ARNOLD & PORTER LLP

Laurence J. Hutt

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

May 16, 2012

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

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

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Respondent MBNA America Bank, N.A. ("MBNA") submits this supplemental letter brief in response to the Court's Order of April 25, 2012, requesting briefing on "the significance, if any, of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. No. 111-203 (July 21, 2010) 124 Stat. 1376) and the Office of the Comptroller of the Currency's regulatory response."

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA") contains provisions relating to preemption of state law by the National Bank Act ("NBA") (12 U.S.C. § 21 *et seq.*) and the implementing regulations of the Office of the Comptroller of the Currency ("OCC"). Those DFA provisions became effective prospectively on July 21, 2011, more than seven years after Parks filed his claim against MBNA. Accordingly, the DFA has no impact on this case. Nevertheless, to the extent the statute and the OCC's regulatory response are considered, they confirm by implication that Parks' claim is preempted by the NBA and the OCC's preemption regulations.

I. Contextual Background

The DFA was enacted on July 21, 2010, as a means to address the financial crisis precipitated by the collapse of the housing market in 2007 and 2008. The statute includes measures to improve systemic stability, prevent losses associated with failing financial firms, increase transparency throughout financial markets, and protect consumers. With respect to the latter goal, the DFA established a new Consumer Financial Protection

Bureau ("CFPB"), and transferred to it many of the responsibilities of other federal banking agencies under statutes pertaining to consumer protection.

The DFA also eliminated the Office of Thrift Supervision ("OTS"), the federal regulator of savings and loan associations ("savings banks"), and transferred its responsibilities to the OCC. Concurrently with that transfer, the DFA made the standard for preemption of state law as applied to federal savings banks the same as the standard that has traditionally applied with respect to national banks under the NBA. The DFA made the NBA preemption standard explicit by express reference to the U.S. Supreme Court's landmark NBA preemption decision, *Barnett Bank of Marion County, N.A. v. Nelson* (1996) 517 U.S. 25.

The above-referenced transfers of authority and related provisions on preemption took effect on the DFA's "Designated Transfer Date," which, by determination of the Secretary of the Treasury, was July 21, 2011. (See 12 U.S.C. § 5551 note ["Effective and Applicability Provisions"]; *id.* § 5582 ["Designated transfer date"]; Designated Transfer Date, 75 Fed. Reg. 57,252, 57,252 (Sept. 20, 2010).) Because Parks filed his claim more than seven years earlier, the DFA does not govern the preemption questions raised here. But, as explained below, the DFA supports the conclusion reached by the trial court, and by the Ninth Circuit in *Rose v. Chase Bank USA, N.A.* (9th Cir. 2008) 513 F.3d 1032, that claims such as Parks' are preempted.

II. Scope of the DFA Provisions on NBA Preemption

The provisions of the DFA addressing NBA and OCC preemption of state law are primarily set forth in DFA Section 1044 (124 Stat. at 2014-17), which has been codified at 12 U.S.C. § 25b ("Section 25b"). Section 25b specifically focuses on preemption of "State consumer financial laws," which it defines as "State law[s] that do[] not directly or indirectly discriminate against national banks and that directly and specifically regulate[] the manner, content, or terms and conditions of any financial transaction . . . or any account related thereto, with respect to a consumer." (12 U.S.C. § 25b(a)(2).)

Under Section 25b, a State consumer financial law will be preempted as applied to national banks if (1) it would have a discriminatory effect on a national bank in comparison with the effect of the law on a state-chartered bank; (2) it is preempted under a federal law other than the NBA; *or* (3) "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.*, 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers." (12 U.S.C. § 25b(b)(1).)

Barnett Bank is the preemption decision the Ninth Circuit relied on in *Rose* in determining that claims virtually identical to Parks' claim were preempted by the NBA.

(See 513 F.3d at 1038 ["We are . . . constrained by the holdings of *Barnett Bank* and *Franklin* to find that the NBA preempts the disclosure requirements of Cal. Civ. Code 1748.9, insofar as those requirements apply to national banks."].) As the Ninth Circuit recognized and MBNA has argued throughout this litigation, *Barnett Bank* compels the conclusion that claims seeking to enforce Cal. Civ. Code § 1748.9 are preempted as applied to a national bank.

Recently, a number of courts have considered suggestions that the DFA preemption provisions, now that they are effective, are applicable in cases involving conduct prior to the Designated Transfer Date. As the United States Court of Appeals for the Sixth Circuit found in *Molosky v. Washington Mutual, Inc.* (6th Cir. 2011) 664 F.3d 109, it is clear they are not applicable to prior conduct. The DFA preemption provisions "came into effect on July 21, 2011, and have no retroactive effect." (*Id.* at 113, fn. 1.) "There is no explicit statement from Congress that they are meant to be retroactive"; indeed, "[t]he Dodd-Frank Act itself declares that its contents should not be construed as retroactive." (*Id.*, citing 12 U.S.C. § 5553; *Davis v. World Sav. Bank, FSB* (D.D.C. 2011) 806 F. Supp. 2d 159, 167, fn. 5 [applying a 1996 OTS preemption regulation because the DFA amendments are not retroactive]; see also *Williams v. Wells Fargo Bank N.A.* (S.D. Fla. Oct. 14, 2011, No. 11-21233-CIV) 2011 WL 4901346, at *7, fn. 6 ["The claims involved in the present action arose prior to July 21, 2011; accordingly, they are analyzed under the preemption rules in effect prior to the changes imposed by the Dodd-Frank Act."]; *Sovereign Bank v. Sturgis* (D. Mass. Mar. 22, 2012, Civil Action No. 11-10601-DPW) 2012 WL 1014607, at *14, fn. 9 ["Because the Sturgises' loans were consummated before Dodd-Frank was enacted or effective, the new preemption standard is inapplicable in the instant case."].)

In addition, even with respect to claims involving conduct occurring after July 21, 2011, the Section 25b provisions do not apply to the extent those claims *arise out of contracts entered into before the DFA's enactment.* The DFA provides, both with respect to Section 25b and the DFA consumer protection standards to be implemented by the CFPB, that the statute:

> [S]hall not be construed to alter or affect the applicability of any regulation, order, guidance, or interpretation prescribed, issued, and established by the [OCC] or the [OTS] regarding the applicability of State law under Federal banking law to any contract entered into on or before the date of enactment of this Act, by national banks . . . .

(DFA § 1043, 124 Stat. at 2014 [codified at 12 U.S.C. § 5553].) In light of this provision, whatever impact the DFA might have on preemption in the future, it has no effect on Parks' claim, as Parks' credit card agreement with MBNA was entered into long before the DFA's enactment. (See *Nicol v. Wells Fargo Bank, N.A.* (D. Or. Mar. 8, 2012, No. 11-cv-1406-SI) __ F. Supp. 2d __ [2012 WL 775077, at *2]; *Copeland-Turner v.*

Wells Fargo Bank, N.A. (D. Or. 2011) 800 F. Supp. 2d 1132, 1137-38; *Thomas v. Bank of Am. Corp.* (Ga. Ct. App. 2011) 711 S.E.2d 371, 376-77.)

Equally significant, the above-quoted provision confirms the validity of the OCC preemption regulation that applies to Parks' claim: 12 C.F.R. § 7.4008 ("Section 7.4008"). Section 7.4008 obviously is a "regulation . . . prescribed, issued, and established by the [OCC] . . . regarding the applicability of State law under Federal banking law," and Congress expressly preserved its application here. (12 U.S.C. § 5553.) If Congress had any doubt about the validity of Section 7.4008, surely it would not have expressly prescribed its *continued* application.

In sum, the DFA provisions on NBA and OCC preemption, while inapplicable in this case, provide additional support for the conclusion that, as the Ninth Circuit held in *Rose* and the trial court held here, claims such as Parks' are preempted.

III. The OCC's Regulatory Response

Like the DFA provisions themselves, the OCC's response to them confirms points previously made by MBNA regarding preemption under *Barnett Bank* and the validity of the OCC's preemption regulations, including Section 7.4008.

In response to the DFA, the OCC proposed and, following a period of public comment, adopted regulations integrating the OTS functions into the OCC and implementing the related DFA provisions on NBA and OCC preemption of state law. (Office of Thrift Supervision Integration; Dodd-Frank Act Implementation, 76 Fed. Reg. 43,549 (July 21, 2011) [final rule].) As part of that rulemaking, the OCC reviewed its preemption regulations adopted in 2004, including Section 7.4008, to ensure their consistency with the DFA. The OCC found no substantive inconsistency, but determined that a few revisions to the 2004 regulations would help clarify that they specifically implemented the U.S. Supreme Court's standard for NBA preemption as articulated in *Barnett Bank.*

First, the OCC added to the preemption regulations an express reference to "the decision of the Supreme Court in *Barnett Bank.*" (See *id.* at 43,565-66.) Second, the OCC removed from the regulations their reference to preemption of state laws that "obstruct, impair, or condition" a national bank's ability to exercise fully its federally granted powers. (See *id.* at 43,556.) As the OCC noted, the "obstruct, impair, or condition" formulation for preemption was intended to reflect the precedents cited in *Barnett Bank.* (*Id.*) In *Barnett Bank*, the U.S. Supreme Court, citing prior preemption case law, referred to NBA preemption of state law that would "*impair*" the exercise of national bank powers; "*condition[]*" the exercise of a national bank's powers on the state's permission (unless the NBA itself imposed such a condition); "*encroc[h] on* the rights and privileges of national banks'"; "'*destro[y] or hampe[r]*' national banks'

functions"; or otherwise "'*interfere with*, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government.'" (517 U.S. at 33-34, emphases added, quoting *Anderson Nat'l Bank v. Luckett* (1944) 321 U.S. 233, 247-52; *McClellan v. Chipman* (1896) 164 U.S. 347, 358 *Nat'l Bank v. Commonwealth* (1869) 76 U.S. (9 Wall.) 353, 362.)

As the OCC explained regarding the DFA revisions, it had considered in 2004 that the "obstruct, impair, or condition" language essentially reflected the various preemption formulations and precedents cited in *Barnett Bank.* (76 Fed. Reg. at 43,556.) However, since the "obstruct, impair, or condition" language apparently had caused some confusion and misunderstanding, the OCC determined that "[e]liminating this language from [its] regulations will remove any ambiguity that the conflict preemption principles of the Supreme Court's *Barnett* decision are the governing standard for national bank preemption." (*Id.*) However, as the OCC also recognized, a proper application of Section 25b must take into account the *full reasoning* underlying *Barnett Bank* – not just one phrase from the *Barnett Bank* opinion. Thus, neither the "obstruct, impair, or condition" language nor the "prevents or significantly interferes" phrase referred to in Section 25b can serve as the *sole* test for preemption in accordance with *Barnett Bank.* Rather, *any and all of the various formulations* for preemption referred to in *Barnett Bank* may serve to indicate whether the application of a particular state law to a national bank would "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Barnett Bank*, 517 U.S. at 31, citation and internal quotation marks omitted.)

Indeed, the California Court of Appeal, Fourth District, recently recognized this very point in its opinion in *Wells Fargo Bank, NA v. Baker* (2012) 204 Cal. App. 4th 1063. At issue there was the application to a national bank of an Iowa statute requiring that, in order to be deemed a "resident" of Iowa, a corporation not formed under Iowa law (such as a national bank) had to obtain a certificate of authority to transact business in the state. The Court of Appeal considered whether the application of the Iowa requirement was inconsistent with, and therefore preempted by, the NBA, given that the NBA "provides that banks shall have power [t]o exercise ... all such incidental powers as shall be necessary to carry on the business of banking." (*Id.* at 1069, quoting *Watters v. Wachovia Bank, N.A.* (2007) 550 U.S. 1, 7, internal quotation marks omitted.) Relying on *Watters*, *Barnett Bank*, and other NBA preemption precedent, the court reasoned that the Iowa law would be preempted by the NBA if its effect was to "*frustrate, destroy, interfere with, or hamper* national banks' exercise of their powers," or if it were to "*curtail or hinder* a national bank's efficient exercise of any [banking] power," including if it "*infringed*" on national banks' power to sue or otherwise "*plac[ed] a burden on the ability of a national bank to efficiently conduct their business.*" (*Id.* at 1070-71, emphases added, citations omitted.)

Although obtaining a certificate of authority to do business in a state is essentially a ministerial process involving the submission of proof of corporate existence and good standing, the court nevertheless found that, "[i]n light of the long standing rule that the States cannot *interfere* with a national bank's exercise of its powers, . . . it [is] implausible that Congress intended to limit the National Bank Act's preemptive scope such that States may require national banks to obtain certificates of authority to use their long-arm statutes." (*Id.* at 1072, emphasis added, citing *Barnett Bank*, 517 U.S. at 33-34; *Watters*, 550 U.S. at 11.) Because the Iowa certificate of authority requirement "*infringes* upon national banks' power to sue as fully as natural persons," the Court of Appeal held the requirement preempted by the NBA. (*Id.*, emphasis added.)

The OCC's regulatory response to the DFA implements this same understanding: that the standard for preemption under *Barnett Bank* does not hinge on any particular terms, whether "obstruct, impair, or condition" or "prevents or significantly interferes." The "prevents or significantly interferes" phrase, as the OCC noted, is "part of the Court's discussion of its reasoning; an observation made describing other Supreme Court precedent that is cited in the Court's decision." (76 Fed. Reg. at 43,555.) Neither it nor any other *single phrase* in *Barnett Bank* can serve as a "stand-alone standard, divorced from the reasoning of the decision." (*Id.*) It is clear from *Barnett Bank*'s reference to multiple linguistic tests for NBA preemption that "the reasoning of the decision . . . includes, but is not bounded by, the 'prevent or significantly interfere' formulation." (*Id.*) Indeed, if Congress had intended otherwise in the DFA, there would have been no need to qualify the "prevents or significantly interferes" criterion by stating that it must be applied "in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank*." (12 U.S.C. § 25b(b)(1)(B).) Construing Section 25b as prescribing only a "prevents or significantly interferes" test for preemption would render the statute's reference to *Barnett Bank* mere surplusage, contrary to well-established principles of statutory construction.

Finally, in reviewing its 2004 preemption regulations as part of implementing Section 25b, the OCC carefully reconsidered whether the rules' reference to preemption of specific types of state laws, including disclosure requirements such as Cal. Civ. Code § 1748.9, is consistent with the standard for conflict preemption in *Barnett Bank*. (76 Fed. Reg. at 43,557.) With respect to state disclosure requirements, the OCC confirmed that:

> [D]isclosure laws that impose requirements that predicate the exercise of national banks' deposit-taking or lending powers on compliance with state-dictated disclosure requirements clearly present a significant interference, within the meaning of *Barnett*, with the exercise of those national bank powers. This type of law falls squarely within the precedent recognized in the Supreme Court's *Barnett* decision, notably the *Franklin Nat'l Bank* decision specifically discussed and relied upon in *Barnett*.

(*Id.* at 43,557 & fn. 51, citing *Barnett Bank*, 517 U.S. at 33; *Franklin Nat'l Bank of Franklin Square v. New York* (1954) 347 U.S. 373; *Am. Bankers Ass'n v. Lockyer* (E.D. Cal. 2002) 239 F. Supp. 2d 1000, 1014-18; *Rose*, 513 F.3d 1032.)

IV. Conclusion

This Court need not consider the DFA in deciding the preemption questions presented in this case. The DFA does not govern preemption of Parks' claim. However, both the statute and the OCC's regulatory response confirm by implication that, as the Ninth Circuit held in *Rose*, any such claims *are* preempted under *Barnett Bank*.

ARNOLD & PORTER LLP

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

PROOF OF SERVICE

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

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

On May 16, 2012, I served the foregoing document described as a **RESPONDENT'S SUPPLEMENTAL LETTER BRIEF**, by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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

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Executed on May 16, 2012, at San Francisco, CA.

Bonnie Hastings

Bonnie Hastings