Case No. 09-16703

United States Court Of Appeals for the Ninth Circuit

MATTHEW C. KILGORE, individually and on behalf of all others similarly situated; WILLIAM BRUCE FULLER, individually and on behalf of all others similarly situated,

Plaintiffs - Appellants,

v.

KEYBANK, NATIONAL ASSOCIATION, successor in interest to KeyBank USA,
N.A.; KEY EDUCATION RESOURCES, a division of KeyBank National Association; GREAT LAKES EDUCATION LOAN SERVICES, INC., a Wisconsin corporation,

Defendants – Appellees.

CORRECTED *AMICUS CURIAE* BRIEF OF THE NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AND NATIONAL CONSUMERS LEAGUE IN SUPPORT OF REVERSAL OF JUDGMENT REGARDING FEDERAL PREEMPTION

On Appeal From The United States District Court for The Northern District Of California, San Francisco Division – The Honorable Thelton E. Henderson

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STATEMENT OF INTEREST

The National Consumer Law Center ("NCLC"), National Association of Consumer Advocates ("NACA") and National Consumers League ("NCL") respectfully submit the accompanying Brief of *Amicus Curiae* in support of Plaintiffs and Appellants Matthew C. Kilgore and William Bruce Fuller in support of reversal of reversal of the judgment regarding federal preemption. In support of this application, *Amici* state as follows:

NCLC is a public interest, non-profit law office established in 1969 and incorporated in 1971, with its main office in Boston, MA and a separate office in Washington DC. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed and elderly consumers. NCLC works to defend the rights of consumers, concentrating on advocating for fairness in financial services, wealth building and financial health, a stop to predatory lending and consumer fraud, and protection of basic energy and utility services for low income families. NCLC devotes special attention to vulnerable populations including immigrants, elders, homeowners, former welfare recipients, victims of domestic violence, military personnel, and others, on issues from access to justice, auto fraud, bankruptcy, credit cards, debt collection abuse, predatory lending, mortgage and payday lending, refund anticipation loans, Social Security, and more.

NACA is a nationwide, nonprofit corporation with over 1,000 members who are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, whose practices or interests primarily involve the protection and representation of consumers. Its mission is to promote justice for all consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. Its Standards and Guidelines For Litigating and Settling Consumer Class Actions may be found at 176 F.R.D. 375 (1997), and www.naca.net at the bottom of the main page. About 150 of NACA's members are California consumer attorneys or non-attorney advocates who regularly represent and advocate for consumers residing in California. Included within these cases are numerous cases brought under California's Unfair Competition Law, Business and Professions Code §§ 17200 et seq. ("UCL") and Consumers Legal Remedies Act, Civil Code §§ 1750 et seq. ("CLRA") against entities which market and sell consumer products like those at issue in this case. From its inception, NACA has focused primarily on issues which involve abusive and fraudulent business practices. Consistent with its goal of promoting justice for consumers, NACA has appeared as amicus curiae in a number of cases challenging such practices, including *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, and *Badie v. Bank of America* (1998) 67 Cal.App.4th 779.

NCL is America's oldest consumer organization, representing consumers and workers on marketplace and workplace issues since our founding in 1899. NCL provides government, businesses, and other organizations with the consumer's perspective on concerns including child labor, privacy, food safety, vocational school fraud, and medication information.

As organizations that are representative of consumers throughout California and the entire United States, *Amici* are vitally interested in the resolution of the issues in this appeal and believe they can be of assistance in illuminating the legal and policy issues before the Court. In particular, in their brief *Amici* address fundamental rules that pertain to conflict preemption, the history and application of the FTC Holder Rule, and public policy considerations in the vocational school fraud arena which militate against shielding national banks from injunctive relief to refrain from violating federal law.

ARGUMENT

I. PREEMPTION

Federal law can preempt state law in one of three ways: 1) expressly, through the language of the federal statute; 2) by actually conflicting with state law; or 3) by exclusively occupying the legislative field (field preemption). *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990). The parties agree and the district court concluded that only conflict preemption is involved in this case.

A. There is No Conflict Preemption In This Case.

As the Supreme Court recently declared, there are "[t]wo cornerstones of [its] pre-emption jurisprudence. *Wyeth v. Levine*, 555 U.S. ---, 129 S.Ct. 1187, 1194 (2009). First, "'the purpose of Congress is the ultimate touchstone in every pre-emption case," citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). 129 S.Ct. at 1194. Second, "'[i]n *all* pre-emption cases, and particularly those in which Congress has 'legislated . . . in a field which the State's have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id*. at 1194-95 (emphasis added), quoting *Lohr*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As the Court made clear in *Wyeth*, it relies on the presumption against preemption "[b]ecause respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state law causes of action.'" *Id*. at 1195 n. 3, quoting *Lohr*, at 485.

It is well established that among the historic police powers of the states is consumer protection, which includes the UCL in this case. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (remedies for unfair business practices); *Jefferson v. Chase Home Finance*, 2008 WL 1883484 (N.D.Cal. 2008) at *9, citing *Gibson v. World Savings & Loan Ass'n*, 103 Cal.App.4th 1291, 1300 (states'

historic powers include the regulation of consumer protection); *Smith v. Wells Fargo Bank N.A.*, 135 Cal.App.4th 1463, 1475 (2005); *Hood v. Santa Barbara Bank & Trust*, 143 Cal.App.4th 526, 537 (2006). Consistent with the presumption against preemption, "in areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *Bates v. Dow Agrosciences*, 544 U.S. 431, 449, 125 S.Ct. 1788, 1801 (2005).

State law that actually conflicts with federal law is preempted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). "Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (citation and quotation omitted). But "impossible preemption is a demanding defense." *Wyeth*, 129 S.Ct. at 1199. It surely cannot be met in a case such as this where no evidence has been introduced by the bank.

"Since shortly after the Bank Act was enacted in 1864, the Supreme Court has oft reiterated that federal substantive authority over national banks is not exclusive." *Wells Fargo Bank N.A. v. Boutris*, 418 F.3d 949, 963 (9th Cir. 2005) (citation and footnote omitted). Regulation of banking has been one of dual control with the states since the passage of the first National Bank Act (NBA).

The concept of the duality of control over national banks is crystallized in *McClellan v. Chipman*, 164 U.S. 347 (1896). Citing prior cases, the Court acknowledged that "[n]ational banks are subject to the laws of the state and are governed in their daily course of business far more by the laws of the state than of the nation." *Id.* at 357. The Court concluded that "[t]hese two propositions, which are distinct, yet harmonious, practically contain a rule and an exception – the *rule* being the operation of general state laws upon the dealings and contracts of national banks; the *exception* being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." *Id.* (emphasis added).

"Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007). This dual "system echoes many other mixed state/federal regimes in which the federal government exercises general oversight while leaving state substantive law in place." *Cuomo v. The Clearing House Ass'n*, 129 S.Ct. 2710, 2718 (2009), citing *Wyeth*, *supra*.

In *Watters*, the Supreme Court was faced with the question of whether national banks' "operating subsidiaries" (which are state-chartered entities) are properly regulated by state regulators via licensing schemes, reporting requirements, and visitorial powers (the last being the regulatory power to conduct audits and surveillance of the regulated entity). *Watters*, at 7. The Court reiterated: "States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way." *Id*. at 12. Because national banks are authorized by statute and regulation to do business through non-bank operating subsidiaries and because federal law vests visitorial powers over national banks solely within the OCC, the Court concluded that national banks' operating subsidiaries are subject solely to the visitorial oversight of the OCC and not state regulators. *Id*. at 20-21.

If there were any question about the scope of the Supreme Court's preemption jurisprudence following *Watters*, its decision a year ago in *Cuomo v. The Clearing House Ass'n* squarely answered it. "[T]he sole question [in *Watters*] was whether operating subsidiaries of national banks enjoy the same immunity from state visitation. The opinion addresses and answers no other question."

129 S.Ct. at 2717. While the decision in *Cuomo* has been described as "a sea change in the perception of the preemptive effect of the NBA and the OCC regulations, [it has simply] dispelled the popular notion that all state laws that affect national banks in any way or to any degree are preempted." *Mwantembe v. TD Bank, N.A.*, 669 F.Supp.2d 545, 549 (E.D.Pa. 2009).[1]

Accordingly, federal banking statutes and regulations do not "deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 33 (1996); *Watters*, 550 U.S. at 12. State laws regulating the conduct of national banks are preempted only "if they conflict with federal law, frustrate the purposes of the NBA, or impair the efficiency of national banks to discharge their duties." *Barnett Bank*, 517 U.S. at 33-37 (holding that a federal statute granting national banks authority to sell insurance conflicts with and therefore preempts state law forbidding banks from selling insurance); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-79, 74 S.Ct. 550, 98 L.Ed. 767 (1954) (holding that national banks' power to receive deposits conflicts with and therefore

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[1] The court in *Mwantembe* noted that prior to *Cuomo*, "courts appeared to be expanding the scope of federal preemption for national banks," *citing* Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets*, 26 Yale J. on Reg. 143, 157-58 (2009) and Rashmi Dyal-Chand, *From Status to Contract: Evolving Paradigms for Regulating Consumer Credit*, 73 Tenn. L. Rev. 303, 320-21 and n. 107 (2006). *Cuomo*, along with the decisions in *Wyeth* and *Altria Group, Inc. v. Good*, 129 S.Ct. 538 (2008) would appear to shut the door on those suspicions.

preempts a state statute prohibiting use of the word "savings" in banking advertisements).

In *Cuomo*, the Court reaffirmed its holding in *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 660 (1924) that where a state statute of general applicability is not substantively preempted, the power of enforcement must rest with the state and not with the national government. *Cuomo*, 129 S.Ct. at 2717. Where conflict preemption is the issue, a factual showing must necessarily be made by the proponent of preemption to establish whether application of state law – in this case, aiding and abetting liability through the UCL – "significantly impairs" or "prevents" the ability of KeyBank to perform its lending function in a lawful manner.[2] At a minimum, reversal and remand is warranted to provide an opportunity for such a showing to be made.

II. PLAINTIFF'S UCL CAUSE OF ACTION DOES NOT CONFLICT WITH OR OTHERWISE UNDERMINE NATIONAL BANKS' FEDERALLY AUTHORIZED LENDING POWER

The NBA does not preempt Plaintiff's UCL claim with respect to KeyBank here because the claim furthers, rather than conflicts with, the federal purposes underlying the FTC Holder Rule.

[2] *C.f. People of California, ex rel. Herrera v. Check 'N Go of California, Inc.*, 2007 WL 2406888, *4 (N.D.Cal.,2007). (Defendant bank argued that plaintiff's claim that bank aided and abetted a non-bank in violating California's Finance Lender Law was "in essence bringing a usury claim directly against" the bank and thus preempted. The District Court disagreed, finding there can be no preemption of an aiding and abetting claim because aiding and abetting is "distinct from the primary violation."

A. Plaintiff's UCL Claim Is Entirely Consistent With the Goals Underlying the FTC Holder Rule.

The only reason federal preemption has even arisen in this case is because Plaintiff's loan contracts were issued *in violation of federal law*. Federal law unambiguously requires a bank to comply with the specific requirements of section 5 of the FTC Act, 7 C.F.R § 7.4008(c). If those contracts had contained the language required by the FTC Holder Rule, then KeyBank would be contractually subject to all the claims and defenses that the Plaintiff could have asserted against the seller, and there would be no issue of federal preemption in this case. It is only because the contracts were issued ***in violation*** of federal law that KeyBank can even attempt to avoid liability here. Under these circumstances, permitting Plaintiffs to proceed with their UCL claim will actually *vindicate* federal purposes by putting KeyBank in the same position that it would have been in if the FTC Holder Rule had not been violated in the first place. Against this backdrop, KeyBank's attempt to turn a violation of federal law into a sword for federal preemption turns logic on its head.

KeyBank's principal argument is that Plaintiff's aiding and abetting claim must be preempted because it is nothing more than a backdoor attempt to apply the FTC Holder Rule to a national bank. By way of background, the FTC Holder Rule requires all sellers entering into "consumer credit contracts" or accepting the

proceeds of "purchase money loans" to include language in their loan agreements preserving the buyer's right to assert "all claims and defenses" against future "holders" of the loans that the buyer could assert against the original seller. 16 C.F.R. § 433.2. The FTC recognized that consumers who are victims of unscrupulous sellers often have no direct recourse against the seller itself, either because the seller is judgment-proof or has sold the credit instrument to a third-party. The FTC concluded that it needed to take regulatory action in order to protect consumers who are victims of seller misconduct stuck from the legal consequences of substantial loan obligations. 40 Fed. Reg. 53506, 53522 (Nov. 18, 1975). Realizing that consumers often are in the worst position to determine the future likelihood of seller misconduct, the FTC enacted the Holder Rule in order to "reallocate the cost of seller misconduct to the creditor, who is in a better position to absorb the loss or recover the cost from the guilty party -- the seller." *Green Tree Acceptance, Inc. v. Pirtle*, 1999 WL 33740367 at *3 (E.D. Mich. Mar. 1, 1999); *see also* 40 Fed. Reg. at 53523; *Maberry v. Said*, 911 F. Supp. 1393, 1402 (D. Kan. 1995) ("The FTC holder rule reallocates the cost of seller misconduct from the consumer to the creditor.").

Although the FTC Holder Rule expressly allows a consumer to assert any claims or defenses against a creditor that it could assert against the original seller, violations of the Rule itself – *i.e.*, in situations where a seller fails to insert the

required language in its contract with the buyer – are only *directly* actionable against sellers, not creditors. Thus, if a seller violates the rule and fails to include the language in its loan documents with a creditor, the federal government is only empowered to sue the seller, not the bank. In most cases, this does not undercut the purposes of the Rule, because the fact that it is enforceable is sufficient to ensure that the required language is included, and hence that creditors bear the risk of seller misconduct.

KeyBank argued below that, because the FTC Holder Rule is not directly enforceable against banks, permitting consumers like Plaintiffs to hold creditors liable for seller misconduct under the UCL would conflict with – and thereby undermine – federal purposes. In support of this argument, KeyBank pointed out that the Federal Trade Commission ("FTC") actually rejected a regulation that would make violations of the FTC Holder Rule directly enforceable against banks. *See* 53 Fed. Reg. 44456 (Nov. 3, 1988). Given this federal decision not to impose the precise obligation directly against banks, KeyBank concludes that the Plaintiffs' UCL claim interferes with federal purposes.

The regulatory materials accompanying the original FTC Holder Rule disprove KeyBank's argument. The preamble to the Rule makes crystal clear that the federal government fully intended for banks to be subject to the strictures of the Rule, even though they cannot be held legally accountable for violating its terms.

There, the FTC explained that its "primary concern . . . has been the distribution or allocation of costs occasioned by seller misconduct in credit sale transactions." 40 Fed. Reg. at 53522 (Nov. 18, 1975). The agency stated that "[t]he current commercial system[,] which enables sellers and creditors to divorce a consumer's obligation to pay for goods and services from the seller's obligation to perform as promised, allocated all of these costs to the customer/buyer." *Id.* This was problematic and unfair, in the FTC's view, because "[c]onsumers are generally not in a position to evaluate the likelihood of seller misconduct in a particular transaction." *Id.*[3]

To solve this problem, the agency consciously chose to impose the costs of seller misconduct on the *creditor* – the proper party, in the FTC's view, to bear this responsibility. *See id.* at 53523. This choice reflected the agency's conclusion then that, "as a practical matter, the creditor is always in a better position than the buyer to return seller misconduct costs to sellers, the guilty party." *Id.* The agency found that "a rule which compels creditors to . . . absorb seller misconduct costs will discourage many of the predatory practices and schemes discussed [above]." *Id.* *See also id*. at 53524 (FTC Holder Rule designed to ensure that "*creditors* will

[3] Notably, the agency specifically singled out "courses of training and instruction" as a particular area of concern whereby seller misconduct has been unfairly passed on to innocent consumers. *See* 40 Fed. Reg. at 53510 (listing various trade schools); *id*. at 53524 (noting that "[t]he rule expressly applies to credit contracts arising from sales of services, such as trade or vocational school agreements as well as sales of consumer tangibles.").

be responsible for seller misconduct," because "[w]e can imagine no reasonable measure of value which could justify requiring consumers to assume all risk of seller misconduct, particularly where *creditors* who profit from consumer sales have access to superior information combined with the means and capacity to deal with seller misconduct consists expeditiously and economically") (emphasis added); *id*. at 53509 (noting that, "[b]etween an innocent consumer, whose dealings with an unreliable seller are, at most, episodic, and a finance institution. . . , the financier is in a better position both to protect itself and to assume the risk of a seller's responsibility"); *id*. at 53524 (noting that "creditors are always in a better position than consumers to return misconduct costs . . . .").

As argued extensively in Appellants' Opening Brief on Preemption, filed on August 30, 2010, KeyBank is obliged by the OCC regulations to comply with section 5 of the FTC Act, 7 C.F.R. § 7.4008(c). This regulation, which prohibits unfair and deceptive practices, was promulgated in 2004. Its invocation in this case as a predicate federal law for liability and remedy under the UCL is not preempted according to the OCC's own pronouncements.

Indeed, the OCC has not only taken this position with respect to deceptive trade practice laws in general, but it has previously specifically identified California's UCL and the False Advertising Act as types of consumer protection laws that are not preempted. (OCC Adv. Ltr. No. AL 2002-3, 2002 WL 521380

(O.C.C.) (March 22, 2002), at 3 & n. 2 ["[a] number of state laws prohibit unfair or deceptive acts or practices, and such laws may be applicable to insured depository institutions. *See*, *e.g.*, Cal. Bus. Prof. Code 17200 *et seq*. and 17500 *et seq*."].)[4]

Based on these legal principles it is difficult to comprehend how KeyBank, which the district court concluded has engaged in knowing conduct sufficient for liability for aiding and abetting the conduct of the vocational school SSH, could be exonerated under the rubric of federal preemption.

The entire premise of the FTC Holder Rule is to impose the costs of seller misconduct on *creditors*, who are in the best position to evaluate the risks of any given transaction. Given this goal, the district court's conclusion that plaintiffs' UCL claim is inconsistent with the purposes underlying the FTC Holder Rule is plainly at odds with the position of the federal government and the FTC. In reality, Plaintiff's claim directly furthers federal purposes by making creditors like KeyBank liable for the misconduct of the sellers with whom they choose to do business.

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[4] In another interpretive letter, for example, the OCC's own Chief Counsel has stated that the national banking laws do not prevent state measures aimed at preventing misleading advertising, as long as the state regulations do not put national banks at a competitive disadvantage relative to state financial institutions. OCC Interp. Ltr. 674, 1995 WL 475442 (O.C.C.) (June 9, 1995).

B. Plaintiff's UCL Claim Is Entirely Consistent With the FTC's Decision Not to Make the Holder Rule Enforceable Against Banks.

The UCL claim in this case is the appropriate legal vehicle to subject KeyBank to liability for aiding and abetting SSH's violation of the FTC Holder Rule. The district court's conclusion that a national bank should be permitted as a matter of federal law to aid and abet a violation of the FTC Holder Rule is nonessential and contrary to recent federal jurisprudence.

As the Supreme Court recently instructed, that sort of reasoning – *i.e.*, that insufficient data previously existed to justify adoption of a universal federal regulation, but that some form of regulation might be appropriate in the future – cannot form the basis for finding a conflict between state and federal law sufficient to give rise to preemption. *See Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51 (2002). In *Sprietsma*, the Court considered whether the U.S. Coast Guard's decision not to require propeller guards on all recreational boat engines impliedly preempted common-law claims that a boat manufacturer was negligent for failing to install a propeller guard on a particular boat engine. The Court held that the mere decision by a federal agency not to adopt a regulation does not exert any preemptive force; instead, the question is whether the common-law claims would undermine the agency's stated *reasons* for declining to regulate. *Id.* at 65.

Sprietsma went on to hold that, because the Coast Guard never found that propeller guards are *unsafe*, but instead merely concluded that it lacked available data to justify a uniform federal rule requiring propeller guards on all boats – in part because there was no "universally acceptable" propeller guard model suitable for use on all boats and in part because of the high cost of "retrofitting millions of boats," *see id.* at 66-67 – the common-law claims would not undermine any federal regulatory purposes and were not preempted.

This reasoning applies here with full force. First, *Sprietsma* makes clear that the FTC's mere decision not to extend the Holder Rule to creditors does not, in and of itself, possess any preemptive force. Second, *Sprietsma* teaches that a decision not to regulate based on an agency's finding that there is insufficient evidence to justify a federal rule also lacks any preemptive effect. As with the Coast Guard's decision in *Sprietsma*, the FTC merely found that, due to "insufficient evidence" of a widespread problem of creditors cutting off consumer defenses, there simply was no justification in 1975 for further federal regulation in the area. And, as in *Sprietsma*, the FTC did not then decide that such a regulation would never be justified; to the contrary, it said that such a rule might be warranted in the future, and that it would continue to study the issue. This is precisely the sort of reasoning that, under *Sprietsma*, cannot be said to preempt any state claims which impose liability and remedial relief for violation of a federal regulatory requirement.

III. PUBLIC POLICY CONSIDERATIONS WEIGH IN FAVOR OF A CONCLUSION THAT THE STUDENTS' UCL CLAIM IS NOT PREEMPTED

The consequences of shielding national banks from liability under the guise of federal preemption will have significant negative consequences for students, the government, and taxpayers. The 1980s and 1990s witnessed significant adverse consequences when lenders escaped liability under the guise of federal preemption.[5] During this period in particular, there were high rates of default on student loans key to the failure of schools and significant misrepresentations by them and their lender partners concerning the quality of education, graduation rates, and placements.

This time period also experienced high rates of schools filing bankruptcy. This happened with Silver State Helicopters in this case two years ago. (Third Amended Complaint, ¶ 38.) In addition to the failure of schools and the disappearance of their owners, students remain saddled forever with debts for an education they didn't receive and which debt they cannot discharge in bankruptcy with very few and limited exceptions. *See generally* National Consumer Law Center, *Student Loan Law*, § 7.2 (3d ed. 2006).

Where, as in this very case, national banks have explicitly "partnered" with a private vocational school with explicit knowledge of misrepresentations about the

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[5] *See, e.g.*, *Tipton v Secretary of Educ.*, 768 F.Supp. 540 (S.D.W.Va. 1991).

quality of education and other factors, there is no public policy that should permit a shield from liability for aiding and abetting a scheme to defraud those students and deny them the education they have been promised.

A. High Rates of Default.

Students at for-profit proprietary vocational schools are more likely to borrow and borrow more funds than students at any other type of college.

According to a recent report, over the past ten years there has been steady growth in student enrollment across all types of post-secondary educational institutions. "Between 1998 and 2008, enrollment at institutions of higher education increased 31 percent, from 14.9 million students to 19.6 million students. For-profit schools have expanded much faster, increasing enrollment 225 percent over the same period." United States Senate Health, Education, Labor and Pensions Committee, *Emerging Risk?: An Overview of Growth, Spending, Student Debt and Unanswered Questions in For-Profit Higher Education* (June 24, 2010) at 2. The same Report stated that for-profit schools are more expensive to attend than community colleges or public four-year schools. As college costs continue to increase, more students are taking out loans and the amounts of the loans are larger. *Id*. at 8.

A direct consequence of increased student borrowing is an increase in the number of defaults. While only 7% of student loans are for for-profit schools, 44%

of all loan defaults are associated with those loans. *See* Deanne Loonin, *For-Profit Higher Education By the Numbers*, National Consumer Law Center's Student Loan Borrower Assistance Project (Jan. 2010) at 5. "Moreover, persistent high default rates raise the question of whether students are receiving educational value sufficient to allow them to afford the debt they incur. Students who cannot pay their loans face punitive fees and higher interest rates." *Id*. at 9; *see also* GAO Testimony Before the Senate Committee on Health, Education, Labor & Pensions, *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices* (Aug. 4, 2010) at 5.

This data presents a bleak picture for students, the government and taxpayers. Permitting lenders who partner with schools and aid and abet schemes which defraud students should not be shielded from liability. No public policy is advanced by allowing lenders to make loans and disburse funds to schools which openly and actively violate the law.

B. High Rates of Schools Filing Bankruptcy.

One significant impediment to the enforcement of the rights of students occurs when schools violate the law but then file for bankruptcy, as Silver State Helicopters KeyBank did in this case two years ago. *In re Silver State Service Corp*., Case No. 09-10936 (MN) (United States Bankruptcy Court for the District of Nevada). Filing for bankruptcy stays all proceedings against the school and

eliminate the student's rights to achieve relief against it. *See* Comments of the National Consumer Law Center and Others in Response to Federal Trade Commission Request for Public Comments, Vocational School Guides Review, Matter No. P097701 (Oct. 16, 2009) at 10. Where aiding and abetting is sufficiently alleged against the lender, as the district court conclusively established that it was in this case, *Kilgore v. KeyBank*, 2010 WL 1461577, *6-7 (N.D. Cal. 2010), lenders like KeyBank should not escape liability simply because the Holder Rule does not apply directly to them. *See generally* Deanne Loonin, *Holding Lenders Responsible for Ripped-Off Students*, New America Higher Ed Watch (Feb. 17, 2009), available at http://www.newamerica.net/blog/higher-ed-watch/2009/guest-post-holding-lenders-responsible-ripped-students-10139.

C. Students Remaining Liable Forever on Vocational School Loans.

Aside from the costs imposed on governments and taxpayers, students in default on federal loans cannot obtain federal loans and grants to return to school. The government can seize their tax refunds (including earned income tax credits), garnish wages without first getting a judgment, and even seize Social Security benefits. There is no time limit on federal student loan collections. *See* Deanne Loonin, *For-Profit Higher Education By the Numbers*, National Consumer Law Center's Student Loan Borrower Assistance Project (Jan. 2010) at 6.

Students in default on their loans cannot obtain relief against the school in situations like the one at issue in this case in which the school has filed for bankruptcy before the lawsuit has even been filed. The consequences achieved by imposing the entire burden on the student who doesn't receive an education and defaults on his loan as against the lender who knowingly and actively participates in the deceptive scheme is unjustifiable.

CONCLUSION

For the foregoing reasons, the district court's order dismissing the Third Amended Complaint should be reversed and remanded for further proceedings.

DATED: September 8, 2010 Respectfully submitted,

CHAVEZ & GERTLER LLP

By: /s/ *Mark A. Chavez*
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The National Consumer Law Center
National Association of Consumer Advocates
And National Consumers League

CERTIFICATE OF COMPLIANCE
F.R.A.P. 32(a)(7)(C)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) and Ninth Circuit Rule 32-1, because this brief contains 4,877 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2003 in 14-point Times New Roman and is a principal brief of no more than 30 pages.

September 8, 2010 CHAVEZ & GERTLER LLP

/s/ *Mark A. Chavez*
Mark A. Chavez

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2010, I electronically filed the foregoing **Corrected *Amicus Curiae* Brief of The National Consumer Law Center, National Association of Consumer Advocates and National Consumers League In Support of Reversal of Judgment Regarding Federal Preemption** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct. Executed on September 8, 2010, at Mill Valley, California.

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