S199074

IN THE SUPREME COURT OF CALIFORNIA

HAROLD ROSE and KIMBERLY LANE,
Plaintiffs and Appellants,

v.

BANK OF AMERICA, N.A.,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO
CASE NO. B230859

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.

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IN THE SUPREME COURT OF CALIFORNIA

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE

Pursuant to California Rules of Court, rule 8.520(f), amici curiae, Chamber of Commerce of the United States of America (U.S. Chamber) and California Chamber of Commerce (Cal. Chamber), respectfully request permission to file the accompanying amici curiae brief in support of defendant and respondent, Bank of America, N.A.[1]

[1] No party or counsel for any party authored this brief, participated in its drafting, or made any monetary contributions intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4)(A).) The U.S. and Cal. Chambers certify that no person or entity other than the U.S. and Cal. Chambers and their counsel authored or made any monetary contribution intended to fund the preparation or submission of the proposed brief.

The U.S. Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country. In particular, the U.S. Chamber has many members located in California and others who conduct substantial business in the State. For that reason, the U.S. Chamber and its members have a significant interest in the sound and equitable administration of the California courts. The U.S. Chamber routinely advocates for the interests of the business community in courts across the nation by filing amicus curiae briefs in cases involving issues of vital concern. In fulfilling that role, the U.S. Chamber has appeared many times before this Court and the California Courts of Appeal.

The Cal. Chamber is a voluntary, non-profit business association with more than 14,000 members from virtually every industry in the State of California. Through its affiliation with local and regional chambers of commerce, the Cal. Chamber advocates for the interests of more than 167,000 small businesses. The Cal. Chamber acts to improve the State's economic and jobs climate by representing businesses on a broad range of legislative, regulatory and legal issues. The Cal. Chamber often advocates before courts by filing amicus curiae briefs in cases involving issues of paramount concern to the business community.

Both the U.S. Chamber and the Cal. Chamber are vitally interested in California's Unfair Competition Law, Business and Professions Code section 17200 et seq. (UCL), given that their members are frequent targets of this widely-used and broadly-worded consumer protection statute. Indeed, every person or entity engaged in business activity in

California has a stake in the question presented here: whether plaintiffs can use the UCL to assert a private right of action to enforce the provisions of a federal statute, even after Congress has expressly revoked the right to privately enforce the terms of the statute. The U.S. and Cal. Chambers offer this brief to support the Court of Appeal's opinion and to explain more generally why California courts should abstain from using their equitable powers afforded under the UCL to enforce complex economic regulatory provisions enacted as part of a comprehensive statutory scheme.

September 20, 2012

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AMICI CURIAE BRIEF

INTRODUCTION

Plaintiffs in this case have engaged in the time honored tradition of looking for a window to crawl through when a door has been shut. Sometimes that is an exercise in creativity and resourcefulness. But sometimes there is a *good reason* for shutting the door—and allowing someone to crawl through the window is a bad idea. That is the situation here.

In this class action brought by several customers of Bank of America, the plaintiff class argues that Bank of America violated a federal statute—the federal Truth in Savings Act (TISA)—by failing to disclose a $3 fee for enclosing cancelled checks with banking statements. Congress at one time allowed consumers to bring private lawsuits for TISA violations, but has since repealed the right of action authorizing private enforcement of its regulatory provisions. Plaintiffs nonetheless seek to enforce the provisions of TISA under the auspices of the UCL.

The Court of Appeal affirmed the dismissal of plaintiffs' claims, finding that plaintiffs cannot "plead around" the Congressional bar to private enforcement of TISA by bringing a claim under the UCL. (*Rose v. Bank of America, N.A.* (2011) 200 Cal.App.4th 1441, 1448 [typed opn., 6] (*Rose*).) Plaintiffs argue the Court of Appeal was wrong because TISA does not preempt state law claims that are not inconsistent with TISA.

Plaintiffs' argument misses the point. The question presented in this case is whether the UCL should be construed *under California law* to

provide a vehicle for asserting a claim for an alleged TISA violation. The UCL does not itself specify when a violation of another law can be prosecuted in a private lawsuit under the rubric of challenging "unlawful" business practices. Rather, the very general terms of the UCL have been refined over the years through common law pronouncements by California courts. The Court of Appeal correctly ruled that, given Congress's decision to revoke the right to privately enforce TISA, plaintiffs cannot privately enforce TISA under the UCL.

There is, however, another reason for this Court to find that plaintiffs may not enforce the federal TISA under the UCL. While courts have held the UCL generally authorizes courts to "borrow" from state and federal statutes to impose equitable remedies for alleged unfair business practices, "the courts have frequently dismissed UCL claims where there exists a comprehensive administrative or regulatory scheme to redress the issue." (Stern, Bus. & Prof. C. § 17200 Practice (The Rutter Group 2012) ¶ 5:82-83, pp. 5-36.2 to 5-36.3.) Where, as here, a legislative body enacts a complex set of banking regulations to be enforced exclusively by administrative agencies, California courts should abstain from using their equitable powers to enforce the same regulations under the UCL.

I. THE OPINION OF THE COURT OF APPEAL SHOULD BE AFFIRMED BECAUSE A UCL CLAIM PREDICATED ON TISA IS IMPROPER WHERE CONGRESS HAS PROHIBITED PRIVATE ENFORCEMENT OF THE STATUTE.

"The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services."

(*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) The UCL "does not proscribe specific practices." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180 (*Cel-Tech*).) Instead this Court has found that the UCL permits (but does not require) courts to use their equitable powers to " 'borrow[ ]' 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 (*Korea Supply*).)

The question presented in this case is whether it is appropriate for the courts to "borrow" the provisions of a comprehensive federal regulatory scheme that, by Congress's design, has no provisions for private enforcement. Plaintiffs, however, spend most of their opening brief answering a different question: whether their UCL-based claims are preempted by TISA. (See OBOM 12 ["The issue at hand is whether, under the Supremacy Clause of the United States Constitution, TISA preempts California's statutes creating causes of action enforcing identical requirements to TISA's. Also before this Court is the issue of whether TISA preempts all California enforcement of its dictates"].)

Plaintiffs' argument is a classic straw man. This Court need not address preemption to determine the proper scope and reach of the UCL. TISA, as well as the similar Truth in Lending Act (TILA), both have savings clauses that recognize the "role of state law" and preempt state law only where it is "inconsistent with the provisions of [TISA or TILA], and then only to the extent of the inconsistency." (*Black v. Financial Freedom Senior Funding Corp.* (2001) 92 Cal.App.4th 917, 936; 12 U.S.C.A. § 4312 [TISA]; 15 U.S.C.A. § 1610 [TILA].) Thus, the cases cited by the plaintiffs have held that TISA and TILA permit certain consistent

state law claims. (*Black*, at p. 938 ["we conclude that TILA does not preempt" the plaintiffs' claims]; *Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1483 [same]; *Barnes v. Fleet Nat. Bank, N.A.* (1st Cir. 2004) 370 F.3d 164, 175-176 [Massachusetts unfair competition claim not preempted].)

Plaintiffs confuse matters, however, when they claim that the "savings clause" allows them to enforce TISA's provisions under the UCL. Nothing in the savings clause addresses whether, under California law, the UCL permits private enforcement of TISA violations. The federal savings clause means that Congress left room for the California Legislature to enact certain parallel, consistent state law regulation of banking disclosure requirements. The California Legislature, however, has expressly declined to enact any such legislation.[2] That is why plaintiffs have resorted to the UCL, and the resulting question is whether, under these circumstances, the UCL should be construed to permit courts to exercise their general equitable powers under the UCL to directly enforce a federal regulatory scheme for which Congress has refused to permit private enforcement.

"Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair." (*Cel-Tech, supra,* 20 Cal.4th at p. 182.) California courts may "borrow" from federal law to impose equitable remedies under the UCL, but there are limits to such borrowing. As the

[2] California had its own version of TISA. The Legislature, however, repealed that statute following the federal enactment of TISA and has not reenacted the California version even after Congress eliminated private enforcement of TISA. (Former Fin. Code, §§ 855, 865-865.10, repealed by Stats. 1993, ch. 107, §§ 1-2.)

Court of Appeal explained in its decision below, where Congress has "expresse[d] its intent to prohibit enforcement of a law through a private action, [plaintiffs] may not 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.' " (*Rose, supra,* 200 Cal.App.4th 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.)

The U.S. and Cal. Chambers agree with the Court of Appeal for the reasons presented in Bank of America's answer brief on the merits. In the remainder of this amici brief we focus on a different point that is independently sufficient to affirm the decision of the Court of Appeal. "Even if federal or state law is not sufficiently paramount as to *preempt* a UCL claim, courts may still abstain in deference to an administrative agency's enforcement powers." (Stern, Bus. & Prof. C. § 17200 Practice, *supra,* ¶ 5:82, p. 5-36.2.) Here, where TISA is part of a broad, comprehensive statutory scheme designed to regulate the banking industry, California courts should abstain from enforcing these federal regulations and instead defer to the agencies tasked with TISA's enforcement.

II. COURTS SHOULD ABSTAIN FROM USING THEIR EQUITABLE POWERS TO ENFORCE COMPLEX REGULATORY SCHEMES UNDER THE UCL.

A. The equitable abstention doctrine recognizes that administrative agencies are in a better position than courts to enforce complex regulatory schemes.

"A court cannot, under the equitable powers of [the UCL], award whatever form of monetary relief it believes might deter unfair practices." (*Korea Supply*, *supra*, 29 Cal.4th at p. 1148.) The remedies authorized under the UCL are limited and are solely "equitable in nature; damages cannot be recovered." (*Id.* at p. 1144.) Because UCL remedies are exclusively equitable in nature, the UCL "does not mandate restitutionary or injunctive relief when an unfair business practice has been shown. Rather, it provides that the court '*may* make such orders or judgments' " in appropriate circumstances. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179-180 (*Cortez*).) Thus "in addition to those defenses which might be asserted to a charge of violation of the statute that underlies a UCL action," courts should take into account equitable considerations before granting relief under the UCL. (*Id* at p. 180.)

One equitable consideration the courts must consider when presented with a UCL claim is the abstention doctrine. "It is well established that a court of equity will abstain from employing the remedies available under the unfair competition law in appropriate cases." (*Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 641 (*Shamsian*); *Desert Healthcare Dist. v. PacifiCare FHP, Inc.* (2001) 94

Cal.App.4th 781, 795 (*Desert Healthcare*) ["because the remedies available under the UCL, namely injunctions and restitution, are equitable in nature, courts have the discretion to abstain from employing them"]; *Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292, 1297 (*Alvarado*).) The doctrine of equitable abstention is rooted in the California Constitution's Article III, section 3, which establishes the separation of the branches of government. (*Connelly v. State of California* (1970) 3 Cal.App.3d 744, 750 [noting that the Supreme Court has "used the doctrine of separation of powers as scaffolding to support its new 'touchstone' of 'judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of government"].)

The abstention doctrine respects the separation of powers by recognizing that state "courts cannot assume general regulatory powers . . . through the guise of enforcing [the UCL]." (*Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1301-1302 (*Samura*).) As one leading treatise explains, the abstention doctrine applies "when giving relief would entangle the court in an area of complex economic policy." (Rushing et al., California Unfair Competition and Business Torts (2012), ¶ 2.41[1], p. 2-95.) Where a UCL " 'action would drag a court of equity into an area of complex economic [or similar] policy, equitable abstention is appropriate. In such cases, it is primarily a legislative and not a judicial function to determine the best economic policy.' " (*Shamsian, supra,* 136 Cal.App.4th at pp. 641–642, quoting *Desert Healthcare, supra,* 94 Cal.App.4th at pp. 795–796 [abstention appropriate where equitable relief "would pull the court deep into the thicket" of a regulated arena "that courts are ill-equipped to meddle in"].)

B. Applying the equitable abstention doctrine, several courts have refused to enforce regulatory schemes under the auspices of the UCL.

The courts have employed the abstention doctrine under a variety of different factual scenarios and circumstances because administrative agencies, and not the courts, are best suited to interpret and enforce complex regulatory schemes. The courts are particularly inclined to abstain where federal interests are at stake. For example, in *Diaz v. Kay-Dix Ranch* (1970) 9 Cal.App.3d 588, 599-600, the court dismissed a UCL suit seeking an injunction prohibiting defendant ranch owners from knowingly employing illegal aliens. The court reasoned that "equity withholds its aid" where it would be "more orderly, more effectual, less burdensome to the affected interests, that the national government [act on plaintiffs' complaints]," rather than the courts. (*Id.* at p. 599.; see also *People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.* (1985) 38 Cal.3d 509, 523 ["[t]he sound counsel of the *Diaz* decision . . . mandates state abstention in reliance upon federal enforcement in this case]; *Cobos v. Mello-Dy Ranch* (1971) 20 Cal.App.3d 947, 951-952; *Larez v. Oberti* (1972) 23 Cal.App.3d 217, 221-227.)

The realm of finance and banking regulation is another area in which courts have found administrative agencies better suited to enforcing regulatory schemes than the courts. As one court commented in addressing the legality of a mortgage loan prepayment charge: "[T]he control of charges, if it be desirable, is better accomplished by statute or by regulation authorized by statute than by *ad hoc* decisions of the courts. Legislative committees and an administrative officer charged with

regulating an industry have better sources of gathering information and assessing its value than do courts in isolated cases." (*Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.* (1971) 22 Cal.App.3d 303, 311.)

Following *Lazzareschi*, the court in *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205 reversed a UCL injunction limiting a $3 bank fee, finding the trial court's injunction "an inappropriate exercise of judicial authority." (*Id.* at p. 217.) The court reiterated that such regulation of banking charges was precisely the type of case that should be left to the administrative agency with greater expertise rather than " 'by *ad hoc* decisions of the courts.' " (*Id.* at p. 218.) And, in *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 789, footnote 9, the court noted that securities transactions are exempt from the reach of the UCL "because of the comprehensive regulatory umbrella of the Securities and Exchange Commission over such transactions."

The same deference to administrative expertise has been granted in a broad array of other regulatory contexts. See, e.g.,

Willard v. AT&T Communications of California, Inc. (2012) 204 Cal.App.4th 53, 60-61 [affirming dismissal of action challenging telephone unlisted service fees under the UCL because "overseeing service fees is best left to the" appointed utilities commission];

Samura, supra, 17 Cal.App.4th at p. 1301 [dismissing suit alleging violations of the Knox–Keene Act because it required the trial court to "assume[ ] a regulatory power" over a regulation "entrusted exclusively to the Department of Corporations"];

Desert Healthcare, supra, 94 Cal.App.4th at pp. 794-796 [dismissing suit of medical providers seeking to recover payment for services rendered

to HMO subscribers because setting the appropriate level for HMO capitation "would pull the court deep into the thicket of the healthcare finance industry, an economic arena that courts are ill-equipped to meddle in"];

Alvarado, supra, 153 Cal.App.4th at pp. 1303-1306 [granting demurrer to complaint seeking to enforce staffing requirements of a skilled nursing facility because determining scope of regulations and calculating the nursing hours involved at each facility under various formulas were tasks "better accomplished by an administrative agency"];

Wolfe v. State Farm Fire & Casualty Ins. Co. (1996) 46 Cal.App.4th 554, 564-565 [rejecting a UCL claim based on the refusal by insurers to issue earthquake insurance policies following the 1994 Northridge earthquake because even if the insurers' refusal constituted an unfair business practice, "that by itself does not permit unwarranted judicial intervention in an area of complex economic policy"];

Shamsian, supra, 136 Cal.App.4th at pp. 631, 642 [dismissing lawsuit against the Department of Conservation for allegedly failing to provide convenient, economical, and efficient beverage container redemption opportunities because "equitable abstention was appropriate in light of the comprehensive administrative scheme created to address beverage container recycling"];

Gregory v. Albertson's, Inc. (2002) 104 Cal.App.4th 845, 855 [sustaining demurrer to complaint alleging that a shopping center unfairly contributed to urban blight because it would be "fashioning a private remedy through the use of the unfair competition law to affect a single leasehold in a shopping center"]; and,

Center for Biological Diversity, Inc. v. FPL Group, Inc. (2008) 166 Cal.App.4th 1349, 1372 [refusing to enjoin use of wind turbines adversely affecting bird life because it could lead to "inconsistent standards and conditions for the operation"].)

C. Courts should abstain from enforcing federal banking regulations under the auspices of the UCL.

1. The federal law is precisely the type of complex regulatory scheme the courts should refrain from enforcing under the UCL.

The preceding cases teach that where a regulatory body is tasked with enforcing a comprehensive or complex regulatory scheme, the courts should abstain from exercising their equitable powers. Abstention is thus appropriate where the claims involve "determining complex economic policy, which is best handled by the legislature or an administrative agency" and where "federal enforcement of the subject law would be more orderly, more effectual, less burdensome to the affected interests." (*Alvarado, supra*, 153 Cal.App.4th at p. 1298, internal quotation marks omitted.) These factors are certainly also implicated here.

TISA is part of a complex series of government regulations designed to regulate the banking industry. TISA was enacted as part of the larger Federal Deposit Insurance Corporation Improvement Act of 1991 "to require the clear and uniform disclosure of" interest rates and fees related to deposit bank accounts. (12 U.S.C.A. § 4301(b).) TISA was implemented by the Board of Governors of the Federal Reserve Board by the issuance of

Regulation DD. (*Id.*, § 4308; 12 C.F.R. § 230.1 (2012).) Following the financial collapse in 2008 and the passage in 2010 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress transferred the authority for enforcement and the issuance of regulations and enforcement of TISA to the newly-created Bureau of Consumer Financial Protection (the Bureau). (12 U.S.C.A. §§ 4308, 4312.)

The Bureau is instrumental in determining whether a particular financial institution is in violation of the regulations. For example, as part of its administrative duties delegated under TISA, the Bureau is tasked with "publish[ing] model forms and clauses for common disclosures to facilitate compliance with" the regulations. (12 U.S.C.A. § 4308(b)(1).) A depository institution is "deemed to be in compliance with the disclosure provisions" of TISA if it uses one of the model forms or clauses or uses a similar form or clause that does not change the substance of the requirements of the regulations. (*Id.*, § 4308(b)(2).)

Inherent in the Bureau's authority to enforce these regulations is the responsibility to interpret whether a violation has occurred and which of the myriad of remedies fits the violation. As the administrative agency tasked with issuing the regulations and devising the model forms, the Bureau is in a superior position to the California courts to weigh the alleged violation in the context of the bank's overall regulatory compliance and to prioritize enforcement and remedial efforts. (See *Ford Motor Credit Co. v. Milhollin* (1980) 444 U.S. 555, 566 [100 S.Ct. 790, 63 L.Ed.2d 22] [with reference to the related TILA: "acquiescence in administrative expertise is particularly apt under TILA. . . . The Act is best construed by those who gave it substance in promulgating regulations thereunder"].)

Indeed, the record is clear that Congress intended that the provisions of TISA "be enforced by a regulatory agency and not private citizens." (*Gunther v. Capital One, N.A.* (E.D.N.Y. 2010) 703 F.Supp.2d 264, 270.) One reason Congress eliminated the private right of action requirement is not only that such lawsuits burden the courts, but because they also put an extra burden on the administrative agencies. The legislative history explains that "the 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." (H.R.Rep. No. 104-193, 1st Sess., p. 104 (1995); ABOM 25.) The reason that civil liability was curtailed was to lessen that burden while still giving the agencies the "authority to take administrative actions to enforce" TISA's provisions. (*Ibid.*)

Turning the enforcement of TISA over to individual plaintiffs and judges necessarily interferes with the regulatory scheme. Unless the California courts seek a ruling from the Bureau for individual disclosure notices, there will inevitably be conflicts in the way the courts and the Bureau enforce TISA. Such a process will inevitably lead a bank to be faced with conflicting interpretations and requirements between its regulator and courts adjudicating the claims of private litigants. Thus, allowing the California courts to enforce TISA inevitably puts the courts in the position of "assum[ing] the functions of an administrative agency." (*Alvarado, supra,* 153 Cal.App.4th at p. 1298.)

Another factor courts consider in determining whether to abstain from using their equitable powers to enforce a regulatory scheme "is whether the Legislature or other government entity has attempted to

remedy the issues raised in plaintiffs' complaint or provided an alternative means of addressing such issues." (*Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1369 [reversing trial court's application of equitable abstention because no administrative remedies were available to enforce the violations alleged by the plaintiffs].) Here, the administrative penalties for violating TISA or any other provision of Dodd-Frank are broad. The potential penalties authorized by Dodd-Frank include fines, restitution, restricting the growth of the institution, rescinding agreements or contracts, removing directors, or suspension. (12 U.S.C.A. § 4309 [incorporating 12 U.S.C.A. § 1818.) These remedies are more than adequate to address plaintiffs' concerns.

Plaintiffs argue that because the California Legislature repealed its own banking disclosure regulations following the enactment of the federal version of TISA, the California Legislature must have wanted to permit Californians to bring private claims under TISA before Congress repealed the private right of action. (OBOM 29-31; RBOM 22.) Plaintiffs contend that by failing to enact new banking disclosure regulations after the repeal of TISA's private right of action, the California Legislature must have "felt that California's continued public interest in enjoining improper bank disclosures would be vindicated by TISA as enforced through the Unfair Competition Law both by public prosecutors and private citizens." (OBOM 31.)

Plaintiffs cannot legitimately infer any such negative implication from the Legislature's decision *not* to authorize private actions such as the one in this case. To the contrary, as the legislative history cited in plaintiffs' own briefs makes clear, the reason that the Legislature repealed California's version of TISA was to make enforcement of depository

disclosures uniform and to leave it to the agencies of the federal government to enforce TISA's provisions: "It would not be in the public interest to continue to require banks to comply with, and regulatory agencies to enforce, both the California deposit disclosure laws and the federal deposit disclosure laws." (Assem. Bill No. 687 (1993-1994 Reg. Sess.) § 3; Stats. 1993, ch. 107, § 2; OBOM 30; ABOM 22.) The Legislature, in other words, made it quite clear that TISA was best enforced by federal "regulatory agencies" not state courts.

Imposing a duty on the courts to interpret and enforce the provisions of TISA would frustrate the express purpose of maintaining a uniform enforcement of TISA under federal law. Neither the California Legislature nor any California agency has promulgated rules or regulations for the enforcement of TISA. Instead, the Legislature has expressly left that job to the federal government. Plaintiffs are asking the California courts to directly enforce federal regulations, even where the Legislature has deferred to Congress and Congress has mandated that the statute be enforced by administrative agencies and not the courts. The federal government has installed a comprehensive regulatory apparatus to deal with banks' failures to properly disclose fees to their customers. This Court should therefore abstain from enforcing those same regulations under the UCL.

2. This Court's holding in *Cortez* does not foreclose application of the abstention doctrine at this stage of the proceedings.

Some courts have misconstrued this Court's ruling in *Cortez* as limited to permitting courts to consider equitable considerations in granting UCL relief, but mandating that "equitable defenses may not be used to defeat the cause of action under the UCL." (See, e.g., *Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 544-545 [refusing to apply an unclean hands defense to deny class certification] (emphasis omitted).) The reluctance to dismiss a claim based on equitable considerations derives from the comment in *Cortez* that certain "equitable defenses may not be asserted to wholly defeat a UCL claim" because "such claims arise out of unlawful conduct." (*Cortez, supra,* 23 Cal.4th at p. 179.) Justice Werdegar in her concurrence in *Cortez* made a similar point, noting that "in general, as between a person who is enriched as the result of his or her violation of the law, and a person intended to be protected by the law who is harmed by its violation, for the violator to retain the benefit would be unjust." (*Id.* at p. 182, conc. opn. of Werdegar, J.)

These points from *Cortez* must be placed in context. The court's holding was that courts are not *required* to grant relief under the UCL even where there is a statutory violation because equitable considerations may dictate that no relief is warranted. The language qualifying that holding means only that certain equitable defenses based solely on the dilatory conduct of the claimant, such as unclean hands or laches, may not in themselves defeat a UCL claim because a defendant should not entirely

avoid liability for breaking the law just because the plaintiff also behaved badly.

That qualification in *Cortez* has no application to the abstention doctrine. Indeed, the abstention doctrine is less an equitable affirmative defense than an obligation on the courts to recognize the separation of powers and the limited reach of the courts' equitable powers. Nothing in *Cortez* suggests that courts cannot wholly abstain from hearing a UCL claim predicated on a complex regulatory scheme. To the contrary, *Cortez* made clear that not all statutory violations necessarily lead to relief under the UCL. (*Cortez, supra,* 23 Cal.4th at pp. 179-180.) Thus, several courts, as previously described, have wholly refused to entertain UCL claims because the claims interfered with enforcement of a complex regulatory scheme. (See, e.g., *Alvarado, supra,* 153 Cal.App.4th at p. 1295 [granting demurrer based on equitable abstention doctrine]; *ante,* pp. 11 to 14.)

CONCLUSION

For the foregoing reasons, this Court should affirm the holding of the Court of Appeal dismissing plaintiffs' claim under the UCL.

September 20, 2012

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 4,870 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: September 20, 2012

Jason R. Litt

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On September 20, 2012, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT BANK OF AMERICA, N.A.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that 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 declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 20, 2012, at Encino, California.

/s/

Jan Loza

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