No. S183703

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARKS, ET AL.,

PLAINTIFFS AND APPELLANTS,

vs.

MBNA AMERICA BANK, N.A.,

DEFENDANT AND RESPONDENT.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G040798
REVERSING A JUDGMENT OF THE
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
CASE NO. 04CC00598
THE HONORABLE GAIL S. ANDLER, JUDGE

RESPONDENT'S OPPOSITION TO PLAINTIFF/APPELLANT'S REQUEST FOR JUDICIAL NOTICE NO. 2

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SERVICE ON THE ATTORNEY GENERAL AND THE DISTRICT ATTORNEY REQUIRED BY CAL. BUS. & PROF. CODE § 17209 AND CAL. RULES OF COURT, RULE 8.29(b)

Defendant and Respondent MBNA America Bank, N.A. ("MBNA")[1] hereby opposes the request of Plaintiff and Appellant Allan Parks ("Parks") that this Court take judicial notice of the purported "fact" that, according to the findings of his counsel's own legal research, "prior to 1913 Congress did not enact any statutes regulating the operational activities of national banks." (Plaintiff/Appellant's Request for Judicial Notice No. 2, § I, footnote omitted.) The request should be denied because (1) it inappropriately requests that the Court take judicial notice of the findings of Parks' counsel's legal research as if they constituted an undisputable fact, when they instead amount to contentions and legal argument; (2) because the research findings sought to be judicially noticed are not relevant to any material issue before the Court; and (3) because Parks did not previously present the request to either the trial court or the Court of Appeal.

A. Only Verifiable Facts Are Subject to Judicial Notice.

Parks notes that Evidence Code § 452 provides that judicial notice may be taken of "'legislative enactments'" of the United States and "'official acts of the legislative ... departments of the United States.'" (RJN No. 2, § II [quoting Evidence Code § 452(b), (c)].) According to Parks, "it is [therefore] proper to take judicial notice of the absence of Congressional statutes." (*Id.*) But Parks provides no authority for this proposition.

Moreover, to support a request for judicial notice of a "fact or proposition," under Evidence Code §§ 453(g), (h), a party must establish that the asserted fact or proposition is indisputable. This may be done by showing that the proffered fact or proposition is either (i) "of such common

[1] Respondent MBNA America Bank, N.A. is now known as FIA Card Services, N.A.

knowledge within the territorial jurisdiction of the court that [it] cannot reasonably be the subject of dispute" or (ii) "not reasonably subject to dispute and [is] capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evidence Code § 452(g), (h).)

Parks does not contend that his asserted "fact" is "of such common knowledge within the territorial jurisdiction of the court that [it] cannot reasonably be the subject of dispute." (*Id.* § 452(g).) Accordingly, Parks has the burden to show that this purported "fact" is "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (*Id.* § 452(h).) To satisfy this burden, Parks must "supply the court with sufficient, reliable and trustworthy sources of information about the matter." (*People v. Maxwell* (1978) 124, 130; *see* Cal. Evid. Code §§ 453, 459.) Parks has not met this burden either.

The only information Parks offers in support of his request for judicial notice is his counsel's declaration that his own research did not reveal any statutes enacted by Congress prior to 1913 regulating the "operational" activities of national banks. (*See* RJN No. 2, § III [Declaration of Michael R. Vachon, Esq. in Support of Motion to Take Judicial Notice].) The declaration does not state what type of research Parks' counsel performed, what database(s) he probed, what search phrases he used, or the amount of time he spent performing his research. The declaration merely states that he "personally researched the issue." (*Id.*) There is no indication of what statutes Parks' counsel reviewed to determine if they regulated the so-called "operational activities" of national banks. Nor is there any indication of how Parks' counsel, upon reviewing a particular statute, determined whether it regulated such activities, which, according to Parks, consist of "a bank's formation of contracts and transactions with its customers, including the rights, obligations, and

remedies attached to the formation of those agreements and performance of those transactions." (*Id.* § I, n.1.)

Parks' counsel's declaration that he was unable to find a statute regulating an ambiguous self-defined type of activity is not sufficient, reliable or trustworthy enough to establish anything as a "fact" – except the proposition that Parks' counsel performed some legal research on the issue. *That* fact is irrelevant to this case. As a practical matter, what Parks is seeking through his request is to transform his arguments and assertions into judicially noticeable "facts." That is an improper use of judicial notice and one not authorized by or permissible under the Evidence Code.

B. The Findings of Parks' Counsel's Legal Research Are Not "Facts" and Are Not Relevant to Any Material Issue in This Case.

Even if Parks' counsel had provided reliable evidence that he performed sufficient research to permit him to determine whether, prior to 1913, Congress enacted any statutes regulating the "operational activities" of national banks, as he defines it, the conclusions of Parks' counsel on that question would not be subject to judicial notice. To make any determination of whether a statute did or did not regulate such "operational activities," Parks' counsel necessarily would have to *interpret* the statute's intended scope, meaning, and effect. But an interpretation of a statute is not a subject of judicial notice. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal. App. 4th 97, 113 ["Although the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputable."], internal citation omitted; *cf. Post v. Prati* (1979) 90 Cal. App. 3d 626, 634-35 ["Interpretation of a statute, however, remains a matter of law . . . ."].) Because Parks' counsel's conclusion that the pre-1913 statutes he may have

reviewed did not regulate national banks' "operational activities" is necessarily a matter of legal interpretation, it is not subject to judicial notice.

Furthermore, the purported findings of Parks' counsel regarding the non-existence of certain statutes prior to 1913 are irrelevant to the issues here under review. To be a proper subject of judicial notice, a matter "must be relevant to a material issue." (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal. 4th 415, 422; see also *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063 ["[J]udicial notice, since it is a substitute for proof, is always confined to those matters which are relevant to the issue at hand."], overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal. 4th 1257.)

Parks asserts that the "fact" that Congress did not enact any statutes regulating the "operational activities" of national banks for 50 years after the National Bank Act ("NBA") was originally enacted in 1863, is relevant because "(1) it demonstrates that when Congress passed the NBA in 1863, it intended that national banks' operational activities would be regulated by State law; and (2) it refutes MBNA's contention, in its Opening Brief on the Merits, that national banking has always been the subject of comprehensive federal regulation." (Parks' RJN No. 2, § I.)

But whether Congress intended that some of a national banks' "operational activities" would be regulated by State law is *not* relevant to the issues presented in this case. MBNA does not contend, as Parks erroneously suggests, that all state law is inapplicable to all national bank "operational activities." Rather, the narrow issue before this Court is whether a *certain* state law – specifically, Civil Code § 1748.9 – is preempted by federal law. Thus, even if Civil Code § 1748.9 could be characterized as regulating a bank's "operational activities" – within the ambiguous meaning of that term assigned to it by Parks – the "fact" that

Congress intended that *some types* of state law regulate *certain* "operational activities" of national banks would not be relevant to the specific issue presented here.

In addition, Parks seeks judicial notice of this asserted "fact" to counter MBNA's argument that, under *Barnett Bank v. Nelson* (1996) 517 U.S. 25, and its progeny, no presumption against preemption applies to the NBA. Parks implicitly contends that unless federal law completely or comprehensively governed banking, the presumption against preemption should apply, despite *United States v. Locke* (2007) 529 U.S. 89. However, Parks posits the wrong standard: under *Locke*, the presumption against preemption does not apply as long as there has been a history of significant federal presence in banking, as numerous courts, federal and state, have found there has been. (MBNA Reply Brief on the Merits at 2-3.) Parks' proffered fact is not germane to application of the relevant standard and, consequently, is irrelevant from any standpoint.

C. A Reviewing Court May Properly Deny a Request for Judicial Notice Not Presented to the Courts Below.

Finally, Parks' request should be denied because he failed to raise it in the trial court or the Court of Appeal. This Court reviews "the judgment of the Court of Appeal. In deciding the question raised by an appeal, a reviewing court will ordinarily look only to the record made in the trial court." (*Brosterhous v. State Bar of California* (1996) 12 Cal. 4th 315, 325.) Indeed, Parks is purporting to seek judicial notice of a "fact." But "facts" need to be in the record from the proceedings below so they can be considered by the lower courts; "facts" are ordinarily not introduced for the first time on appeal.

Parks acknowledges that he did not make his request for judicial notice to the trial court or the Court of Appeal, but offers no explanation why. (See RJN No. 2, § I.) It is therefore proper for this Court to deny

Parks' request. (See *Brosterhous*, 12 Cal. 4th at 325-326 [denying request for judicial notice pursuant to California Evidence Code sections 452 and 459 where the party requesting the Court take judicial notice "put[] forth no reason for its failure to request the trial court and Court of Appeal to take judicial notice"].) As it did in *Brosterhous*, this Court should "properly decline to take judicial notice under Evidence Code sections 452 and 459 of a matter which should have been presented to the trial court for its consideration in the first instance." (*Id.* at 325-326.)

For the foregoing reasons, the Court should deny Parks' request for judicial notice of the findings of his counsel's legal research.

DATED: April 4, 2011

ARNOLD & PORTER LLP

By: _____
LAURENCE J. HUTT
Attorneys for Respondent

PROOF OF SERVICE

Parks, et al. v. MBNA America Bank, N.A. (USA)

I am employed in the County of San Francisco , State of California. I am over the age of 18 and not a party to the above-entitled action. My business address is 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017

On April 4, 2011, I served the foregoing document described as a **RESPONDENT'S OPPOSITION TO PLAINTIFF/APPELLANT'S REQUEST OR JUDICIAL NOTICE NO. 2** by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Michael Vachon Law Office of Michael Vachon 16935 West Bernardo Drive, Suite 175 San Diego, CA 92127-1100 *Counsel for Plaintiffs and Appellants*	District Attorney for the County of Orange 401 Civic Center Drive Santa Ana, CA 92701
Sheldon H. Jaffe Deputy Attorney General Department of Justice 455 Golden Gate Ave., Suite 1000 San Francisco, CA 94102-7004	Clerk of the Court California Superior Court, County of Orange Civil Complex Center 751 West Santa Ana Blvd. Santa Ana, CA 92701
Clerk of the Court California Court of Appeal Fourth Appellate District Division Three 601 West Santa Ana Blvd Santa Ana, CA 92701	Office of the Comptroller of the Currency Litigation Department Attn: Douglas Jordan, Senior Counsel 250 E Street S.W. Washington, DC 20219-4515
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	David M. Arbogast Arbogast & Berns 6303 Owensmouth Avenue 10th Floor Woodland Hills, CA 91367-2262
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☒ **By U.S. mail**. I enclosed the document in a sealed envelope or package addressed to the persons at the addresses above and

☑ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

☒ ☑ **STATE**: I, Stacie James, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 4, 2011, at Los Angeles, California.

Stacie James