rees-Levering.

B. The Unfair and Fraudulent Prongs of Mr. Aguayo's Claim Are Not Preempted by 12 C.F.R. §7.4008 or by the NBA Itself.

Regardless of whether the Rees-Levering Act's notice requirements are preempted, Mr. Aguayo's allegations of unfair and misleading conduct are not preempted by the NBA or by 12 C.F.R. §7.4008.

First, because Mr. Aguayo's allegations of unfair and deceptive conduct sound in contract and fraud, they fall within the express terms of OCC's savings clause, which preserves state law regulating "contracts" and "torts." 12 C.F.R.

§7.4008(e)(1)–(2); *see also Davis*, 650 F. Supp. 2d at 1086 (UCL and other state-law claims sounding in contract fell within the savings clause); *Hood*, 49 Cal. Rptr. 3d at 382 (also applying the savings clause); *cf. White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358, 1367 (N.D. Ga. 2008) (deceptive practices and other state-law claims sounding in tort and contract fell within similar savings clause in §7.4007); *Gutierrez*, 2008 WL 4279550, *9 (same).

Second, because the OCC's regulation itself prohibits national banks from engaging in "unfair or deceptive practices," 12 C.F.R. §7.4008(c), there is no conceivable conflict in purpose between the agency's regulation and Mr. Aguayo's claims. *See also* OCC Advisory Letter 2002-3 (March 2002), 2002 WL 521380, *2 & n.2 (warning banks that they may face litigation for violating "state [unfair-practices] law," citing §17200 as an example, and stating that state unfair-practices laws "may be applicable to insured depository institutions"). Nor is there any conflict between Mr. Aguayo's allegations of unfair and fraudulent conduct and the NBA itself: the NBA does not authorize misrepresentations or breaches of contract, and there is no indication that Congress intended to immunize banks from liability for such behavior.

For these reasons, many courts have rejected NBA preemption challenges to unfair trade practices claims similar to Mr. Aguayo's. *See, e.g.*, *Davis*, 650 F. Supp. 2d at 1085–1086 (UCL claims sounding in contract and fraud not preempted

by the NBA); *White*, 563 F. Supp. 2d at 1367–69 (deceptive-practices claims not preempted by the NBA); *Smith*, 38 Cal. Rptr. 3d at 672–73 (UCL claim alleging breach of contract not preempted by the NBA).[12]

Thus, regardless of whether Rees-Levering's notice requirements are preempted, his allegations of unfair and fraudulent conduct are not and should be permitted to proceed.

V. MR. AGUAYO HAS STANDING TO SUE UNDER CALIFORNIA'S UNFAIR COMPETITION LAW.

In its motion to dismiss, U.S. Bank made one argument in addition to preemption: that Mr. Aguayo lacks standing to sue under California's UCL. The district court did not reach this argument, ER 13 n.5, which is without merit.

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[12] *See also, e.g.*, *Mwantembe v. TD Bank, N.A.*, --- F. Supp. 2d ----, 2009 WL 3818745, *7 (E.D. Pa. Nov. 17, 2009) (deceptive-practices claim not preempted by the NBA because the "duty to refrain from deceptive and misleading conduct" does not impair banks' ability to exercise authorized powers); *Mann v. TD Bank, N.A.*, 2009 WL 3818128, *2, *4–*8 (D.N.J. Nov. 12, 2009) (claim for misleading conduct under New Jersey's Consumer Fraud Act not preempted by the NBA); *Young*, 2009 WL 3450988, *6–10 (California UCL claim and other deceptive-practices claims sounding in fraud not preempted by the NBA); *Poskin*, 2009 WL 2981963, *20–*21 (deceptive-practices claim sounding in fraud not preempted by the NBA); *Baldanzi v. WFC Holdings Corp.*, 2008 WL 4924987, *1–*3 (S.D.N.Y. Nov. 14, 2008) (deceptive-practices claim sounding in tort and contract not preempted by the NBA; citing additional cases); *Gutierrez*, 2008 WL 4279550, *9–*12 (claims based on misleading disclosures not preempted by the NBA); *Jefferson*, 2008 WL 1883484, *13 (explaining that "the duty to refrain from misrepresentation falls on all businesses," "does not target or regulate banking or lending," and "only incidentally affects the exercise of banks' real estate lending powers").

Plaintiffs proceeding under the UCL must demonstrate that they "lost money or property as a result" of the defendant's alleged misconduct. Cal. Bus. & Prof. Code §17204. Mr. Aguayo satisfies this requirement: he lost money to the Bank when he made a deficiency payment after his car was sold, ER 24, 39, and he made that payment as a direct result of the Bank's wrongful conduct—its "unlawful demand[s]" for payment following inadequate notice. *Fireside Bank*, 155 P.3d at 282. In *Fireside Bank*, the California Supreme Court held that a plaintiff who made a deficiency payment after inadequate notice had standing to sue under §17200. *See id*. That decision is controlling.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

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Respectfully submitted,

/s/ F. Paul Bland Jr.

F. Paul Bland, Jr.
Claire Prestel
Melanie Hirsch
PUBLIC JUSTICE, P.C.
1825 K Street NW, Suite 200
Washington, DC 20006
(202) 797-8600

Leslie A. Brueckner
PUBLIC JUSTICE, P.C.
555 12th Street, Suite 1620
Oakland, CA 94607
(510) 622-8150

Andrew J. Ogilvie
Carol M. Brewer
ANDERSON, OGILVIE & BREWER LLP
600 California Street, 18th Floor
San Francisco, CA 94108
(415) 651-1950

Michael E. Lindsey
4455 Morena Boulevard, Suite 207
San Diego, CA 92117
(858) 270-7000

STATEMENT OF RELATED CASES

No related cases are pending in this Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 13,961 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief 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). It has been prepared in a 14-point proportionally spaced typeface using Microsoft Word.

Date: February 26, 2010

PUBLIC JUSTICE, P.C.

/s/ Melanie Hirsch
Melanie Hirsch
Counsel for Plaintiff-Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 26, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the appellate CM/ECF system.

Date: February 26, 2010

PUBLIC JUSTICE, P.C.

/s/ Melanie Hirsch
Melanie Hirsch
Counsel for Plaintiff-Appellant

ADDENDUM

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12 U.S.C. §24
(excerpt)

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power--

…

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

12 C.F.R. §7.4008

(a) Authority of national banks. A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) Standards for loans. A national bank shall not make a consumer loan subject to this § 7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

(c) Unfair and deceptive practices. A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this § 7.4008.

(d) Applicability of state law.

(1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.

(2) A national bank may make non-real estate loans without regard to state law limitations concerning:

(i) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(ii) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(iii) Loan-to-value ratios;

(iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(v) Escrow accounts, impound accounts, and similar accounts;

(vi) Security property, including leaseholds;

(vii) Access to, and use of, credit reports;

(viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(ix) Disbursements and repayments; and

(x) Rates of interest on loans.

(e) State laws that are not preempted. State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

12 C.F.R. §560.2

(a) Occupation of field. Pursuant to sections 4(a) and 5(a) of the HOLA, 12 U.S.C. 1463(a), 1464(a), OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations when deemed appropriate to facilitate the safe and sound operation of federal savings associations, to enable federal savings associations to conduct their operations in accordance with the best practices of thrift institutions in the United States, or to further other purposes of the HOLA. To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with best practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations. OTS intends to give federal savings associations maximum flexibility to exercise their lending powers in accordance with a uniform federal scheme of regulation. Accordingly, federal savings associations may extend credit as authorized under federal law, including this part, without regard to state laws purporting to regulate or otherwise affect their credit activities, except to the extent provided in paragraph (c) of this section or § 560.110 of this part. For purposes of this section, "state law" includes any state statute, regulation, ruling, order or judicial decision.

(b) Illustrative examples. Except as provided in § 560.110 of this part, the types of state laws preempted by paragraph (a) of this section include, without limitation, state laws purporting to impose requirements regarding:

(1) Licensing, registration, filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements;

(3) Loan-to-value ratios;

(4) The terms of credit, including amortization of loans and the deferral and capitalization of interest and adjustments to the interest rate, balance, payments due, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) Loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit fees;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to and use of credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents and laws requiring creditors to supply copies of credit reports to borrowers or applicants;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Usury and interest rate ceilings to the extent provided in 12 U.S.C. 1735f-7a and part 590 of this chapter and 12 U.S.C. 1463(g) and § 560.110 of this part; and

(13) Due-on-sale clauses to the extent provided in 12 U.S.C. 1701j-3 and part 591 of this chapter.

(c) State laws that are not preempted. State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph (a) of this section:

(1) Contract and commercial law;

(2) Real property law;

(3) Homestead laws specified in 12 U.S.C. 1462a(f);

(4) Tort law;

(5) Criminal law; and

(6) Any other law that OTS, upon review, finds:

(i) Furthers a vital state interest; and

(ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

16 C.F.R. §433.2

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for a seller, directly or indirectly, to:

(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

or,

(b) Accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract made in connection with such purchase money loan contains the following provision in at least ten point, bold face, type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

Cal. Civ. Code §2983.2

(a) Except where the motor vehicle has been seized as described in paragraph (6) of subdivision (b) of Section 2983.3, any provision in any conditional sale contract for the sale of a motor vehicle to the contrary notwithstanding, at least 15 days' written notice of intent to dispose of a repossessed or surrendered motor vehicle shall be given to all persons liable on the contract. The notice shall be personally served or shall be sent by certified mail, return receipt requested, or first-class mail, postage prepaid, directed to the last known address of the persons liable on the contract. If those persons are married to each other, and, according to the most recent records of the seller or holder of the contract, reside at the same address, one notice addressed to both persons at that address is sufficient. Except as otherwise provided in Section 2983.8, those persons shall be liable for any deficiency after disposition of the repossessed or surrendered motor vehicle only if the notice prescribed by this section is given within 60 days of repossession or surrender and does all of the following:

(1) Sets forth that those persons shall have a right to redeem the motor vehicle by paying in full the indebtedness evidenced by the contract until the expiration of 15 days from the date of giving or mailing the notice and provides an itemization of the contract balance and of any delinquency, collection or repossession costs and fees and sets forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice.

(2) States either that there is a conditional right to reinstate the contract until the expiration of 15 days from the date of giving or mailing the notice and all the conditions precedent thereto or that there is no right of reinstatement and provides a statement of reasons therefor.

(3) States that, upon written request, the seller or holder shall extend for an additional 10 days the redemption period or, if entitled to the conditional right of reinstatement, both the redemption and reinstatement periods. The seller or holder shall provide the proper form for applying for the extensions with the substance of the form being limited to the extension request, spaces for the requesting party to sign and date the form, and instructions that it must be personally served or sent by certified or registered mail, return receipt requested, to a person or office and address designated by the seller or holder and

received before the expiration of the initial redemption and reinstatement periods.

(4) Discloses the place at which the motor vehicle will be returned to those persons upon redemption or reinstatement.

(5) Designates the name and address of the person or office to whom payment shall be made.

(6) States the seller's or holder's intent to dispose of the motor vehicle upon the expiration of 15 days from the date of giving or mailing the notice, or if by mail and either the place of deposit in the mail or the place of address is outside of this state, the period shall be 20 days instead of 15 days, and further, that upon written request to extend the redemption period and any applicable reinstatement period for 10 days, the seller or holder shall without further notice extend the period accordingly.

(7) Informs those persons that upon written request, the seller or holder will furnish a written accounting regarding the disposition of the motor vehicle as provided for in subdivision (b). The seller or holder shall advise them that this request must be personally served or sent first-class mail, postage prepaid, or certified mail, return receipt requested, to a person or office and address designated by the seller or holder.

(8) Includes notice, in at least 10-point bold type if the notice is printed, reading as follows: "NOTICE. YOU MAY BE SUBJECT TO SUIT AND LIABILITY IF THE AMOUNT OBTAINED UPON DISPOSITION OF THE VEHICLE IS INSUFFICIENT TO PAY THE CONTRACT BALANCE AND ANY OTHER AMOUNTS DUE."

(9) Informs those persons that upon the disposition of the motor vehicle, they will be liable for the deficiency balance plus interest at the contract rate, or at the legal rate of interest pursuant to Section 3289 if there is no contract rate of interest, from the date of disposition of the motor vehicle to the date of entry of judgment.

The notice prescribed by this section shall not affect the discretion of the court to strike out an unconscionable interest rate in the contract for which the notice is required, nor affect the court in its determination of whether the rate is unconscionable.

(b) Unless automatically provided to the buyer within 45 days after the disposition of the motor vehicle, the seller or holder shall provide to any person liable on the contract within 45 days after their written request, if the request is made within one year after the disposition, a written accounting regarding the disposition. The accounting shall itemize:

(1) The gross proceeds of the disposition.

(2) The reasonable and necessary expenses incurred for retaking, holding, preparing for and conducting the sale and to the extent provided for in the agreement and not prohibited by law, reasonable attorney fees and legal expenses incurred by the seller or holder in retaking the motor vehicle from any person not a party to the contract.

(3) The satisfaction of indebtedness secured by any subordinate lien or encumbrance on the motor vehicle if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the seller or holder, the holder of a subordinate lien or encumbrance must seasonably furnish reasonable proof of its interest, and unless it does so, the seller or holder need not comply with its demand.

(c) In all sales which result in a surplus, the seller or holder shall furnish an accounting as provided in subdivision (b) whether or not requested by the buyer. Any surplus shall be returned to the buyer within 45 days after the sale is conducted.

(d) This section shall not apply to a loan made by a lender licensed under Division 9 (commencing with Section 22000) or Division 10 (commencing with Section 24000) of the Financial Code.

Cal. Civ. Code §2983.8

Notwithstanding Section 2983.2 or any other provision of law, no deficiency judgment shall lie in any event in any of the following instances:

(a) After any sale of any mobilehome for which a permit is required pursuant to Section 35780 or 35790 of the Vehicle Code for failure of the purchaser to complete his or her conditional sale contract given to the seller to secure payment of the balance of the purchase price of such mobilehome. The provisions of this subdivision shall not apply in the event there is substantial damage to the mobilehome other than wear and tear from normal usage. This subdivision shall apply only to contracts entered into on or after the effective date of the act that enacted this subdivision and before July 1, 1981.

(b) After any sale or other disposition of a motor vehicle unless the court has determined that the sale or other disposition was in conformity with the provisions of this chapter and the relevant provisions of Division 9 (commencing with Section 9101) of the Commercial Code, including Sections 9610, 9611, 9612, 9613, 9614, 9615, and 9626. The determination may be made upon an affidavit unless the court requires a hearing in the particular case.