No. S199074
IN THE
SUPREME COURT OF CALIFORNIA

HAROLD ROSE AND KIMBERLY LANE, individually and on behalf of all others similarly situated,

Plaintiffs/Appellants and Petitioners

vs.

BANK OF AMERICA, N.A.an individual and DOES 1 through 100, inclusive,

Defendant/Respondent.

After A Decision By The Court of Appeal,
Second Appellate District, Division Two, Case No. B230859.
On Appeal From The Superior Court For Los Angeles County,
Case No. BC 433460, The Honorable Jane L. Johnson

REPLY IN SUPPORT OF PETITION FOR REVIEW

Unfair Competition Law Case (Cal. Bus. & Prof. Code § 17209)

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I. INTRODUCTION

The Court of Appeal erred as a matter of law in failing to consider the entire text of the Truth in Savings Act, 12 U.S.C. § 4301 *et seq.* ("TISA"), including TISA's broad savings clause, in holding that Californians are barred from enforcing California state disclosure requirements identical to TISA's through the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"). In doing so the Court of Appeal created an erroneous method for determining whether UCL incorporation of federal statutory requirements are prohibited and the relevance of broad preemption savings clauses to those decisions. The questions presented by this appeal are of vital importance to California's jurisprudence as to the reach and implementation of the UCL.

II. CONGRESS EXPRESSLY PRESERVED ENFORCEMENT OF STATE REQUIREMENTS IDENTICAL TO TISA'S THROUGH THE BROAD SAVINGS CLAUSE LIMITING THE PREEMPTIVE EFFECT OF TISA ON STATE LITIGATION BY PRIVATE PARTIES.

Congress enacted TISA in 1991. Congress clearly provided a broad savings clause preserving enforcement of state laws in relation to, *inter alia,* disclosures of account "terms for accounts to the extent such State law requires the disclosure of such … terms for accounts, except to the extent that those laws are inconsistent" with TISA's requirements.[1] This savings clause is a direct and unambiguous indication that Congress

[1] The savings clause of TISA and Regulation DD state plainly and unambiguously:

> The provisions of this chapter do not supersede any provisions of the law of any State relating to the disclosure of yields payable or terms for accounts to the extent such State law requires the disclosure of such yields or terms for accounts, except to the extent that those laws are inconsistent with the provisions of this chapter,

not only did not intend to prevent state litigation enforcing identical requirements to TISA's pro-competitive and consumer protection provisions but also that even different requirements could be enforced if they were not inconsistent with TISA's requirements. In this case, Petitioners merely seek to enforce the identical requirements adopted by the UCL as a matter of California law. Here no provision of TISA or any other federal law either bars the UCL claim or immunizes the offending conduct.

By this savings clause, Congress preserved the duality of banks', including national banks', obligations to follow both federal and state requirements. As the Advisory Letter sent by the Office of the Comptroller of the Currency, Administrator of National Banks to all national banks warned:

> 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*. Operating subsidiaries, which operate effectively as divisions or departments of their parent national bank, also may be subject to such state laws. Congress explicitly acknowledged that national bank operating subsidiaries engage "solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks." 12 USC 24a(g)(3). Pursuant to 12 CFR 7.4006, state laws apply to national bank operating

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> and then only to the extent of the inconsistency. The Board may determine whether such inconsistencies exist.

12 U.S.C. § 4312.

> (d) Effect on state laws. State law requirements that are inconsistent with the requirements of the act and this part are preempted to the extent of the inconsistency. Additional information on inconsistent state laws and the procedures for requesting a preemption determination from the Board are set forth in appendix C of this part.

12 C.F.R. 230.1(d).

> subsidiaries to the same extent that those laws apply to the parent national bank, unless otherwise provided by federal law or OCC regulation. (*See* OCC letter, Appellants Appendix Vol. 2 at AA00326.)

This letter merely acknowledged the banks' dual legal obligations to comply with both applicable state and federal laws, noting the applicability of state consumer protection laws including specifically California's UCL in enforcing that compliance.

This unremarkable legal situation is ignored by the Court of Appeal in its decision. Nowhere does the court discuss or even acknowledge the existence or effect of the savings clause. The clause is never mentioned. It is not analyzed as either a determinant of the availability of state remedies or a direct manifestation of Congressional intent. Nor does the Court in its opinion recognize this Court's clear holdings that the existence of a federal private right of action does not determine whether the state's UCL applies just as the provision by the federal legislature of a federal private right of action is not necessary for the UCL to apply. This Court has always required a direct manifestation of legislative intent as found in the relevant statute's legislative history or provisions to prohibit UCL enforcement of federal statutes. Here there is no such manifestation or provision.

Neither the Respondent nor the Court of Appeal advance any rationale for refusing to analyze and to give effect to all of TISA's provisions in deciding this case. Indeed, neither at any time even acknowledge the relevance of the savings clause. *See* Answer to Petition for Review, p. 19. These failures are particularly difficult to understand in light of the extensive federal and state litigation involving savings clauses similar to TISA's. The United States Supreme Court's seminal decision in *Bates v. Dow Agrosciences LLC*

(2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687, reversed decades of consistent judicial opinions upholding Federal Insecticide, Fungicide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* preemption of all state litigation enforcing state requirements that were either equivalent to or identical to the federal statute's requirements. The Supreme Court held that only state requirements that were "in addition to or different from those" imposed by federal law were prohibited by the Act's savings clause, § 136v(b). *Id.* at 436.

In *Bates* private parties, peanut farmers, sued under a variety of theories including the Texas Consumer Protection laws. The Court, noting that "[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder the functioning" of the federal statue, upheld the primacy of analysis of all the statute's provisions in determining Congressional intent. *Id.* at 451. The Court based its ruling on an extensive analysis of the savings clause: "[A] state-law labeling requirement is not pre-empted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions…."

> We agree with petitioners insofar as we hold that state law need not explicitly incorporate FIFRA's standards as an element of a cause of action in order to survive pre-emption. As we will discuss below, however, we leave it to the Court of Appeals to decide in the first instance whether these particular common-law duties are equivalent to FIFRA's misbranding standards. The "parallel requirements" reading of § 136v(b) that we adopt today finds strong support in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996). In addressing a similarly worded pre-emption provision in a statute regulating medical devices, we found that "[n]othing in [21 U.S.C.] § 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements." *Id.*, at 495, 135 L. Ed. 2d 700, 116 S. Ct. 2240. As Justice O'Connor explained in her separate opinion, a state cause of action that seeks to enforce a federal requirement "does not impose a requirement that is 'different from, or in addition to,' requirements under federal

> law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. Section 360k does not preclude States from imposing different or additional remedies, but only different or additional requirements." *Id.,* at 513, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (opinion concurring in part and dissenting in part). Accordingly, although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in § 136v(b)) precludes States from providing such a remedy. *Id.* at 447-448.

The California Supreme Court has consistently adopted this approach in its own jurisprudence in relation to the relationship between state and federal law. In *Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1061, this Court analyzed the effect of the "broad savings clause" of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*,[2] a clause identical in effect with TISA's, in preempting only state law claims that are inconsistent with the federal statutes provisions. This Court found in the preemption clause the answer to Congress' intent:

> As originally enacted, the FCRA contained a broad savings clause, confirming Congress had no intention of displacing state law except to the extent state law and the FCRA were in irreconcilable conflict …. Consequently, consumers remained free to sue furnishers under state law, subject only to a provision limiting certain state law tort claims to instances where a defendant had acted maliciously or with the intent to injure. (§ 1681h(e).) (Emphasis added).

The Congressional intent recognized in *Brown* is the same as that manifested by Congress when it enacted TISA, only inconsistent claims are barred.

[2] Former section 1681t provided: "This title does not annul, alter, affect, or exempt any person subject to the provisions of this title from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provisions of this title, and then only to the extent of the inconsistency." (FCRA, Pub.L. No. 91-508, 622 (Oct. 26, 1970) 84 Stat. 1136.) *Id.* at 1061.

This Court went further in analyzing Congressional intent after FCRA's amendment and the amendment of its "savings clause by carving out from the general no-preemption rule a series of discrete areas in which federal law henceforth would govern to the exclusion of state law." *Id.* at 1054. Again this Court found the text of the amended savings clause determinative of whether private parties could bring suit under state law. This Court, acknowledging that the provision was ambiguous and subject to "two plausible readings", analyzed the clause and found the interpretation narrowly construing the reach of preemption to be compelled. *Id.* at 1064.

This Court was guided by the presumption against preemption based on its own jurisprudence and United States Supreme Court precedent:

> In making this determination, we are assisted by the strong presumption against displacement of state law that applies in the preemption context. That presumption applies not only to the existence, but also to the extent, of federal preemption. (*Farm Raised Salmon Cases, supra*, 42 Cal.4th at p. 1088.). Because of it, "courts should narrowly interpret the scope of Congress's 'intended invalidation of state law' whenever possible." (*Olszewski v. Scripps Health, supra*, 30 Cal.4th at p. 815, quoting *Medtronic, Inc. v. Lohr, supra*, 518 U.S. at p. 485; *see also Cipollone v. Liggett Group, Inc., supra*, 505 U.S. at p. 518 [the "presumption reinforces the appropriateness of a narrow reading" of an express preemption provision]; *Cipollone*, at p. 533 (conc. & dis. opn. of Blackmun, J.) ["We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language."].) Indeed, the presumption against preemption is sufficiently powerful to impose upon courts a "duty to accept the reading that disfavors pre-emption" as among equally plausible interpretations of an express preemption clause. (*Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 449 [161 L. Ed. 2d 687, 125 S. Ct. 1788]; *see also Altria Group, Inc. v. Good* (2008) 555 U.S. 70, __ [172 L.Ed.2d 398, 129 S. Ct. 538, 543] ["[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"].) *Id.* at 1064.

The analysis of Congressional intent in the context of the UCL is identical to that in preemption analysis. It can not be accomplished where a savings clause exists without consideration of that clause. The Court of Appeal's construction of a different doctrine for determining the reach of federal proscription of UCL claims poses both an entirely novel, and erroneous, doctrine of California law and poses important issues appropriate for determination by this Court.

III. THE SUNSET PROVISION DOES NOT MANIFEST CONGRESSIONAL INTENT TO EXPAND THE REACH OF THE SAVINGS CLAUSE TO BAR STATE ENFORCEMENT THROUGH THE UCL OF DISCLOSURES IDENTICAL TO THOSE PRESCRIBED BY TISA OR AMEND THE BROAD SAVINGS CLAUSE CONGRESS ENACTED.

Respondent and the Court of Appeal misunderstand the Sunset Amendment and its effect on state enforcement of disclosure requirements identical to TISA's. The Sunset Amendment does not say a single word about the state enforcement authority "saved" by Section 4312 from preemption. In fact, the Sunset Amendment nowhere mentions state actions under state laws including consumer protection laws to "require disclosure of terms for accounts" that are consistent with TISA. The Sunset Amendment did not amend the savings clause, 12 U.S.C. § 4312. The Sunset Amendment merely repealed a provided federal clause of action which included actual and statutory damages.

Congress has not prohibited enforcement by private citizens of TISA requirements incorporated into state law by enacting the Sunset Amendment. In arguing for this position neither Respondent nor the Court of Appeal offer a complete analysis of TISA's provisions. As shown above, neither Respondent nor the Court of Appeal offer any

analysis of TISA. The Sunset Amendment did not mention state law or enforcement at all. The Sunset Amendment was completely silent on these issues.

Respondent cites both *Almond Hill School v. US Dept. of Agriculture* (9th Cir. 1985) 768 F.2d 1030 and *Hartless v. Clorox Co.* (S.D. Cal. 2007) 2007 U.S. Dist. LEXIS 81686 both of which adopt the analysis of FIFRA explicitly rejected by the United States Supreme Court in *Bates,* 544 U.S. 431 *supra*. They are neither relevant nor persuasive authority. Respondent also relies upon *Schnall v. Amboy Nat'l Bank* (3rd Cir. 2002) 279 F.3d 205 and *Barnes v. Fleet Natl's Bank* (1st Cir. 2004) 370 F.3d 164. *Schnall* merely recited that the federal claim repealed by the Sunset Amendment was no longer available. No state action was involved in that case. *Barnes* upheld both the private federal claim and the private state claim under Massachusetts' consumer protection law. Since these claims predated the Sunset Amendment, the Court of Appeals for the First Circuit merely noted the repeal of the federal cause of action. Each of these courts' decisions described the repeal of the federal private right of action; neither purported to analyze or decide whether TISA's savings clause preserved state private causes of action.

Gunther v. Capitol One, N.A. (E.D.N.Y. 2010) 703 F.Supp.2d 264, 270-271 is of limited value. The District Court was presented with breach of contract claims allegedly incorporating TISA requirements as a matter of law as contract provisions. The court accepted the plaintiff's concession that TISA did not provide a private right of action. Ruling based on cases involving the Davis-Bacon Act, the court applied a second circuit doctrine disallowing such incorporation claims where the statute did not provide a private right of action. The District Court was not presented with claims alleging a state private

right of action based upon TISA's broad savings clause. Thus, the court never considered or ruled on the effect of the savings clause or whether state claims were preserved or preempted.

Here the published opinion announces a new, faulty method of analyzing issues in relation to UCL incorporation of the provisions of federal statutes that will recur each time Congress enacts a new law. Clarity in this area is very important. The Court of Appeal's decision here is not based upon a full analysis of TISA, either pre or post amendment. It is based instead on several discrete errors as well as incorporating a faulty approach.

First, as shown above, *Schnall* and *Barnes* did not decide the scope of federal preemption or the effect of the Sunset Amendment on "saved" state claims. They merely recited the truism that Congress had revoked the federal private right of action created by the repealed 12 U.S.C. § 4310. They are not decisive holdings of federal Circuit Courts of Appeals on the effect of the Sunset Amendment. They are simply a recital of the Amendment's effect on the withdrawn statutory federal claim.

Second, as argued previously, the failure to enact an offered amendment to TISA five years after the Sunset Amendment's enactment creating new, hitherto unknown state causes of action is not probative of Congressional intent when it has enacted and maintained a specific savings clause saving state private enforcement of requirements not inconsistent with TISA's requirements. *See* Petition, pp. 22-23. Both the U.S. Supreme Court and this Court have noted the lack of probative or persuasive force of an argument based on such an event.

Third, the Court of Appeal erroneously rejected, indeed did not even mention 12 U.S.C. § 4312, TISA's savings clause. Petitioner's arguments that the savings clause preserved Petitioners' claims were ignored. Stripped of these props, the Opinion is without sound legal foundation.

IV. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW.

The California decisions discussed in the Petition carry forward California's caution in finding UCL claims prohibited based on federal statutes. As shown previously, the claims must be barred or the conduct immunized. The intent of Congress to bar state claims must be clear. The instant opinion departs from those principles.

The issues posed, the effect of the repeal of a separate federal private right of action on state claims explicitly saved by the federal statute's savings preemption clause, and the necessity of analyzing savings clauses in determining the availability of UCL and other state claims, are of great importance to California law. They define both the availability of claims alleging violations of federal laws incorporated by the UCL and the analysis required to decide the effect of preemption savings clauses on the availability of not only UCL but other state claims. In effect, the case presents for review the question of whether Congressional intent in this area can be determined without the analysis of the preemption savings clauses which primarily define the relationship between federal and state law in the areas affected by the Congressional enactment at issue. These are issues of continuing and repeated importance.

V. CONCLUSION

The Petition raises for decision important issues of California jurisprudence that are of statewide importance and will govern the resolution of numerous and repeated future decisions in the courts of this state. The Petition for Review should be granted.

DATED: January 30, 2012

RESPECTFULLY SUBMITTED,

THE ROSSBACHER FIRM

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Henry H. Rossbacher

Attorneys for Plaintiffs and Petitioners Harold Rose and Kimberly Lane

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that pursuant to Cal. Rules of court, rule 8.504(a)(1), the foregoing Reply In Support Of Petition for Review is proportionally spaced (i.e., type size no smaller than 13 point) and contains 3,142 words, including footnotes, (but excluding title page, tables, and this Certification) which is less than the 8,400 words permitted by the foregoing rule. Undersigned counsel relied on the word count feature of the computer program used to prepare this brief.

DATED: January 30, 2012

RESPECTFULLY SUBMITTED,

THE ROSSBACHER FIRM

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Henry H. Rossbacher

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PROOF OF SERVICE
(1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action. My business address is: 811 Wilshire Blvd., Suite 1650, Los Angeles, California 90017-2666.

On January 30, 2012, I served the foregoing document described as **REPLY IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action by placing [] the original [x] a true copy thereof enclosed in a sealed envelope addressed as follows:

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I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made. Executed on January 30, 2012, at Los Angeles, California.

_____

Maricela Ruiz

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