LIU, J.

COPY

No. S199074

In the Supreme Court of the State of California

HAROLD ROSE AND KIMBERLY LANE,

Plaintiffs, Appellants and Petitioners,

vs.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

ANSWER TO PETITION FOR REVIEW

After A Decision By The Court Of Appeal,
Second Appellate District, Division Two, Case No. B230859
On Appeal From The Los Angeles County Superior Court,
Case No. BC433460, Honorable Jane L. Johnson

Service On The Los Angeles District Attorney And The
California Attorney General Required By
Cal. Bus. & Prof. Code § 17209 And Cal. R. Ct. 8.29(b)

Margaret M. Grignon (SBN 76621)
Scott H. Jacobs (SBN 81980)
Zareh A. Jaltorossian (SBN 205347)
REED SMITH LLP
355 S. Grand Avenue, Suite 2900
Los Angeles, CA 90071-1514
Telephone: 213.457.8000
Facsimile: 213.457.8080

Attorneys for Defendant and Respondent
Bank of America, N.A.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

Statutes

TABLE OF AUTHORITIES (CONTINUED)

Page(s)

Rules

Other

I.

INTRODUCTION

This Court's opinions as well a host of California Court of Appeal decisions have held that when a legislative body intends to prohibit private enforcement of a statute, that statute cannot serve as the predicate for a claim under California's Unfair Competition Law ("UCL") (Bus. & Prof. Code, §§ 17200 *et seq.*). In this case, the Court of Appeal for the Second Appellate District, Division 2, applied that long-standing body of law to affirm the dismissal of the putative class action complaint brought by Plaintiffs Harold Rose and Kimberly Lane. Plaintiffs' complaint set forth a single cause of action under the UCL based on alleged violations of technical notice provisions of the federal Truth In Savings Act (12 U.S.C. § 4301 *et seq.*) ("TISA") and its implementing Regulation DD. The Court of Appeal held that because Congress intended to prohibit private enforcement of TISA, California law prohibits Plaintiffs from using the UCL to sue for alleged violations of TISA's specific and detailed notice requirements.

As demonstrated below, the Court of Appeal's decision is in line with a uniform body of California cases, including the decisions of this Court. Under that law, parties, such as Plaintiffs, may not bring a cause of action under the UCL to enforce a statute whose private enforcement has been foreclosed. As the Court of Appeal recognized, Congress has rejected private enforcement of TISA on two separate occasions. As such, under California law,

Plaintiffs may not use the UCL to enforce TISA's requirements. By affirming the dismissal of Plaintiffs' complaint, the Court of Appeal rejected Plaintiffs' suggested departure from this established body of California law and applied that law in a straightforward manner to the specific factual allegations of Plaintiffs' complaint. The Court of Appeal's decision does not represent a change in the law. Nor does it conflict with other published California cases. As such, the petition should be denied.

Review also should be denied because the preemption issues that form the basis of Plaintiffs' petition were not addressed by the Court of Appeal and are irrelevant to its holding. The Court of Appeal addressed whether Plaintiffs' complaint states a UCL cause of action *under California law*. The Court of Appeal did *not* hold that Plaintiffs' UCL claim is preempted by TISA. Indeed, as Plaintiffs acknowledge, the Court of Appeal did not address preemption at all. Rather, it held that Plaintiffs' UCL claim failed as a matter of California law because Plaintiffs may not bring a UCL suit to enforce TISA's provisions.

Plaintiffs are correct that TISA leaves California free to adopt its own laws that are similar or even identical to TISA. However, what Plaintiffs ignore is that California has not done so. Rather, the Legislature has enacted no TISA-like statutes and California courts have limited UCL claims to statutes whose private enforcement has not been foreclosed. The Court of Appeal's decision in this case simply does not affect the scope or efficacy of TISA's

preemption savings clause. It concerns only California law. The preemption issues which from the basis of Plaintiffs' petition for review in this court, therefore, are irrelevant to the Court of Appeal's decision in this case. For this reason as well, the petition should be denied.

II.
PROCEDURAL BACKGROUND

Plaintiffs in this putative class action have deposit accounts with Bank of America. (*Rose v. Bank of America, N.A.* (2011) 200 Cal.App.4th 1441, 1445 (*Rose*).) Plaintiffs' complaint sets forth a single cause of action under the UCL based on alleged violations of TISA. Plaintiffs allege that Bank of America failed to properly notify them of increases in fees applicable to their deposit accounts in violation of TISA. (*Ibid.*) Specifically, Plaintiffs claim that Bank of America's notice of pricing changes applicable to their accounts did not specify the exact increase for their personal accounts or the precise date the increase would take effect, both of which allegedly are required by TISA. They also allege that the notice was not clear and conspicuous in various technical respects as required by TISA. After announcing the increase, Bank of America allegedly deducted increased monthly fees from Plaintiffs' accounts. (*Ibid.*) As the Court of Appeal noted, "Plaintiffs' complaint and brief make clear that their claim is solely based on alleged violations of TISA. They write, 'This class action arises from Defendant's violations of the

Truth in Savings Act . . . and its implementing Regulation DD.'" (*Id.* at p. 1450.)

"[Plaintiffs] seek restitution of all money improperly deducted for increased service fees taken by [Bank of America] from their personal accounts, interest, injunctive relief, attorney fees and costs." (*Rose*, *supra*, 200 Cal.App.4th at p. 1445.)

Bank of America demurred to the complaint, arguing that because Congress has prohibited private enforcement of TISA by repealing its former civil liability provision, Plaintiffs cannot sue for TISA violations under the guise of the UCL. (*Rose*, *supra*, 200 Cal.App.4th at p. 1446.) Plaintiffs countered that their UCL claim is permissible because TISA does not specifically bar claims under the UCL and because it does not preempt consistent state laws. (*Ibid.*)

The trial court sustained Bank of America's demurrer, finding that the UCL cannot be used to "plead around" Congress's bar of private enforcement of TISA. (*Rose*, *supra*, 200 Cal.App.4th at pp. 1445-1446.) The trial court granted Plaintiffs leave to amend the complaint, but when Plaintiffs elected not to do so, the trial court entered an order of dismissal and judgment for Bank of America. (*Id.* at p. 1446.) Plaintiffs' appeal followed. (*Ibid.*)

III.

THE COURT OF APPEAL DECISION

In a unanimous published opinion, the Court of Appeal affirmed the judgment of dismissal. The Court of Appeal began its analysis by discussing the history of TISA. The Court of Appeal noted that when originally enacted in 1991, TISA contained a civil liability provision that provided a private right of action against any depository institution that failed to comply with its disclosure requirements. (*Rose*, *supra*, 200 Cal.App.4th at p. 1446.) "The 'private attorney general' provision was contained in 12 U.S.C. § 4310, and allowed individual account holders to sue for civil penalties and damages arising from TISA violations." (*Ibid.*)

The Court of Appeal observed that in 1996, however, Congress amended 12 U.S.C. § 4310 ("section 4310"), adding a sunset clause that repealed the private right of action provision as of September 30, 2001. (*Rose*, *supra*, 200 Cal.App.4th at p. 1447.) The Court of Appeal concluded, as have federal courts, that the repeal of section 4310 indicated Congress's intent entirely to eliminate private enforcement of TISA, both through direct actions for violation of TISA and through indirect actions by utilizing other laws like the UCL. (*Ibid.*)

The Court of Appeal also took note of TISA's legislative history subsequent to the repeal of the civil liability provision. This history revealed that, "[b]efore the sunset clause took effect, efforts

were made to retain a private right of action for the banking public . . . . The proposed bill would have amended TISA to authorize state authorities to sue for injunctive relief to enforce TISA disclosure requirements, and would have reinstated civil liability lawsuits against noncompliant banks. Legislative efforts to prevent the repeal of section 4310 failed," however. (*Rose*, *supra*, 200 Cal.App.4th at p. 1447.) The Court of Appeal saw Congress's rejection of a bill to eliminate the sunset provision as furnishing further compelling evidence of Congress's clear intent not to allow private suits to enforce TISA. (*Id.* at p. 1451.)

The Court of Appeal held that Congress's repeal of TISA's civil liability provision, and its subsequent rejection of proposed legislation to keep that provision in place, precluded Plaintiffs from using the UCL to sue for alleged TISA violations. (*Rose*, *supra*, 200 Cal.App.4th at pp. 1450-1451.) The Court of Appeal recognized that while the UCL borrows violations from other laws by making them independently actionable as unlawful under the UCL, under the precedent of this Court, a UCL claim may not go forward when the enacting legislative body has expressed an intent to prohibit private enforcement of a statute. (*Id.* at p. 1448.) "'If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination.'" (*Ibid.*, quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182 (*Cel-Tech*).)

The Court of Appeal recognized that a legislative body's intent regarding the availability of private enforcement may be determined in various ways, including "from the text of the statute or legislative history." (*Rose*, *supra*, 200 Cal.App.4th at p. 1449, citing *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 300 (*Moradi-Shalal*) [considering statutory history to ascertain legislative intent with respect to the availability of private actions].)

The Court of Appeal held that, with respect to TISA, Congress had indicated its intent to prohibit private actions "when it enacted a sunset clause that expressly repealed the statute allowing individuals to enforce TISA. It reconfirmed that intent when, in 2001, it rebuffed legislation to reinstate civil liability suits against noncompliant banks." (*Rose*, *supra*, 200 Cal.App.4th at p. 1451.) The Court of Appeal thus concluded that "California consumers can[not] seek injunctive relief and restitution against a bank for 'unlawful' conduct when Congress has clearly rejected a private right to enforce TISA." (*Ibid.*) Such a suit would constitute an "end run" around the limits on enforcement set by Congress. The Court of Appeal thus concluded that Plaintiffs' complaint failed to state a claim under the UCL's unlawful prong. (*Ibid.*)

The Court of Appeal further held that Plaintiffs failed to state a claim under the UCL's unfair prong, because the complaint's unfair conduct allegations are limited to violations of TISA (*Rose*, *supra*, 200 Cal.App.4th at pp. 1452-1453.)

Accordingly, the Court of Appeal affirmed the judgment of dismissal in favor of Bank of America. (*Rose*, *supra*, 200 Cal.App.4th at p. 1453.)

IV.

REVIEW SHOULD BE DENIED

A. Review Is Not Necessary To Secure Uniformity Of Decision Or Settle An Important Question

Review by this Court is warranted to decide important legal questions and maintain uniformity of decision among the appellate courts by ensuring that the published Court of Appeal opinions of this state are not in conflict in their analysis or articulation of the law. (See, e.g., Eisenberg et al., Cal. Prac. Guide: Civil Appeals and Writs (The Rutter Group 2006) ¶ 13.1, p. 13-1; *People v. Davis* (1905) 147 Cal. 346, 348; Cal. Rules of Court, rule 8.500(b) ["Court may order review . . . [w]hen necessary to secure uniformity of decision or to settle an important question of law . . . ."].)

Review of the Court of Appeal's decision in this case is not warranted under these standards, because in affirming the trial court's judgment, the Court of Appeal simply applied California's established body of UCL law to the specific allegations of Plaintiffs' complaint.

1. California Law Does Not Permit UCL Claims Predicated On Statutes Whose Private Enforcement Is Foreclosed

The unlawful prong of "[s]ection 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143 [citation omitted].) Theoretically, any federal or state statute can serve as a predicate for a section 17200 unlawful claim, including a statute that does not provide for direct enforcement by means of a private right of action. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561, 565 (*Stop Youth Addiction*).)

But as this Court has held on several occasions, the extent to which other statutes can serve as vehicles for UCL claims has limits. For example, when a statute permits or immunizes certain conduct, that conduct cannot be used to state a UCL claim. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1204 (*Rubin*).) Likewise, this Court has recognized that a statute may not serve as a predicate for a UCL cause of action when the legislative body enacting the statute has expressed an intent to prohibit its enforcement through private action. (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 567 [recognizing that a bar to a private cause of action under a statute deprives plaintiffs of standing to allege a UCL claim based on that statute].) Therefore, when private actions are barred under a statute, a plaintiff does not have standing to allege a claim under the unlawful prong of the UCL on the basis of that statute. (*Ibid.*; see also *Manufacturers Life Ins. Co. v. Superior*

Court (1995) 10 Cal.4th 257, 283-284 (*Manufacturers Life*) [legislative prohibition of private causes of action cannot "be avoided by characterizing the claim as one under the" UCL]; *Rubin, supra,* 4 Cal.4th at p. 1201 [plaintiffs may not plead around barriers to relief by relabeling the action as one brought under the UCL].)

In *Manufacturers Life*, this Court affirmed the Court of Appeal's conclusion that a plaintiff could not allege a UCL cause of action premised on a violation of California's Unfair Insurance Practices Act, Insurance Code section 790.03 ("UIPA"). (*Manufacturers Life, supra,* 10 Cal.4th at pp. 283-284.) Although the statutory language of the UIPA is silent as to whether private individuals can assert direct claims under that statute, the UIPA's legislative history reflects a legislative intent to prohibit private actions to enforce that statute. (*Moradi-Shalal, supra,* 46 Cal.3d at p. 300.) Because the UIPA's legislative history demonstrated an intent to prohibit private actions under that statute, the UIPA could not serve as a predicate statute for a claim under the UCL. (*Manufacturers Life, supra*, 10 Cal.4th at pp. 283-284.)

In *Manufacturers Life*, this Court pointed to a series of Court of Appeal decisions barring UCL actions based on the UIPA. (*Manufacturers Life*, *supra*, 10 Cal.4th at pp. 283-284.) *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1493-1494 (*Safeco*), the first in this line of cases, noted that in *Moradi-Shalal*, the Supreme Court had determined that private actions were legislatively prohibited under the UIPA. As a result, the Court of Appeal in *Safeco*

had "no difficulty in deciding the Business and Professions Code provides no toehold for scaling the barrier of *Moradi-Shalal*." (*Ibid.*) Consistent with *Safeco*, other Court of Appeal decisions have also held that the UCL cannot be used to circumvent the legislative bar to private actions under the UIPA. (See *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592, 1598 (*Maler*); *Industrial Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1093, 1096 (*Industrial Indemnity*); *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1070.)

Even prior to *Manufacturers Life*, this Court had adopted the rationale of these Court of Appeal decisions (*Safeco*, *Maler* and *Industrial Indemnity*) to foreclose UCL claims. (See *Rubin*, *supra*, 4 Cal.4th at pp. 1199-1202 [UCL could not be used to sue for conduct protected by litigation privilege codified in Civil Code section 47, subdivision (b)].)

Federal courts also have adhered to this rule in considering whether federal statutes can serve as bases for California UCL claims. (*Hartless v. Clorox Co.* (S.D. Cal., Nov. 2, 2007, No. 06CV2705) 2007 WL 3245260, *4 (*Hartless*) [plaintiff could not maintain UCL claim based on the Federal Insecticide, Fungicide, and Rogenticide Act ("FIFRA") because Congress had considered and rejected private actions to enforce FIFRA]; *Banga v. Allstate Ins. Co.* (E.D. Cal., Mar. 31, 2010, No. 5-08-1518) 2010 WL 1267841, *3 [plaintiff failed to state UCL claim because a "violation of 15 U.S.C. § 1681m cannot serve as the predicate for a UCL claim" as that

section contains "a bar to private suit"]; see also *Almond Hill School v. U.S. Dept. of Agriculture* (9th Cir. 1985) 768 F.2d 1030, 1035-1036 (*Almond Hill*) [section 1983, which like the UCL allows parties to sue for violations of other statutes, could not be used to pursue FIFRA claim because Congress had prohibited a private action under FIFRA].)

Both California and federal authorities therefore have uniformly held that, when a legislative body has prohibited private enforcement of a statute, that statute cannot serve as a basis for a cause of action under the UCL's unlawful prong.

2. Congress Has Prohibited Private Enforcement Of TISA

As the Court of Appeal in this case recognized, Congress has prohibited private enforcement of TISA. When Congress enacted TISA, it initially created an enforcement regime that included both administrative enforcement and a private right of action. The private right of action was included in the statute's "Civil Liability" provision, section 4310. That section entitled individual account holders to sue for TISA violations and obtain "actual damages" resulting from such violations. It also provided for civil penalties in "individual actions" and damages in class actions limited to the lesser of $500,000 or 1 percent of the net worth of the depository institution guilty of the TISA violation. Section 4310 provided a right to bring

private TISA actions in both federal and state courts.[1] In 1996, however, Congress repealed the private right of action in section 4310, effective September 30, 2001. (Pub.L. No. 104-208, § 2604(a), (Sept. 30, 1996), 110 Stat. 3009-470.)

As the Court of Appeal noted, Congress's repeal of the civil liability provision of TISA means that the only remedy under TISA and Regulation DD after September 2001 is administrative enforcement as set forth in 12 U.S.C. § 4309. As of September 30, 2001, the repeal statute "entirely eliminated the cause of action [under section 4310], thereby releasing banks from future claims of private parties to recover actual and statutory damages for TISA violations." (*Schnall v. Amboy Nat. Bank* (3rd Cir. 2002) 279 F.3d 205, 209, fn. 2 (*Schnall*) ["priveate parties may no longer sue for violations of TISA"]; *Barnes v. Fleet Nat. Bank, N.A.* (1st Cir. 2004) 370 F.3d 164, 169, fn. 4 ["The provision of TISA granting a private right of action . . . was repealed on September 30, 2001"].)

The repeal not only eliminated *direct* private enforcement under TISA, it also prohibited *indirect* private enforcement. (*Gunther v. Capital One, N.A.* (E.D.N.Y. 2010) 703 F.Supp.2d 264, 271 (*Gunther*).) In *Gunther*, the plaintiff alleged that TISA's disclosure requirements had been incorporated into his account agreement. (*Id.*

---

[1] "Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within 1 year after the date of the occurrence of the violation involved." (Former 12 U.S.C. § 4310 subd. (e).)

at p. 270.) Plaintiff conceded that he could not bring a private action under TISA, but argued he nevertheless could sue for breach of the contract incorporating those TISA provisions. (*Ibid.*) The district court disagreed, concluding that "to permit a breach of contract suit based on TISA's substance would frustrate Congress's indication that TISA be enforced exclusively by public entities" and "would impermissibly undermine Congress's expressed intent that TISA be enforced by a regulatory agency and not private citizens." (*Id.* at pp 270-271.)

As explained, Plaintiffs cannot rely on a statute as a predicate for their UCL claim if private enforcement of that statute has been foreclosed. Here, Congress has foreclosed private enforcement of TISA after September 2001 by repealing the private right of action provisions in the statute. (See *City of Irvine v. Southern California Ass'n of Governments* (2009) 175 Cal.App.4th 506, 522 [Legislature's deletion of a statutory provision providing certain remedy reflects its intent to preclude that remedy].) Unlike other statutes that are silent regarding the availability of a private action, here Congress has spoken clearly by repealing TISA's civil liability provision as of September 30, 2001. Congress's repeal of the private right of action provision in TISA conclusively establishes its intent to bar private enforcement of TISA and its implementing regulation—either directly or indirectly. (See *Central Delta Water Agency v. State Water Resources Control Bd.* (1993) 17 Cal.App.4th 621, 633 ["that the Legislature chose to omit a provision from the final version of a statute which was included in an earlier version

constitutes strong evidence that the act as adopted should not be construed to incorporate the original provision."]; see also *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 28 ["'The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision.'"]; *Almond Hill, supra*, 768 F.2d at pp. 1037-1038 [Congress's "explicit rejection of a proposed amendment to authorize private suits" under FIFRA was "a strong indication that Congress was opposed to private actions to enforce the provisions of FIFRA."].)

TISA's subsequent legislative history reinforces the conclusion that Congress intended to prohibit private enforcement of TISA. In March 2001, six months prior to the time that a private right of action under TISA would cease to exist, a bill was introduced in Congress to keep the civil liability provision of TISA in place, essentially to repeal the repeal statute. Congress, however, rejected this bill, thereby reaffirming its intent to repeal's TISA's civil liability provision. (*Rose, supra,* 200 Cal.App.4th at p. 1451.)

In sum, under these authorities, all private enforcement of TISA after September 2001 is prohibited, whether directly through the assertion of a cause of action under TISA or indirectly through the use of other statutes like the UCL. (*Schnall, supra,* 279 F.3d at p. 209, fn. 2; *Almond Hill, supra*, 768 F. 2d at p. 1035; *Gunther, supra*, 703 F.Supp.2d at pp. 270-271; *Hartless, supra*, 2007 WL 3245260 at *3-4.)

3. The Court Of Appeal's Decision Applies Established Law To Plaintiffs' Complaint

In this case, the Court of Appeal applied this uniform body of law to the allegations of Plaintiffs' complaint. The Court of Appeal began from the well-established premise that a UCL claim cannot be predicated on a statute whose private enforcement is foreclosed. This conclusion is based squarely on this Court's decisions in *Manufacturers Life*, *Cel-Tech*, *Rubin*, and *Stop Youth Addiction* as well as the numerous Court of Appeal decisions consistent with that precedent. The Court of Appeal also applied well-settled principles of statutory interpretation by concluding that Congress's repeal of TISA's civil enforcement provision, as well as Congress's subsequent rejection of a bill to keep the civil liability provision in place, reflect a legislative intent not to permit private enforcement of TISA. Indeed, numerous federal courts have reached this same conclusion. These harmonious lines of California and federal authorities inexorably lead to the conclusion the Court of Appeal reached—that Congress's repeal of TISA's civil liability provision constitutes a categorical bar to Plaintiffs' attempt to enforce TISA through the UCL.

It bears emphasis that enforcing *TISA* is exactly what Plaintiffs are attempting to do here with their UCL claim. As the Court of Appeal recognized, Plaintiffs' complaint is based solely on alleged violations of TISA's technical provisions. (*Rose*, *supra*, 200 Cal.App.4th at pp. 1451-1452.) Plaintiffs do not deviate from that

position in their petition. According to Plaintiffs, Bank of America engaged in unlawful conduct under the UCL by not providing the specific detailed disclosures required by TISA. (See Petition for Review ("Petn.") at 5 ["Plaintiffs' case seeks to enforce disclosures identical to those imposed by TISA."].)

The Court of Appeal thus correctly perceived that, by using the UCL to sue for violations of TISA's specific, technical requirements, Plaintiffs are attempting a classic "end run" around a legislative prohibition of private enforcement. The Court of Appeal blocked that end run, concluding that Congress's rejection of private suits to enforce TISA forecloses Plaintiffs' attempt to accomplish that precise result through the UCL. In this regard, the Court of Appeal did no more than apply existing California UCL law to the specific factual context alleged in Plaintiffs' complaint. (*Rose*, *supra*, 200 Cal.App.4th at p. 1452.) The Court of Appeal's decision therefore does not represent any alteration of California law. Nor does it conflict with prior precedent. Indeed, far from threatening uniformity, the opinion straightforwardly applies settled law to the particular factual allegations of Plaintiffs' complaint. There is therefore no sound basis for this Court to grant review.

B. Review Also Is Not Warranted Because The Court Of Appeal's Decision Is Not Premised On A Preemption Analysis And Because Such An Analysis Is Irrelevant To The Issues In This Appeal

The issues on which Plaintiffs seek review in this Court are whether the preemption "savings clause" in TISA "explicitly preserves claims under state laws" such as the UCL, and whether California courts are required to "give effect" to that savings clause by allowing UCL claims to go forward notwithstanding Congress's bar of private actions to enforce TISA.[2] (Petn. at 1-2.) Plaintiffs contend that by affirming the dismissal of their UCL claim, the Court of Appeal allowed the UCL to be preempted by TISA. (Petn. at 2.) But, the Court of Appeal's holding is not premised on a preemption analysis and the preemption arguments that form the basis of Plaintiffs' petition for review are irrelevant to the Court of Appeal's decision. As such, the issues raised in the petition do not furnish grounds for review.

Plaintiffs claim that the Court of Appeal opinion "holds that the repeal of the federal private right of action for violations of [TISA] results in the preemption of a state cause of action under the

---

[2] TISA's preemption provision states: "The provisions of this chapter do not supersede any provisions of the law of any State relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts, except to the extent that those laws are inconsistent with the provisions of this chapter, and then only to the extent of the inconsistency." (12 U.S.C. § 4312.)

UCL." (Petn. at 2.) This is not true. The Court of Appeal's decision is not based on preemption. In fact, the opinion does not discuss preemption at all. As explained, the Court of Appeal held that Plaintiffs' UCL claim is barred under California law because it is predicated on a statute whose private enforcement is foreclosed. The Court of Appeal's holding rests on long-standing California case law regarding the requisites for maintaining a claim under the UCL. It has nothing to do with federal preemption.

Indeed, Plaintiffs subvert their own characterization of the Court of Appeal's decision when they acknowledge in the petition that the opinion does not "discuss or analyze the preemption clause" of TISA. (Petn. at 4.) This is correct. Plaintiffs fail to realize, however, that the Court of Appeal did not "discuss or analyze the preemption clause" of TISA because it is completely irrelevant to the issue presented in this appeal in two important respects.

First, that Congress has not preempted the field regulated by TISA is a separate question from whether Congress intended to bar private enforcement of TISA. As noted, TISA's civil liability provision, section 4310, initially permitted private actions in both federal and state courts. Congress's repeal of that provision thus precludes direct enforcement of TISA through private suits in both federal and state courts. TISA's preemption savings clause simply means Congress left states free to adopt their own laws similar to TISA. But Congress's intent with respect to preemption of state laws regulating bank disclosures is not the same as, and should not be

confused with, its intent to foreclose private enforcement of TISA itself.

Likewise, the lack of TISA preemption is irrelevant to the requirements for stating a UCL cause of action under California law. Whether California allows use of the UCL to enforce statutes whose private enforcement is barred is unaffected by those statutes' preemptive effect. The absence of preemption means only that nothing prevents California from adopting laws similar or even identical to TISA; it does not mean that California must permit enforcement of TISA through its own laws like the UCL. As explained, California has defined the requirements for asserting a UCL claim, and one of those requirements is that such a claim must be predicated on a statute under which private enforcement is not precluded. While the absence of preemption means California is free to adopt state statutes consistent with the provisions of TISA, it does not mean it is *required* to do so.

Plaintiffs argue that because Congress left TISA's preemption clause unchanged when it repealed the civil liability provision, an inference arises that Congress did not intend to preclude enforcement of TISA through the UCL. (Petn. at 3-4.) Here, again, Plaintiffs confuse Congress's intent with respect to preemption with Congress's intent with respect to whether private individuals can sue for TISA violations. As explained, the two issues are not the same—just because the UCL is not preempted by TISA does not mean that the UCL may be utilized to enforce TISA in the face of Congress's

foreclosure of private suits. Boiled down to its essence, Plaintiffs are confusing the effect of federal law (preemption) with the effect of California law (the requirements for stating a cause of action under the UCL).[3]

For these reasons, there is no conflict between *Rose* and *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463 (*Smith*), cited by Plaintiffs. In *Smith*, deposit account holders alleged false and misleading advertising, violation of the UCL, and violation of the Consumer Legal Remedies Act arising from a bank's changes to their account terms in contravention of the bank's own marketing materials. (*Smith, supra*, 135 Cal.App.4th at pp. 1468-1469.) Later, the plaintiffs asserted that the same conduct violated Regulation DD. (*Id.* at p. 470.) The trial court entered judgment for the bank based on federal preemption under the National Bank Act and Office of the Comptroller of the Currency ("OCC") regulations addressing National Bank Act preemption. (*Id.* at p. 1469.) Similarly, the issue on appeal was National Bank Act preemption and not whether Regulation DD

---

[3] Plaintiffs argue that "[i]n failing to cite or discuss the preemption clause" of TISA, the Court of Appeal held "that federal preemption clauses are irrelevant in determining the availability of UCL relief." (Petn. at 3.) However, since the Court of Appeal did not consider the preemption issue, no holding can be inferred from its silence on that issue. (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278 ["an opinion is not authority for a proposition not therein considered"] [internal quotation marks omitted].) In any event, as demonstrated herein, in this case TISA's preemption clause is in fact irrelevant to whether Plaintiffs have stated a cause of action under the UCL as a matter of California law.

could serve as a predicate for UCL action. (See *id.* at p. 1477.) Indeed, the bank did "not argue on appeal that [the] alleged violations of OCC regulations could not, as a matter of law, constitute predicate acts underlying [the plaintiffs'] UCL cause of action." (*Id.* at pp. 1481-1482.) Instead, the bank argued that plaintiffs' UCL cause of action premised on Regulation DD violations was preempted by OCC regulations addressing National Bank Act preemption. (*Id.* at p. 1482.)

Smith therefore did not involve a challenge to a UCL claim based on the prohibition of private enforcement of TISA or any other statute. Thus, *Smith* does not address whether a UCL claim may be premised on TISA in light of Congress's repeal of TISA's civil liability provision. *Rose*, in turn, does not address the National Bank Act preemption issue addressed in *Smith*. Because there is no conflict between these two decisions, *Smith* does not furnish any basis for review either.

IV.
CONCLUSION

The Court of Appeal's decision is consistent with and does not alter well-settled California law. Further, it is not based on and does not implicate any preemption analysis. Accordingly, the petition should be denied.

DATED: January 19, 2012.

REED SMITH LLP

By Margaret M. Grignon
Margaret M. Grignon
Attorneys for Defendant and
Respondent *Bank Of*
America, N.A.

Certification of Word Count Pursuant To California Rules Of Court, Rule 8.504

I, Margaret M. Grignon, declare and state as follows:

1. The facts set forth herein below are personally known to me, and I have first hand knowledge thereof. If called upon to do so, I could and would testify competently thereto under oath.

2. I am one of the appellate attorneys principally responsible for the preparation of the Petition for Review in this case.

3. The brief was produced on a computer, using the word processing program Microsoft Word 2003.

4. According to the Word Count feature of Microsoft Word 2003, the brief contains 5,246 words, including footnotes, but not including the table of contents, table of authorities, and this Certification.

5. Accordingly, the brief complies with the requirement set forth in Rule 8.504, that a brief produced on a computer must not exceed 8,400 words, including footnotes.

I declare under penalty of perjury that the forgoing is true and correct and that this declaration is executed on January 19, 2012, at Los Angeles, California.

Margaret M. Grignon

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071-1514. On January 19, 2012, I served the following document(s) by the method indicated below:

ANSWER TO PETITION FOR REVIEW

☐ by transmitting via facsimile on this date from fax number 213.457.8080 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

☐ by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below. A signed proof of service by the process server or delivery service will be filed shortly.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

☐ by transmitting via email to the parties at the email addresses listed below:

PLEASE SEE ATTACHED SERVICE LIST.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 19, 2012, at Los Angeles, California.

Rebecca R. Rich

SERVICE LIST

Harold Rose v. Bank of America, et al., S199074
Court of Appeal Case No. B230859
(Los Angeles Superior Court Case No. BC433460)

Henry H. Rossbacher (SBN 60260) James Cahill (SBN 70353) Talin K. Tenley (SBN 217572) The Rossbacher Firm 811 Wilshire Boulevard, Suite 1650 Los Angeles, CA 90017-2666 Telephone: 213.895.6500 Facsimile: 213.895.6161 Email: h.rossbacher@rossbacherlaw.com j.cahill@rossbacherlaw.com t.tenley@rossbacherlaw.com	Attorneys for Plaintiffs and Appellants *Harold Rose and Kimberly Lane*
Clerk for the Hon. Jane Johnson Los Angeles Superior Court Central Civil West 600 S. Commonwealth Avenue, Dept. 308 Los Angeles, CA 90005 Telephone: 213.351.8601	Case No. BC433460
Clerk, Court of Appeal Second Appellate District Division Two 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013-1213	Case No. B230859
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 South Spring Street Fifth Floor, North Tower Los Angeles, CA 90013 Telephone: 213.897.2000	Served Pursuant to Bus. & Prof. Code 17209 and Rule 8.29
Office of the District Attorney Appellate Division 320 W. Temple St. #540 Los Angeles, CA 90012 Telephone: 213.974.5911	Served Pursuant to Bus. & Prof. Code 17209 and Rule 8.29