2012 WL 2344187 (E.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, E.D. California.

Ronald L. LOSEL, an individual, on behalf of himself and a class of similarly-situated consumers, Plaintiffs,

v.

CHASE BANK USA, N.A., a Delaware corporation; and Does 1 through 50, inclusive, Defendants.

No. 2:11-CV-01999-KJM-DAD.
January 25, 2012.

Plaintiff's Memorandum of Points and Authorities in Opposition to Motion of Defendant Chase Bank USA, N.A. to Dismiss First Amended Complaint for Failure to State a Claim and Failure to Plead Fraud with Particularity

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Judge: Hon. Kimberly J. Mueller.

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I. *INTRODUCTION*

The motion to dismiss filed by Chase Bank USA, N.A. ("Chase") relies upon arguments which disregard allegations in Plaintiff's First Amended Complaint (the "FAC"), ignores language in its loan agreement with Plaintiff (the "Agreement") (a true and correct copy of the Agreement is attached to the FAC as Exhibit "C"). Chase also ignores authorities - statutes, regulations, OCC Advisory Letters - which contradict its arguments. California law applies to Plaintiff's claims, and those claims are sufficiently pled and are not preempted.

II. *BACKGROUND*

A. *THE BAIT AND SWITCH*

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Plaintiff Ronald Losel ("Mr. Losel") is a 79-year-old man who suffers from severe pain in his left knee and right hip and who responded to a chiropractor's advertisement in the Sacramento Bee offering four ***free*** laser litecure treatments to relieve pain. FAC, ¶7. The advertisement invited Sacramento area consumers to try the "FOUR FREE TREATMENTS!" to "determine if this technology will work" to relieve pain. FAC, ¶18. To get the four free treatments, Mr. Losel was required to sign up for a "14 treatment" program at a cost of $3,877.00. FAC, ¶19. Instead of providing any pain relief, the chiropractor signed Mr. Losel up for ChaseHealthAdvance no interest **financing**. FAC, ¶7. The treatments were completely worthless, but Mr. Losel ended up paying Chase over $5,000.00, including significant interest on the no interest loan he had received. *Id*. Chase imposed the 24.75% APR default interest from the date of the loan as soon as Plaintiff notified Chase he was disputing the obligation and withheld payment. *Id*.

B. *THE PURCHASE MONEY LOAN*

Chase actively solicits California medical providers to broker its credit arrangements to California consumers and, in fact, has signed up and lined up more than 5,000 medical providers in California to do so. FAC, ¶13. The **financing**, of course, is used to pay for the medical care being offered by those medical providers Chase has recruited. In this case, Chase had previously approved the chiropractor to broker its **financing**, and thus, the chiropractor also signed Mr. Losel up for Chase's so-called no interest **financing** to pay for the laser litecure pain relief treatments. FAC, ¶20. A true and correct copy of Chase's "CHASEHEALTHADVANCE[SM] REVOLVING ACCOUNT CHARGE AUTHORIZATION FOR RONALD L. LOSEL" ("Charge Authorization") is attached to the FAC as Exhibit "A."[1] *Id*. In other words, the Agreement was a "purchase money loan" as that term is defined by 16 C.F.R. §431.1(d). As explained below, the fact that the Agreement was a purchase money loan is significant because the FTC Holder Rule extends to purchase money loans and renders creditors subject to the consumer's claims and defenses against the seller. Chase's **financing** package enables the health care provider (and enabled the chiropractor who treated Mr. Losel) to immediately receive from Chase the entire cost of treatment, before the treatment had been provided. FAC, ¶23.

C. *THE OTHER "KEY TERMS" IN THE AGREEMENT*

Chase purports to summarize the "key terms" in its motion, but, given the issues framed by the FAC, Chase overlooked several provisions that matter more.

1. The Agreement Expressly Authorizes Mr. Losel (And Other *Consumers) To Withhold Payment Of A Questioned Charge*

Chase's argument that the obligation to make the minimum payment was unambiguous is contradicted by a provision on Page 4 of the Agreement. Under the section "**Notify Us In Case of Errors or Questions About Your Bill**," Chase instructed Mr. Losel to write to Chase if an error or problem appeared on the bill. FAC, Ex. C at 4. Mr. Losel did write to Chase and disputed the chiropractor's charge on his bill. In the section of the Agreement, entitled "**Your Rights and Our Responsibilities After We Receive Your Written Notice,"** Chase told Mr. Losel, "You do not have to pay any questioned amount while we are investigating, but you are still obligated to pay the parts of your bill that are not in question." FAC, Ex. C at 4. Having questioned the chiropractor's entire charge, Mr. Losel did not pay the questioned amount, i.e., he did not make the minimum payment. Chase received his letter disputing the charge and immediately charged Plaintiff a late fee and then default interest when he withheld his payment while Chase investigated.

2. *The "Promise To Pay" Provision Implies The Promise Is Conditional*

In the Agreement, Chase provided for a "Promise to Pay." FAC, Ex. C, ¶3, at 1. Although Chase structures the second sentence of that provision as a disclaimer, the prefatory clause recognizes Chase may be liable for a seller's failure to perform, "to the extent required by law:"

> Except to the extent required by law, we have no responsibility for failure or inadequacy of any procedures or goods provided by a merchant or any procedure wrongfully done or not done by a merchant, and you agree to hold us harmless from any such liability or responsibility.

On page 4 of the Agreement, Chase effectively acknowledges that the law requires it to be responsible for the seller's failures. There, in the FTC Holder Notice, Chase declares (as it must) that the law makes Chase subject to the same claims and defenses which Mr. Losel had against for the chiropractor. FAC, Ex. C at 4.

3. *The Agreement Expressly Makes Chase Subject To All of The Claims And Defenses Which Plaintiff Could Have Asserted Against The Chiropractor*

The first three pages of the Agreement are well organized with numbered sections, and bold headings. That organization, however, disappears when Chase gets around to including the FTC Holder Rule notice. On page 4 of the Agreement, amidst an unnumbered hodgepodge of provisions, Chase included the following notice as part of the "Notice to Cosigner" paragraph (suggesting it is only applicable to cosigners):

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

FAC, Ex. C at 4.

This notice tells a defrauded consumer the creditor is liable for a seller's failure to perform, and as explained below, it gives a consumer caught in a purchase money loan the right to withhold payment from the creditor, notwithstanding any other conditions of the purchase money loan.

III. *LEGAL ARGUMENT*

A. *MOTION TO DISMISS LEGAL STANDARDS*

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "In reviewing the complaint, the Court must 'accept as true all of the factual allegations contained in the complaint.' " *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "All reasonable inferences from the complaint must be drawn in favor of the plaintiff." *Id.*

B. *THE FIRST CAUSE OF ACTION, FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING, ADEQUATELY STATES A CLAIM*

There is no dispute about this point of law: Every contract imposes upon each party a duty of good faith and fair dealing in the performance of the contract such that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 100 Cal.App.4th 44, 55 (2002). The covenant of good faith and fair dealing does not dictate particular terms of credit, but merely requires a creditor

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to comply with the loan contract in the same way that any other contracting party must, that is, by refraining from exercising its contractual discretion in an underhanded, arbitrary or unreasonable way. *See, Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005); *PAMI-LEMB I Inc. v. EMB-NHC, LLC*, 857 A.2d 998, 1016 (Del.Ch. 2004); *See also Hilco Capital, LP v. Federal Ins. Co.*, 978 A.2d 174, 178 (Del. 2009) (applying Missouri law) ("But, the corollary is that, when a contract gives one party discretion, it must not be exercised to deprive the other party of the benefit of the contractual relationship or evade the spirit of the bargain."). The Agreement gave Chase discretion to allow a 30-day or other grace period after a minimum payment default. *See* FAC, Ex. C, ¶14, at 2. Yet Chase exercised that and other discretion in a manner designed to defeat the spirit of the no interest **financing** bargain it had struck with Mr. Losel and other California health care consumers and deprive them of the benefit of the no interest **financing**. FAC, ¶9.

Citing *McCoy v. Chase Manhattan Bank, USA*, 654 F.3d 971 (9th Cir. 2011), Chase attacks the cause of action for breach of the covenant of good faith and fair dealing by arguing the subject matter is covered by the express terms of the Agreement. Chase's reliance upon *McCoy* is misplaced, for two reasons. First, in *McCoy* the claim for breach of the covenant of good faith and fair dealing was premised upon Chase's alleged failure to provide advance notice of the interest rate increase. As the Court explained when it affirmed the dismissal of that claim:

McCoy's seventh cause of action fails to state a claim for breach of an implied duty of good faith because the contract already contained an express obligation for Chase to provide notices as required by law, and "where the subject at issue is expressly covered by the contract" . . . the implied duty to perform in good faith does not come into play.

Id. at 751, *citing Dave Greytak Enters., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del.Ch. 1992).

This case, in contrast, does not involve a failure to give notice, nor does it involve a subject expressly covered by the Agreement. While Chase argues the Agreement ***unambiguously*** authorizes Chase to charge Plaintiff interest when he withheld his payment, the Agreement is particularly ambiguous on this point.

1. ***The Agreement Does Not "Unambiguously" Provide Chase May Impose Late Fees And Default Interest Charges When A Customer Questions Or Disputes The Obligation To Pay***

While on the one hand, the Agreement does authorize Chase to charge a late fee or default interest if the customer fails to make a minimum payment, the Agreement also invites the customer who questions a charge to not pay the charge while Chase investigates. And as noted, the Agreement also tells the customer Chase is subject to the same claims and defenses as the seller.

2. ***As A Purchase Money Loan, The Agreement Is Subject To FTC Holder Rule***

As a threshold point: the Agreement was a purchase money loan, and the FTC Holder Rule expressly incorporates purchase money loans within the scope of the rule. *See* 16 C.F.R. §433.2(b). The Federal Trade Commission has included within the reach of the FTC Holder Rule those sellers and creditors who "employ procedures in the course of arranging the **financing** of a consumer sale which separate the buyer's duty to pay for goods or services rendered from the seller's reciprocal duty to perform as promised." 40 Fed.Reg. 53,506, 53,522 (1975). The agency has recognized this practice as "dragging the body," wherein:

> a merchant, desiring to circumvent restrictions upon the holder in due course doctrine, arranges for a consumer purchase to be **financed** by a cooperating **financing** agency. The resultant **financial** transaction has the appearance of a direct cash loan, payment of which can be enforced by the loan company without reference to the underlying transaction.

40 Fed.Reg., *supra*, at 53,514.

The FTC implemented the rule because it was "an unfair practice for a seller to employ procedures in the course of arranging the **financing** of a consumer sale which separate[d] the buyer's duty to pay for goods or services from the seller's reciprocal duty to perform as promised." *Music Acceptance Corp. v. Lofing*, 32 Cal.App.4th 610, 627-628 (1995) (*quoting* Statement of Basis and Purpose, 40 Fed.Reg. 53.522 (1975)). In its "Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses," the FTC explained as follows:

[The] dramatic increase in consumer credit over the past thirty years has caused certain problems. Evolving doctrines and principles of contract law have not kept pace with changing social needs. One such legal doctrine which has worked to deprive consumers of the protection needed in credit sales is the so-called 'holder in due course doctrine.' Under this doctrine, the obligation to pay for goods or services is not conditioned upon the seller's corresponding duty to keep his promises.

Typically, the circumstances are as follows: A consumer relying in good faith on what the seller has represented to be a product's characteristics, service warranty, etc., makes a purchase on credit terms. The consumer then finds the product unsatisfactory; it fails to measure up to the claims made on its behalf by the seller, or the seller refuses to provide promised maintenance. The consumer, therefore, seeks relief from his debt obligations only to find that no relief is possible. His debt obligation, he is told, is not to the seller but to a third party whose claim to payment is legally unrelated to any promises made about the product.

Music Acceptance Corp., supra at 627-628.

"There is no question that this provision protects consumers by preserving their claims and defenses against creditors ***and allowing non-payment in the face of a seller's fraudulent actions***." *Comer v. Pers. Auto Sales, Inc.*, 368 F.Supp.2d 478, 490 (M.D.N.C. 2005) (emphasis supplied). The FTC Holder Rule notice entitles the buyer to withhold the balance of the purchase price when the seller fails to perform. *See Tinker v. De Maria Porsche Audi, Inc.*, 459 So.2d 487, 492 (Fla.Dist.Ct.App. 1984) ("[I]t is clear that not only does the Notice clause entitle the buyer to withhold the balance of the purchase price owed to the creditor when the seller's contractual duties are not fulfilled, but it gives the buyer a complete defense should the creditor sue for payment."); *see also Home Sav. Ass'n v. Guerra*, 733 S.W.2d 134, 135 (Tex. 1987) (FTC rule was designed to reallocate the cost of seller misconduct to the creditor, as Commission felt creditor was in a better position to absorb loss or recover from the guilty party - the seller). In other words, the creditor on a purchase money loan or retail installment contract is subject to any claim or defense the debtor could assert against a seller, as long as the claim or defense arises out of or is connected with the original transaction. *State ex rel. Stenberg v. Consumer's Choice Foods, Inc.*, 755 N.W.2d 583, 589 (Neb. 2008), *citing Primus Auto **Financial** Serv. v. Brown*, 840 N.E.2d 254 (Ohio 2005).

The ambiguous and conditional nature of the obligation to pay is further confirmed by the second sentence in paragraph 3 of the Agreement, the "Promise to Pay" paragraph. FAC, Ex. C at 1. While Chase constructed that statement in an attempt to disclaim responsibility for the merchant's failings, the opening clause - "Except to the extent required by law," swallows the disclaimer when juxtaposed against the FTC Holder Rule. The law requires creditors like Chase to be subject to the same claims and defenses as the seller who arranged the **financing** and then fails to perform or provides a worthless service or product.

3. ***The Agreement Gave Chase Discretion Not To Charge Default Interest***

As noted, paragraph 15 of the Agreement gave Chase the discretion to allow a 30-day or other grace period when a consumer did not make the minimum payment. FAC, Ex. C at 2. Notwithstanding that discretion, Chase imposed a late payment fee after Mr. Losel wrote to question the chiropractor's charge and then imposed default interest. The covenants in the Agreement gave Mr. Losel the right to dispute the charge and the right to withhold his payment. As Chase concedes, the covenant of good faith is read into contracts in order to protect the express covenants and promises of the contract. Motion, 7:17-18, *citing Careau & Coo. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal.App.3d 1371, 1393 (1990). Chase, however, exercised its discretion in a way designed to deprive Mr. Losel of the benefits of the no interest covenant in their Agreement. [2]

C. ***CALIFORNIA LAW APPLIES TO PLAINTIFF'S CLAIMS***

The choice-of-law issue is governed by the holdings in *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 464-469 (1992) and *Washington Mutual Bank v. Superior Court*, 24 Cal.4th 906, 914-919 (2001). Under *Nedlloyd*, California courts apply the principles set forth in Restatement Second of Conflict of Law Section §187.
Briefly restated, the proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue . . . ." (Rest., § 187, subd. (2).) If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.

Nedlloyd, supra, at 464-466, fns. omitted. California is the state with the most significant contacts to this case.

In the interests of brevity, Plaintiff will assume the chosen state (Delaware) has a substantial relationship to the parties, as Chase is a Delaware corporation and, under *Nedlloyd*, that alone is sufficient to establish the "substantial relationship." *See Nedlloyd, supra*, at 467. Thus the issue becomes whether the law chosen, Delaware, conflicts with a fundamental policy of California. If there is a conflict, the Court must determine whether California has a materially greater interest than Delaware in the determination of the particular issue. *Id*. at 464-466. As explained below, there is a fundamental conflict between Delaware and California law and California does have a materially greater interest than Delaware in the determination of the claims at issue.

1. ***Delaware Law Conflicts With A Fundamental Policy Of California***

a. ***Delaware Law on Unfair Competition and Elder Abuse***

Delaware law does not provide consumers with the right to sue for unfair competition nor does Delaware law provide **financially abused elders** with the right to sue and recover damages and attorneys' fees. Delaware law does have a Consumer Fraud Act (6 Del.C. §2511 *et seq*.), but it would not apply to protect Mr. Losel and other California residents who purchased health care in California using Chase's purchase money loans, because those transactions did not occur in Delaware. *See Wal-Mart Stores v. AIG Life Ins. Co.*, 872 A.2d 611 (Del.Ch. 2005) (Department store's claim against the insurance companies was dismissed, as no transaction occurred in Delaware; the Act requires the unfair practice occur wholly or in part within Delaware.) Delaware also has a Deceptive Trade Practices Act (6 Del.C. §2531 *et seq*.), but it is not intended to redress wrongs between a business and its customers. *See Grand Ventures, Inc. v. Whaley*, 632 A.2d 63 (Del. 1993). Delaware law, in other words, fails to protect California consumers or provide them with any of the remedies the UCL offers. Delaware has no statute which gives **financially abused elders** special protections or remedies. As explained below, the absence of such protections, which California does provide, matters where they manifest fundamental California policy.

b. ***California Law on Unfair Competition and Financial Abuse***

California's Business and Professions Code §17200 *et seq*. codifies California's strong public policy against unfair competition and prohibits wrongful business conduct in whatever context such activity might occur. *See Premier Tech. Sales, Inc. v. Digital Equip. Corp.*, 11 F.Supp.2d 1156, (N.D.Cal 1998), aff'd in part, rev'd in part *Premier Tech. Sales, Inc. v. Digital Equip. Corp.*, 202 F.3d 279 (9th Cir. 1999).

Similarly, the Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA") set forth in Welfare & Institutions Code §15600 *et seq*. reflects a fundamental policy of California to protect a vulnerable class of its residents. *See* Welf. & Inst. Code §15600(h) (Legislative finding that elderly persons are disadvantaged class, that cases of abuse are seldom prosecuted and that few civil cases are brought for reasons including lack of incentives to prosecute these suits); and §15600(j) (declaring legislative intent in adding provisions for remedies and recovery of attorneys fees in order to enable abused elderly persons and dependent adults to engage attorneys). *See Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC,* 150 Cal.App.4th 469 (2007) (EADACPA expresses California public policy to protect the elderly, a particularly vulnerable portion of the population, from abuse and to ensure appropriate relief for such mistreatment).

In light of California's strong public policy against unfair competition and financial elder abuse, the second step of the Restatement analysis weighs in favor of applying California law.

2. ***California Has A Materially Greater Interest In Determining The Issue***

Delaware law conflicts with fundamental California public policy in that it has no comparable statutory protections for consumers and elders. Delaware law does not give Mr. Losel any recourse for Chase's alleged unfair competition, no statutory protections for his status as an elder, no statutory remedies or provisions to recover attorneys' fees for the alleged financial abuse. Given that Mr. Losel is not only an elder but the kind of California resident for whom the legislature specifically enacted UCL and financial abuse protections, California has a materially greater interest than Delaware in determining the unfair competition and financial elder abuse issues before this Court. Particularly instructive on this point is *Brack v. Omni Loan Company, Ltd.*, 164 Cal.App.4th 1312 (2008). In *Brack*, a Nevada lender included a choice of law clause, choosing Nevada law, in its loan agreements with non-resident military members stationed in California. When a class of those military members challenged Omni Loan Company, Ltd.'s ("Omni") conduct under California's Finance Lenders Law, Omni invoked Nevada law. The trial court agreed, but the Court of Appeal reversed, finding that the Finance Lenders Law was fundamental California policy and that California had a materially greater interest in the challenged loan transactions than Nevada.

Here, California's fundamental public policy in protecting its residents, particularly its elderly residents, is materially greater than Delaware's interest in uniformity in bank regulation - even where the bank, like Chase, is a national bank. As the California Court of Appeals explained in *Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 1291 (2005), "California's interest becomes even more intense when it is protecting its citizens from 'take it or leave it' agreements that incorporate one-sided protections and impose hidden waivers without actual notice or a realistic opportunity to reject them." *Id*. Although *Klussman* involved a hidden waiver of the right to bring a class action, its choice of law reasoning remains instructive. In *Klussman*, a class of credit cardholders sued a Delaware bank for violations of the UCL and of California's Consumers Legal Remedies Act. Like the Agreement here, the cardmember agreement in *Klussman* contained a provision choosing Delaware law, except where federal law applied. The court of appeals in *Klussman*, however, declined to enforce the choice of law clause because of the fundamental conflict between California law and Delaware law on class action waivers.

Under Delaware law, Chase can disregard a consumer's status as an elder and threaten defrauded elders who want to dispute a charge with imposition of late fees and default interest. Under Delaware law, the elder facing that wrongful taking has no special recourse nor right to recover her or his attorneys' fees. Moreover, as the amounts in dispute are relatively small, few defrauded elders, if any, will go through the time and trouble of suing Chase. Chase, therefore, has a notably reduced incentive to avoid improperly assessing late fees and default interest charges. Delaware, of course, could choose to enact statutes protecting elders, but it has not.

Mr. Losel is a California resident, invoking claims under California law, based on a transaction he made in California. Chase came to California, recruited the chiropractor and thousands of other providers, and advertised and offered purchase money loans in those providers' California offices. Clearly, Chase has a significant consumer market in California. California's interest in the resolution of the dispute outweighs Delaware's. California's laws should apply.

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D. ***PLAINTIFF'S UCL CLAIM IS SUFFICIENTLY PLED***

Chase challenges the sufficiency of Plaintiff's UCL claim (Bus. & Profs. Code §17200 *et seq.*) based upon two claimed deficiencies. Chase argues Mr. Losel has not pled the UCL claim with sufficient specificity, and argues he has not pled all of the required elements. Neither argument has merit.

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Bus. & Profs. Code §17200. Plaintiff has alleged a host of such practices in which Chase engaged, any one of which would support a UCL claim. *See, e.g.*, FAC, ¶27. These allegations are "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *See Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The Charge Authorization (FAC, Ex. A) shows the date of the transaction. And Plaintiff has alleged the place of the transaction, the nature of Chase's alleged fraudulent activities and "what is false or misleading about a statement, and why it is false." *See* FAC, ¶¶3-7, 9-10, 18-26, 28; *see also* FAC ¶27 (listing examples of traps designed to trigger default rate of interest). Such allegations suffice to satisfy Rule 9(b). *See In re GlenFed, Inc., Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994); *see also Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).

Chase argues the FAC is devoid of any specifics concerning Chase's "fraudulent" and "unfair" conduct as to Mr. Losel. This argument ignores the specific allegations that: Chase's offer of no interest **financing** was "intended and designed to be illusory" (FAC, ¶25); Chase is not really in the business of making unprofitable, interest-free loans (FAC, ¶2); through "a variety of shenanigans, Chase succeeded in collecting from those no interest **financing** customers a ***very high*** rate of interest (24.75% - 27.99% APR)" (*id.*); Chase recruited a sizeable army of California providers (over 5,000) to act as informal loan "brokers" (FAC, ¶3); Chase's practice and intent to trigger the 24.75% interest on its no interest **financing** is also evidenced in the fact that Chase has made "bonus" payments of up to $200 to health care providers in return for getting consumers to sign up for no interest "**financing**" (*id.*); Chase wrote its loan agreements in a way designed to discourage the consumer from asserting against Chase the claims or defenses she or he may have against the medical provider (FAC, ¶5); Chase's attempted to mask the consumer's rights if the seller failed to perform (*id.*); and Chase attempted to extinguish the consumer's rights to challenge the repayment obligation by immediately imposing a 24.75% APR (from the beginning of the contract) on any consumer who did not receive the promised health care and stopped his payments to dispute the obligation (*id.*). Plaintiff submits these examples of Chase's specific conduct suffice to allege "fraudulent," "unlawful" and "unfair" conduct.

Chase is also mistaken when it argues Mr. Losel has not alleged he suffered any economic injury caused by Chase's unfair or fraudulent conduct, as required by *Kwikset Corp. v. Super. Ct.*, 51 Cal.4th 310, 322 (2011). Chase's high interest economic traps for the unwary include two which ensnared Mr. Losel. One was Chase's charging of a late fee and/or default interest when the customer accepts Chase's invitation not to pay the disputed amount. Another was the late fee and/or default interest Chase charges when the customer withholds payment to dispute the obligation under the FTC Holder Notice in the Agreement. Caught in these traps, Plaintiff has alleged he suffered *economic injury* as a result of Chase's unfair and fraudulent practices. Here is an example:

> Plaintiff ended up on the hook and paying Chase over $5,000.00, including a significant interest charge on the NO INTEREST **FINANCING** loan Plaintiff received. Chase imposed that 24.75% APR from the date of the loan as soon as Plaintiff notified Chase he was disputing the obligation and withheld payment.

FAC, ¶7.

Plaintiff specifically selected no interest **financing**. Then, having received worthless litecure treatments, he accepted Chase's invitation to question or dispute the charge, he withheld his payment of the questioned amount, and he exercised his rights

under the FTC Holder Rule. The result: Mr. Losel was saddled with more than $1,000 of interest on his no interest **financing**. Plaintiff has sufficiently and specifically pled the elements of his UCL claim. [3]

E. ***PLAINTIFF'S FINANCIAL ELDER ABUSE CLAIM IS SUFFICIENTLY PLED***

Chase mounts the same attack on Plaintiff's **financial elder abuse** claim. Chase contends that claim is deficient because it fails to allege fraud with specificity and fails to allege all of the elements of **financial elder abuse**. Both arguments ignore the substance of the FAC. Again, Plaintiff has sufficiently alleged Chase's fraudulent activities. *See* section D, *supra*. These allegations suffice under Rule 9(b). Plaintiff also has sufficiently pled the elements of his **financial elder abuse** claim. Chase's argument to the contrary - that the allegations in paragraph 55 are inadequate - apparently overlooks or ignores paragraph 52, which incorporates into the **financial elder abuse** claim the first 51 paragraphs of the FAC. FAC, ¶52. As explained above, those allegations make it clear the Mr. Losel was misled and tricked into paying 24.75% interest on his no interest loan, and that constitutes **financial elder abuse**.

F. ***FEDERAL LAW DOES NOT PREEMPT PLAINTIFF'S CLAIMS***

Chase's entire preemption argument relies upon a mischaracterization of Plaintiff's claims. Those claims do not “challenge the credit terms,” nor challenge “the interest rate and amount” nor even challenge Chase's “disclosures” for preemption purposes. Those claims ***do*** challenge Chase's business model - offering health care consumers purchase money loans with no interest **financing** under hidden conditions designed to trigger high rates of interest.

Chase discusses the National Banking Act (12 U.S.C. §21 *et seq.*) (“NBA”) and OCC regulation promulgated thereunder (e.g., 12 C.F.R. §7.4008), but Chase fails to acknowledge that both the NBA and OCC regulations permit the enforcement of state laws relating to contracts, torts and other subject matter. Indeed, the Supreme Court made it clear long ago that the NBA and OCC regulations do not preempt the entire field of national bank regulation. *See*, *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656, 44 S.Ct. 213, 68 L.Ed. 486 (1924). Instead, when Congress enacted the NBA, it created a “mixed state/federal regime[] in which the Federal Government exercises general oversight while leaving state substantive law in place.” *Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S.Ct. 2710, 2718, 174 L.Ed. 2d 464 (2009). “National banks are subject to the laws of a state in respect of their affairs, unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies, or conflict with the paramount law of the United States.” *First Nat'l Bank in St. Louis, supra*, at 656. Therefore, “[s]tates 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.” *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12, 127 S.Ct. 1559, 167 L.Ed.2d 389 (2007). “[I]f a state statute of general applicability is not substantively pre-empted, then ‘the power of enforcement must rest with the [State] and not with’ the National Government.” *Cuomo, supra*, at 2717 (*citing First Nat'l Bank in St. Louis, supra*, at 660); *see also* *North Dakota v. Merchants Nat'l Bank & Trust Co.*, 634 F.2d 368, 374-78 (8th Cir. 1980) (holding that Congress did not intend to preempt state laws of general application, such as common law tort and unfair competition statutes, by occupying the field of banking law when it enacted the NBA).

Accordingly, 12 C.F.R. §7.4008(e) states in pertinent part:
(e) State laws that are not preempted. State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:

(1) Contracts;

(2) Torts; .....

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12 C.F.R. §74008(e); emphasis added.

In short, preemption does not exist where state law is one of general application and only "incidentally" affect or "are otherwise consistent with" a national bank's non-real estate lending powers.

Plaintiff's first cause of action, for breach of the covenant of good faith and fair dealing, is contract-based. It only "incidentally" affects, if at all, Chase's non-real estate lending powers, and is otherwise consistent with those powers. As such, that claim is expressly permitted under the NBA and OCC regulations. 12 C.F.R. §7.4008(e)(1). Instructive here is *Trombley v. Bank of Am. Corp.*, 715 F. Supp. 2d 290 (R.I. 2010), a case in which the plaintiffs claimed Bank of America violated its duty of good faith and fair dealing under Delaware law by failing to post the plaintiffs' payments on the day they were received, without imposing additional fees or charges. Citing 12 C.F.R. §7.4008(d)(2)(iv), Bank of America argued plaintiffs' claim was preempted by the NBA and OCC regulations. Looking at the regulations, the Court rejected the preemption argument:

> The language does not expressly preempt generally applicable laws about performing one's contracts in good faith. Rather, subsection (d)(2)(iv) focuses on specific terms that are explicit in a lending contract, such as the schedule for repayment, the balance, the payments due, and minimum payments. The language targets specific terms, not general good faith requirements. Cf. *Davis*, 650 F. Supp. 2d at 1085 (general false advertising laws do not fall within section 7.4008(d)(2)). Good faith and fair dealing laws do not dictate particular terms of credit, but merely require that a creditor comply with the terms of its contracts in the same way that any other contracting party must, that is, by refraining from exercising its contractual discretion in an underhanded, arbitrary, or unreasonable way.

Id., at 296.

Each of Plaintiff's remaining two claims is likewise consistent with the exercise of Chase's non-real estate lending power, and has only an incidental effect (if any) on that power. The UCL and EADAPA are laws of general application, which merely require all businesses (including banks) to refrain from misrepresentations and abide by contracts and representations to customers. Such laws do not in any way impair Chase's ability to exercise its lending powers. Because such laws only "incidentally affect" the exercise of Chase's lending powers, they do not fall into the enumerated categories of §34.4(a), and are therefore not preempted. *See Hood v. Santa Barbara Bank & Trust,* 143 Cal.App.4th 526 (2006) (finding California's contract, tort or debt collection laws do not have more than an incidental effect on national banks' deposit-taking or lending powers, nor are they otherwise inconsistent with those powers); *see also Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 963, 970 (9th Cir. 2005) ("[S]tates retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."); *Alkan v. Citimortgage, Inc.,* 336 F.Supp.2d 1061, 1064 (N.D.Cal. 2004).

Conversely, the NBA does not authorize national banks such as Chase to mislead or deceive, nor do the OCC regulations grant such authority. To the contrary, the OCC has declared "[u]nfair or deceptive acts or practices are unlawful under federal and state law" (OCC Advisory Letter 2002-3 (Mar. 22, 2002), p.3 available online at http://www.occ.treas.gov/ftp/advisory/2002-3.doc [as of January 25, 2012].) Moreover, in that Advisory Letter, the OCC specifically warned national banks "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." *Id*. at p.3, fn2 (italics omitted). As one court explained, when it held that the UCL was not preempted by OTS regulations:

> [T]he Bank's argument that, by permitting fraud and unfair trade practices suits, the state is regulating the Bank's conduct, is off the mark. Plaintiffs' ability to sue the Bank for fraud does not interfere with what the Bank may do, that is, how it may conduct its operations; it simply insists that the Bank cannot misrepresent how it operates, or employ fraudulent methods in its operations. Put another way, the state cannot dictate to the Bank how it can or cannot operate, but it can insist that, however the Banks chooses to operate, it do so free from fraud and other deceptive business practices.

Gibson v. World Savings & Loan, 103 Cal.App.4th 1291, 1299 (2002), *See also Fenning v. Glenfed, Inc.*, 40 Cal.App.4th 1285 (1995) (court rejected savings association's assertion that plaintiffs' UCL claims were preempted by HOLA or OTS regulations); *People ex rel. Sepulveda v. Highland Fed. Savings & Loan*, 14 Cal.App.4th 1692 (1993) (court found that neither HOLA nor OTS regulations expressly or impliedly preempted UCL or fraud actions because their effect on the operations of the savings association was incidental rather than direct); *Lopez v. World Savings & Loan Assn.*, 105 Cal.App.4th 729, 741-742 (2003) (UCL remains available to remedy a myriad of potential unfair, unlawful, and fraudulent practices engaged in by federally chartered savings and loan associations, so long as the practice is outside the scope of federal regulation).

Chase's preemption cases do not support preemption here; without exception, they arose from different facts and are distinguishable. For example, in *Bank of America v. San Francisco*, 309 F.3d 551 (9th Cir. 2002), the Ninth Circuit addressed municipal ordinances which prohibited ATM charges - surcharges against non-accountholder ATM users by the **financial** institutions which operated the machines. The ordinances were ***not*** laws of general application. Moreover, OTS and HOLA regulations specifically authorized federal savings banks to collect fees through ATMs. Thus, the Ninth Circuit determined the ordinances were preempted because they attempted to directly regulate the bank's operations of ATM machines. Yet, as the Ninth Circuit recognized, a state-law claim may be asserted against a national bank when it "does not prevent or significantly interfere with the national bank's exercise of its powers." *Bank of America, supra*, at 558-559.

Chase's other preemption cases are similarly distinguishable because they too involved a state law specifically directed at a bank's exercise of its lending powers or otherwise arise from dramatically different facts. For example, *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008) involved California Civil Code §1748.9, which specifically imposed disclosure requirements on national banks when they issued "convenience checks," the use of which created credit card charges. Thus, the Ninth Circuit found plaintiffs' UCL claims were preempted because they were premised upon Civil Code §1748.9, which directly attempted to regulate certain aspects of national banks. *Id.* at 1038. In contrast, Mr. Losel's **elder** **abuse** claim is not attempting to regulate banking activity but instead relies upon a law of general applicability which applies to any business offering goods or services. Similarly, Plaintiff's UCL claim is not based upon a law attempting to regulate banking activity but instead is based upon allegations of fraudulent and unfair business conduct which could apply to any other business offering goods or services. The Court in *Rose* recognized again that "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." *Rose, supra*, at 1037.

Plaintiff is not seeking to regulate, directly or indirectly, how Chase extends credit. Whatever manner Chase uses, it simply cannot be fraudulent or deceptive. Thus, Plaintiff's claims only seek to compel Chase to honor its no interest **financing** and stop relying upon hidden traps and exercising its discretion in ways designed to deprive the consumer of the no interest contractual benefit. As the Ninth Circuit explained when it considered the NBA's preemptive effect in the context of mortgage-related lending, "[s]tate laws of general application, which merely require all businesses (including national banks) to refrain from fraudulent, unfair, or illegal behavior, do not necessarily impair a bank's ability to exercise its real estate lending powers." *Martinez v. Wells Fargo Home Mortg., Inc.*, 598 F.3d 549, 555 (9th Cir. 2010). This is because "[s]uch laws are not designed to regulate real estate lending, nor do they have a disproportionate or other substantial effect on lending." *Id*. In making these points, the Ninth Circuit recognized the OCC has issued an advisory letter cautioning banks they may be subject to laws that prohibit unfair or deceptive acts or practices. *Id*. (*citing* the OCC Advisory Letter, Guidance on Unfair or Deceptive Acts or Practices, AL 2002-3, 2002 WL 521380, at *2, *7 n.2 (Mar. 22, 2002)).

There are, consequently, numerous decisions rejecting preemption arguments like Chase makes here. For example, in *Patterson v. Regions Bank*, 2006 U.S. Dist. LEXIS 86029 (S.D.Ill. 2006), the plaintiff brought a claim against the bank, alleging that the bank violated the Illinois Consumer Fraud and Deceptive Business Practices Act by charging a higher interest rate on a promissory note than originally negotiated. The defendant removed the case, asserting federal question jurisdiction because plaintiff's state-law usury claims were completely preempted by the NBA. The court, however, determined the crux of the plaintiff's claims was that the interest rate on the note was not the interest rate the defendant allegedly represented it would

apply. And because plaintiff was not arguing that interested rate exceeded what was allowed by law, the court determined plaintiff was not alleging usury claims and remanded a breach of contract claim to state court. *Id*. at *17. Specifically, the court found that "allegations such as these . . . do not fall within the ambit of . . . the National Bank Act." *Id*. Furthermore, as the *Patterson* court noted, "expressly excluded from preemption are state laws only incidentally affecting the bank's lending power: contracts, torts, and criminal law. *See* 12 C.F.R. §§7.4008(e) and 34.4(b)." *Id* at *20.

Also particularly instructive is *Davis v. Chase Bank U.S.A., N.A.*, 650 F.Supp.2d 1073 (C.D.Cal. 2009), a case which Chase failed to cite even though it was a party and even though its motion to dismiss, which was based on the same preemption arguments, by the same lawyers, was denied. In *Davis*, the plaintiffs' claims included both a UCL claim and one for breach of the implied covenant of good faith and fair dealing, based upon Chase's promising purchasers of Circuit City Promotional Purchases that they would receive an interest-free period in which to pay off their purchase when, in fact, Chase charged interest fees in connection with Promotional Purchases. While the court recognized that a claim that the allocation of payments or the charging of a **finance** fee is generally an unfair act and would fall squarely within §7.4008(d)(2)(iv) and be preempted, the court rejected Chase's argument that the UCL claim (based upon unconscionable provisions and breach of the implied covenant of good faith and fair dealing) were based in contract, and therefore fall into the scope of §7.4008(e) and were not preempted as they only incidentally affect the exercise of Chase's non-real estate lending practices. *Davis, supra* at 1086. As the Court went on to explain:

> Plaintiff's challenge to specific terms on the ground that they are unconscionable does not seek to dictate the terms of credit in a way that would run afoul of either § 7.4008(d)(2)(iv) or the NBA's broader preemption principles: it does not seek to impose a specific term of credit, but rather is part of a general rule of contract law.

Id.

Plaintiff has alleged Chase ***misrepresented*** its no interest **financing**, not that it charged a usurious interest or an impermissible **finance** fee. And Plaintiff has alleged Chase offered its no interest **financing** but never intended to provide it as promised. These misrepresentations violate the UCL, and the misappropriation they accomplished constitutes **financial elder abuse**. This is not a "transparent challenge" to the credit terms. It is a challenge to Chase's misrepresentation and fraudulent intent. The remedies for this conduct will only incidentally affect Chase's lending power. While state law cannot dictate to Chase how it can or cannot operate, state law ***can*** insist that, however Chase chooses to operate, it does so without using deceptive business practices. *See Fenning, supra*, at 1299. Plaintiff's state law claims of general application are not preempted.

IV. *CONCLUSION*

For all of the above reasons, Plaintiff respectfully requests that this Court deny Chase's motion to dismiss the first amended complaint.

DATED: January 25, 2012

MAJORS & FOX LLP

By: */s/Frank J. Fox*

Frank J. Fox

Attorneys for Plaintiff Ronald L. Losel and a class of

similarly-situated consumers

Footnotes

1 Chase has referred to the Charge Authorization and the Agreement collectively as the "Agreement." Motion, 1:3-5. For purposes of this opposition, however, Plaintiff will continue to distinguish the two documents; subsequent references to the "Agreement" will refer only to the document attached to the FAC as Exhibit "C."

2 Absent application of the FTC Holder Rule, Chase's relationships with California health care providers would give rise to a perverse incentive: Chase would be more likely to benefit through the collection of default interest rates if the health care provider ***fails*** to perform and the patient then disputes the payment obligation and withholds payment.

3 As the California Supreme Court has explained, the fraudulent business practice prong of the UCL is distinct from common law fraud. *In Re Tobacco II Cases*, 46 Cal.4th 298, 312 (2009). While a common law fraud must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages, none of these elements are required to state a claim for injunctive relief under the UCL. *Id.*, *citing* *Day v. AT&T Corp.*, 63 Cal.App.4th 325, 332 (1998). "This distinction reflects the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices." *Id., citing* *Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442, 453 (1979).

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