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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 REPLY BRIEF

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SUMMARY OF ARGUMENT

U.S. Bank's brief largely ignores the key fact in this case—that the Bank purchased an existing consumer contract that promised compliance with state law. Mr. Aguayo's car dealership, Star Ford, promised to provide "all [post-repossession] notices required by law," and that promise necessarily ensured compliance with California's Rees-Levering Motor Vehicle Sales and Finance Act ("Rees-Levering"). When U.S. Bank purchased Mr. Aguayo's contract, it purchased the promise of Rees-Levering notice as well, and that voluntarily assumed promise cannot be held preempted. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995).

Nothing about the Bank's brief alters this straightforward analysis. The Bank argues that Mr. Aguayo's contract never promised compliance with Rees-Levering, but the Bank's contract-interpretation argument is contrary to controlling law. Alternatively, the Bank argues that even if Mr. Aguayo's contract promised Rees-Levering notice, that promise was extinguished at the moment of assignment because the National Bank Act ("NBA") preempts the generally applicable rule that assignees stand in their assignors' shoes. This novel theory is as meritless as the Bank's first: both the Supreme Court and Office of the Comptroller of the Currency ("OCC") have made clear that generally applicable contract law applies to national banks. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007); 12

C.F.R. §7.4008(e)(1). The Bank does not cite a single case that has accepted its contrary view.

In addition to failing as a matter of law, the Bank's arguments lead to unfair and absurd results. Consumers like Mr. Aguayo have no control over the assignment of their contracts, but in the Bank's view, unilateral assignments can change consumers' bargains without their consent—depriving them of notice they were promised and would have received from their dealerships. This result is unfair not only because it reduces consumers' rights without their consent, but also because it is far outside what any consumer would expect: the hornbook rule, confirmed by Mr. Aguayo's contract, is that a unilateral assignment *cannot* change the parties' bargain. *See* Opening Br. at 27–29; ER 47. The Bank's arguments also lead to the absurd conclusion that two consumers who purchase identical cars on identical terms on the same day from the same dealer, and who sign the same contract, may end up with two completely different sets of legal rights depending on whether their contracts are assigned and to whom—decisions made without the consumers' knowledge or participation.

Finally, all of the Bank's arguments fail for another independent reason: Rees-Levering's requirements are not preempted because they regulate debt collection, which the Supreme Court, this Court and OCC all agree is a matter that the NBA leaves entirely to state law. *See, e.g.*, *Atherton v. FDIC*, 519 U.S. 213,

222–23 (1997); *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002); 12 C.F.R. §7.4008(e)(4). State control in this area is so clear that OCC has not promulgated any regulations governing banks' post-repossession notice; there are no federal rules with which Rees-Levering could even arguably conflict.

ARGUMENT

I. U.S. BANK VOLUNTARILY ASSUMED STAR FORD'S PROMISE TO PROVIDE REES-LEVERING NOTICE AND THAT VOLUNTARY PROMISE CANNOT BE HELD PREEMPTED.

As Mr. Aguayo explained in his opening brief, Star Ford promised to provide "all [post-repossession] notices required by law." ER 49. That promise necessarily ensured compliance with Rees-Levering—Star Ford is a California car dealer, subject to California law, and it must comply with Rees-Levering's requirements in order to provide "all" required notice. *See* Opening Br. at 24–27. U.S. Bank bound itself to Star Ford's promise when it purchased Mr. Aguayo's contract, *see id*. at 27–29, and the Bank's "self-imposed undertakings" cannot be held preempted. *Am. Airlines*, 513 U.S. at 228.

Against this straightforward application of contract law and controlling precedent, U.S. Bank offers two alternative arguments—neither of which has merit.

A. U.S. Bank's Contract-Interpretation Argument Fails As a Matter of Law.

The Bank's principal argument is that Mr. Aguayo's contract could not have promised compliance with Rees-Levering without leading to absurd results—*i.e.*, the Bank might have to comply with Rees-Levering even if Mr. Aguayo moved to another state or the statute were repealed. *See* Appellee's Br. at 37–39. This contract-interpretation argument, made without citation to authority, is both contrary to law and contradicted by the Bank's conduct.

As an initial matter, the Bank's argument proves too much: If the Bank's view were correct, then any promise to comply with a state statute would open the door to absurd results because statutes can always be repealed and contracting parties can always move. But state statutory requirements are *routinely* incorporated into parties' contracts. As the California Supreme Court explained in *Edwards v. Arthur Andersen LLP*, 189 P.3d 285 (Cal. 2008), applicable state statutes "enter into [parties'] contract[s] . . . as if they were expressly referred to and incorporated." *Id*. at 296–97 (citation omitted). Given this principle, it cannot be true that any promise to comply with a state statute leads inevitably to absurd results.

Indeed, neither of the results the Bank identifies as absurd is actually absurd at all. The Bank complains that it might have to comply with Rees-Levering even if it repossessed Mr. Aguayo's car in a different state. Far from being absurd, that

is exactly what the law requires. *See Consol. Capital Income Trust v. Khaloghli*, 227 Cal. Rptr. 879, 882 (Cal. Ct. App. 1986) (right to deficiency judgment is subject to law of the place of contracting, not law where collateral is foreclosed). The Bank also complains that it might have to comply with Rees-Levering even if the statute were repealed after contracting. But that result, too, is not at all absurd. *See Fla. East Coast Ry. v. CSX Transp., Inc.*, 42 F.3d 1125, 1130 (7th Cir. 1994) (after existing law is incorporated into contract, "a subsequent change in the law cannot retrospectively alter the parties' agreement"); *Fla. Beverage Corp. v. Div. of Alcoholic Beverages*, 503 So.2d 396, 398–99 (Fla. Dist. Ct. App. 1987) (requiring compliance with repealed statute implied into parties' agreement).

Moreover, even if either of the Bank's hypothetical results *were* actually absurd, the Bank's argument would still fail because neither result follows from Mr. Aguayo's interpretation of the contract. Mr. Aguayo contends that Star Ford promised compliance with Rees-Levering and that a unilateral assignment could not change that promise. He has taken no position on what law would apply if he moved to another state or if Rees-Levering were repealed. Those are choice-of-law and contract-interpretation questions entirely separate from whether a unilateral assignment can change the meaning of his agreement.

In addition to failing for all these reasons, the Bank's absurd-results argument is also contradicted by the Bank's own conduct. The Bank had no doubt

about its obligation to comply with Rees-Levering when it sent Mr. Aguayo his post-repossession notice. The Bank's notice was "California" specific, quoted Rees-Levering verbatim, and was plainly an attempt to comply with the statute's requirements. *Compare* ER 45 (box at bottom) *with* Cal. Civ. Code §2983.2(a)(8); *see also* Appellee's Br. at 6. It is disingenuous for the Bank to argue that Mr. Aguayo's interpretation of Star Ford's promise is "absurd" given that the Bank shared his interpretation prior to litigation.[1]

The Bank's contract-interpretation argument fails for another reason as well: Even if the Bank's argument injected some ambiguity into Star Ford's promise, that promise would have to be construed according to *Mr. Aguayo's* "objectively reasonable expectations." *Buckley v. Terhune*, 441 F.3d 688, 698 (9th Cir. 2006) (en banc) (disputed or ambiguous term is interpreted according to the promisee's expectations) (citation omitted). Here, any consumer in Mr. Aguayo's position would reasonably expect Star Ford's promise of "all" required notice to lead to compliance with Rees-Levering's requirements—Star Ford is a California dealership, subject to California law, and it must comply with Rees-Levering to provide "all" required notice. U.S. Bank's argument about the meaning of Star

[1] In addition to arguing that Mr. Aguayo's interpretation of Star Ford's promise is absurd, the Bank contends that if Mr. Aguayo's contract promised compliance with Rees-Levering, then the contract's reference to applicable "federal" law is "meaningless." Appellee's Br. at 39. Not so. The face of the agreement shows that it is subject (at least) to the federal Truth in Lending Act and the Federal Trade Commission's Holder Rule. ER 46, 49.

Ford's promise cannot be squared with this objectively reasonable expectation.

Finally, regardless of whether Star Ford's express promise ensured compliance with Rees-Levering, the statute's requirements were implied into Mr. Aguayo's agreement as applicable law at the time of contracting. *See Edwards*, 189 P.3d at 296–97.[2] The implied terms in Mr. Aguayo's agreement are as enforceable against U.S. Bank as any express contractual terms, *see In re Doctors Hosp. of Hyde Park, Inc.*, 337 F.3d 951, 956–57 (7th Cir. 2003), and they are not affected by the Bank's argument about the meaning of the dealership's express promise. U.S. Bank also can have no right to collect a deficiency without complying with Rees-Levering—regardless of any express *or* implied promise—because Star Ford never had any such right to convey. *See id*. at 956 ("An assignor can assign only what he has[.]"); *Brienza v. Tepper*, 42 Cal. Rptr. 2d 690, 696 (Cal. Ct. App. 1995) (same).

B. U.S. Bank Cannot Evade Star Ford's Promise.

Next, the Bank argues that even if Star Ford promised compliance with Rees-Levering, that promise was extinguished at the moment of assignment because the Bank has a federal "power" to collect from Mr. Aguayo without complying with state law and that power cannot be limited by contract. Appellee's

[2] The NBA, unlike Rees-Levering, was not implied into Mr. Aguayo's agreement because it did not apply to his relationship with Star Ford. *See Hale v. Bohannon*, 241 P.2d 4, 16 (Cal. 1952) ("only applicable laws" are incorporated).

Br. at 40–43. The Bank does not cite a single case that has accepted this novel theory, which is foreclosed by controlling case law and rests on a demonstrably false premise.

The Bank's argument is directly contrary to the Supreme Court's decision in *American Airlines*. Under *American Airlines*, a company may be held to contractual promises that limit what it would otherwise be able to do as a matter federal law. *See* 513 U.S. at 228–30. The Bank never mentions *American Airlines* or the many other cases that have followed its rule. *See* Opening Br. at 30–32 (citing cases).

The Bank's argument is also contrary to the Supreme Court's decision in *Watters*. *Watters* holds that national bank contracts are "governed and construed" according to state law, 550 U.S. at 11 (citation omitted),[3] and California contract law dictates that assignees stand in their assignors' shoes—subject to their assignors' contractual obligations. *See* Opening Br. at 27–29 (citing cases and Cal. Comm. Code §9404(a)(1)). Allowing U.S. Bank to evade Star Ford's promise would be inconsistent with this settled contract-law principle and inconsistent with *Watters*' holding that state contract law applies to national banks.

In addition to creating a conflict with *American Airlines* and *Watters*, the Bank's argument also rests on a demonstrably false premise. The Bank contends

[3] *See also* 12 C.F.R. §7.4008(e)(1) (listing state law governing "[c]ontracts" as generally "not preempted" by the NBA)

that it has a federal "power" to collect a deficiency from Mr. Aguayo without complying with state law. But there is nothing in the NBA or in OCC's regulations about deficiencies—nothing that creates the putative federal power on which U.S. Bank relies. Instead, the Bank's right to collect a deficiency comes from the underlying contract that created Mr. Aguayo's debt. The Bank admits as much later in its brief, when it states that any right it has to a deficiency "come[s] from . . . the contract." Appellee's Br. at 51.[4] That contract, under *Watters*, is governed by state contract-law principles.

Nothing cited by U.S. Bank supports its argument that it may evade Star Ford's promise. The Bank points to language in OCC Interpretive Letter No. 1095 explaining that when a national bank purchases a contract from another company, the bank must comply with OCC regulations governing that type of agreement—even if the selling company is not subject to OCC's regulatory authority. *See* OCC Interpr. Letter No. 1095 (Feb. 27, 2008), at 1, 3. That rule makes perfect sense; a national bank cannot violate federal law simply because it purchases a contract from another company. But the rule articulated in Letter 1095 has no application here. There is no federal regulation governing post-repossession notice and no

[4] Moreover, if the Bank had a federal right to collect a deficiency, one would expect it to invoke that right in collection actions. But when the Bank attempts to collect debts, it asserts state-law claims. *See, e.g.*, Pl. Third Am. Pet., *US Bank, N.A. v. Prestige Ford Garland Ltd. P'ship*, No. 03-01688-L (Tex. Dist. Ct. Nov. 7, 2005) (complaint against defaulting lessee), *available at* 2005 WL 6210497.

dispute about complying with federal requirements. The only question presented is whether U.S. Bank can break a voluntarily assumed promise to do more than federal law requires. Nothing in Letter 1095 suggests that it can, and it defies common sense to conclude that OCC intended its letter, which does not address preemption at all, to create a conflict with *American Airlines* or to override the generally applicable principle that assignees stand in their assignors' shoes.[5]

The Bank also makes a policy argument that it should be permitted to evade Star Ford's promise because national banks should be subject only to uniform laws, not state-by-state requirements. But to "invoke the concept of 'uniformity' . . . is not to prove its need," and national banks have been subject to non-uniform state laws since the NBA was enacted—particularly in the area of debt collection. *Atherton*, 519 U.S. at 220, 222–23; *see also, e.g.*, *Cuomo v. The Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710, 2720–21 (2009); *McClellan v. Chipman*, 164 U.S. 347, 356–357 (1896). The Bank complains that the burden of complying with state law in this case is intolerable, but it had no obligation to purchase Star Ford's contract and its contractual promises. Nor do the Bank's complaints ring true,

[5] The Bank also overstates the deference due Letter 1095. *Auer v. Robbins*, 519 U.S. 452 (1997), is inapplicable because it did not involve any argument regarding preemption and because, if Letter 1095 does preempt state law (as the Bank contends), then it is "*de facto* a new regulation," ineligible for *Auer* deference. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000); *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009) (agency conclusions regarding preemption are not entitled to deference).

given that its California-specific notice demonstrates that it already tracks state-law requirements. See ER 45.

C. The FTC Holder Rule Supports Mr. Aguayo's Claim.

As Mr. Aguayo explained in his opening brief, the Federal Trade Commission's ("FTC's") Holder Rule provides further support for his claim. The FTC's Rule cannot be preempted by another federal regulation, and the contract language it requires is an explicit articulation of the principles discussed above—namely, that U.S. Bank "stands in the shoes" of Star Ford. 41 Fed. Reg. 20,022, 20,023 (May 14, 1976).

The Bank argues that the Holder Rule is inapplicable because it only governs claims that arise before assignment. *See* Appellee's Br. at 44. But in promulgating the Rule, FTC explained that it applies to claims that arise either before or after the assignment of a contract. *See* 41 Fed Reg. at 20,022 (the Rule was intended to address situation where a consumer is denied promised service after his contract's assignment); 40 Fed. Reg. 53,506, 53,511 (Nov. 18, 1975) (similar example); *see also id*. at 53,507, 53,512 (stating generally that the Rule was intended to ensure that assignees have no rights "superior" to their assignors and that consumers do not unwillingly waive claims).

The Bank also argues that the Holder Rule applies only when the original seller has done something wrong. But if Mr. Aguayo's claims have merit, then

Star Ford *has* done something wrong: it promised Rees-Levering notice and that Mr. Aguayo's contract would not be "changed" without his consent, ER 47, but it broke those promises. This is exactly the type of situation FTC intended the Holder Rule to address. *See* 40 Fed. Reg. at 53,523 (Holder Rule ensures that a consumer's duty to pay is not "separated from a seller's duty to perform as promised").

* * * * *

For all these reasons, the Bank's contract arguments fail. Under the Supreme Court's decision in *American Airlines*, the Bank is bound by its voluntarily assumed obligation to provide Rees-Levering notice. To hold otherwise would be to turn national bank assignments into a bait-and-switch scheme—a "method of shucking off contractual obligations without the consent of the obligee." *In re Doctors Hosp.*, 337 F.3d at 956–57.

II. MR. AGUAYO'S CLAIM IS NOT PREEMPTED BY 12 C.F.R. §7.4008.

U.S. Bank's preemption arguments fail for a second independent reason: the OCC regulation on which the Bank relies expressly preserves state debt-collection law from preemption. *See* 12 C.F.R. §7.4008(e)(4). None of the Bank's arguments overcome that fact.

A. Section 7.4008's Savings Clause Applies.

Section 7.4008 makes only one explicit reference to state debt-collection

law: in its savings clause, the regulation states that state law regulating banks' "rights to collect debts" is generally "not preempted" by the NBA. 12 C.F.R. §7.4008(e)(4). Because U.S. Bank agrees that Rees-Levering regulates its right to collect debts, *see, e.g.*, Appellee's Br. at 25–26, the savings clause in §7.4008(e)(4) should decide this appeal. Neither of the Bank's contrary arguments has merit.

1. The Court May Not Ignore the Savings Clause.

First, U.S. Bank argues that the Court may ignore the savings clause entirely. *See* Appellee's Br. at 28–32. This argument is inconsistent with Ninth Circuit precedent: as this Court has explained, regulations must be interpreted "as a whole," *Charles Schwab & Co. v. Debickero*, 593 F.3d 916, 921 (9th Cir. 2010), giving effect "to each word." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *see also* Opening Br. at 52 (citing additional cases); *Trombley v. Bank of Am. Corp.*, --- F. Supp. 2d ----, 2010 WL 2202110, *4 (D. R.I. June 3, 2010) (to decide whether §7.4008 preempted state law, court would consider both the regulation's preemption provisions and its savings clause). Ignoring §7.4008's savings clause would create a conflict with this controlling Ninth Circuit case law, which U.S. Bank never mentions.

Rather than address the rule articulated in cases like *Charles Schwab* and *Boise Cascade*, U.S. Bank argues that the Court may rely on an Office of Thrift Supervision ("OTS") guidance to ignore OCC's savings clause. But applying

OTS's guidance would not only create a conflict with Ninth Circuit precedent, it would also override OCC's informed decision *not* to adopt OTS's approach. OCC is well aware of what OTS has done, *see* 69 Fed. Reg. 1904, 1905 (Jan. 13, 2004), but it has never adopted OTS's guidance as its own. While the Bank argues that the Court may impose OTS's guidance because the OCC and OTS preemption regimes are "similar," that does not mean they are the same, and the critical difference here is that OCC has never adopted OTS's guidance. *See Davis v. Chase Bank USA, N.A.*, 650 F. Supp. 2d 1073, 1083 (C.D. Cal. 2009) (noting differences between OCC and OTS regimes and "caution[ing] against" applying OTS's analysis in the NBA context).

In addition to relying on OTS's guidance, the Bank makes a convoluted argument that the savings clause in §7.4008(e)(4) applies only to state laws that would otherwise be "conflict preempted" by §7.4008(d)(1), not laws that would be "expressly preempted" by paragraph (d)(2). Nothing in the regulation supports this view. The savings clause does not include any language limiting its application, although it would have been easy for OCC to write a limiting phrase. The Bank's argument also rests on a distinction between conflict preemption and express preemption that makes no sense in the context of OCC's rule. Section 7.4008(d)(1) states a general test for conflict preemption and §7.4008(d)(2) applies that same test—in other words, both (d)(1) and (d)(2) embody the same conflict-

preemption standard. *See* 69 Fed. Reg. at 1906; *Rose v. Chase Manhattan Bank, USA*, 396 F. Supp. 2d 1116, 1121 (C.D. Cal. 2005) (cited by the Bank).

2. Rees-Levering's Post-Repossession Notice Requirements Only Incidentally Affect Lending.

Second, the Bank argues that §7.4008's savings clause is inapplicable because Rees-Levering has more than an incidental effect on lending. *See* Appellee's Br. at 33–35. This argument misinterprets the term "incidentally affect." 12 C.F.R. §7.4008(e).

The Bank contends that because Rees-Levering affects its right to collect debts, which is important to the Bank, Rees-Levering necessarily has more than an incidental effect on lending. But in making that argument, the Bank incorrectly equates incidental with de minimis: "Incidentally affect" is a term of art meaning that states may not target national banks for regulation that does not apply to other businesses. It does not mean that state law is preempted if it has anything more than a de minimis effect on bank practices. *See Binetti v. Wash. Mut. Bank*, 446 F. Supp. 2d 217, 221 (S.D.N.Y. 2006) (incidental does not mean de minimis; instead, the test is whether any effect on bank lending is "incidental to the [state] statute's primary purpose"); *McCurry v. Chevy Chase Bank, FSB*, --- P.3d ----, 2010 WL 2521772, *5 (Wash. June 24, 2010) (same); *see also Watters*, 550 U.S. at 11 (national banks remain subject to "state laws of general application"). Here, Rees-Levering's post-repossession requirements have no more than an incidental effect

on bank lending because they apply to banks and non-banks alike and because they target debt collection, not lending.[6]

The Bank's incidentally-affects argument also goes too far. If the Bank were correct that any restriction on debt collection more than incidentally affects lending, then *all* state debt-collection law would be preempted. That interpretation would read the debt-collection savings clause out of §7.4008 entirely, and it would create a conflict with more than 100 years of case law holding that state debt-collection law is not preempted by the NBA. *See, e.g.*, *Atherton*, 519 U.S. at 222–23; *McClellan*, 164 U.S. at 356–357; *Nat'l Bank v. Commonwealth*, 76 U.S. 353, 362 (1869); Opening Br. at 41 (citing additional cases).[7]

In summary, neither of the Bank's arguments regarding the savings clause has merit, and §7.4008(e)(4)—OCC's only reference to debt-collection law—

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[6] The Banks cites *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008), and *Martinez v. Wells Fargo Home Mortgage*, 598 F.3d 549 (9th Cir. 2010), as support for its interpretation of "incidentally affect," but neither case even mentions the term. The Bank also argues that only "infrastructure" laws pass the "incidentally affect" test. But in *Cuomo*, the Supreme Court rejected OCC's "infrastructure" distinction as "not comport[ing] with the statute." 129 S. Ct. at 2719–20.

[7] The Bank argues that some debt-collection law must be preempted because otherwise there would be no need for a debt-collection "savings" clause. *See* Appellee's Br. at 27. This misconstrues the structure of OCC's rule. Although courts routinely use the term "savings" clause to refer to anti-preemption provisions like §7.4008(e), that term is something of a misnomer here. Section 7.4008(e) lists state laws that are "not preempted" and never have been. It does not list state laws that would otherwise be preempted. *See* 69 Fed. Reg. at 1912 (listed state laws are "as a general matter, . . . not preempted").

preserves Rees-Levering's post-repossession requirements from preemption.

B. The Bank Misinterprets §7.4008(d)(2).

The Bank's preemption arguments also misinterpret the provisions in §7.4008(d)(2).

1. Rees-Levering's Post-Repossession Notice Requirements Are Not a "Disclosure" Law Within the Meaning of §7.4008(d)(2)(viii).

The Bank argues that Rees-Levering's requirements are preempted by §7.4008(d)(2)(viii), which applies to state "disclosure" laws. In the Bank's view, (d)(2)(viii) preempts any and all disclosure requirements—even those that pertain to debt collection. *See* Appellee's Br. at 15–20. This understanding of "disclosure" is overbroad and incorrect.

"Disclosure" in §7.4008(d)(2)(viii) refers to lending-related disclosure laws, not debt-collection disclosure laws. The introduction to (d)(2) makes this clear: it states that (d)(2)'s preemption provisions apply only to the extent that state laws interfere with banks' ability to "make . . . loans." Moreover, all the examples of preempted state disclosure laws listed in §7.4008(d)(2)(viii) pertain to lending; not one relates to debt collection or to post-repossession notice. *See Cal. State Legislative Bd. v. Dep't of Transp.*, 400 F.3d 760, 763 (9th Cir. 2005) ("According to the canon of *ejusdem generis*, the general term [here, "disclosure"] should be defined in light of the specific examples provided."). Limiting "disclosure" to

lending-related disclosures also makes sense in light of the NBA itself. The statute explicitly authorizes banks to lend but has always been interpreted as leaving state debt-collection law in place. *Compare* 12 U.S.C. §24 (Seventh) *with* cases cited *supra* p.16.[8]

Like its interpretation of "incidentally affect," the Bank's overbroad interpretation of "disclosure" also goes too far. In the Bank's view, §7.4008(d)(2)(viii) preempts all state disclosure laws, but courts interpreting the regulation have held that it preempts only "particular types" of disclosure laws, such as those that require notice of credit terms "like APR." *Davis*, 650 F. Supp. 2d at 1085; *Agustin v. PNC Fin. Servs. Group, Inc.*, --- F. Supp. 2d ----, 2010 WL 1507975, *12 (D. Haw. Apr. 15, 2010). Indeed, even the Bank acknowledges that some disclosure requirements—like those in California's UCC, *see* Cal. Comm. Code §9614, and the Rosenthal Fair Debt Collection Practices Act, *see* Cal. Civ. Code §1788.14—are not preempted. *See* Appellee's Br. at 26, 51. Thus, case law and the Bank's own brief confirm that "disclosure" in §7.4008(d)(2)(viii) does not encompass all state disclosure laws.

[8] The *Martinez* and *Rose* cases cited by the Bank involved the very types of lending-related disclosures at the core of (d)(2)(viii). *Martinez*, 598 F.3d at 552, 556–57; *Rose*, 513 F.3d at 1034–35. Neither case involved disclosures related to debt collection.

2. Post-Repossession Notice Is Not a "Credit-Related" Document Within the Meaning of §7.4008(d)(2)(viii).

As a fallback argument, the Bank contends that even if Rees-Levering's requirements are not preempted by the general term "disclosure," they are still preempted by §7.4008(d)(2)(viii) because Rees-Levering notice is a "credit-related" document within the meaning of that section. *See* Appellee's Br. at 20–23. This argument is unavailing.

The Bank cites *Crespo v. WFS Financial Inc.*, 580 F. Supp. 2d 614 (N.D. Ohio 2008), for the proposition that anything related to debt collection is "credit-related" as well. But that cannot be correct; equating debt collection with lending wipes away 100 years of case law distinguishing between the two. *See* cases cited *supra* p.16. The Bank also neglects to mention that the OTS regulation at issue in *Crespo* does not draw the same distinction between lending regulation and debt-collection regulation that is drawn under the NBA. *See* 12 C.F.R. §560.2 (no savings clause for debt-collection law).

Next, the Bank contends that Rees-Levering notices are more "credit-related" than other post-repossession notices because in some circumstances, Rees-Levering requires a conditional right of reinstatement. But the right to reinstate does not transform post-repossession notice into a "credit-related" document like those listed in (d)(2)(viii). *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) ("words grouped in a list should be given related meaning"). All of the

listed documents set or can set terms of credit. *See* 12 C.F.R. §7.4008(d)(2)(viii) (listing credit applications, solicitations, billing statements and contracts). Post-repossession notice does not set any terms of credit; at most, notices with a right to reinstate allow consumers to re-establish pre-existing contracts according to their *already-negotiated* terms.

Ultimately, what the Bank ignores is that when a creditor sends post-repossession notice, the parties are in a fundamentally different relationship than when the documents listed in §7.4008(d)(2)(viii) are issued—the consumer has defaulted, the creditor has repossessed the consumer's car, and the creditor is trying to collect everything it is owed. None of the other documents listed in §7.4008(d)(2)(viii) pertains to a similar situation.

3. Rees-Levering's Post-Repossession Notice Requirements Are Not Preempted by §7.4008(d)(2)(iv) or (d)(2)(vi).

The Bank argues that §7.4008(d)(2)(iv) and (d)(2)(vi) preempt Rees-Levering's requirements because post-repossession notices affect "terms of credit" and "security property." *See* Appellee's Br. at 23–25. These arguments are without merit.

Section 7.4008(d)(2)(iv) preempts state laws governing "terms of credit," such as "minimum payments." The provision's purpose is obvious—to override state laws that require banks to offer loans according to certain terms. Rees-Levering's post-repossession requirements have no such effect. They do not

regulate banks' offers of credit or the terms of credit; even the right to reinstate only permits consumers to return to terms their creditors already set. The Bank contends that there is no term of credit more important than the "right to obtain repayment," but that right is the right "to collect debts," and state law regulating that right is explicitly "not preempted" by the NBA. 12 C.F.R. §7.4008(e)(4).[9]

The Bank's argument under §7.4008(d)(2)(vi) is equally unavailing. That provision's purpose is to preempt state laws that prevent a particular type of collateral from qualifying as "permissible security property." Statement of John D. Hawke, Jr., Comptroller of the Currency, before the S. Comm. on Banking, Hous. and Urban Affairs, Apr. 7, 2004, 23 OCC Q.J. 69, 2004 WL 3418806, *2. Rees-Levering does nothing of the kind. It does not limit what can qualify as collateral; nor does Mr. Aguayo challenge the Bank's right to repossess his car.

C. Section 7.4008 Must Be Interpreted in Accordance with Traditional Conflict-Preemption Principles, and Under Those Principles, Rees-Levering Is Not Preempted.

The Court should also reject U.S. Bank's §7.4008 arguments because they lead to a conclusion inconsistent with traditional conflict-preemption principles applied under the NBA. *See* Opening Br. at 53–56.

As Mr. Aguayo explained in his opening brief, §7.4008 cannot preempt

[9] To the extent the Bank also relies on a provision of Rees-Levering that affects acceleration during a reinstatement period, its argument is both moot and irrelevant. The Bank voluntarily provided a reinstatement period, which is now over, ER 45, and the cited section of Rees-Levering is not at issue here.

Rees-Levering unless the statute is conflict-preempted by the NBA itself. OCC has no authority to preempt state law independently of the NBA,[10] and when determining whether state law is preempted by the statute, both the Supreme Court and this Court apply the traditional conflict-preemption test. *See, e.g.*, *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996); *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1037 (9th Cir. 2008). Accordingly, OCC intended the preemption provisions in §7.4008 to be "entirely consistent with" and to go no further than the conflict-preemption standard. 69 Fed Reg. at 1910; *see also Jefferson v. Chase Home Fin.*, 2008 WL 1883484, *8–*9 (N.D. Cal. Apr. 29, 2008) (OCC intended its preemption regulations to be consistent with "the conflicts standard"); *Rose*, 396 F. Supp. 2d at 1121.[11]

Applying that standard, it is clear that Rees-Levering's post-repossession requirements are not preempted. State law "stands as an obstacle" to Congress'

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[10] *See* 12 U.S.C. §1 *et seq*. (containing no provision authorizing OCC to preempt); *Wyeth*, 129 S. Ct. at 1201 & n.9 (in the absence of such a provision, agencies are not authorized to preempt state law directly); Remarks of Comptroller John D. Hawke, Jr., before Women in Hous. and Fin. (Feb. 12, 2002), *reprinted in* 2 OCC Q.J. 23 (OCC "has no self-executing power to preempt state law").

[11] The Bank is wrong when it argues that §7.4008 "has the same preemptive force as a federal statute." Appellee's Br. at 17. A substantive regulation can have the effect of preempting state law, provided it is consistent with the statute it implements. But regulations like §7.4008 are in a different category because they merely state legal conclusions regarding preemption. *Wyeth*, 129 S. Ct. at 1200–01 (explaining this difference). Agency conclusions regarding preemption, like those in §7.4008(d)(2), are not entitled to deference. *Id*. at 1201.

purpose in enacting the NBA only if it "forbid[s]" or "impair[s] significantly" an authorized bank power. *Barnett Bank*, 517 U.S. at 33. Here, the only power at issue is banks' ability to lend, 12 U.S.C. §24 (Seventh), and Rees-Levering's post-repossession requirements leave that power entirely unaffected. Banks remain free to make loans, to set loan terms, to collect payments, and even to repossess collateral.

In fact, this case is just like the Supreme Court's decision in *McClellan*, which applied conflict-preemption principles to uphold a Massachusetts law that had the effect of preventing a national bank from collecting a debt. *See* 164 U.S. at 347–49. *McClellan* upheld Massachusetts's law because it applied generally to all businesses and did not prohibit the exercise of any authorized bank power. *Id*. at 358. The same is true of Rees-Levering: it applies to banks and non-banks alike and does not prevent banks from exercising their power to lend.[12]

The Bank's only argument with respect to conflict preemption is that any state debt-collection regulation interferes with bank lending because banks' "power to collect debts . . . is inseparable from the power to make or purchase loans." Appellee's Br. at 26. The Bank makes the same argument elsewhere in its brief—equating debt collection with lending for purposes of preemption. As discussed

[12] The Bank points out that in *McClellan*, the Court suggested that a state law barring all loans secured by real estate would be preempted, *see* Appellee's Br. at 35, but that point has no bearing here—Rees-Levering does not bar *any* car loans, let alone all car loans.

above, debt collection and lending cannot be "inseparable" because case law and §7.4008 consistently distinguish between the two. *See* cases cited *supra* p.16; Opening Br. at 41 (citing additional cases); 12 C.F.R. §7.4008(e)(4) (state debt-collection law is "not preempted" by the NBA).

In sum, Rees-Levering's post-repossession notice requirements are not conflict-preempted by the NBA, and any application of §7.4008 must be consistent with that conclusion.

D. The Presumption Against Preemption Applies.

The Court should apply the presumption against preemption if it has any remaining doubt about the proper interpretation of §7.4008. *See* Opening Br. at 21–24. The Bank's arguments to the contrary misstate the law.

The Bank argues that the presumption can never be applied in an NBA case because there is a long history of federal banking regulation. *See* Appellee's Br. at 11–15. But the Bank fails to mention *Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005), when it made—and *lost*—the exact same argument. As *Kroske* held and *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), confirmed, the test for applying the presumption focuses on the state law at issue: if it addresses an area where there has been an "historic presence of state law," then the presumption applies even if there is also a concurrent history of federal regulation. *Wyeth*, 129 S. Ct. at 1195 n.3; *Kroske*, 432 F.3d at 981–82; *see also In re Pharm. Indus. Average*

Wholesale Price Litig., 582 F.3d 156, 178 (1st Cir. 2009) (*Wyeth* clarified that the presumption applies when "there is a history of state law regulation, even if there is also a history of federal regulation").

Under *Kroske* and *Wyeth*'s test, the presumption plainly applies here. The States' role in regulating debt collection is clear and long-standing. *See, e.g.*, *Atherton*, 519 U.S. at 222–23; *McClellan*, 164 U.S. at 356–57. Indeed, the Bank never disputes that there is an "historic presence of state law" in the area of debt collection. [13]

The Bank argues that *Wyeth* is inapplicable because it involved prescription drugs. *See* Appellee's Br. at 13. But *Wyeth*'s analysis was not limited to its facts, and this Court has already applied it in non-drug cases. *See, e.g.*, *Nat'l Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010); *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1209 (2009).[14] The Bank cites cases where this Court has declined to apply the presumption, but none of those cases involved state debt-

[13] The Bank mischaracterizes Mr. Aguayo's argument when it suggests that he would apply the presumption in every NBA case. *See* Appellee's Br. at 13. Mr. Aguayo's position is that the presumption applies here because of states' historical involvement in debt-collection regulation.

[14] The Bank also asserts, quite incorrectly, that the Supreme Court did not mention *Wyeth* in *Cuomo*. Appellee's Br. at 15. In fact, *Cuomo* cites *Wyeth* to compare the national banking system to the regulatory regime for prescription drugs; it describes both as "mixed state/federal regimes in which the Federal Government exercises general oversight while leaving state substantive law in place." 129 S. Ct. at 2718.

collection laws. *See Rose*, 513 F.3d at 1035; *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 954–56 (9th Cir. 2005); *see also Kroske*, 432 F.3d at 981 (citing *Bank of Am.*, 309 F.3d at 559, on which *Rose* and *Wells Fargo* rely, and finding no conflict with that decision).

* * * * *

For all these reasons, 12 C.F.R. §7.4008 does not preempt Rees-Levering's post-repossession requirements.

III. THE "UNFAIR" AND "FRAUDULENT" PRONGS OF MR. AGUAYO'S CLAIM ARE NOT PREEMPTED.

As Mr. Aguayo explained in his opening brief, the "unfair" and "fraudulent" prongs of his §17200 claim are not preempted, regardless of whether Rees-Levering is preempted, because those aspects of his claim depend on U.S. Bank's generally applicable duties to abide by contractual promises and to be truthful in its dealings. *See* Opening Br. at 57–60; *Rose*, 513 F.3d at 1038 (test for preemption turns on the predicate "legal duty"). U.S. Bank's arguments to the contrary only prove Mr. Aguayo's point. *See* Appellee's Br. at 45–48.

The Bank argues that Mr. Aguayo's unfair-conduct claim depends on a state-imposed duty to comply with Rees-Levering, but its own description of the claim belies its position. The "unfair" prong of Mr. Aguayo's claim depends on whether the Bank breached a self-imposed contractual obligation. *See* Appellee's Br. at 46. A claim based on a contractual promise is not preempted, even if the

promise is to comply with state law. *See Am. Airlines*, 513 U.S. at 228; *see also Augustin*, 2010 WL 1507975, *14 (claims based on "contractual obligations" are not preempted by the NBA); *Trombley*, 2010 WL 2202110, *4–*5; Opening Br. at 59–60 & n.12 (citing additional cases).

A similar analysis governs Mr. Aguayo's fraudulent-practices claim. This aspect of Appellant's claim turns on whether the Bank lied about complying with Rees-Levering. The duty at issue is the duty to tell the truth—not any duty imposed by Rees-Levering itself. Regardless of whether the Bank has to comply with Rees-Levering's requirements, it cannot lie to consumers about what it has done. *See Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 555 (9th Cir. 2010) (claims of "express deception" are not preempted by the NBA); Opening Br. at 59–60 & n.12.[15]

IV. U.S. BANK'S POLICY ARGUMENTS ARE UNAVAILING.

The Bank makes a series of public policy arguments, but none supports a finding of preemption.

The Bank argues that Rees-Levering's requirements are unnecessary because California consumers are adequately protected by California's UCC.

[15] The Bank contends that one part of Mr. Aguayo's fraudulent-practices claim is about inadequate disclosures, but that is incorrect: the claim is that the Bank's express identification of a "total" amount due was false and misleading. *See* Opening Br. at 58.

Appellee's Br. at 51–52. But what constitutes adequate consumer protection in the debt-collection context is a decision for the California Legislature to make, and the Legislature enacted Rees-Levering because it concluded that the UCC's protections are inadequate. Rees-Levering also strikes a balance that the Bank's position would upset: the statute requires creditors to provide post-repossession notice in exchange for their right to invoke California process when collecting debts. The Bank would allow creditors to assert all their affirmative rights under California law without complying with the state's corresponding consumer protections.

The Bank also argues that the Court need not be concerned about consumer protection because OCC adequately protects consumers' rights. Appellee's Br. at 56–60. There is sharp disagreement on this point, to put it mildly. *See, e.g.*, Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 Yale J. on Reg. 143, 151–55 (2009) (citing OCC as a "case study" example of the "shortcomings of the current consumer-protection regime" and concluding that OCC has not "engage[d] in meaningful consumer-protection regulation and enforcement"); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Penn. L. Rev. 1, 82–83, 86–95 (2008) (criticizing OCC's "lack of interest" and

"inaction" with respect to consumer protection).[16] But there can be no disagreement with respect to the specific consumer-protection issue here: OCC has not enacted regulations that govern banks' post-repossession notice.

Finally, the Bank argues that its preemption arguments might not affect home foreclosures because courts might draw a distinction between foreclosures and car loans. But the Bank offers no persuasive basis for drawing that distinction, and its argument is not reassuring given the obvious similarities between the home-loan and car-loan regimes and the Bank's careful preservation of its right to argue that any rule announced in this case applies to nonjudicial foreclosures as well. *See* Appellee's Br. at 55 n.5.

[16] *See also, e.g.*, Andrew Martin, *Does this Bank Watchdog Have a Bite?*, N.Y. Times, Mar. 26, 2010, at B1 ("[T]he O.C.C. only sparingly takes robust action on consumer protection issues, particularly against the big banks."); Craig Torres & Alison Veksin, *Fed, OCC Publicly Chastised Few Lenders During Boom*, Bloomberg News, Mar. 14, 2007. In contrast to these independent sources, the Bank relies on statements made by OCC itself in an attempt to defend its consumer-protection record.

CONCLUSION

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

Date: June 30, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 6,993 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: June 30, 2010

PUBLIC JUSTICE, P.C.

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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 June 30, 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: June 30, 2010

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May 24, 2010

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Re: ***Aguayo v. U.S. Bank*, No. 09-56679**

Dear James:

Pursuant to Ninth Circuit Rule 31-2.2., the Ninth Circuit today granted Mr. Aguayo a 14-day extension of time for his reply brief. The brief is now due June 30, 2010.

Sincerely,

Claire Prestel

cc: Carol Brewer
Michael Lindsey
Rita F. Lin
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