LAW OFFICE OF
MICHAEL R. VACHON, ESQ.

17150 VIA DEL CAMPO, SUITE 204
SAN DIEGO, CA 92127
PH: (858) 674-4100
FAX: (858) 674-4222

May 24, 2012

Via Overnight Delivery

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Response Letter Brief in *Parks v. MBNA National Bank, N.A.*
(Supreme Court Case No. S183703)

Justices of the Supreme Court:

In response to the Supreme Court's request, Plaintiff/Appellant Allan Parks submits this letter brief in response to Defendant/Respondent MBNA America Bank, N.A.'s May 16, 2012 letter brief addressing the significance of the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Office of the Comptroller of the Currency's ("O.C.C.") regulatory response.

I.
SUMMARY

MBNA's assertion that Section 1043 of the Dodd-Frank Act prevents the Act's preemption provisions from applying to pre-existing cases is inaccurate. First, the Dodd-Frank Act expressly states that Section 1043 should not be interpreted as affecting whether or not a national bank has to comply with State laws. Additionally, Section 1043 states that it only applies to Chapter 53 of the NBA, and the Dodd-Frank Act's NBA preemption standards are in Chapter One. In truth, Section 1043 simply protects pre-existing contracts from the rule-making and enforcement powers of the Consumers Financial Protection Bureau – powers which include promulgating new preemption standards, and the rescission and reformation of contracts. Finally, MBNA's proposed interpretation of Section 1043 is untenable because it would lead to the absurd result that national savings associations would (for decades to come) be permitted to ignore State laws for some customers, while having to obey them for others.

MBNA's assertion that the Dodd-Frank Act requires courts to apply not just the "significant interference" test, but also other supposed "formulations" of the test for NBA preemption is without merit because there are no other "formulations" for NBA preemption. MBNA is misinterpreting the *Barnett Bank* decision, and trying to pull single-word quotations out of their context. All of the authority cited in *Barnett Bank* effectively applied the "significant interference" test, and none advocated a lower threshold.

Finally, MBNA's assertion that the O.C.C. "carefully" re-considered and affirmed its prior regulation preempting all State disclosure laws is not true. The O.C.C.'s analysis was conclusory at best, and confusing at worst. Indeed, in support of its argument that all State disclosure laws are preempted it even (in what appears to be a mistake) cited to a case holding that some State disclosure laws are not preempted. It is not a cogent analysis worthy of deference.

II.
The Dodd-Frank Act Does Not Exempt Pre-Existing Cases From Its NBA Preemption Provisions

1. Section 1043 Does Not Apply to the Dodd-Frank Act's Preemption Standards

MBNA's letter brief attempts to suggest that Section 1043 of the Dodd-Frank Act (12 U.S.C. § 5553) mandates that the Act's NBA preemption standard in 12 U.S.C. § 25b not be applied to contracts formed prior to July 21, 2011. However, that argument ignores the express terms of the Dodd-Frank Act.

The Dodd-Frank Act states that Section 1043 should not be interpreted to affect the determination of whether or not national banks have to comply with State laws. 12 U.S.C. § 5551(a)(1). Section 1041 of the Dodd-Frank Act makes clear that:

> (1) RULE OF CONSTRUCTION - This title, other than sections 1044 through 1048, may not be construed as annulling, ***altering, or***

> ***affecting, or exempting*** any person subject to the provisions of this subchapter from complying with, the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.

12 U.S.C. § 5551(a)(1).

Contrary to MBNA's suggestion, Section 1043 is merely intended to ensure that the Consumer Financial Protection Bureau ("CFPB") does not utilize its newly-granted enforcement powers to invalidate existing contracts. *See* 12 U.S.C. 5565(a)(2) (permitting CFPB to rescind and reform contracts, and order restitution and disgorgement); *Cline v. Bank of America*, 823 F. Supp. 2d 387, 396 (S.D. W.Va. 2011) ("[Section 1043] was intended to preserve existing contracts by national banks, not to effectively insulate those institutions from generally applicable state consumer protection actions").

Section 1043's text confirms that its application is limited to the actions of the CFPB and issues dealing with the "application of state laws to contracts." Specifically, Section 1043 states:

> SEC. 1043. PRESERVATION OF EXISTING CONTRACTS.
> ***This title, and regulations, orders, guidance, and interpretations prescribed, issued, or established by the Bureau,*** shall not be construed to alter or affect the applicability of any regulation, order, guidance, or interpretation prescribed, issued, and established by the Comptroller of the Currency or the Director of the Office of Thrift Supervision ***regarding the applicability of State law under Federal banking law to any contract*** entered into on or before July 21, 2010, by national banks, Federal savings associations, or subsidiaries thereof that are regulated and supervised by the Comptroller of the Currency or the Director of the Office of Thrift Supervision, respectively. [emphasis added].

Accordingly, Section 1043 does not apply to cases (like this one) in which the issue is not the application of State law to a particular contract, but instead whether a national bank has to comply with a State consumer protection statute.

Additionally, Section 1043 (which became 12 U.S.C. § 5553) by its own terms only affects how Subchapter V of Chapter 53 of Title 12 of the United States Code (*i.e.*, the Subchapter titled "Bureau of Consumer Financial Protection") should be interpreted. 12 U.S.C. § 5553 (stating that "This ***subchapter*** ... shall not be construed ..." [emphasis added]). The Dodd-Frank Act created a new section in the NBA (*i.e.*, 12 U.S.C. § 25b) for its clarification of preemption standards, and placed it in Subchapter I of Chapter One of the NBA. *See* Dodd-Frank Act, Sec. 1044(a) ("Chapter one of the [NBA] is amended by inserting ... the following new section"). Accordingly, Section 1043 does not govern how 12 U.S.C. § 25b should be interpreted because Section 1043 only applies to Subchapter V of Chapter 53.

Finally, MBNA's proposed interpretation of Section 1043 is untenable because it would also lead to absurd results. Under MBNA's proposed interpretation, the Dodd-Frank Act's HOLA and NBA preemption standards would *never* apply to customers who happened to open their accounts prior to July 21, 2011. Since some people keep the same bank accounts and/or credit cards for 10, 20, or even 30 or more years, MBNA is suggesting that for decades to come national bank and federal savings association activities will be regulated by two different standards - one for customers who opened their accounts prior to the Act, and a different standard for those who opened accounts after. In the case of federal savings associations, since the Dodd-Frank Act eliminated field preemption and replaced it with the significant interference test, federal savings associations would have to comply with State laws for some customers, but not for others. MBNA's proposed interpretation raises two unanswerable questions: why would Congress want the *future* activities of national banks and federal savings associations to be immune from the Dodd-Frank Act's terms? And why would Congress create two classes of consumers with differing legal rights arising out of the same federal savings association conduct? There is no reason to presume that Congress intended such a confusing and arbitrary result.

Section 1043 was not intended to apply to the Dodd-Frank Act's preemption standards.

2. The Cases Cited by MBNA Are Distinguishable and Not Persuasive

In its brief, MBNA cites to seven cases which it argues confirm that the Dodd-Frank Act's NBA preemption provisions do not apply to cases pre-dating the Act. However, all of MBNA's cited cases are either: (1) distinguishable because they are not NBA preemption cases at all; or (2) not persuasive because they fail to provide significant analysis, and do not even mention relevant portions of the Act.

Of MBNA's seven cited cases, five are actually analyzing preemption by the Home Owner's Loan Act (the "HOLA") - not NBA preemption.[1] Prior to the enactment of the Dodd-Frank Act, the HOLA and the regulations promulgated thereunder by the Office of Thrift Supervision (the "OTS") broadly preempted the entire field of regulation of federal savings associations. *See Fid. Fed. Sav. & Loan Ass'n. v. de la Cuesta,* 458 U.S. 141, 161-162 (1982) (HOLA granted the OTS authority to broadly preempt state laws by regulation); 12 C.F.R. 560.2(a) (OTS regulation preempting field of regulation of federal savings associations). Thus, the Dodd-Frank Act *changed* the standards for HOLA preemption from field preemption to *Barnett Bank's* "significant interference" test. 12 U.S.C. § 1465. Because there was a change in law, it makes sense that the courts in these cases did not apply the Dodd-Frank Act retroactively. But these decisions are distinguishable from cases (like this one) involving NBA preemption because the Dodd-Frank Act did not change the standard for NBA preemption - it merely codified the existing *Barnett Bank* standard.

The other two cases cited by MBNA (*i.e., Williams v. Wells Fargo, N.A.*, 2011 WL 4901346 (S.D. Fla. 2011) and *Thomas v. Bank of America Corp.*, 711 S.E. 2d 371 (Ga. Ct. App. 2011)) are not binding on this Supreme Court, and their analyses

[1] The HOLA cases cited by MBNA in its brief are: *Molosky v. Washington Mutual, Inc.*, 664 F. 3d 109 (6th Cir. 2001); *Davis v. World Savings Bank, FSB*, 806 F. Supp. 2d 159 (D.D.C. 2011); *Sovereign Bank v. Strugis*, 2012 WL 1014607 (D. Mass. 2012); *Nicol v. Wells Fargo, N.A.*, 2012 WL 775077 (D. Or. 2012); and *Copeland-Turner v. Wells Fargo Bank*, 800 F. Supp. 2d 1132 (D. Or. 2011)

are not persuasive. Both simply cite to Section 1043 and conclude that the Dodd-Frank Act was not intended to apply to existing cases. Neither case mentions Section 1041 (which states that Section 1043 should not be interpreted as affecting the determination of whether State laws are preempted). And neither acknowledges that 12 U.S.C. 25b is in a different Chapters of the U.S. Code than the one to which Section 1043 applies. Accordingly, their analyses are not persuasive.

III.
The Dodd-Frank Act Mandates That "Significant Interference" is the Standard for NBA Preemption

1. MBNA's Statutory Construction Argument is a *Non Sequitur*

MBNA (like the O.C.C. in its July 21, 2011 regulation) attempts to argue that by adopting the "significant interference" test from the U.S. Supreme Court's *Barnett Bank* decision the Dodd-Frank Act actually intended to adopt a supposedly "broader" preemption test including what it believes to be other preemption formulations in the *Barnett Bank* decision. Specifically, MBNA attempts to make a statutory construction argument asserting that the Act's reference to *both* the "significant interference" test *and* the *Barnett Bank* decision reveals Congress's supposed intention to adopt more than just the significant interference test, because otherwise the reference to *Barnett Bank* would be superfluous.

However, MBNA's statutory construction argument is a *non sequitur.* Following MBNA's own line of reasoning, it would be equally valid to conclude that Congress's reference to both the *Barnett Bank* decision and the "significant interference" standard demonstrates that Congress did not intend to incorporate the entire *Barnett Bank* decision, because if it had then the reference to the "significant interference" test would be superfluous.

In fact, there is no statutory surplusage. The reason why Congress referred to both the "significant interference" test and the *Barnett Bank* decision is that the phrase "significant interference" – when considered in a vacuum – is

vague and uncertain. But by referring to the "significant interference" test in the *Barnett Bank* decision, Congress specified a particular legal test, as enunciated in a particular U.S. Supreme Court decision.

2. MBNA's Contention That Barnett Bank Contains Multiple "Formulations" of the NBA Preemption Test is Not Well Founded

MBNA and the O.C.C. are wrong to contend that *Barnett Bank* contains "multiple formulations" of the NBA preemption test under which State laws can be preempted if they merely "interferes with," "hamper," "impair," or "encroach on" national bank powers. MBNA (like the O.C.C.) claims that the existence of these supposed additional tests is demonstrated by the precedents cited in the *Barnett Bank* decision. But MBNA and the O.C.C. are really just cherry-picking single words out of the *Barnett Bank* decision, and trying to insist that they have a meaning divorced from their context.

The portion of the Barnett Bank decision from which MBNA extracts the "interferes with," "encroaches on," "impair," and "hamper" language is the following:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers. *See, e.g., Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 247-252, 64 S.Ct. 599, 606-609, 88 L.Ed. 692 (1944) (state statute administering abandoned deposit accounts did not "unlawfully ***encroach on*** the rights and privileges of national banks"); *McClellan v. Chipman*, 164 U.S. 347, 358, 17 S.Ct. 85, 87-88, 41 L.Ed. 461 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destroy or **hamper**" national banks' functions); *National Bank v. Commonwealth*, 76 U.S. (9 Wall.)

> 353, 362, 19 L.Ed. 701 (1869) (national banks subject to state law that does not "***interfere with***, or ***impair*** national banks' efficiency in performing the functions by which they are designed to serve the Federal Government").

Barnett Bank, 517 U.S. at 33.

In the above-quoted passage, the *Barnett Bank* Supreme Court expressly states that the cited precedents demonstrate that more than minimal or trivial interference is required in order for a law to be preempted. *Id.* (stating that the NBA does not "deprive States of the power to regulate national banks, where ... doing so does not prevent or significantly interfere with the national bank's exercise of its powers"). MBNA's attempt to lift single words from this passage out of their context, and to argue that they represent *additional* preemption formulations, under which any sort of minimal "interference" or "impairment" triggers NBA preemption is untenable because it ignores the context in which those words are presented. All of the cases from which MBNA extracts these single-word quotations clearly held that more than minimal "interference" is required in order to trigger NBA preemption. *Luckett*, 321 U.S. at 248 (upholding State law regulating how national banks must handle abandoned deposits, and holding that "[i]t has never been suggested that non-discriminatory [State] laws of this type are so burdensome as to be inapplicable to the accounts of depositors of national banks"); *McClellan*, 164 U.S. at 358 ("Of course, in the broadest sense, any limitation by a state on the making of contracts is a restraint upon the power of a national bank within the state to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of congress"); *National Bank v. Commonwealth*, 76 U.S. at 362 (holding that that State laws are preempted by the NBA ***only*** if they prevent banks from performing their federal purpose, and that "[a]ny other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States").[2]

[2] MBNA and the O.C.C. also attempt to suggest that *Barnett Bank* held that States cannot "condition" a national bank's lending activities on State law. But this is another erroneous attempt to cherry-pick a single word from the *Barnett Bank* decision out of its context. *See*

Accordingly, MBNA's (and the O.C.C.'s) attempt to cherry-pick single words out of the *Barnett Bank* decision, and suggest that they represent different NBA preemption tests is not well founded. Taken in context, all of the cases cited in *Barnett Bank* unequivocally state that much more than just a minimal "interference," "impairment," "encroachment," or "hampering" is necessary for NBA preemption to exist.[3]

IV.
The O.C.C.'s Contention That All State Disclosure Requirements Are Preempted by the NBA is Not Persuasive

MBNA attempts to argue that the O.C.C. "carefully" re-considered and affirmed its prior conclusion that all State disclosure laws are necessarily preempted by the NBA. However, there are serious defects in the O.C.C.'s analysis that prevent it from being persuasive.

In particular, the O.C.C. mischaracterized the U.S. Supreme Court's decision in *Franklin National Bank v. New York*, 347 U.S. 373 (1954) by erroneously asserting that *Franklin National Bank* "squarely" stands for the proposition that the NBA preempts all State disclosure laws. 76 F.R. 43549, 43557 (July 21, 2011). Specifically, the O.C.C.'s explanation of its July 21, 2011 regulatory amendments asserted that:

Parks's Answer Brief on the Merits, pg. 36-37 (explaining the "condition" statements in *Barnett Bank*).

[3] MBNA's letter brief attempts to argue that the recent California Court of Appeal decision in *Wells Fargo Bank, NA v. Baker*, 204 Cal. App. 4th 1063 (2012) ruled that *Barnett Bank* includes many formulations of the NBA preemption test, other than "significant interference." But that case is not binding on this Supreme Court. Moreover, the *Baker* case did not analyze the "significant interference" test at all - its decision was based on the fact that the Iowa statute at issue discriminated against national banks and was expressly preempted by 12 U.S.C. 24 (Fourth). Id., at 1072 ("In sum, we conclude that [the Iowa statute] infringes upon national banks' power to sue as fully as natural persons (12 U.S.C. 24 (Fourth)) and Iowa's state-chartered banks"). Because the *Baker* decision is not binding on this Supreme Court, and because its holding was based on the facts that the State law discriminated against national banks and conflicted with an express provision of the NBA, it is not relevant here.

> [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*. [emphasis added].

Id.

Contrary to the O.C.C.'s analysis, *Franklin National Bank* cannot reasonably be interpreted as holding that the NBA preempts ***all*** State disclosure laws. *Franklin National Bank* considered a New York statute that prevented national banks (but not State-chartered banks) from using the words "savings" in their advertisements – thus, it did not involve a State disclosure law at all. Moreover, in *Franklin National Bank* the U.S. Supreme Court expressly held that State laws apply to national banks so long as they do not conflict with federal law. *Franklin National Bank,* 347 U.S. at 378 n. 7 ("national banks may be subject to some state laws in the normal course of business if there is no conflict with federal law"). The *Franklin National Bank* decision states that its holding is based on the facts that the New York statute in that case (1) discriminated against national banks, and (2) effectively prevented them from attracting deposits. *Id.,* 377-378. Accordingly, the O.C.C.'s conclusory assertion that *Franklin National Bank* "squarely" preempts ***all*** State disclosure laws finds no obvious support in that decision.

Another case that the O.C.C. cited in support of its contention that the NBA preempts all State disclosure laws is *American Bankers Association v. Lockyer,* 239 F. Supp. 2d 1000 (E.D. Cal. 2002). The O.C.C.'s explanation for its July 21, 2012 amendments states that *Lockyer* stands for the proposition that "the monetary and non-monetary costs of a mandatory disclosure scheme constituted a significant interference with national banks' powers" under the *Barnett Bank* test. 76 F.R. at 43557 n. 51. But the fact that the O.C.C. cites to *Lockyer* is puzzling

– especially given the fact that *Lockyer* actually ruled that a State law disclosure requirement in that case did not amount to a significant interference under *Barnett Bank*. *Lockyer*, 239 F. Supp. 2d at 1019-1020 ("In short, if credit card issuers were required to include only the Minimum Payment Warning on billing statements, the burdens imposed would be insignificant").

Under the Dodd-Frank Act's new requirements, as well as under pre-existing case law, O.C.C. preemption determinations are only entitled to deference according to their thoroughness and persuasiveness. 12 U.S.C. § 25b(b)(5)(A); *Wyeth v. Levine*, 129 S. Ct. 1187, 1229 (2009). Because the O.C.C. failed to provide a cogent justification for its conclusion, and because it attempted to rely on two cases that have nothing to do with preemption of State disclosure requirements (other than one holding that a State disclosure law was not preempted by the NBA), the O.C.C.'s analysis is neither thorough nor persuasive. Accordingly, it is not entitled to deference.

V.
Conclusion

The Dodd-Frank Act's NBA preemption provisions properly apply to this case. Contrary to MBNA's suggestions, Section 1043 does not apply to cases involving preemption of State lending laws. Section 1043 instead protects pre-existing contracts from the rule-making and enforcement powers of the CFPB.

Also, MBNA's and the O.C.C.'s argument that the *Barnett Bank* case contains many supposed "formulations" of the NBA preemption test is simply wrong. It is nothing but an attempt to cherry-pick single words from that decision out of their context.

And finally, regardless of whether or not this Supreme Court applies the pre or post-Dodd-Frank Act standards, no deference should be accorded to the O.C.C.'s re-consideration and re-affirmation of its regulations purporting to preempt all State disclosure laws. The O.C.C.'s analysis is conclusory, and not supported by the authority upon which it relies.

Respectfully submitted,

Michael R. Vachon, Esq.
Attorney for Appellant Allan Parks

PROOF OF SERVICE

Parks v. MBNA America Bank, N.A.
Supreme Court of California Case No. S183703

I am over the age of 18 and not a party to the within action. My business address is: 17150 Via Del Campo, Suite 204, San Diego, California 92127. On the date shown below, I served the foregoing document(s) described as:

Re: Response Letter Brief in *Parks v. MBNA National Bank, N.A.*
(Supreme Court Case No. S183703)

on the interested parties in this action as follows:

ARNOLD & PORTER, LLP Attn.: Laurence J. Hutt, Esq. 777 South Figueroa Street, 44th Floor Los Angeles, CA 90017-5844 *(Attorneys for MBNA America Bank, N.A.)*	Sheldon H. Jaffe, Esq. Deputy Attorney General State of California Department of Justice 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004 Fax: (415)703-5480
Comptroller of the Currency Litigation Department Attn.: Douglas Jordan, Senior Counsel 250 E Street SW Washington, DC 20219 Fax: (202) 874-5279	Clerk of the Court California Superior Court County of Orange Civic Complex Center 751 West Santa Ana Blvd. Santa Ana, CA 92701
District Attorney for the County of Orange 401 Civic Center Drive Santa Ana, CA 92701	Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230
Clerk of the Court California Court of Appeal Fourth Appellate District Division Three 601 West Santa Ana Blvd. Santa Ana, CA 92701	

[X] **(BY MAIL):** The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business.

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Date: May 23, 2012

Svetlana Morozovskaya