BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Accusation of:	)	
	)	
THE CALIFORNIA CORPORATIONS COMMISSIONER	)	Case No. 413-0088
	)	
	)	OAH No. N2003020615
Complainant,	)	
	)	
v.	)	
	)	
Wells Fargo Home Mortgage, Inc.	)	
	)	
Respondent.	)	

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated March 25, 2003, is hereby adopted by the California Corporations Commissioner as his Decision in the above-entitled matter with the following clarifying changes pursuant to Section 11517(c)(2)(C) of the Government Code. The changes conform the decision to Article III, Section 3.5 of the California Constitution and do not change the factual or legal basis of the proposed decision.

(1) At the beginning of the second sentence of Paragraph No. 3 of Factual Findings on page 2 of the proposed decision, "It is up to the federal courts to decide whether an" is substituted for the word "An".

(2) The word "The" is substituted for the words "In August 2001, the" in the first sentence of Paragraph No. 5 of Factual Findings on page 3.

(3) In the first sentence of the second paragraph in Paragraph No. 3 of Legal Conclusions on page 6, the phrase "it is up to the federal courts to decide whether" is inserted after the word "that" at the end of the first line.

(4) In the second sentence of the second paragraph in Paragraph No. 3 of Legal Conclusions on page 6, in the third line of that paragraph, the phrase "up to the federal courts to decide whether" is substituted for the words "abundantly evident that".

(5) In the seventh sentence of the second paragraph in Paragraph No. 3 of Legal Conclusions on page 6, in the eighteenth line of that paragraph, the phrase ", if so decided by the federal courts," is inserted after the word "or" and before the word "OCC-permitted".

(6) In the eighth sentence of the second paragraph in Paragraph No. 3 of Legal Conclusions on page 6, in the nineteenth line of that paragraph, the phrase "Even if respondent possessed" is substituted for the words "Possessed of".

(7) In the first sentence of the sixth paragraph in Paragraph No. 3 of Legal Conclusions on page 7, in the first line of that paragraph, the phrase "It is up to the federal courts to decide whether such" is substituted for the word "Such".

(8) In the fifth sentence of the sixth paragraph in Paragraph No. 3 of Legal Conclusions on page 8, in the eighth line of that paragraph, the phrase ", if so decided by the federal courts," is added after the word "or" and before the word "applicable".

This Decision shall become effective May 1, 2003

IT IS ORDERED May 1, 2003

CALIFORNIA CORPORATIONS COMMISSIONER

By _____
DEMETRIOS A. BOUTRIS

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of: WELLS FARGO HOME MORTGAGE, INC., Respondent.	CASE No. 413-0088 OAH No. N2003020615

PROPOSED DECISION

On March 11, 2003, the matter came on regularly for hearing before Jaime René Román, Administrative Law Judge, Office of Administrative Hearings,[1] State of California, in Sacramento, California.

Complainant appeared by and through Judy L. Hartley, Senior Corporations Counsel, and Linda Stella, Corporations Counsel.

Respondent Wells Fargo Home Mortgage, Inc., appeared by and through Severson & Werson, Attorneys at Law, by William L. Stern, Esq., and Michael J. Steiner, Esq.

Evidence having been received, the matter was submitted on March 11, 2003.

FACTUAL FINDINGS

1. On February 4, 2003, Complainant, Demetrios A. Boutris, California Corporations Commissioner, filed, by and through Judy L. Hartley, Senior Corporations Counsel, an Accusation and Notice of Intention to Issue Order Revoking Residential Mortgage

[1] The Office of Administrative Hearings, extant in the executive branch of the State of California, provides a forum independent of the Department of Corporations to fully effectuate the State's interest in providing due process with an independent and neutral adjudicative body. See *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017.

Lender and Servicer License against respondent Wells Fargo Home Mortgage, Inc. ("respondent"), solely in his official capacity.

2. Respondent, on February 18, 2003, filed a timely Notice of Defense[2] and Request for Hearing.

3. Respondent is a wholly owned operating subsidiary[3] of Wells Fargo Bank, N.A., a federal national bank organized under the National Bank Act.[4] An operating subsidiary of a National Bank is subject to OCC supervision.[5] Respondent has been issued a Residential Mortgage Lender and Residential Mortgage Loan Servicer license (File No. 413 0088) by the Commissioner of Corporations ("the Commissioner"), State of California. At the time respondent first obtained its license, it was not an operating subsidiary of Wells Fargo Bank, N.A. Said license is in full force and effect and authorizes respondent to engage in specified real estate lending activities in California.[6]

4. On April 17, 2001, Edwin F. Henderson, a Corporation Examiner employed by the Commissioner, commenced an examination of respondent's books and records for the period beginning December 6, 1999, to determine respondent's compliance with rules and regulations of the Commissioner.[7] Following his examination, Mr. Henderson determined that:

A. In four of 23 loans reviewed, respondent charged the borrower a per diem interest in excess of one-day prior to recording of the deed of trust or mortgage.

(1) The per diem interest overcharges ranged between $103.58 and $476.99, with an average of $279.33 per loan.

(2) The interest overcharge period ranged between one and five days.

B. In 9 of 25 loans reviewed, respondent understated finance charges in excess of $100 tolerance limits pursuant to 12 C.F.R. §226.18.

(1) Mr. Henderson, unable to categorically ascertain the exact cause of the understatements inasmuch as respondent did not maintain

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[2] The Notice of Defense included Special Defenses pursuant to Government Code §§11506(a)(2), 11506(a)(3) and 11506(a)(5).
[3] See 12 C.F.R. §5.34, 12 U.S.C. §24 (Seventh), and *Bank of America v. City and County of San Francisco* (9th Cir. 2002) 309, F.3d 551, 562.
[4] 12 U.S.C. §§21, et seq.
[5] 12 C.F.R. §5.34(e).
[6] Financial Code §50002.
[7] See Financial Code §50302. Cf. *First Union National Bank v. Burke* (1999) 48 F.Supp.2d 132, 144 re state visitorial powers.

Truth in Lending calculations on all loans and added a $35 cushion to its calculation, ascribed the finance charge understatements to respondent's failure to include settlement fees.

(2) The finance charge understatements ranged between $115 and $2,174.14, with an average of $910.44 per loan.

5. In August 2001, the Office of the Comptroller of the Currency ("OCC")[8] promulgated a regulation concerning the exercise of national bank visitorial powers[9] which provided, in pertinent part:

> "Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks....State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law."[10]

6. On April 9, 2002, the Commissioner commenced a follow-up examination to the regulatory examination conducted in 2001. The follow-up examination expanded to include a larger sample of loans to inspect for per diem overcharges and finance charge understatements. This examination disclosed that:

A. In 13 of 100 loans reviewed for the period between January 1, 2001 and December 31, 2001, respondent charged the borrower a per diem interest in excess of one-day prior to recording of the deed of trust or mortgage.

(1) The per diem interest overcharges ranged between $30.89 and $854.38, with an average of $156.79 per loan.

(2) The interest overcharge period ranged between one and six days.

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[8] The National Bank Act charges the OCC with the supervision of the Act and primary responsibility for surveillance of "the business of banking". See *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.* (1995) 513 U.S. 251, 256; *Burke, supra* at p. 137; and also 12 U.S.C. §§1, 26 – 27, and 481.

[9] Visitorial powers include examination of a bank, inspection of a bank's books and records, regulation and supervision of activities authorized or permitted pursuant to federal banking law, and enforcing compliance with any applicable federal or state laws concerning those activities. 12 C.F.R. §7.4000(a)(2). See also *Guthrie v. Harkness* (1905) 199 U.S. 148, 158.

[10] 12 C.F.R. §7.4000.

B. In 25 of 146 loans reviewed for the period between January 1, 2001 and December 31, 2001, respondent understated finance charges in excess of $100 tolerance limits pursuant to 12 C.F.R. §226.18. Attributed to a failure by respondent to include settlement fees, the finance charge understatements ranged between $182.50 and $1,350.52, with an average of $506.80 per loan.

7. Having determined that finance charges were understated as a result of the December 1999 examination, the Commissioner instructed respondent to implement procedures necessary to ensure that finance charges were not understated in the future.

8. In March 2002, respondent, in a response to the 2001 regulatory examination, informed the Commissioner that it had modified its origination system programming in December 2000 to include all settlement/closing fees in finance charge calculations. Respondent subsequently modified its representation as to the origination system programming modification to March 2001 after the Commissioner notified respondent that, incident to its subsequent examination, loans originating in February 2001 continued to understate finance charges by settlement fees.

9. Loans originating between April 2001 and August 2001, inclusive, were found by the Commissioner to understate finance charges by the settlement fees.

10. On December 18, 2001 and February 27, 2002, the Commissioner directed respondent to conduct a self-audit on its loans made since December 6, 1999, make appropriate customer refunds, and submit a report of its findings to the Commissioner. On December 3, 2002, the Commissioner amended its demand to include only loans made after January 1, 2001. Respondent, notwithstanding written demands by the Commissioner, has failed to present evidence of a self-audit, refund effectuation, or a report of its findings following self-audit and evaluation.

11. On January 22, 2003, notwithstanding its licensure and the prior exercise of concomitant visitorial powers by the Commissioner, respondent objected to and contested the Commissioner's jurisdiction.

12. On January 27, 2003, respondent filed a civil lawsuit in the United States District Court, Eastern District of California, entitled *Wells Fargo Bank, N.A., and Wells Fargo Home Mortgage, Inc. v. Demetrios A. Boutris*, CIV. No. S-03-0157 GEB JFM, seeking injunctive and declaratory relief against the Commissioner alleging, inter alia, that the Commissioner's jurisdiction was preempted by federal law and, consequently, the Commissioner lacked authority to regulate, supervise, examine or enforce the California Residential Mortgage Lending act against respondent. Respondent readily submits that the Commissioner, as a result of respondent's suit and federal preemption, possesses sufficient cause to revoke its State license.

13. On March 10, 2003, the United States District Court issued an Order stating, "...the Commissioner is preliminary enjoined from exercising visitorial powers over Plaintiffs [including respondent] or from otherwise preventing [respondent] from operating in California; however, the portion of [respondent's] motion seeking to preliminarily enjoin the Commissioner from revoking [respondent's] California issued license is denied.

LEGAL CONCLUSIONS

1. Respondent filed a timely Notice of Defense that included several Special Defenses. Submitting that jurisdiction is appropriately vested in a federal tribunal, no evidence was presented with respect to several discrete issues raised by its Special Defenses. Cause, accordingly, does not exist to find that:

A. The Commissioner lacks jurisdiction to proceed on the Accusation.

B. The Accusation and proceedings thereunder violate respondent's right to petition the government.

C. The Accusation and proceedings thereunder were filed in retaliation to respondent's exercise of constitutional, statutory, or regulatory protected rights.

D. The Commissioner is violating federal-state comity.

E. Revocation is an excessive penalty.

F. Respondent has substantially complied with pertinent provisions of the Financial Code.

G. The Commissioner's concern for compliance places an impossible burden on respondent.

H. The acts attributed to respondent were performed by third parties.

I. Respondent is being deprived of contractual and property rights with respect to its permissible commencement period for charging interest.

J. Respondent is entitled to offset and recoupment from borrowers.

K. The action is barred by consent and ratification.

2. Respondent, at the conclusion of the evidentiary submission, and consistent with its submission that jurisdiction over the Commissioner lies with a federal tribunal, moved to dismiss the matter. Mindful of respondent's express admission with respect to its civil lawsuit and assertions relative to preemption, and concomitant effect on its licensure status, it becomes evident that what may purport to be a motion to dismiss the entire Accusation lacks merit and, accordingly, is denied.

Cause, therefore, exists to revoke or suspend the residential mortgage lender and residential loan servicer license of respondent for a fact or condition that, if extant at the time of original application, would have reasonably warranted the Commissioner's refusal to issue the license pursuant to Financial Code §§50327, 50124 and 50125 and as set forth in Findings 1 – 3, 5 and 11 – 14.

3. Returning to the balance of respondent's jurisdictional motion to dismiss more narrow aspects of the Accusation,[11] it is particularly directed to this tribunal's factual findings incident to the Commissioner's visitorial powers in (1) conducting an examination of respondent, (2) inspecting the books and records of respondent, (3) regulating and supervising respondent's activities, and (4) enforcing respondent's compliance with applicable federal or state laws.

Deferring to respondent's jurisdictional challenge, it would, at first blush, appear that the Commissioner lacks the jurisdiction to exercise visitorial powers over a national bank and its operating subsidiaries. Indeed, it is abundantly evident that respondent, once having become an operating subsidiary of a national bank, to wit, Wells Fargo, no longer required a license by the Commissioner "to conduct federally permitted permissible banking activities authorized by the OCC",[12] including real estate lending activities.[13] Respondent however retained its California license and when approached by an examiner from the Commissioner, rather than objecting to an inspection or examination of its books and records, acceded to the request and produced its records and books for Commissioner review. When deficiencies were both discovered and subsequently disclosed to respondent, and a follow-up examination was ensued with particular focus on areas of similar deficiencies in a subsequent chronological period, respondent still interposed no objection. Directed to remedy its programming deficiencies, respondent, again without interposing an objection, indicated its efforts at programming compliance. It is not until a demand was made that not only required self-audit but also included refunds to injured California consumers, with a compliance report to the Commissioner, did respondent interpose a jurisdictional challenge. Notably, it would appear that the predicate for the Commissioner's visitorial exercise of power lies not with respondent's presence or OCC-permitted activities in California but, rather, the possession of a California license. Possessed of two authorizations—a federal and state—to engage in real estate lending

[11] Jurisdictional determinations, when properly raised, lie within this tribunal's purview. *Erhlich v. McConnell* (1963) 214 Cal.App.2d 280, 288.

[12] The Honorable Garland E. Burrell, Jr.,'s Order of March 10, 2003, p. 15:12 – 13.

[13] 12 U.S.C. §371, 12 U.S.C. §24 (Seventh), 12 CFR §§34.3 and 34.4, and 61 Federal Register 11294 (1996).

activities, it becomes evident that were the OCC-authorization to end respondent's capacity to engage in such activity by either respondent's disassociation from its parent or administrative discipline; respondent, if licensed by the Commissioner, could nevertheless engage in real estate lending activities in California.

Respondent's belated effort to preclude the introduction of evidence of its errant conduct on California consumers appears to rest narrowly on whether OCC's visitorial powers or the District Court's Order now function to prevent a limited State administrative licensure prosecution. As to the District Court's Order—it does not expressly prevent the instant prosecution. Respondent nevertheless objects, claiming the scope of "visitorial" powers as referenced in both the Order and its reference to federal statutes and regulations vest prosecution of enforcement actions in the OCC or its authorized representatives.

"As a general rule, state laws have been found applicable to national banks provided the state laws do not unfairly discriminate against national banks, favor state-chartered banks or frustrate, destroy, interfere with, or hamper national banks' exercise of their powers."[14] While it is readily evident that the business of banking lies within the exclusive jurisdictional purview of the OCC—real estate lending does not.[15] Indeed, Congress has not completely preempted such lending to grant an exclusive federal remedy. Respondent appears to argue that despite its capacity to engage in real estate lending without a Commissioner license; when it otherwise obtains or retains a Commissioner license, the Commissioner is nevertheless deprived of jurisdiction to supervise that which he has issued—even to an entity ordinarily exempt.[16] Specifically, respondent argues that the exclusive scope and expanse of federal preemption would appear to encompass and shield the conduct of respondent—however errant—from Commissioner scrutiny, enforcement, or efforts to protect the California public.

Respondent submits that, within the scope of the District Court's Order, the Commissioner is enjoined "from exercising visitorial powers" over respondent or from preventing respondent "from operating in California." Respondent contends that the ambit of the Order's reference to "visitorial" compels a determination that the Commissioner lacks the capacity to: (1) examine it, (2) inspect its books and records, (3) regulate and supervise its activities as authorized by federal banking law, and (4) enforcing its compliance with federal or state laws. Consequently, respondent concludes—rather emphatically—the Commissioner's instant efforts to prosecute or establish violations of the California Residential Mortgage Lending Act[17] violate the federal District Court's Order.

Such a conclusion might be warranted. What is lost on respondent is the fact that it retains a license issued by the Commissioner—a license with a character separate and apart from that issued by the federal government. It is respondent who by virtue of possessing such license has vested the State of California (within expressly narrow limits) jurisdiction over its

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[14] *Burke, supra* at p. 138.
[15] See 12 C.F.R. §34.4(b).
[16] Financial Code §50003(g)(1).
[17] Financial Code §§50000, et seq.

conduct.[18] Having voluntarily retained a California issued license and mindful of the particularly limited focus of this proceeding, respondent's motion to dismiss is denied. It is not lost on the undersigned that the effect of a revocation of respondent's license does not, in the face of the District Court's Order or applicable federal law, prevent respondent from engaging in conduct otherwise permitted by the OCC, including real estate lending activities. Nevertheless, the uncontroverted evidence presented this administrative law judge establishes:

A. Cause exists to revoke or suspend the residential mortgage lender and residential loan servicer license of respondent for per diem interest overcharges pursuant to Financial Code §§50204(o) and 50327, and as set forth in Findings 1 – 4 and 6.

B. Cause exists to revoke or suspend the residential mortgage lender and residential loan servicer license of respondent for finance charge understatements pursuant to Financial Code §§50204(i), 50204(j), 50204(k) and 50327, and as set forth in Findings 1 – 4, 6 and 8 – 9.

C. Cause exists to revoke or suspend the residential mortgage lender and residential loan servicer license of respondent for failure to submit a report as required pursuant to Financial Code §§50124(a)(3), 50124(a)(7), 50307(b) and 50327, and as set forth in Findings 1 – 4 and 6 – 10.

D. Cause exists to revoke or suspend the residential mortgage lender and residential loan servicer license of respondent for unfair business practices pursuant to Financial Code §§50204(i) and 50327, and as set forth in Findings 1 – 4 and 6 – 10.

E. Cause exists to revoke or suspend the residential mortgage lender and residential loan servicer license of respondent for fraud or dishonest dealings pursuant to Financial Code §§50204(k) and 50327, and as set forth in Findings 1 – 4 and 6 - 10.

F. Cause exists to revoke or suspend the residential mortgage lender and residential loan servicer license of respondent for information circumvention pursuant to Financial Code §§50204(j) and 50327, and as set forth in Findings 1 – 4 and 6 - 10.

[18] It is apparent that the District Court was aware of the Commissioner's proceeding on the Accusation and that the scope of this proceeding rests only on a license issued by the Commissioner to respondent. The Commissioner's jurisdiction does not function to enforce the banking law but, as previously indicated, to discipline, if culpable, the California license of respondent when appropriate violations of state law are established.

ORDER

The Residential Mortgage Lender and Residential Loan Servicer License of Wells Fargo Home Mortgage, Inc., issued by the California Corporations Commissioner is revoked pursuant to Legal Conclusions 2 and 3.A – 3.F, and each of them.

Dated: 3-25-03

JAIME RENÉ ROMÁN
Administrative Law Judge
Office of Administrative Hearings