**No.**
**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.

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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

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# PETITION FOR REVIEW

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

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**THE ROSSBACHER FIRM**
HENRY H. ROSSBACHER (060260)
JAMES S. CAHILL (070353)
TALIN K. TENLEY (217572)
811 Wilshire Blvd., Suite 1650
Los Angeles, CA 90017-2666
Telephone: 213/895-6500
Facsimile: 213/895-6161

Attorneys for Plaintiffs/Appellants and Petitioners
Harold C. Rose and Kimberly Lane

## PETITION FOR REVIEW

To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

Plaintiffs-Appellants Harold Rose and Kimberly Lane, ("Plaintiffs") respectfully petition for review of the Opinion by the Court of Appeal, Second Appellate District, Division Two (Boren, P.J., with Doi Todd, J. and Chavez, J. concurring.) The Court of Appeal Opinion, published at *Rose v. Bank of America, N.A.* No. B230859 (2011) 200 Cal.App.4th 1441, 1454 ("*Rose*") affirms the Superior Court's order sustaining a demurrer to the complaint and judgment of dismissal in favor of Defendant-Respondent Bank of America, N.A. ("Defendant"). A copy of the Opinion is appended to this Petition. Plaintiffs petitioned for rehearing with the Court of Appeal which was denied on December 8, 2011. A copy of the order denying rehearing is also attached

## I. ISSUES PRESENTED FOR REVIEW

This case presents the following issues for review:

1. Does repeal by Congress of a federal statute's private right of action prohibit UCL claims based on violations of the federal statute's requirements where the federal statute's preemption clause explicitly preserves claims under state laws enforcing consistent state standards and Congress has not indicated an intent to bar the preserved state claims? (No)

2. Does California law require giving effect to explicit federal preemption clauses which preserve state claims where no specific provision of the federal law bars the claim or immunizes the conduct in violation of the federal act? (Yes)

## II. INTRODUCTION

Pursuant to Cal. Rules of Court, rule 8.500(b) Plaintiffs ask this Court to grant review of the Court of Appeal's published Opinion to secure uniformity of decision and to settle important rules of law. The opinion is wrong, breaking new ground eviscerating California law on the relationship between federal preemption and the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL") and untethering California jurisprudence from a full analysis of all a federal statute's provisions and Congress' actions and intent.

The Court of Appeal holds that the repeal of the federal private right of action for violations of the Truth in Savings Act, 12 U.S.C. § 430 *et seq.* ("TISA") results in the preemption of a state cause of action under the UCL enforcing state law requirements that are identical to TISA's requirements despite a preemption savings clause that specifically preserves a state's enforcement of its laws "to the extent that such state law requires" compliance with the disclosure requirements of TISA unless the state's laws are "inconsistent" with the requirements of that federal law and where there is no statement of Congressional intent to bar state claims. The opinion can point to no language or legislative history of TISA suggesting that Congress intended total preemption of TISA-related private causes of action founded on requirements contained in state law. Rather,

TISA's savings clause (12 U.S.C. § 4312) explicitly saves the UCL claims from preemption, clearly and unmistakably evincing Congress's intent to authorize states to enforce their consistent TISA-related laws with state remedies such as the UCL. Here, the UCL is not inconsistent with TISA. The UCL incorporates and adopts TISA disclosure requirements and makes their violation a violation of California laws. The California and TISA bank disclosure requirements to consumers are not inconsistent as they are identical.

The Court of Appeal decision announces unprecedented California law on preemption of UCL claims based on violations of federal law. The Court bars the California UCL claims here without mentioning or analyzing in its Opinion the federal act's preemption clause or analyzing its effect in saving the consistent state claims authorized by the clause. This decision raises important issues under this Court's decisions in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553 ("*Stop Youth Addiction*") and *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel.* (1999) 20 Cal.4th 163("*Cel-Tech*"). Here, despite these cases, the Court of Appeal has wrongly barred causes of action which are based on conduct that is specifically prohibited by the federal statute and not permitted by any provision of any federal act. The decision does not rely on contemporaneous legislative history or specific statutory language. In failing to cite or discuss the preemption clause, the decision, in effect, holds that federal preemption clauses are irrelevant in determining the availability of UCL relief.

The Court of Appeal's ruling that repeal of a federal private cause of action supersedes the clear provision of state enforcement under the federal preemption clause

raises serious issues of California and federal jurisprudence. Here both the First Circuit Court of Appeals and the California Court of Appeal have directly held that state unfair competition claims were available for violations of TISA. The repealing Sunset Amendment merely prospectively repealed only the provided federal private right of action. Congress did not consider or legislate in the Sunset Amendment as to the existing state causes of action. Congress maintained the preemption clause that was originally enacted.

The Court of Appeal, unable to point to contemporary legislative history and without discussion of the preemption clause, held that the Sunset Amendment itself evidences an intent to bar all state causes of action. The Court of Appeal also relied on an unenacted amendment proposed decades after the original adoption of TISA and years after adoption of the Sunset Amendment as probative of Congress's intent in barring state enforcement by enacting the Sunset Amendment. This decision does not discuss or cite this Court's consistent jurisprudence as exemplified by *Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911 ("*Grupe*") and the United States Supreme Court's similar injunction in *Jones v. United States* (1999) 526 U.S. 227, 238, 119 S.Ct. 1215, 1221, 143 L.Ed.2d 311, 323 ("*Jones*") that using unenacted later legislation "is a hazardous basis for inferring the intent of an earlier Congress." Nor does it discuss or analyze the preemption clause. The effect of the court's opinion is to untether preemption analysis from both concrete legal facts and existing jurisprudence. The decision, thus, creates important issues relating to the proper analysis of federal preemption of California's UCL.

Granting review will present an ideal opportunity for the Court to clarify crucial issues that consistently arise in California actions under the UCL involving violations of federal law as the bases for UCL actions and to make clear both the prescriptive effect of federal preemption clauses saving these claims and the proper analysis to be undertaken when determining Congressional intent.

## III. WHY REVIEW SHOULD BE GRANTED

The legal issues posed by this Petition are vitally important to California's UCL jurisprudence.

Plaintiffs allege that Defendant Bank of America did not properly notify in advance Plaintiffs and other class members, its customers, about specific pricing changes to fees applicable to each particular deposit account held at Defendant as required by TISA and its implementing Regulation DD, 12 C.F.R. 230 *et seq.* Plaintiffs allege that Defendant violated both the "unlawful" and "unfair" prongs of the UCL by violating their rights (and those of the Class) delineated in TISA and Regulation DD and adopted into the UCL. The Plaintiffs' claims are specifically permitted by TISA's preemption clause which saves state actions requiring "the disclosure … of terms for accounts, except to the extent those laws are inconsistent" with TISA's requirements.[1] Plaintiffs' case seeks to enforce disclosures identical to those imposed by TISA.

[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

Defendant countered by demurrer arguing that Congress years after TISA's adoption provided a Sunset Amendment to TISA by which the federal private right of action section of TISA (*i.e.*, former 12 U.S.C. § 4310) was repealed effective September 30, 2001, thereby prohibiting a federal private right of action to enforce TISA. The Court of Appeal ruled that "[w]hen Congress repealed the statutory right of consumers to enforce TISA [*i.e.*, the Sunset Amendment], it intended to bar *all* private actions alleging TISA violations, including indirect enforcement suits brought under California's [UCL]. The UCL may not be deployed to redress TISA violations." *Rose*, 200 Cal.App.4th at 1446. The Court of Appeal did not discuss the preemption provision in its opinion. Nor did the Court of Appeal reply on evidence of Congressional intent cotemporaneous with the adoption of either TISA or the Sunset Amendment.

The Sunset Amendment does not immunize conduct violating TISA's disclosure requirements or bar a state's enforcement of its consistent laws. TISA itself, through the preemption provision, specifically permits state enforcement. The effect of the Court of Appeal's ruling is to bar California's citizens from enforcing bank disclosure

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> to the extent that those laws are inconsistent with the provisions of this chapter, and then only to the extent of the inconsistency. The Bureau 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 are 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).

requirements adopted into California's law through enforcement of California's own laws. This is a sea change in preemption law in general and California's jurisprudence as to the applicability of the UCL in particular.

The Court of Appeal's opinion will have a profound influence on the availability of state UCL actions premised on violations of federal laws. The legal landscape prior to the TISA amendment sunsetting the private federal direct cause of action was clear: private rights of action based on the UCL and its equivalents in other states were available and not preempted. They were specifically allowed under TISA's preemption clause authorizing the enforcement by unfair competition laws so long as those state laws were not inconsistent with TISA. The United States Court of Appeals and the California Court of Appeal so held. *Barnes v. Fleet Nat'l Bank* (1st Cir. 2004) 370 F.3d 164, 175-76; *Smith v. Wells Fargo Bank* (2005) 135 Cal.App.4th 1463, 1480-85. TISA's narrow preemption clause was enacted to save from preemption the state causes of action at issue here; significantly, it was not altered by the Sunset Amendment.

The Opinion errs in judicially creating "an exception to the UCL" in violation of the command in *Aron v. U-Haul Co. of Calif.* (2006) 143 Cal.App.4th 796, 804. It immunizes violations of TISA's disclosure requirements from redress through the UCL notwithstanding this Court's holding in *Cel-Tech* 20 Cal.4th 163 that only clear, legislatively conferred immunity or a statute barring state relief is sufficient to bar UCL relief. *Id.* at 182. Congress did neither.

Second, this Court's review is necessary to secure uniformity of decision.

Prior to *Rose,* California courts held that a "borrowed" law does not need to contain a private right of action in order to serve as a predicate for a UCL claim. *Stop Youth Addiction* 17 Cal.4th at 565; *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 950. Whether a private right of action is implied under the borrowed statute is immaterial. *Stop Youth Addiction,* 17 Cal.4th at 562. This Court has held that the relevant inquiry is not whether the underlying statute (such as TISA) can be enforced directly, or administratively, but whether the legislative body expressly intended to displace the UCL. *Stop Youth Addiction,* 17 Cal.4th at 562 n.5, 656; *Cel-Tech,* 20 Cal.4th at 182-83. Without finding any language of TISA or the Congress to support its finding, the Court of Appeal wrongly concludes that mere withdrawal of a private remedy from a federal statute (*i.e.,* the Sunset Amendment) is enough to prohibit the UCL from furnishing its remedies for enforcing that predicate statute. *Rose,* 200 Cal.App.4th at 1452. This holding, thus, creates new law, dispensing with this Court's requirements that California actions can be only barred by explicit federal commands. The Court of Appeal's further reliance on a later unenacted proposed amendment ignores this Court's and federal jurisprudence to the contrary and will produce confusion if allowed to stand.

The Court of Appeal also mints law at odds with California precedent in stating that legislative intent to ban UCL enforcement of a statute may be implied from an administrative scheme in that statute. *Rose,* 200 Cal.App.4th at 1450. This Court and other California courts have previously held that the UCL applies unless the legislative body has expressly provided otherwise. *State of Calif. v. Altus Finance* (2005) 36 Cal.4th 1284, 1303 ("*Altus*").

In the area of consumer protection, California courts have appreciated the scarce resources available for public enforcement of the law, and have espoused private enforcement as a necessary adjunct of public protection. "That public prosecutors can … sue is of limited solace, given the significant role [the California Supreme Court has] recognized private consumer enforcement plays for many categories of unfair business practices." *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 330. In *Rose* the Court of Appeal abandons this principal.

The radical holding in *Rose* stands in opposition to the holdings of this Court and other Court of Appeal decisions and creates harmful new rules. If these rules become part of California jurisprudence, *Rose* will undermine the strong consumer protections of the UCL, and will deprive California consumers not only of any remedy against banks who fail to satisfy disclosure requirements to consumers about charges to their deposit accounts but also of any ability to remedy violations of federal laws in general.

## IV. STATEMENT OF THE CASE

### A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs allege that in or about April 2009 Defendant did not properly notify in advance Plaintiffs and other Class members about specific pricing changes applicable to their particular deposit accounts held at Defendant in violation of TISA and Regulation DD. *Rose*, 200 Cal.App.4th at 1446; Comp. ¶ 1, 1 AAA 00002. Defendant violated the "unlawful" and "unfair" prongs of the UCL by violating the rights of Plaintiffs and Class

members delineated in TISA and Regulation DD. *Rose*, 200 Cal.App.4th at 1446; Comp. ¶¶ 27-31; 1 AA 00010-AA00011.

These violations occurred when Bank of America did not clearly and conspicuously (in advance in writing) (1) disclose the categories of fees (and their amounts) for account services which were changing applicable to the particular deposit accounts of Plaintiffs and other class members; (2) direct Plaintiffs' and Class members' attention to the particular changes for their accounts; and (3) inform Plaintiffs and other class members the precise date when changes to the fees on their accounts would occur. Comp. ¶22-26, 1 AA00007-AA00009. Materials furnished by Defendant to Plaintiffs and the class were deficient in that those materials did not clearly and conspicuously differentiate the proposed specific changes in fees among the accounts held by Plaintiffs and other Class members. *Id.; Rose,* 200 Cal.App.4th at 1446.[2]

Plaintiffs and the Class seek relief as provided under Cal. Bus. & Prof. Code § 17203 including restitution of all money improperly deducted for increased service fees taken by Defendant from the personal bank accounts of each Plaintiff and Class member,

[2] The "FACTS" of the Complaint are inaccurately and incompletely stated in the opinion. "Upcoming price changes" as to each Plaintiffs' and Class member's particular account were not "detailed' in advance of the fees increases. *Rose,* 200 Cal.App.4th at 1446. Although Plaintiffs and other accountholders were referred to a "brochure" and "website", these did not furnish the mandated advance disclosure requirements unique to each accountholder required by TISA. Comp. ¶¶ 22-23, 1 AA00007-AA00009. They were not accountholder specific; they were composed of a list of all fee changes for all of the different accounts, but did not notify each accountholder which fee changes applied to that consumer's individual account. These short-comings in the Opinion were highlighted for the court in Plaintiff's Petition for Rehearing, but the Court declined to make any corrections to its opinion. Cal. Rules of Court, rule 8.500(c)(2).

and an injunction stopping and correcting Defendant's misconduct. *Rose,* 200 Cal.App.4th at 1446; Comp. ¶¶ 2, 34, 1 AA00002, AA00011-AA00012.

Plaintiffs filed the Complaint against Defendant on March 9, 2010. 1 AA00001-AA00014. As summarized by the Superior Court, "Defendant [demurred] to putative class action complaint on the sole basis that the Truth in Savings Act, which the § 17200 cause of action is based, does not allow for a private right of action." Order at 4, 2 AA00356. The Superior Court, in sustaining the demurrer, agreed with Defendant: "[B]ecause the repeal of the private cause of action [in TISA] reflects an intent to absolutely bar a private cause of action, [the UCL] could not be used to 'plead around' an 'absolute bar to relief' simply 'by recasting the cause of action as one for unfair competition.' (Citation.)" Order at 8. 2 AA00360; *Rose,* 200 Cal.App.4th at 1446-1447. The Superior Court granted Plaintiffs leave to amend "to articulate some basis for the [UCL] claim other than a statute which bars a private right of action." Order at 9, 2 AA00361.

"Plaintiffs did not file an amended pleading." *Rose,* 200 Cal.App.4th at 1447. The Superior Court entered its Order of Dismissal and Judgment in favor of Defendant. *Id.* Plaintiffs timely appealed. *Id.*

### B. COURT OF APPEAL'S OPINION

The Court of Appeal affirmed the judgment of the Superior Court on November 21, 2011. The court acknowledges that "[t]he goal [of TISA] is to enhance economic stability, improve competition among banks, and enable consumers to make informed decisions regarding deposit accounts by requiring uniform disclosure of the terms,

conditions, and fees associated with bank disclosures. (Citation)." *Rose,* 200 Cal.App.4th at 1447. The court further notes that "[a] bank can be liable either for a violation of TISA itself or for a violation of Regulation DD." *Id.* 1447. In the court's view "[t]he question is whether an indirect suit to enforce TISA survives the sunset clause repealing [former 12 U.S.C. § 4310]." *Id.* 1451. [3] The court answers this question holding that "[w]hen Congress repealed the statutory right of consumers to enforce TISA, it intended to bar all

[3] Former 12 U.S.C "Section 4310 entitled 'civil liability' stated that if any depository institution failed to comply with TISA, it is liable to accountholders for actual and statutory damages… Jurisdiction over TISA private enforcement actions was conferred concurrently on federal and state courts." *Rose,* 200 Cal.App.4th at 1448, n2. Former 12 U.S.C. 4310(a) stated:

> (a) Civil liability
>
> Except as otherwise provided in this section, any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person who is an account holder is liable to such person in an amount equal to the sum of --
>
> (1) Any actual damage sustained by such person as a result of the failure;
>
> (2) (A) in the case of an individual action, such additional amount as the court may allow, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or
>
> (B) In the case of a class action, such amount as the court may allow except that ---
>
> (i) as to each member of the class, no minimum recovery shall be applicable; and
>
> (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same depository institution involved; and
>
> (3) In the case of any successful action to enforce any liability under paragraph(1) or (2), the costs of the action, together with a reasonable attorney's fee as determined by the court.
>
> "In 1996, Congress amended section 4310, adding a 'sunset clause' [ ]" (*Rose,* 200 Cal.App.4th at 1448) which stated: "Effective as of the end of the 5-year period beginning on the date of enactment of this act [*i.e.*, September 30 2001], section 271 of [TISA] (12 U.S.C. §4310) is repealed."

private actions alleging TISA violations, including indirect enforcement suits brought under California's [UCL]. (Citation)." *Id.* at 1446. In reaching this result the court finds congressional intent to bar the UCL action only from the Sunset Amendment itself and the subsequent "rebuffed legislation to reinstate the civil liability suit against noncompliant banks." *Id.* at 1452. The court reasons that "even if the law does not expressly say 'No civil action,' the courts may imply a legislative intent to bar private civil actions to indirectly enforce the statute by providing a comprehensive administrative remedy." *Id.* at 1450.

The opinion also addresses the UCL's "unfair prong" holding that the complaint failed to state a claim under any of those formulae developed in the case law. *Rose,* 200 Cal.App.4th at 1452-1454. "Plaintiffs' complaint fails the first test, because their fairness claim cannot be tethered to TISA,… With respect to the balancing test, the pleading does not sufficiently allege 'grave harm' to the victim or immoral, unethical, oppressive, and unscrupulous conduct by the bank.." *Ibid.* at 1453. "Finally, the pleading fails the third test because plaintiffs could have reasonably avoided the imposition of high fees in successive months . . .." *Ibid.* at 1453-1454.[4]

[4] Again, the Court of Appeal misstates the Complaint's factual allegations. Plaintiffs and Class members were not properly warned beforehand about price changes. Comp. ¶¶ 22-23, 1 AA00007-AA00009. As alleged, the injuries are substantial and not outweighed by any countervailing benefits. Comp. ¶¶ 1, 22-26, 30, 1 AA00002, AA00007, AA00010-AA00011. By having failed to disclose in advance specific pricing changes, Plaintiff and the Class could not have reasonably avoided their injuries. *Id.* Despite Plaintiffs' Petition for Rehearing, the court did not correct its opinion. The court ignored the rule that whether a practice is unfair calls for a balancing of policy interests which needs a complete factual record. *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal.App.3d 735, 740.

Plaintiffs' Petition for Rehearing was denied on December 8, 2011.

## V. LEGAL DISCUSSION

### A. THE ISSUES ARE OF STATEWIDE IMPORTANCE.

#### 1. The Court Of Appeal Misconstrues The Relationship Between TISA And Regulation DD And The California UCL.

The Court of Appeal's decision errs in according preclusive, preemptive effect to the Sunset Amendment. That amendment neither alters the preemption clause nor indicates a congressional "intent" to bar state causes of action such as the UCL here. The opinion errs in not acknowledging the preemption clause both as a specific statement by Congress that state causes of action are not preempted and as a clear indication of Congressional intent preserving state enforcement.

Whether TISA and Regulation DD provide a federal direct private right of action is not dispositive. The issue here is whether TISA and Regulation DD can serve as predicates for an UCL claim in this state proceeding. A private right of action under the predicate statute is not necessary in order to state a cause of action under the UCL for violation based on that statute. *Stop Youth Addiction,* 17 Cal.4th at 565; *Kasky*, 27 Cal.4th at 950.

The relationship between TISA and state laws is set forth in the Act. As originally enacted, TISA (and Regulation DD) contained a broad savings clause which has never changed. 12 U.S.C. § 4312, 12 C.F.R. 230.1(d). TISA and Regulation DD specifically contemplate that consumers may seek redress concerning their depository accounts

against banks through state laws (not inconsistent with TISA). Those state laws encompass state consumer protection statutes such as the UCL. TISA is silent about proscribing the range of available remedies states might permit for the violation of state laws. TISA, then, authorizes state remedies through a private UCL action.

States may create their own TISA-related causes of action. In California, the UCL is designed to remedy violations of other laws, both state and federal. The UCL establishes a state private right of action to remedy three varieties of unfair competition: the unlawful, the unfair and the fraudulent. *See People ex rel. Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 515. Thus, California statutorily established a cause of action to redress TISA and Regulation DD violations. The UCL permits Plaintiffs and the Class here to seek restitution and injunctive relief caused by Defendant's business practices which TISA and Regulation DD make unlawful and unfair. "This claim, despite its reference to [the predicate law], arises under California and not federal law." *Sullivan v. Oracle Corp.* (2011) 51 Cal.4th 1191, 1207.

Originally, if a depository institution violated TISA, enforcement occurred in three alternative forms: (a) a federal direct private cause of action for actual damages or civil penalties brought by an account holder in federal or state court (former 12 U.S.C. § 4310(a), (e)); (b) state actions under state laws including consumer protection actions (not inconsistent with TISA) where violation of protections described in TISA also qualified as a state unfair business practice (12 U.S.C. § 4312, 12 C.F.R. 230.1(d)); and (c) a cease and desist order or similar administrative remedy sought by a regulator. 12 U.S.C. § 4309.

On September 30, 2001 federal 'civil liability' for TISA violations ended. *Rose*, 200 Cal.App.4th at 1448, n2. By repealing 12 U.S.C. § 4310 Congress eliminated only the standing of a private person to prosecute directly a federal TISA lawsuit for the federal TISA remedies. Congress did not repeal or alter consumers' existing rights to enforce those protections described in TISA and Regulation DD through state law in state courts as underscored in the unchanged, limited preemption provisions of 12 U.S.C. § 4312 and 12 C.F.R. 230.1(d). *Barnes*, 370 F.3d at 175-76 (holding violation of TISA as per se violation of the Massachusetts consumer protection statute which is similar to California's UCL); *Smith*, 135 Cal.App.4th at 1480-85 (treating violation of TISA regulations as UCL violation). The Sunset Amendment is completely silent both as to preemption of state causes of action and Congressional intent as to state enforcement.

The operative language of Cal. Bus. & Prof. Code § 17200 has remained substantially as enacted in the 1933 amendment to former Cal. Civ. Code § 3369. *Stop Youth Addiction*, 17 Cal.4th at 569-70 ("In 1933, the Legislature created the modern UCL by expanding Section 3369 exception for nuisance cases to include unfair competition cases.") Congress, in turn, is deemed to have been aware of existing state laws (such as the California UCL) when it enacted TISA in 1991 and passed the Sunset Amendment in 1996. *See People v. Harrison* (1989) 48 Cal.3d 321, 329 (Legislature "is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof").[5]

[5] After the TISA Sunset Amendment took effect in 2001, an advisory letter promulgated by the Office of the Comptroller of the Currency in 2002 warned national banks of the

TISA neither expressly nor impliedly preempts state law with respect to Plaintiffs' UCL claim. There is no conflict between the UCL and TISA. In her Order sustaining Defendant's demurrer, the Superior Court noted that "Defendant does not argue that TISA preempts California law." Order at 8. n.2, 2AA00360.

The ability of California consumers to enforce TISA protections under long existing California law survives the Sunset Amendment. The Court of Appeal's opinion misreads TISA's savings preemption clause and coins a new erroneous rule.

### 2. The Court Of Appeal Misapplies The Effect Of The Sunset Amendment On California Law.

In asserting their UCL claim, Plaintiffs and the Class plead a California state, not a federal, cause of action. TISA and Regulation DD are used by Plaintiffs and the Class to define the contours of their UCL claim.

This Court appreciates "the significant role … private consumer enforcement plays for many categories of unfair business practices." *Kwikset Corp.,* 51 Cal.4th at 330. The UCL is intended as a means to prevent unfair competition which is a goal separate from that of the underlying violation of the predicate law. *See Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179. The UCL creates a right of action independent of and cumulative to any claim available directly for violation

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risks in engaging in lending and marketing practices that may constitute unfair or deceptive acts or practices under federal and state law: "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*." OCC Advisory Ltr. 2002-03 (Mar. 22, 2002) at p.3, n.2. 2 AA00326**.**

of the predicate law. A UCL cause of action has its own standing standards (Cal. Bus. & Prof. Code § 17204) and remedies. *Id.* §§ 17203, 17205.

By repealing 12 U.S.C. §4310 Congress eliminated only the standing of a private person to prosecute directly a TISA lawsuit and seek TISA remedies. It is immaterial to this present UCL action that standing and damages are no longer available for direct TISA and Regulation DD violations to private consumers. *Stop Youth Addiction,* 17 Cal.4th at 562 ("'[W]hether a private right of action should be implied' under [the predicate statute] … is immaterial since any unlawful business practice … may be redressed by a private action charging unfair competition…").

Withdrawing a private remedy from a federal statute is not the same as prohibiting the UCL to furnish its remedies for that predicate statute. The UCL permits distinct remedies from those potentially available under the borrowed law. *See Farmers Ins. Exch. v. Superior Court* (1992) 2 Cal.4th 377, 382-83.[6] Absence of a private federal remedy in TISA does not ban the UCL claim here.

[6] Former 12 U.S.C. § 4310(a)(1), (2)(A) awarded an account holder actual damages, statutory damages of not less than $100 or more than $1,000, costs and attorney fees. A class action recovery was restricted to the lesser of $500,000 or one percent of the depository institution's net worth. *Id.* Section 4310(a (2)(B). Injunctive relief was not included in those private remedies. Plaintiffs' UCL cause of action seeks restitution and injunction, not damages. *Rose*, 200 Cal.App.4th at 1446. Damages are not available under Cal. Bus. & Prof. Code § 17203. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1266.

### 3. The Opinion Fails To Pinpoint In TISA Or The Legislative History Preceding The Sunset Amendment Any Express Or Implied Intent To Bar State Enforcement of Consistent Requirements.

Again, the Court of Appeal concludes that "[w]hen Congress repealed the statutory right of consumers to enforce TISA, it intended to bar all private actions alleging TISA violations, including indirect enforcement suits brought under California unfair competition law (UCL)." *Rose,* 200 Cal.App.4th at 1446. Neither the text of TISA nor the Sunset Amendment supports this observation. There is not a single word in either expressing any intent other than to allow state enforcement of consistent State law.

The Court of Appeal's conclusion mirrors Lucky Stores' unsuccessful, flawed argument in *Stop Youth Addiction,* 17 Cal.4th at 561: a private party "should not be permitted to use the UCL to obtain relief, indirectly, for violation of an underlying statute [ ] that [it] is not authorized to enforce directly. According to Lucky, the only reasonable construction of the UCL is that its remedies are not available to private parties if the Legislature did not include an express private right of action in the enforcement scheme for the underlying law." This Court rejected that argument. *Id.* at 562, n.5, 565-66.

This Court has explained that in evaluating unlawful or unfair practices underlying an UCL claim, courts should be conscious of any specific legislative immunity. *Cel-Tech,* 20 Cal.4th at 182. This Court also sharply circumscribed the rule: "To forestall an action under the unfair competition law, another provision must actually 'bar the action or clearly permit the conduct."' *Ibid.* at 183. This Court is clear that "[t]hat other provision must actually bar it, … and not merely fail to allow it." *Ibid.* at 184 (emphasis added). Furthermore, only the legislative branch has the power to "create and define an

exception to the UCL … Courts thus may not create 'implied safe harbor[s].' (Citation)." *Aron,* 143 Cal.App.4th at 804.

These narrow limitations do not prevent Plaintiffs' UCL claim. No statutory provision excuses Defendant from failing to communicate to Plaintiff and the Class the required disclosures about fee changes mandated by TISA and Regulation DD. Nothing in the Sunset Amendment (or any other TISA provision) indicates that violation of TISA and Regulation DD disclosure requirements can not serve as a predicate unlawful business practice for a UCL claim.

The Court of Appeal, though, finds Congressional intent to bar the UCL action only from the Sunset Amendment itself and the subsequent "rebuffed legislation to reinstate the civil liability suit against noncompliant banks." *Rose,* 200 Cal.App.4th at 1452. This is a dramatic misapplication of California law.

First, this Court instructs that California courts should identify not whether a right of action is recognized by TISA, but whether an independent UCL action is expressly barred by TISA. *Stop Youth Addiction,* 17 Cal.4th at 562 n.5, 565-66; *Cel-Tech,* 20 Cal.4th at 182-83. "The term expressly means in an express manner; in direct or unmistakable terms; explicitly; definitely; directly (Citation)." *Stop Youth Addiction,* 17 Cal.4th at 573 (internal quotations omitted).

The Sunset Amendment ended the federal civil remedy. It did not repeal any consumer rights or change TISA's savings preemption clause allowing enforcement through state consumer protection statutes. Despite the Sunset Amendment, consumers retain their rights under TISA and Regulation DD and their state law causes of action to

protect those rights. State laws are not altered, annulled or affected by TISA except to the extent that state laws are inconsistent with TISA and Regulation DD. 12 U.S.C. § 4312; 12 C.F.R. 230.1(d). A California UCL action predicated on TISA and Regulation DD is congruent with TISA. *See Smith*, 135 Cal.App.4th at 1482.

TISA's limited preemption provision expresses Congress's intent not to bar state consumer protection laws (like the UCL) to enforce TISA rights. When Congress passed the Sunset Amendment it could have revisited the scope of TISA preemption and revised 12 U.S.C. § 4312. It could have expressly precluded TISA-related actions under state laws then known to Congress such as the UCL to enforce TISA protections. It could have concluded that TISA afforded exclusive remedies prohibiting state remedies. Congress elected not to do so.

The Court of Appeal errs in disregarding TISA's narrow preemption provision as a key part of the context of TISA's whole statutory scheme. California courts should "examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts." *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1040. Moreover, courts should "'read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" *Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1065 (quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898-899). The court's opinion never mentions the preemption clause or analyzes its effect in saving the California consistent causes of action at issue from preemption. The opinion fails to "harmonize" the statute's provisions.

The Court of Appeal also deviates from this Court's precedent when it bars the instant suit yet fails to find in TISA (and especially the Sunset Amendment) any explicit language barring this UCL action. The lack of federal standing and remedies does not impose an express, absolute bar in TISA impeding California consumers' enforcement of TISA protections via California's independent UCL. Indeed, courts "are not authorized to insert qualifying provisions not included, and may not rewrite the statue to conform to an assumed intention which does not appear from its language." *Stop Youth Addiction,* 17 Cal.4th at 573.

The Court of Appeal wrongly rules that the 2005 failed amendment is probative of Congress' intent. Congressional inaction in repealing the Sunset Amendment is irrelevant in construing TISA. In construing a statute the court must "ascertain the Legislature's intent at the date of enactment." *People v. Williams* (2001) 26 Cal.4th 779, 785. Rather than present legislative history preceding and resulting in the Sunset Amendment as part of that deliberative process to explain its scope, Defendant proffered merely a subsequent, unpassed bill. *Rose*, 200 Cal.App.4th at 1448, 1452. This bill, offered over 4 years after the Sunset Amendment and decades after TISA's enactment, is not part of TISA's or the Sunset Amendment's legislative history. "California courts have frequently noted, however, the very limited guidance that can generally be drawn from the fact that the Legislature has not enacted a particular proposed amendment to an existing statutory scheme." *Grupe* 4 Cal.4th at 922-23. Consequently, "'[u]npassed bills, as evidences of legislative intent, have little value.' [Citation]." *Ibid.* The United States Supreme Court has repeatedly emphasized that such subsequent legislative history "is a

hazardous basis for inferring the intent of an earlier Congress." *Jones* 526 U.S. at 238 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.* (1990) 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579) (internal quotation marks omitted).[7]

The unpassed bill demonstrates no congressional findings as to the intent of TISA as previously enacted. It is silent about TISA preemption and did not purport to have any effect on existing state laws which already allowed TISA-related causes of action with state remedies. The court should not have depended on an unpassed bill for its ruling in *Rose*.

The Court of Appeal's citation to *Almond Hill School v. US Dept. of Agriculture*, (9th Cir. 1985) 768 F.2d 1030, 1036-1038 ("*Almond Hill*") is erroneous for several reasons. The case involved a federal statute where Congress explicitly considered and rejected private enforcement at the time the statute was enacted. Thus, Congress did not enact a preemption clause like TISA's saving state causes of action. The court detailed the extensive federal enforcement scheme, noting that the federal agency wanted to retain the ability not to enforce the statute if it determined that violations were harmless, *i.e.*, if use of the pesticides at issue "is not inconsistent with the purposes of the Act." *Id.* at 1038. The Ninth Circuit found preemption. Here, there is no similar basis to claim that California laws are preempted. *Almond Hill* is not relevant to this case.

[7] The Court of Appeal's citation to *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88-89 is not controlling here. *See Rose*, 200 Cal.App.4th at 1452. In *City of Santa Cruz*, this Court reviewed the procedure for a criminal defendant to obtain discovery under Cal. Evid. Code § 1043. This Court looked at the history leading to passage of that statute, not attempts after its passage to amend it.

## B. THE OPINION CREATES A CONFLICT WITH ESTABLISHED CASE LAW ON MATTERS REQUIRING UNIFORMITY.

This Court of Appeal "believe[s] that California consumers can [not] seek injunctive relief and restitution against a bank for 'unlawful' conduct when Congress has clearly rejected a private right to enforce TISA." *Rose*, 200 Cal.App.4th at 1452. This belief is pure speculation, based neither on relevant legislative history nor explicit provisions of federal law. By removing the federal private remedy from TISA the Court of Appeal errs in holding that state private rights of action are no longer available. The Sunset Amendment did not reject state private rights of action. These had already been authorized by TISA's preemption clause. The California UCL allows a private remedy even if the borrowed statute confers no private right of action. *Stop Youth Addiction,* 17 Cal.4th at 561-67. The court's belief contravenes established California precedent that "[t]he 'unlawful' practices prohibited by section 17200 are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court made." *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-39; *see, e.g., McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1486 (permitting UCL to enforce federal law regulating home loan transactions based on unlawful omissions or disclosures); *Washington Mut. Bank, FA v. Superior Court* (1999) 75 Cal.App.4th 773, 783 (RESPA and Regulation X).

The Court of Appeal errs in finding that TISA creates a comprehensive regulatory regime that places enforcement exclusively in the federal government. The court is

mistaken as a matter of law in stating "[o]nly federal authorities have standing to enforce bank compliance with TISA." *Rose,* 200 Cal.App.4th at 1452.

According to this Court "even though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper pursuant to applicable provisions of the [UCL]. (Citation)." *Stop Youth Addiction,* 17 Cal.4th at 572. An administrative enforcement scheme does not preclude a UCL claim because the UCL remedies are cumulative to those imposed under the other law. *See Fremont Life Ins.,* 104 Cal.App.4th at 515. *See, e.g., People v. McKale* (1979) 25 Cal.3d 626, 631-33 (Supreme Court considered and rejected the contention that allowing a UCL claim would circumvent the "specific statutory enforcement scheme provided by the Act."); *Blue Cross of Calif., Inc. v. Superior Court* (2009) 180 Cal.App.4th 1237, 1249-51 (recognizing UCL suit for violation of Knox-Keene Act where that statute did not declare administrative enforcement as exclusive remedy) and; *Washington Mut. Bank,* 75 Cal.App.4th at 785 (permitting UCL action where the underlying statute could only be enforced by government regulators).

It is an incorrect statement of California law that "even if the law does not expressly say 'No civil action,' the courts may imply a legislative intent to bar private civil actions to indirectly enforce the statute by providing a comprehensive administrative remedy." *Rose,* 200 Cal.App.4th at 1450. Instead, "the statute itself [must] provide [] that the [administrative] remedy is to be exclusive." *Altus Finance,* 36 Cal.4th at 1303; *accord Blue Cross of Calif.,* 180 Cal.App.4th at 1249.

In sum, the Court of Appeal's decision imperils California's citizens' rights to remedy violations of federal law through the UCL. The decision further untethers preemption analysis from specific statutory language and Congressional history, creating both conflicts with this Court's prior decisions and confusion in California jurisprudence. This Court should grant review and reverse.

## VI. CONCLUSION

For the foregoing reasons, this Court should grant review of this Petition and reverse the published Opinion of the Court of Appeal in *Rose v. Bank of America, N.A., supra*.

DATED: December __, 2011

RESPECTFULLY SUBMITTED,

**THE ROSSBACHER FIRM**

_____

Henry H. Rossbacher

Attorneys for Plaintiffs/Appellants and Petitioners

## CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that pursuant to Cal. Rules of Court, rule 8.504(a)(1), the foregoing Petition for Review is proportionally spaced (i.e., type size no smaller than 13 point) and contains 7,053 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: December __, 2011

RESPECTFULLY SUBMITTED,

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Henry H. Rossbacher

The Rossbacher Firm

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