No. S199074

In the Supreme Court of the State of California

HAROLD ROSE AND KIMBERLY LANE,

Plaintiffs and Appellants,

vs.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

ANSWER BRIEF ON THE MERITS

After A Decision By The Court Of Appeal,
Second Appellate District, Division Two, Case No. B230859

On Appeal From A Judgment Of Dismissal
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)

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

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Full Name of Interested Entity/Person	Party	Non-Party	Nature of Interest
N.B. Holdings Corporation	[ ]	[X]	Parent Company of Bank of America and wholly owned subsidiary of Bank of America Corp.
Bank of America Corporation	[ ]	[X]	Parent Company of N.B. Holdings Corporation
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
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Submitted by: Scott H. Jacobs

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I.

INTRODUCTION

Despite the one-dimensional focus of Plaintiffs' brief, this case does not implicate federal preemption jurisprudence. Instead, it involves a modest and established limit on the reach of California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) ("UCL"), which arises from the required deference to the intent of legislative bodies. Thus, contrary to Plaintiffs' suggestion, the question on this appeal is not whether the federal Truth In Savings Act (12 U.S.C. § 4301 et seq.) ("TISA") preempts California's UCL, but instead whether California and federal law permit a UCL claim predicated exclusively on TISA where Congress has expressly barred private enforcement of TISA. Under both California and federal law, the consequence of Congress's express rejection and elimination of TISA's private-right-of-action provision forecloses both direct and indirect private enforcement of TISA. Indeed, neither California nor federal law authorizes the end run around congressional intent that would result from allowing indirect private enforcement of TISA through a UCL claim.

Plaintiffs' complaint set forth a single cause of action under the unlawful and unfair prongs of the UCL based solely and exclusively on Bank of America's alleged failure to comply with certain provisions of TISA and its implementing regulation, Regulation DD. Although TISA as originally enacted included a private-right-of-action provision, in 1996, Congress repealed this

civil liability provision based on its findings that private enforcement of TISA placed unnecessary and undue burdens on banks and government regulators alike and that enforcement of the statute should reside exclusively with government agencies. And, then, before the repeal became effective in 2001, Congress confirmed its intent to bar private enforcement of TISA by rejecting a proposed amendment to continue the private right of action. These legislative actions demonstrate, without question, Congress's intent to prohibit private enforcement of TISA. Under both California and federal law, this declared congressional intent means that TISA may not be indirectly enforced through a UCL claim.

In affirming the dismissal of Plaintiffs' complaint, the Court of Appeal for the Second Appellate District, Division 2 properly looked not to federal preemption jurisprudence, but to the California and federal law that directly addresses the specific question at hand—namely, whether a UCL claim may be based on a statute where the enacting legislative body has forbidden private enforcement of that statute. The Court of Appeal held that because Congress has expressed a clear intent to prohibit private enforcement of TISA, California and federal law prohibit Plaintiffs from using the UCL to sue for alleged violations of TISA's notice requirements.

Plaintiffs have nothing meaningful to say about this California and federal law or the conclusion that follows when these authorities are applied to Plaintiffs' UCL claim based exclusively on

TISA. Indeed, Plaintiffs make no effort to explain why dismissal of their complaint is not warranted under the body of law cited in the Court of Appeal's decision, and instead simply ignore that law and try to shoehorn that decision into a federal preemption analysis.

Under Plaintiffs' view, a UCL claim may be predicated on a federal statute even where Congress has expressed an intention to bar its private enforcement, provided that the statute contains a savings clause allowing state laws not inconsistent with the federal statute. That view, however, conflicts with longstanding California law that forecloses UCL claims in which indirect enforcement of a statute through the UCL would contravene legislative intent, as well as federal law that gives deference to congressional intent by setting limits on the circumstances in which federal statutes may be indirectly enforced. There is no justification for departing from settled law in the manner Plaintiffs suggest. Nor does Plaintiffs' preemption argument provide any basis to override the body of California and federal law that forbids an end run around Congress's bar on private enforcement of TISA and requires the dismissal of Plaintiffs' complaint.

To begin, the preemption issues that occupy virtually all of Plaintiffs' brief are not relevant to the question at hand. Application of TISA's savings clause means only that TISA leaves California free to adopt its own laws that are similar or even identical to TISA. While California may choose to include a private right of action in a TISA-like statutory scheme even if Congress did

not include a private right of action in the federal statutory scheme, Plaintiffs ignore that California has no TISA-like statute. In fact, California repealed its TISA-like statute when Congress enacted TISA and did not reenact it when Congress repealed TISA's private right of action. In that regard, the unlawful prong of the UCL is not a state statute similar to TISA. Rather, it is a statute used to enforce TISA itself. And, that indirect enforcement will engender the same problems that Congress sought to avoid by the repeal of TISA's private right of action.

Nor is there any conflict between TISA's savings clause that allows California to enact consistent statutes and the legal principles that prohibit indirect private enforcement of a statute through a UCL claim where the enacting legislative body has expressed an intention to bar private enforcement. That is because the preemption question and the indirect enforcement question implicate Congress's intent on two different issues—namely, (1) did Congress authorize the States to enact their own statutes similar to a federal statute and (2) has Congress foreclosed private enforcement of a federal statute. While Plaintiffs' brief goes on at length about deference to congressional intent, it ignores entirely Congress's intent on the relevant issue—private enforcement of TISA.

In the end, this case involves an attempt to assert a UCL claim predicated on a statute Congress has expressly declared may not be privately enforced. Both California law and federal law mandate dismissal of that claim. This Court's precedents make clear

that although the UCL is sweeping in scope, there are limits on the type of statute that may be borrowed as the predicate for a UCL claim. Under California law, where the enacting legislative body has foreclosed private enforcement of a statute, that statute may not serve as a predicate for a UCL claim. Similarly, under federal law, where Congress has indicated that a statute may not be privately enforced, private enforcement of the statute—both direct and indirect—is foreclosed.

Plaintiffs' UCL complaint is based exclusively on alleged violations of TISA and Regulation DD. Allowing a UCL claim to be based on TISA would contravene Congress's express intent that TISA may not be privately enforced. The Court of Appeal correctly held that Congress's prohibition against private enforcement of TISA may not be circumvented in this manner. The legal principle underlying the authorities upon which the Court of Appeal decision is based—the rule of law respecting deference to legislative judgments—is well-established. There is no reason to depart from that rule and, accordingly, this Court should affirm the judgment.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Plaintiffs' Complaint Alleges A Single Cause Of Action For Violation Of The UCL Based Exclusively On Alleged Violations Of TISA And Its Implementing Regulation

Harold Rose and Kimberly Lane, 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 [2011 WL 5831324] (*Rose*), review granted Mar. 14, 2012, S199074.) Plaintiffs' complaint asserted a single cause of action under the UCL based on alleged violations of TISA. 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, quoting Appellants' Opening Brief, filed in Court of Appeal, p. 1.)[1]

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[1] The Board of Governors of the Federal Reserve System ("the Board of Governors") "promulgated 'Regulation DD' (12 C.F.R. § 230.1 et seq. (2005) . . . to implement the disclosure requirements for national banking associations set forth in [TISA]." (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1477.) Regulation DD was enacted pursuant to the congressional authority delegated to the Board of Governors under 12 U.S.C. § 4308. (See 12 C.F.R. § 230.1.)

Plaintiffs allege that Bank of America failed to properly notify them of increases in fees applicable to their deposit accounts in violation of TISA. (*Rose*, *supra*, 200 Cal.App.4th at p. 1450.) 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.*) 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." (*Id.* at p. 1445.)

B. After The Trial Court Sustains Bank Of America's Demurrer With Leave To Amend, Plaintiffs Elect Not To Amend And A Judgment Of Dismissal Is Entered

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 may not sue for TISA violations under the guise of a UCL claim. (*Rose*, *supra*, 200 Cal.App.4th at p. 1446.) Plaintiffs countered that their UCL claim was not subject to dismissal 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, concluding that the UCL may not 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 appealed to the Court of Appeal. (*Ibid.*)[2]

C. Applying Settled Principles Of California And Federal Law, The Court Of Appeal Affirms The Trial Court's Dismissal Of Plaintiffs' Complaint

In a unanimous published opinion, the Court of Appeal affirmed the judgment of dismissal in favor of Bank of America. 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 this Court's precedents, a UCL claim is prohibited when the enacting legislative body has expressed an intent to prohibit private enforcement of a statute. (*Rose*, *supra*, 200 Cal.App.4th at p. 1448 ["'If the Legislature has permitted

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[2] When, as here, a demurrer is sustained with leave to amend but the plaintiff elects not to amend, it is presumed on appeal that the complaint states as strong a case as is possible. (*Giraldo v. California Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231, 252.) As such, the "judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by the demurrer." (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585; *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 457.)

certain conduct or considered a situation and concluded no action should lie, courts may not override that determination.'"] [quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182 (*Cel-Tech*)]; see also *id.* at p. 1449 ["If standing to bring a private action for enforcement of a statute is legislatively or judicially abolished, no UCL claim can be maintained to enforce the statute."].)

The Court of Appeal then 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 unlawful prong to sue for alleged TISA violations. (*Rose*, *supra*, 200 Cal.App.4th at pp. 1450-1451.) The Court explained why this conclusion gives the required deference to legislative judgments: "When a legislative body expresses its intent to prohibit enforcement of a law through a private action, a plaintiff may not 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.'" (*Id.* at p. 1448, quoting *Cel-Tech*, *supra*, 20 Cal.4th at p. 182 and *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 283-284 (*Manufacturers Life*).)

The Court of Appeal further concluded that Plaintiffs' claim under the UCL's unfair prong—which also was based solely on alleged violations of TISA—properly was dismissed for these same reasons. (*Rose*, *supra*, 200 Cal.App.4th at pp. 1452-1453.)

The Court of Appeal therefore affirmed the judgment of dismissal in favor of Bank of America. (*Id.* at p. 1453.)

This Court granted Plaintiffs' petition for review to resolve the following issue: Can a cause of action under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) be predicated on an alleged violation of the Truth in Savings Act (12 U.S.C. § 4301 et seq.), despite Congress's repeal of the private right of action initially provided for under that Act? As explained below, the answer to this question is no.

III.

ARGUMENT

A. This Court's UCL Precedents, And Federal Precedents Governing Private Enforcement Of Federal Statutes, Forbid Indirect Private Enforcement Of A Statute Through The UCL When The Legislative Body Enacting The Statute Has Expressed The Intent To Bar Private Enforcement

Under both California and federal law, the enacting legislative body's intent to bar private enforcement of a statute forecloses indirect private enforcement of that statute through a UCL claim. Although this Court's precedents provide that a UCL claim may be predicated on a violation of a statute that does not specifically provide for a private right of action, they also provide that such a claim may not be premised on any statute under which private enforcement is barred or prohibited. This rule applies

whether the plaintiff is attempting to sue for violation of the UCL's unlawful prong or its unfair prong.

As Plaintiffs acknowledge (Opening Brief on the Merits ["OBOM"] 11), Congress has foreclosed private enforcement of TISA. Consequently, application of both California law and federal law to Plaintiffs' allegations yield the same result: because Congress has barred private enforcement of TISA, any private enforcement of TISA—whether direct or indirect—is forbidden and thus no UCL claim may be premised on alleged violations of TISA. The Court of Appeal, therefore, correctly affirmed the dismissal of the putative class action brought by Plaintiffs, asserting a UCL claim based exclusively on alleged violations of TISA.

1. California Law Does Not Permit UCL Causes Of Action Predicated On Statutes Whose Private Enforcement Has Been Foreclosed

The UCL defines "unfair competition" as including "any unlawful, unfair or fraudulent business act or practice . . . ." (Bus. & Prof. Code, § 17200.) 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 may 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*) [a statute that is silent as to whether individual actions may be brought may be used as the basis of a UCL claim].)

But as this Court has held on several occasions, the extent to which other statutes may serve as the basis for UCL claims has limits. This Court first addressed the legislative limits imposed on the UCL's reach—barring a UCL claim that would contravene a legislative body's intent—when it held in *Rubin* that a plaintiff could not maintain a solicitation claim against attorneys under the UCL's unlawful prong, even though solicitation was prohibited by Business and Professions Code sections 6152 and 6153. (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1199-1200 (*Rubin*).) This Court reasoned that premising a UCL claim on allegations regarding conduct that came within the litigation privilege of Civil Code section 47, subdivision (b) would contravene the Legislature's intent. In arriving at its conclusion, this Court compared attempts to plead around the immunity conferred by the Legislature with attempts to avoid the Legislature's foreclosure of private actions to enforce California's Unfair Insurance Practices Act, Insurance Code section 790.03 ("UIPA"), which the Court of Appeal had repeatedly held was forbidden. (*Id.* at pp. 1201-1202.)[3] Concluding that those

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[3] In those cases, the Court of Appeal held that the UCL cannot be used to circumvent the legislative bar to private actions under the UIPA. (*Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1493-1494 (*Safeco*) [stating that it had "no difficulty in deciding the Business and Professions Code provides no toehold for scaling the barrier of *Moradi-Shalal*, [*supra*, 46 Cal.4th 287]" and

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Court of Appeal decisions involved an "an analogous context," this Court adopted their rationale and ultimately held that the Legislature's decision to foreclose private enforcement of a statute "may not be circumvented by recasting the action as one under Business and Professions Code section 17200." (*Id.* at p. 1202; see also *id.* at p. 1201 [a plaintiff may not "'plead around' absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute"].)

Then, in *Manufacturers Life*, this Court again recognized that a legislative body's intent regarding another statute can foreclose borrowing that statute as a predicate for a UCL claim. In that case, 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 the UIPA. (*Manufacturers Life, supra,* 10 Cal.4th at pp. 283-284.) As this Court noted, it had previously held that, although the UIPA's text is silent on 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. (*Id.* at pp. 267-269, 283-284; see also *Moradi-Shalal v.*

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explaining that allowing plaintiffs to state a cause of action under the UCL would render the legislative prohibition against individual UIPA actions "meaningless"]; *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*); see also *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1070.)

Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287, 300 (*Moradi-Shalal*).) This Court affirmed the Court of Appeal's conclusion that because the UIPA's legislative history demonstrated the Legislature's 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; see also *id.* at p. 267 ["The Court of Appeal recognized that the UIPA does not create a private right of action for violations of its provision [citations omitted], and that a plaintiff may not 'plead around' that limitation by casting a cause of action based on a violation of the UIPA as one brought under the [UCL]."]; *id.* at pp. 283-284 [legislative prohibition of private causes of action cannot "be avoided by characterizing the claim as one under the [UCL]]").)[4]

Next, in *Cel-Tech*, this Court reiterated what it had said in *Rubin* and *Manufacturers Life* about the importance of deferring to legislative intent regarding private enforcement of a statute alleged as a predicate for a UCL claim, explaining that "courts may not override [legislative] determination[s] under the guise of the unfair competition law." (*Cel-Tech*, *supra*, 20 Cal.4th at pp. 182-

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[4] In *Manufacturers Life*, this Court again pointed to the series of Court of Appeal decisions barring UCL actions based on the UIPA. (*Manufacturers Life*, *supra*, 10 Cal.4th at pp. 283-284 [citing *Safeco*, *supra*, 216 Cal.App.3d 1491; *Maler*, *supra*, 220 Cal.App.3d 1592; *Industrial Indemnity Co.*, *supra*, 209 Cal.App.3d 1093].)

184.) This Court began by noting that "[a]lthough the unfair competition law's scope is sweeping, it is not unlimited." (*Id.* at p. 182.) Accordingly, "[i]f the Legislature has . . . considered a situation and concluded no action should lie, courts may not override that determination." (*Ibid.*) Citing *Rubin*, this Court explained that "[a] bar against an action 'may not be circumvented by recasting the action as one under [the UCL].'" (*Ibid.*, quoting *Rubin*, *supra*, 4 Cal.4th at p. 1202.) In other words, a plaintiff may not use a UCL claim as a means to "plead around" a legislative determination foreclosing private enforcement of another statute "by recasting the cause of action as one for unfair competition." (*Ibid.*, quoting *Manufacturers Life*, *supra*, 10 Cal.4th at p. 283.)

Two of this Court's more recent decisions reiterate the principle that a legislative body's intentions regarding a statute used as a predicate for a UCL claim will foreclose a UCL claim that would contravene a legislative body's intentions regarding private enforcement of the predicate statute. In *Stop Youth Addiction*, this Court once again recognized the continuing viability of the legal principle that the "UCL cannot be used to state a cause of action the gist of which is absolutely barred under some other principle of law." (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 566.) Indeed, this Court made clear that attention must be paid to what the

legislative body that enacted the predicate statute has to say about private enforcement of that statute. (*Id.* at p. 562, fn. 5.)[5]

This Court's more recent decision in *In re Farm Raised Salmon Cases* likewise recognizes the critical difference between efforts to base a UCL claim on a statute whose private enforcement has been foreclosed and those based on a statute whose private enforcement is authorized. (*In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077 (*Farm Raised Salmon*).) In that case, the plaintiff asserted a UCL claim predicated on a California statute paralleling the federal Food, Drug, and Cosmetic Act ("FDCA"). (*Farm Raised Salmon, supra*, 42 Cal.4th at p. 1084.) While Congress has barred private enforcement of the FDCA, the parallel California statute contains a private-right-of-action provision. This Court acknowledged a UCL claim could not be based on the FDCA itself because Congress has barred private enforcement of that statute. (See *id.* at p. 1093.) But that did not resolve the question because the plaintiff's claim in that case was based on the California statute (the Sherman Law), which *did* contain a private right of action.

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[5] As this Court explained: "Lucky's briefing blurs what are really two separate arguments against the existence of a UCL cause of action for violations of Penal Code section 308. On the one hand, whether the UCL requires that the underlying statute have a direct right of action turns primarily on the Legislature's intent in enacting and amending the UCL. On the other hand, whether the Legislature intended that section 308 not serve as the basis for a UCL action turns primarily on the Legislature's intent in enacting section 308 and (according to Lucky) the STAKE Act." (*Stop Youth Addiction, supra*, 17 Cal.4th at p. 562, fn. 5.)

(*Ibid.* ["[I]t is undisputed that section 337 [of the FDCA] bars private enforcement of the FDCA—no one contends section 343-1 [of the FDCA, permitting states to adopt requirements identical to the FDCA's,] alters that conclusion. However, plaintiffs do not seek to enforce the FDCA. Their action is based on the violation of *state law* . . . ."].)

Having recognized the principle that a UCL claim may not be based on a statute where private enforcement of that statute has been foreclosed, this Court in *Farm Raised Salmon* turned to the question of whether private enforcement of California's Sherman Law was allowed. (*Farm Raised Salmon, supra*, 42 Cal.4th at p. 1087 ["Whether or not section 337 [of the FDCA] precludes private claims predicated on state law is the crux of the present litigation . . . ."].)[6] If it were, the plaintiff's UCL claim based on

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[6] It was in this context that *Farm Raised Salmon* addressed federal preemption—that is, to resolve the question of whether Congress's decision to preclude private enforcement of the FDCA preempted a private right of action under a state statute paralleling the FDCA, not to address whether the FDCA preempts the UCL. (*Farm Raised Salmon*, *supra*, 42 Cal.4th at p. 1095 ["The crux of defendants' preemption argument is that plaintiffs' private state claims are precluded because they improperly seek to enforce the FDCA in violation of section 337(a). . . . Plaintiffs do not seek to enforce the FDCA; rather, their deceptive marketing claims are predicated on violations of obligations imposed by the Sherman Law, something that state law undisputedly allows."].) Here, by contrast, the question is not whether California could enact a statute paralleling TISA that includes a private right of action or whether the UCL could be used to enforce such a state statute. Rather, Plaintiffs' UCL claim here is based exclusively on a purported violation of the federal statute itself, not a parallel state statute.

the California statute could proceed. Concluding that there was no federal law barrier to the private-right-of-action provision in the Sherman Law, this Court concluded that a UCL claim could be predicated on an alleged violation of that state statute. (*Id.* at p. 1099.)

In sum, this Court's most recent decisions addressing statutes that may be borrowed as predicates for UCL claims recognize the paramount importance of the intent of the legislative body that enacted the statute sought be used as the basis for a UCL claim and the limit placed on that borrowing when a legislative body has foreclosed private enforcement of a predicate statute.

2. Under Federal Law, When Congress Has Expressed An Intent To Bar Private Enforcement Of A Statute, Both Direct And Indirect Enforcement Is Foreclosed

The foundational principle underlying the California rule of law barring UCL claims based on statutes whose private enforcement has been foreclosed—namely, that courts should defer to the expressed will of legislative bodies—also is manifest in federal law. And federal authorities governing the analysis of private enforcement of a federal statute apply with particular force here because the intent of Congress regarding private enforcement of TISA is paramount—indeed, controlling. (See *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n* (1981) 453 U.S. 1, 13 (*Middlesex*) [determining Congress's intentions on

private enforcement is an inquiry based upon "the intent of the Legislature"].)

Under federal law, if Congress has rejected the possibility of private suits to enforce a federal statute, then both direct individual enforcement and indirect individual enforcement—via another law, but predicated on the federal statute—are barred. (See, e.g., *Almond Hill School v. U.S. Dept. of Agriculture* (9th Cir. 1985) 768 F.2d 1030, 1035, 1038 (*Almond Hill*) [no indirect enforcement of Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") through a claim under 42 U.S.C. § 1983]); *Vinson v. Thomas* (9th Cir. 2002) 288 F.3d 1145, 1155 (*Vinson*) [no indirect private enforcement of ADA and Rehabilitation Act through a claim under 42 U.S.C. § 1983]).[7]

Such express congressional rejection of a private remedy for violations of a statute—and concomitant bar on indirect private enforcement—may be discerned from: (1) an express provision in the statute barring individual and indirect enforcement (*Vinson*, *supra*, 288 F.3d at p. 1155 ["An alleged violation of federal law may not be vindicated under § 1983, . . . where . . . Congress has foreclosed citizen enforcement in the enactment itself . . . ."] [quotation marks and citations omitted]); (2) the

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[7] Section 1983 may be used as a vehicle to sue for violations of constitutional rights and federal statutes. (See *Alexander v. Sandoval* (2001) 532 U.S. 275, 300-301 (*Alexander*).)

legislative history of the statute demonstrating that Congress considered and rejected a private-right-of-action provision (*Almond Hill*, *supra*, 768 F.2d at p. 1038 ["explicit rejection of a proposed amendment to authorize private suits is a strong indication that Congress was opposed to private actions to enforce the provisions of [the federal statute]"]); (3) the existence of a comprehensive scheme for administrative enforcement (*id.* at p. 1035 ["[a]n intent to foreclose private remedies may be inferred if the remedial devices in the statute are 'sufficiently comprehensive' to suggest exclusivity [of administrative enforcement]"] [quoting *Middlesex*, *supra*, 453 U.S. at p. 20]; see also *Alexander*, *supra*, 532 U.S. at pp. 289-290 [finding no private enforcement of § 602 of Title VI of Civil Rights Act of 1964 in light of comprehensive administrative enforcement scheme]);[8] or (4) the repeal of a pre-existing private right of action [*Gunther v. Capital One, N.A.* (E.D.N.Y. 2010) 703 F.Supp.2d 264, 270 (*Gunther*)].[9]

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[8] The United States Supreme Court in *Alexander* further explains that private rights of action under federal statutes must be created by Congress. (*Alexander*, *supra*, 532 U.S. at pp. 286-287 ["The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."] [citations omitted].)

[9] California law, too, looks to various sources when determining the legislative body's intent regarding private enforcement. As the Court of Appeal correctly noted, a legislative body's intent regarding the availability of private enforcement may be expressed

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Almond Hill illustrates the federal limitations on indirect enforcement of a statute whose private enforcement has been foreclosed in a manner directly relevant to this case. In *Almond Hill*, *supra*, 768 F.2d at p. 1035, the plaintiffs purported to bring an action under 42 U.S.C. § 1983 to enforce FIFRA. Section 1983 provides a federal cause of action for damages or equitable relief against state officials who deprive individuals of their federal rights. (*Ibid.*) Like the UCL, section 1983 may be used to indirectly enforce another statute even if that statute does not furnish a private remedy under its terms. (*Ibid.*)

In considering whether FIFRA could serve as a basis for a section 1983 claim, the Ninth Circuit looked for Congress's intentions regarding private enforcement of FIFRA. (*Almond Hill*, *supra*, 768 F.2d at pp. 1035-1036.) The court began by explaining that section 1983 is available to enforce a federal statute—even if that statute does not include a private right of action—unless Congress has "act[ed] in a manner that would suggest a prohibition on private enforcement." (*Id.* at p. 1035.) Applying settled federal law, the Ninth Circuit went on to explain that an "intent to foreclose private remedies" (*ibid.*, citing *Middlesex*, *supra*, 453 U.S. at p. 20) "may be found when the relevant act establishes 'detailed

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in various ways, including "from the text of the statute or legislative history" or it might be "implicit in the legislative scheme." (*Rose*, *supra*, 200 Cal.App.4th at p. 1449, citing *Moradi-Shalal*, *supra*, 46 Cal.3d at p. 300.)

procedures for administrative and judicial review'" (*ibid.*, quoting *Department of Educ., State of Hawaii v. Katherine D. By and Through Kevin and Roberta D.* (9th Cir. 1983) 727 F.2d 809, 820 (*Katherine D.*), cert. den. (1985) 471 U.S. 1117; see also *Vinson*, *supra*, 288 F.3d at p. 1155 ["An alleged violation of federal law may not be vindicated under § 1983 . . . where . . . 'Congress has foreclosed citizen enforcement in the enactment itself, either explicitly, or implicitly by imbuing it with' its own comprehensive remedial scheme."].) Consequently, the Ninth Circuit concluded, "the use of section 1983 to enforce FIFRA would undermine the 'balance, completeness and structural integrity' of the Act's express enforcement scheme." (*Almond Hill*, *supra*, 768 F.2d at p. 1037.)

The Ninth Circuit found further support for the conclusion that Congress intended to foreclose private enforcement in FIFRA's legislative history, particularly in Congress's consideration and "explicit[ ] reject[ion] [of] the use of private suits to enforce" FIFRA, concluding that Congress's rejection of direct private suits under FIFRA "foreclose[d] the use of section 1983 as a means to enforce" the statute. (*Almond Hill*, *supra*, 768 F.2d at p. 1038; see also *Pennhurst State School and Hospital v. Halderman* (1981) 451 U.S. 1, 28; *Katherine D.*, *supra*, 727 F.2d at p. 820.)

In sum, both California and federal authorities have uniformly held that, when the enacting legislative body has expressed its intention to bar private enforcement of a statute, there can be no indirect private enforcement of the statute. Because a

federal statute is involved here, California law directs courts to look at Congress's intent regarding private enforcement. As explained in the next section, Congress has spoken clearly and unequivocally in declaring that private enforcement of TISA is forbidden. And that means that there can be no indirect private enforcement of TISA—and thus TISA may not serve as a basis for a cause of action under the UCL's unlawful prong.

3. Congress Has Foreclosed Private Enforcement Of TISA

There is no dispute that 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.[10] (12 U.S.C. former § 4310.) But in 1996 Congress passed a statute repealing the entire "Civil Liability" section effective September 30, 2001. (Pub.L. No. 104-208, § 2604(a), (Sept. 30, 1996), 110 Stat. 3009-470 ["Effective as of the end of the 5-year period beginning on the date of enactment of this Act [September 30, 1996], section 271 of the Truth in Savings Act (12 U.S.C. [§] 4310) is repealed."].) By adopting the repeal statute in 1996, Congress expressly rejected a

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[10] TISA's "Civil Liability" provision, former section 4310, permitted private individual account holders to sue in state or federal court for TISA violations and obtain "actual damages" resulting from such violations, 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. (12 U.S.C. former § 4310.)

private right of action for enforcement of TISA after September 2001.

Thus, unlike other statutes that are silent on the question of private enforcement, Congress has spoken clearly and expressly by repealing TISA's civil liability provision—conclusively establishing its intent to bar private enforcement of TISA and its implementing regulation. (See *Royal Co. Auctioneers, Inc. v. Coast Printing Equipment Co., Inc.* (1987) 193 Cal.App.3d 868, 873 ["When the Legislature deletes an express provision of a statute, it is presumed that it intended to effect a substantial change in the law."]; *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].)

The legislative history of Congress's repeal of TISA's civil liability provision—which shows *why* Congress rejected the private enforcement provision of TISA—illuminates why indirect enforcement of TISA would undermine Congress's objectives. The repeal was enacted as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, which constituted Title II of the Omnibus Consolidated Appropriations Act of 1997 (the "Consolidated Appropriations Act"). (Pub. L. No. 104-208 (Sept. 30, 1996) 110 Stat. 3001.) The repeal initially had been proposed in both houses of Congress on March 30, 1995, as part of two separate bills: in the House of Representatives, the Financial

Institutions Regulatory Relief Act of 1995 ("the House Bill") (CRS Summary, H.R. No. 1362, 104th Cong., 1st Sess. (1995)); and, in the Senate, the Economic Growth and Regulatory Paperwork Reduction Act of 1995 ("the Senate Bill") (CRS Summary, Sen. No. 650, 104th Cong., 1st Sess. (1995)). Both bills proposed repealing TISA's civil liability provision for essentially the same reason: to implement a unified administrative enforcement scheme.

The House Report on the House Bill explained that the civil liability provision was being repealed in order to lessen the burden on regulatory agencies responsible for implementing the statute. (H.R.Rep. No. 104-193, 1st Sess., p. 104 (1995).)[11] It explained that "[t]he imposition of civil liability for violation of the TISA ha[d] resulted in financial institutions seeking numerous clarifications and commentaries from the Federal Reserve Board increasing the regulatory burden for both the industry and the Board." (*Ibid.*) The report further explained that the repeal of TISA's civil liability provision was intended to lessen this burden, while leaving federal banking agencies the "authority to take administrative actions to enforce TISA." (*Ibid.*)

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[11] The House Bill was initially introduced by Representative Doug Bereuter on March 30, 1995 as H.R. 1362 (see CRS Summary, H.R. No. 1362, 104th Cong., 1st Sess. (1995)), then reintroduced on June 15, 1995 by Representative James Leach as H.R. 1858 (see CRS Summary, H.R. No. 1858, 104th Cong., 1st Sess. (1995)).

Similarly, the Senate Committee on Banking, Housing, and Urban Affair's report on the Senate Bill explained that the repeal was being proposed "[i]n light of the fact that TISA compliance ha[d] been integrated into the industry's compliance programs" as an effort to reduce the regulatory burden and attendant liability facing banks. (Sen. Rep. No. 104-185, 1st Sess., p. 21 (1995).) It explained that the amendment was being offered to provide for "an administrative enforcement scheme" of TISA. (*Ibid.*)[12]

Ultimately, the Senate Bill was incorporated into the Consolidated Appropriations Act as Title II. However, because there were some differences between the House and Senate versions of the Consolidated Appropriations Act, the proposed Act was referred to conference for resolution of the discrepancies. Inclusion of the sunset provision—under which TISA's civil liability provision would not be eliminated for 5 years—was the compromise reached. (Conference Report, H.R.Rep. No. 104-863, 2d Sess., p. 483 (1996).) Both the House and Senate adopted the proposed compromise.

The Economic Growth and Regulatory Paperwork Reduction Act, as enacted, represented a "significant regulatory

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12 *See Alexander*, *supra*, 532 U.S. at pp. 288-289 (holding individuals could not sue for violations of section 602 of Title VII, 42 U.S.C. § 2000d-1, because that provision of the statute contained regulations that could be enforced only by federal agencies).

relief for the Nation's banks" (Remarks of Rep. Leach, Debate on H.R. No. 3610, H12094 (1996)) while "not unravel[ing] consumer protections laws of the past 25 years" (Remarks of Rep. Vento, Debate on H.R. No. 3610, H12095 (1996); see also Pres. Clinton, Statement on Signing the Omnibus Consolidated Appropriations Act, 1997 (Sept. 30, 1996) ["The bill also makes important changes in the Nation's banking laws. It assures the continued soundness of the bank and thrift deposit insurance system and it includes significant regulatory relief for financial institutions. At my insistence, the bill does not erode the protection of consumers and communities."].)

Congress's intent to prohibit private enforcement of TISA was further confirmed when it declined to adopt a proposed amendment to TISA that would have restored the private-right-of-action provision. In March 2001, six months before the private right of action under TISA was set to sunset, the "Truth in Savings Enhancement Act of 2001" (HR 1057, proposed) was introduced in an effort to keep the civil liability provision of TISA in place—essentially to repeal the repeal statute. (*Rose, supra,* 200 Cal.App.4th at p. 1451). Congress, however, rejected this proposed legislation, thereby reaffirming its intent to bar private enforcement of TISA. (*Ibid.*)

Like the 1996 legislation repealing TISA's private right of action, Congress's 2001 rejection of the proposed amendment constitutes a statement of congressional intent to bar direct and indirect private enforcement of TISA. (See *City of Santa Cruz v.*

Municipal Court (1989) 49 Cal.3d 74, 88 [noting well-settled proposition that when the Legislature has expressly considered and rejected a specific provision, the Court "need not speculate . . . as to the Legislature's intentions . . . ."]; *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 *Hamdan v. Rumsfeld* (2006) 548 U.S. 557, 558 ["Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpretation."]; *Doe v. Chao* (2004) 540 U.S. 614, 615 [concluding that a certain category of damages could not be awarded under the Privacy Act where the "drafting history shows that Congress cut out the very language in the bill that would have authorized such damages"].)

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 power to enforce compliance with TISA was vested exclusively with specified federal agencies. With respect to an insured depository institution such as Bank of America, section 4309 authorizes the Comptroller of the Currency to enforce compliance with TISA's requirements, as provided in section 1818 of Title 12. (12 U.S.C. § 4309(a)(1)(A); 12 C.F.R. § 230.9(a).) Section 1818 authorizes the Comptroller of

the Currency to institute administrative proceedings culminating in cease-and-desist orders where the "the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation" (12 U.S.C. § 1818(b)(1)), and to issue temporary cease-and-desist orders that are effective upon service on the depository institution (12 U.S.C. § 1818(c)). Section 1818 further provides that the agency may impose tiered penalties upon the depository agency for violation of any law, regulation or order, and the agency may apply to the district court for enforcement of any effective and outstanding notice or order. (12 U.S.C. § 1818(i).)

Recently, section 4309 was amended by the Consumer Financial Protection Act of 2010. (Pub.L. No. 111-203 (Jul. 21, 2010) Title X, § 1100B(1), 1100H, 124 Stat. 2110, 2113 ("CFPA").) The CFPA created the Bureau of Consumer Financial Protection and authorized the Bureau also to enforce TISA. (CFPA, §§ 1011-1012 [codified at 12 U.S.C. §§ 5491-5492]; CFPA, § 1100B [amending 12 U.S.C. § 4309(a)(3)].)

Subtitle E of the CFPA gives the Bureau of Consumer Financial Protection broad authority to enforce federal consumer financial protection laws, including TISA. Subtitle E vests authority in the Bureau to conduct investigations and administrative discovery related to alleged violations of the federal consumer financial protection laws (CFPA, § 1052 [codified at 12 U.S.C. § 5562]), conduct hearings and adjudication proceedings to ensure or enforce

compliance with such laws (CFPA, § 1053 [codified at 12 U.S.C. § 5563]), and to "commence a civil action against [any person who violates such laws] to impose a civil penalty or to seek all appropriate legal and equitable relief including a permanent or temporary injunction" (CFPA, § 1054 [codified at 12 U.S.C. § 5564(a)].) This comprehensive administrative enforcement scheme indicates a congressional intent to foreclose private enforcement.

In sum, by enacting the repeal statute, Congress expressly considered and rejected a private right of action under TISA, thereby clearly expressing its intent to bar any private enforcement of the statute. Therefore, under California and federal law—where the question turns on legislative intent—indirect enforcement of TISA through a UCL claim is forbidden. Any other conclusion would impermissibly contravene Congress's intent.

Indeed, the circumstances here provide ample proof of a clear congressional intent to foreclose private enforcement of TISA—either direct or indirect: (1) Congress expressly rejected a private right of action under TISA, as evidenced by the repeal statute (*Vinson*); (2) the legislative history evidences Congress's intention to foreclose private enforcement of TISA and reveals that Congress did so for very specific reasons (*Almond Hill*); and (3) TISA includes a complex and comprehensive administrative enforcement scheme and the legislative history reveals that Congress concluded that administrative enforcement was preferable to private

enforcement (*Alexander* and *Almond Hill*).[13] It accordingly is clear that Congress's repeal of TISA's private-right-of-action provision did more than bar direct private enforcement of TISA. Instead, it reflected a congressional intent to categorically bar all private enforcement of TISA—direct or indirect.

A deeper look at Congress's decision to repeal TISA's private enforcement provision provides even further support for the conclusion that TISA may not be indirectly enforced through the UCL. To begin, because Congress enacted legislation that *repealed* TISA's private enforcement provision, Congress has not been silent on the question of private enforcement. Instead, through the repeal, Congress *expressly* indicated its intention to foreclose private enforcement. The legislative history of the repeal statute further reveals that Congress acted for a reason—that is, it made a considered decision to eliminate private enforcement of TISA in order to eliminate the burdens such enforcement imposed on the banks and government agencies alike. At the same time, Congress was careful to ensure that TISA's provisions would be fully and adequately enforced through a complex and detailed administrative

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[13] Indeed, a federal court relied on these legal principles to hold that Congress's repeal of TISA's private right of action barred indirect enforcement of TISA through a contract claim based exclusively on alleged violations of TISA. (*Gunther*, *supra*, 703 F.Supp.2d at pp. 270, 271 ["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"].)

enforcement scheme—something that Congress concluded was preferable to private enforcement.

4. The Court Of Appeal's Decision Applied Established Law To Affirm The Dismissal Of Plaintiffs' UCL Claim Based Exclusively On TISA

A straightforward application of California and federal law regarding the private enforcement of statutes, generally, and indirect enforcement of a statute via a UCL claim, specifically, fully supports the Court of Appeal's decision here. As explained above, this Court's opinions recognize that where the enacting legislative body has expressed an intent to bar private enforcement of a statute, a UCL claim may not be based on alleged violations of that statute. Federal law, likewise, forbids indirect enforcement of a statute where Congress has expressed its intention to bar private enforcement of the statute.

The foundational policy underlying California and federal law on this question is the same—the enacting legislative body's intent to bar private enforcement of a statute cannot be circumvented under the guise of indirect private enforcement. The Court of Appeal applied this settled law and policy and afforded the required deference to Congress's decisions when it affirmed the dismissal of Plaintiffs' complaint, which sought to privately enforce TISA in the face of Congress's express decision to bar private enforcement.

The Court of Appeal began its analysis by invoking the well-established principle—reflected in this Court's decisions in *Rubin*, *Manufacturers Life*, *Cel-Tech*, *Stop Youth Addiction*, and *Farm Raised Salmon*—that a UCL claim may not be predicated on a statute whose private enforcement has been foreclosed by the legislative body that enacted the statute. (*Rose*, *supra*, 200 Cal.4th at p. 1448 ["When a legislative body expresses its intent to prohibit enforcement of a law through a private action, a plaintiff may not plead around an absolute bar to relief simply by recasting the cause of action as one for unfair competition."] [citations and internal quotation marks omitted].) Accordingly, because California UCL jurisprudence requires an examination of whether the enacting legislative body has expressed an intention to foreclose private enforcement of the statute borrowed as the basis of a UCL claim, the Court of Appeal went on to consider what Congress had to say about private enforcement of TISA.

When ascertaining Congress's intent regarding private enforcement of TISA, the Court of Appeal looked to federal law. (*Rose*, *supra*, 200 Cal.App.4th at p. 1451 ["'private rights of action to enforce federal law must be created by Congress [and so] [t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy"] [quoting and citing *Alexander*, *supra*, 532 U.S. at pp. 286-287].) That was the proper approach because: (1) this Court's UCL precedents expressly direct court's to determine the enacting legislative body's intent regarding private

enforcement (see, *supra*, at pp. 11-18); and (2) it is a well-settled principle of California law that courts should look to federal authorities when ascertaining Congress's intent. (See *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, 352 ["we are bound by decisions of the United States Supreme Court in the construction and application of federal law"]; *RCJ Medical Services, Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1006 ["Because we are considering a federal statute, we follow rules of statutory construction enunciated by the United States Supreme Court."].) Indeed, the Supremacy Clause requires this deference to federal law and Congress's intent regarding private enforcement of TISA. (U.S. Const., art. VI, cl. 2.)

Applying well-settled principles of statutory interpretation, the Court of Appeal concluded that Congress had indicated its intent to prohibit private enforcement of TISA "when it enacted a sunset clause that expressly repealed the statute allowing individuals to enforce TISA [and] 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.) This clearly indicated a congressional intent not to permit private

enforcement of TISA—either direct or indirect. (See *Rose*, *supra*, 200 Cal.App.4th at pp. 1451-1452.)[14]

Looking at the governing federal law, the Court of Appeal noted that Congress's "repeal of [the civil liability provision of TISA] 'entirely eliminated the . . . cause of action [under section 4310], thereby releasing banks from future claims of private parties" and that, after September 2001, the only remedy available under TISA and Regulation DD is administrative enforcement as set forth in 12 U.S.C. § 4309. (*Rose*, *supra*, 200 Cal.App.4th at p. 1447, quoting *Schnall v. Amboy Nat. Bank* (3rd Cir. 2002) 279 F.3d 205, 209, fn. 2 ["private parties may no longer sue for violations of TISA"].)

Given this, the Court of Appeal held that because Congress has unquestionably barred private enforcement of TISA, California and federal law preclude TISA from serving as a predicate for a UCL claim because such a suit would constitute an

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[14] Indeed, federal courts have rejected efforts to base UCL claims on federal statutes whose private enforcement has been foreclosed by Congress. (*Hartless v. Clorox Co.* (S.D. Cal., Nov. 2, 2007, No. 06CV2705) 2007 WL 3245260, *3-4 [citing, e.g., *Stop Youth Addiction* and *Cel-Tech* and holding that plaintiff could not maintain UCL claim based on 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 ["violation of 15 U.S.C. § 1681m [of Fair Credit Reporting Act] cannot serve as the predicate for a UCL claim" because that section contains "a bar to private suit"].)

"end run" around the limits Congress set on who may enforce TISA, as well as the reasons for those limits. (*Rose*, *supra*, 200 Cal.App.4th at p. 1451 ["Allowing private plaintiffs to recover on a UCL claim based solely on TISA violations would constitute an 'end run' around the limits on enforcement set by Congress."].)

For all of these reasons, the Court of Appeal's decision aligns with this Court's reasoning in *Stop Youth Addiction*. The Court of Appeal came to a different conclusion on the viability of Plaintiffs' UCL cause of action here than the one this Court reached regarding the UCL cause of action asserted in *Stop Youth Addiction*, but not because the Court of Appeal departed from this Court's precedents or applied a different view of the law. Rather, this case involved circumstances that are far different from those in *Stop Youth Addiction*. That case involved a UCL cause of action based on alleged violations of section 308 of the California Penal Code and the Stop Tobacco Access to Kids Enforcement ("STAKE") Act (Bus. & Prof. Code, § 22950 et seq.)—statutes that are silent on private enforcement. (*Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 553.) By contrast, this case involves a UCL cause of action based on alleged violations of TISA where Congress has expressed its intention to prohibit private enforcement of TISA.

In *Stop Youth Addiction*, the defendant argued that by asserting a UCL cause of action based on Penal Code section 308 and the STAKE Act, the plaintiff was trying to "circumvent the absence of a private right of action under Penal Code [section] 308"

and the STAKE Act. (*Stop Youth Addiction, supra*, 17 Cal.4th at p. 566.) This Court disagreed, reasoning that where a statute does not contain a private right of action, but there is no indication that the Legislature intended to bar its private enforcement, is different than where the Legislature has expressly barred private enforcement. (*Id.* at p. 565.)[15] Moreover, as this Court noted, although the language of the Penal Code says nothing about private enforcement, the Legislature had not been silent on the issue: the legislative history of the UCL indicated that the Legislature intended to make the UCL available for private enforcement of Penal Code provisions. (*Id.* at p. 567.)[16] Thus, the absence of any evidence of a legislative intent to bar private enforcement actions under section 308 and the STAKE Act, together with the evidence of a legislative intent to allow use of the UCL to enforce penal laws, led this Court to hold in *Stop Youth Addiction* that the two statutes could serve as predicates for a UCL unlawful claim.

As explained, the opposite is true here: Congress has clearly spoken and expressed its intent to foreclose private

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[15] At the same time, this Court reaffirmed the rule stated in its earlier decisions that a legislative body's bar on private enforcement of a statute makes the statute unavailable to serve as a predicate for a UCL claim. (*Stop Youth Addiction, supra*, 17 Cal.4th at pp. 562-564.)

[16] It was for this reason that Court had no trouble rejecting the defendant's argument that the Penal Code's comprehensive remedial scheme provided the exclusive means for enforcing the Code's provision. (*Stop Youth Addiction, supra*, 17 Cal.4th at p. 567.)

enforcement of TISA. And, Bank of America does not argue that the absence of a private right of action in TISA forecloses a UCL action; nor is the Court of Appeal's decision based on such a conclusion. To the contrary, the Court of Appeal's analysis began by acknowledging that a UCL cause of action may be based on alleged violations of a statute that does not contain a private right of action—and the absence of a private of action in TISA's statutory text was not the reason the Court of Appeal found that Plaintiffs' UCL cause of action was barred. The Court of Appeal's decision instead was based on Congress's *express* foreclosure of private enforcement of TISA, which the Court of Appeal correctly held could not be circumvented by indirect enforcement through a UCL cause of action based exclusively on alleged violations of TISA.

There is no reason to depart from either the Court of Appeal's conclusion that Plaintiffs may not maintain a UCL claim based exclusively on alleged violations of TISA or the reasoning used to reach that decision. Sound policy and foundational legal principles requiring deference to the intent of legislative bodies are the cornerstones of the California and federal decisions relied upon by the Court of Appeal. Here, Congress has clearly stated that there shall be no private enforcement of TISA—and it made the decision to foreclose private enforcement in order to alleviate burdens on federal agencies. Because a UCL cause of action enforces the predicate statute, a UCL unlawful prong claim based on TISA would impose the exact same burdens on the federal regulatory agencies as a direct action under TISA.

In the end, when the enacting legislative body has barred private enforcement of a statute, allowing a party to use the UCL to sue for the same conduct covered by that statute would circumvent the legislative body's intent. Neither California law nor federal law countenances that result. By attempting to use the UCL to sue for violations of TISA's specific, technical requirements, Plaintiffs attempted a classic end run around Congress's prohibition of private enforcement of TISA. The Court of Appeal properly blocked that end run.

B. Plaintiffs May Not Circumvent Congress's Bar Of Private TISA Actions By Relying On Allegations That The Bank's Purported TISA Violations Were "Unfair"

Plaintiffs' claim under the unfair prong of the UCL, like their claim under the unlawful prong, is based explicitly and solely on Bank of America's purported violations of TISA. Indeed, in support of their contention that the Bank's conduct was "unfair," Plaintiffs' complaint does not contain a single factual allegation unrelated to the specific, technical TISA and Regulation DD notice requirements. And, Plaintiffs' arguments on this appeal are based only on their contention that Congress's bar on private enforcement of TISA does not bar their UCL claim. For the reasons discussed above, the Court of Appeal correctly rejected Plaintiffs' argument in this regard. Like their unlawful prong allegations, Plaintiffs' unfair prong allegations seek to enforce TISA—and thus Congress's bar on

private enforcement of TISA applies with equal force to foreclose Plaintiff's claim under the UCL's unfair prong.[17]

C. TISA's Savings Clause And Plaintiffs' Preemption Argument Do Not Override Congress's Specific Intent To Bar Private Enforcement Of TISA

Plaintiffs' brief does not even mention—let alone address—the California and federal authorities discussed above, which show why the Court of Appeal was correct to conclude that approval of Plaintiffs' UCL claim would amount to an impermissible end run around Congress's expressed intention to bar private enforcement of TISA. Nor do Plaintiffs argue that the Court of Appeal misconstrued or wrongly applied these authorities (which it did not). Instead, Plaintiffs try to change the question at issue to a federal preemption analysis. This approach is flawed in multiple respects and provides no reason to reverse the Court of Appeal's decision in this case or to more generally alter the California law that affords the required deference to legislative bodies when

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[17] The Court of Appeal also explained why Plaintiffs' complaint did not allege "immoral, unethical, or oppressive" conduct and why its allegations did not allege a substantial consumer injury that could not have been reasonably avoided. Plaintiffs' brief does not take issue with these conclusions and thus any arguments in this regard have been abandoned. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 616, pp. 647-648 ["Ordinarily, contentions not raised in appellant's opening brief are deemed waived."]; *Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 753, fn. 2 ["'An appellant abandons an issue by failing to raise it in the opening brief.'"].)

evaluating the legal viability of UCL claims based on borrowed statutes.

To begin, the preemption discussion that is the sole focus of Plaintiffs' brief is not relevant to the question at hand. Application of TISA's savings clause means only that TISA leaves California free to adopt its own laws that are similar or even identical to TISA. While, under a preemption analysis, a state could include a private right of action in a TISA-like state statutory scheme even if Congress did not include a private right of action in the federal scheme, California has no TISA-like statute. Thus, unlike in *Farm Raised Salmon*, the question here is not whether a federal statute preempts a private right of action contained in a state statute paralleling the federal statute such that the state statute may not be used as the basis for a UCL claim. Instead, the question is whether the UCL unlawful prong may be used indirectly to enforce TISA itself.

The gist of Plaintiffs' argument is that by affirming the dismissal of their UCL claim, the Court of Appeal effectively concluded that TISA preempted the UCL. (See, e.g., OBOM 6 [asserting that Court of Appeal "interpreted [the] repeal [of TISA's private right of action] as proof that Congress intended to deprive states of all rights to bring an action under consistent state statutes"]; see also OBOM 1 ["The Bank says this suit is prohibited because TISA preempts it."].) That is not true. The Court of Appeal's decision is not based on preemption. In fact, the opinion does not

discuss preemption at all. Nothing in the Court of Appeal's opinion even suggests that California could not enact a TISA-like statute (and even include a private right of action in that state statute), which also could be indirectly enforced by the UCL. Instead, as explained, the Court of Appeal held that Plaintiffs' UCL claim is barred under California law because their UCL claim is predicated on a statute whose private enforcement is foreclosed. This holding rests on longstanding California case law regarding the requisites for maintaining a claim under the UCL and on the federal law governing private enforcement of federal statutes. In short, it has nothing to do with federal preemption.[18]

Nor does the Court of Appeal's decision implicate TISA's savings clause, much less contravene its scope or efficacy. There is no conflict between the legal principles that control the enforcement of a federal statute's savings clause—allowing California (or any other state) to enact laws consistent with the federal statutory scheme—on the one hand, and the legal principles that prohibit indirect private enforcement of a statute through a UCL claim where a legislative body has expressed an intention to bar

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[18] Plaintiff also relies on an Office of the Comptroller of the Currency ("OCC") Advisory Letter promulgated in 2002 to support their argument. (OBOM 37.) The letter has no relevance to the issue here. TISA is nowhere mentioned in the OCC letter. In addition, the advisory letter does not concern bank *deposit accounts*, much less say anything about the ability of account holders to bring unfair competition claims based on TISA. Instead, the letter concerns banks' practices regarding the extension of *consumer credit*.

private enforcement, on the other. That is because the preemption question and the indirect enforcement question are separate questions that each must be answered separately, by looking at Congress's intent on two different issues—namely, (1) did Congress authorize the States to enact their own laws similar to a federal statute and (2) has Congress foreclosed private enforcement of a federal statute.

This Court acknowledged this distinction in *Farm Raised Salmon*. There, this Court began by noting that it was "undisputed that section 337 [of the FDCA] bars private enforcement of the FDCA" and that the FDCA's savings clause did not "alter[ ] that conclusion." (*Farm Raised Salmon*, *supra*, 42 Cal.4th at p. 1093.) Because the "plaintiffs [did] not seek to enforce the FDCA" and "[t]heir action [was] based on the violation of *state law*," the question was whether the states may include private-right-of-action provisions in their own FDCA-like statutes. (*Ibid.*, original italics) This Court then went on to explain that "[c]oncluding that section 343-1 [the FDCA's saving clause] permits private claims based on state law does not affect section 337's preemption of efforts to enforce the FDCA." (*Ibid.*)[19]

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[19] Here, by contrast, the California Legislature repealed the state's TISA-like statute when Congress enacted TISA and did not reenact the state statute when Congress repealed TISA's private right of action. (Fin. Code, former §§ 855, 865-865.10, repealed by Stats. 1993, ch. 107, §§ 1-2.)

Thus, Plaintiffs' assertions that the UCL is not inconsistent with TISA and that TISA's savings clause "saves state enforcement of [a state's] consistent state laws and permits causes of action under the UCL" simply misses the mark because it does not address the question that is relevant here. (See OBOM 1.) TISA's preemption savings clause means that Congress left states free to adopt their own laws similar to TISA and to enforce those state laws as the state saw fit. But TISA's savings clause, which authorizes states to enact their own laws regarding TISA's subject matter, does not directly speak to the UCL. The UCL is not a state TISA-like statute—instead, in the circumstances of this case, it is a vehicle to enforce TISA itself. (See *Stop Youth Addiction*, *supra*, 17 Cal.4th at p. 572 [stating that "specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition" and that the "UCL affords both 'specific' and 'preventive' relief, restitution being an example of the former . . . (see Civ. Code, § 3367) and an injunction an example of the latter (*id.*, § 3368)."].) There is a vast difference between a state's enforcement of its *own* TISA-like statute, which TISA's savings clause permits, and utilization of a state cause of action (like the UCL) to enforce TISA *itself* in the face of Congress's clear rejection of private enforcement of TISA. 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, which is the gist of Plaintiffs' UCL action here.[20]

Second, while Plaintiffs' brief goes on at length about the settled principle that deference must be given to congressional intent, Plaintiffs ignore Congress's intent on the relevant issue—namely, private enforcement of TISA. Adoption of Plaintiffs' approach—which asks whether there is "preemption" (i.e., whether the savings clause saves a UCL claim) rather than whether a legislative body has barred private enforcement of a borrowed statute—would amount to a sea change in the California law discussed above, which looks to the enacting legislative body's intent regarding private enforcement when deciding whether a statute may be indirectly enforced through the UCL. And, any such new rule would be wrong as a matter of law. Holding that a federal statute's savings clause could "save" a UCL claim based on a federal statute like TISA despite the fact that Congress has unequivocally *foreclosed* private enforcement would directly and profoundly contravene congressional intent—something that long-standing California and federal law forbid. In short, the consequences of adopting Plaintiffs' approach would be that a

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[20] The bar on indirect private enforcement of TISA applies with equal force whether the plaintiff attempts to enforce TISA via a UCL claim, another state's statute, or a federal statute such as section 1983. Thus, Bank of America does not argue—and the Court of Appeal did not hold—that the UCL is preempted by TISA, but instead only that individuals cannot enforce it.

legislative body's declaration that a particular statute may not be privately enforced is rendered irrelevant. Both California and federal law forbid that result.

Plaintiffs' more specific preemption arguments can be disposed of easily because each one asks the wrong question and evaluates the Court of Appeal's decision through the lens of the wrong legal principles. The following examples illustrate this.

- Plaintiffs' extended discussion of the presumption against preemption, and the proper interpretation of savings clauses, shows only that California may enact a statute like TISA—something that the Bank does not dispute and the Court of Appeal's opinion does not call into question.

- Because Plaintiffs do not put the focus on Congress's intent on the dispositive issue—private enforcement of TISA—they misread TISA's saving clause when they assert that it provides that "state administrative and civil cases will be allowed to go forward and not be preempted by the [A]ct." (OBOM 13.) The savings clause simply does not say that, and as explained, any such interpretation of the savings clause would ignore Congress's expressions of intent on the specific question of private enforcement of TISA—namely, the 1996 repeal legislation and the 2001 failed bill to restore TISA's civil remedies provision. Likewise, Plaintiffs' criticism of the Court of Appeal for "look[ing] backward to 1996, when Congress . . . repealed a part of TISA, Section 4310, that

provided a complex bank liability scheme that set damages for federal individual and class action suits" (OBOM 5-6) is flawed. The Court of Appeal did exactly what California and federal law instructs—it determined Congress's intent on private enforcement of TISA.

- 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. (OBOM 23.) Here, again, Plaintiffs confuse the question of Congress's intent regarding preemption of state laws covering subject matter addressed in TISA with the question of Congress's intent regarding private enforcement of TISA. 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.

- Plaintiffs' brief includes a lengthy analysis of the United States Supreme Court's opinion in *Chamber of Commerce of U.S. v. Whiting* (2011) ___ U.S. ___, 131 S.Ct. 1968 (*Whiting*) and asserts that the Court of Appeal's decision violates the federal preemption principles embodied in *Whiting*. (OBOM 14-18.) Plaintiffs' assertions in this regard, like the entirety of their preemption argument, are a product of the wrong turn they have taken in framing the question and analyzing the issues involved in

this case. As always, if you ask the wrong question, you get the wrong answer. Here, federal preemption is the wrong question.

Plaintiffs' first contend that the Court of Appeal violated *Whiting's* instruction that the plain language of a federal statute's savings clause, not legislative history, is the touchstone of a preemption analysis. (OBOM 14, 18.) While Plaintiffs' assertion that courts should look first to a statute's plain text is true, that assertion does not undermine the Court of Appeal's approach. As explained, this case does not involve a preemption question and so the Court of Appeal did not construe the savings clause (because it did not need to). And, on the relevant question—Congress's intent regarding private enforcement—the Court of Appeal looked to Congress's express enactment (the repeal statute), not just legislative history. Finally, both California and federal law instruct that Congress's intent regarding private enforcement may be found in the legislative history. (*Lu v. Hawaiian Gardens Casino, Inc.* (2010) 50 Cal.4th 592, 596 [legislative intent to create a private right of action "is revealed through the language of the statute and its legislative history"]; *Moradi-Shalal*, *supra*, 46 Cal.3d at pp. 300-301 [looking to legislative history to ascertain Legislature's intent regarding private enforcement of the UIPA]; *Middlesex*, *supra*, 453 U.S. at pp. 15-18.)

Plaintiffs also contend that the Court of Appeal contravened *Whiting* when it "implied" congressional intent regarding preemption from the fact that it repealed "another" section

of TISA. (OBOM 18.) This assertion, too, is wrong. As a threshold matter, the Court of Appeal correctly focused its analysis on the repeal statute because that is where Congress's intent concerning private enforcement of TISA is found. And, in this regard, the Court of Appeal did not "imply" Congress's intent—instead, it relied upon Congress's express decision to repeal TISA's private enforcement provision. Finally, the Court of Appeal did not rely on the repeal statute to interpret the savings clause, but rather to determine Congress's intent on private enforcement of TISA.

- In support of their preemption argument, Plaintiffs assert that the Court of Appeal's decision in this case is inconsistent with *Washington Mut. Bank, FA v. Superior Court* (1999) 75 Cal.App.4th 773, 783 (*Washington Mutual*). *Washington Mutual*, however, did not address whether a UCL claim may be based on alleged violations of a predicate statute whose private enforcement has been foreclosed. Instead, *Washington Mutual* involved the question of whether the federal Real Estate Settlement Procedures Act ("RESPA") preempted a private right of action in a state statute whose regulatory scheme paralleled RESPA's regulation. (*Ibid.* [rejecting argument that Congress intended to preempt "all private state causes of action simply by enacting a limited provision preempting state laws that are inconsistent with" RESPA].) This is the same question answered by this Court in *Farm Raised Salmon*. (*Farm Raised Salmon*, *supra*, 42 Cal.4th at p. 1087.) The Court of Appeal here, by contrast, did not address the question of whether TISA would preempt a private right of

action in a state TISA-like statute—and it did not need to do so, because Plaintiffs did not invoke any such state statute as a basis for their UCL claim. Nor did the Court of Appeal more generally find that Plaintiff's UCL claim was barred because TISA preempted it.

In sum, nothing in TISA's savings clause or federal preemption jurisprudence undermines the Court of Appeal's conclusion that Plaintiffs may not assert a UCL claim based on violations of TISA because Congress has expressed an intention to bar private enforcement of TISA.

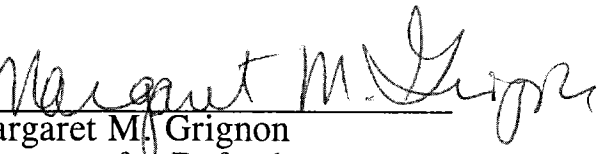
IV.
CONCLUSION

Plaintiffs' UCL claim is based exclusively on alleged violations of TISA. Congress, however, has expressly barred private enforcement of TISA, which means that not only are private parties precluded from bringing suit to enforce the provisions of TISA directly, they also may not use other statutes, such as the UCL, to indirectly enforce TISA through a claim based on alleged violations of TISA. Under settled California and federal law, a UCL claim may not be maintained where the claim is in substance (even if not in form) a claim for violating TISA. In short, because Plaintiffs are suing for violations of TISA, which Congress says may not be enforced by private parties, their UCL claim is barred as a matter of California and federal law. Any other conclusion would disregard Congress's intent in a manner that both California and

federal law forbid. Accordingly, the Court of Appeal properly affirmed the trial court's judgment of dismissal. This Court should affirm the judgment of the Court of Appeal.

DATED: July 16, 2012.

REED SMITH LLP

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

Certification of Word Count Pursuant To California Rules Of Court, Rule 8.504(d)(1)

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 Opening Brief on the Merits 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 12,310 words, including footnotes, but not including the table of contents, table of authorities, and this Certification.

5. Accordingly, the petition complies with the requirement set forth in Rule 8.504(d)(1), that a brief produced on a computer must not exceed 14,000 words, including footnotes.

I declare under penalty of perjury that the forgoing is true and correct and that this declaration is executed on July 16, 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 July 16, 2012, I served the following document(s) by the method indicated below:

ANSWER BRIEF ON THE MERITS
(FILED CONCURRENTLY WITH MOTION FOR JUDICIAL NOTICE; EXHIBITS IN SUPPORT OF MOTION FOR JUDICIAL NOTICE)

☐ 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.

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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 July 16, 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)

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