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17 Credit One Bank, N.A.

18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA
20 EASTERN DIVISION

21 CREDIT ONE BANK, N.A.,
22 Plaintiff,

23 v.

24 MICHAEL A. HESTRIN, DISTRICT
25 ATTORNEY OF RIVERSIDE COUNTY,
26 CALIFORNIA

27 Defendant.

Case No. 5:20-cv-02156-JGB-KK

**PLAINTIFF CREDIT ONE BANK
N.A.'S NOTICE OF MOTION AND
MOTION FOR SUMMARY
JUDGMENT**

Date: Monday, October 18, 2021
Time: 9:00 a.m.
Place: Courtroom 1

Honorable Jesus G. Bernal

NOTICE OF MOTION

PLEASE TAKE NOTICE that on October 18, 2021, or as soon thereafter as counsel may be heard by the Court, Plaintiff Credit One Bank, N.A. (“Credit One”) will and hereby does move the Court for summary judgment against Michael A. Hestrin, District Attorney of Riverside County, California (“the District Attorney”).

Credit One seeks summary judgment on the grounds that there is no genuine issue as to any material fact that it is entitled to declaratory relief and injunctive relief against the District Attorney. Specifically, the National Bank Act, regulations prescribed by the Office of the Comptroller of the Currency (“OCC”), and the Dodd-Frank Wall Street Reform and Consumer Protection Act prohibit the District Attorney from bringing any enforcement actions challenging the banking operations of a national bank such as Credit One, because such enforcement actions constitute an unlawful exercise of “visitorial powers.” However, the District Attorney filed exactly such an enforcement action on March 26, 2021, in the California Superior Court for Riverside County. No rational trier of fact could conclude that the District Attorney has not violated the exclusive visitorial powers that Congress has vested in the OCC under the National Bank Act.

This motion is based on this Notice of Motion and Motion, on the accompanying memorandum of points and authorities, on the declaration and exhibits filed in support, and on such other matters as may be presented to the Court at the time of hearing.

This motion is made following two telephonic conferences of counsel pursuant to L.R. 7-3: the first of which took place in advance of the parties’ filing of their Joint Scheduling Report on April 5, 2021 (ECF No. 26), and the second on September 9, 2021.

Dated: September 17, 2021

/s/ Raymond Y. Kim

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The central issue in this action is whether the National Bank Act prohibits the District Attorney of Riverside County (the “District Attorney”), or any county-level law enforcement officer, from bringing an enforcement action challenging the banking operations of a national bank, such as Credit One Bank, N.A.¹ As explained below, pursuant to the National Bank Act, regulations prescribed by the Office of the Comptroller of the Currency (“OCC”), and the Dodd-Frank Wall Street Reform and Consumer Protection Act, the District Attorney is prohibited from bringing such an enforcement action because it is an unlawful exercise of “visitorial powers.”

Nearly 200 years ago, in *McCulloch v. Maryland*² the U.S. Supreme Court held federal law supreme over state law with respect to national banking. Though the bank at issue in *McCulloch* was short-lived, a federal banking system reemerged in the Civil War era.³ In 1864, Congress enacted the National Bank Act (“National Bank Act”), establishing the system of national banking still in place today. One of the hallmarks of this bedrock of the American financial system has been the principal that national banking associations are subject to the exclusive “visitorial power” of the Office of the Comptroller of the Currency (“OCC”). “Visitorial power” includes “conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions” and “enforcing compliance with any applicable Federal or state laws.”⁴

Against this backdrop, county-level prosecutors’ offices and related law enforcement *must be* prohibited from exercising visitorial powers over national banks, as otherwise these banks could be subject to individual enforcement actions

¹ See Joint Scheduling Report and Discovery Plan, ECF No. 26, § 3.

² 4 Wheat. 316, 4 L.Ed. 579 (1819).

³ See *Atherton v. FDIC*, 519 U.S. 213, 221–222 (1997); B. Hammond, *Banks and Politics in America: from the Revolution to the Civil War* (1957).

⁴ 12 C.F.R. § 7.4000(a)(1); 12 C.F.R. § 7.4000(a)(2)(iii) and (iv).

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1 and inspections by different prosecutors’ offices, each with differing standards and
2 expectations. These standards and expectations could vary from those imposed by
3 the OCC and interfere with the banks’ federally-authorized servicing, lending and
4 general banking operations. This need to avoid duplicative and potentially
5 contradictory regulatory regimes was one of the key components in Congress’
6 decision to establish a national bank charter and a national banking system.

7 As it stands today, there are 58 district attorneys in California alone with
8 authority to bring consumer protection enforcement actions. Other states also imbue
9 their district attorneys with similar authority, and these regulatory regimes are subject
10 to change at any time by the will of state legislatures or the political whims of local
11 elected officials. Without the exclusive visitorial power of the OCC to prevent
12 county-level district attorneys from bringing these enforcement actions that target
13 national banking practices by institutions like Credit One, the purpose of the federal
14 regulatory framework to create uniform governance of nationally-chartered banks
15 would be defeated.

16 Plaintiff Credit One Bank, N.A. (“Credit One”) is a national banking association
17 chartered by the OCC, and subject to the exclusive visitorial powers of the OCC. The
18 dispute between Credit One and the District Attorney began in November 2019, when the
19 District Attorney first attempted to exercise visitorial powers over Credit One by serving
20 an investigatory subpoena on Credit One, through which the District Attorney sought an
21 extensive amount of bank business records and customer information. Credit One
22 consistently objected to this subpoena as an improper exercise of visitorial powers. On
23 June 25, 2020, the District Attorney filed a petition to enforce the investigative subpoena
24 in the Riverside County Superior Court.⁵ During the pendency of the discovery
25 proceeding, Credit One filed the Complaint in this action against the District Attorney
26 seeking the following relief:

27 _____

28 ⁵ The District Attorney withdrew the subpoena in November 2020. See Order Denying District Attorney’s Motion to Dismiss, ECF No. 19, at 3, 5.

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1 A. Declaring the [District Attorney’s] investigative subpoena as
2 unenforceable as an unlawful encroachment upon the exclusive
3 visitorial authority of the OCC.

4 B. Preliminary and permanently enjoining the [District Attorney], his
5 agents, and all persons acting in concert with them from (1)
6 investigating, requesting or issuing subpoenas for information
7 concerning, *or taking any other action to enforce federal and state*
8 *lending, debt collection, servicing and consumer laws against*
9 *[Credit One], with respect to its credit card lending operations,* or
10 (2) otherwise exercising visitorial powers with respect to [Credit
11 One] in violation of Section 484 of the National Bank Act.

12 C. Granting [Credit One] such other and further relief, including costs,
13 as this Court may deem justice and proper.⁶

14 As set forth in the Complaint, Credit One specifically challenges the District Attorney’s
15 authority to “take any other action to enforce federal or state” law against Credit One
16 “with respect to its credit card lending operations.” While this matter was pending, the
17 District Attorney filed such an enforcement action in the California Superior Court for
18 Riverside County, seeking to enforce the California Unfair Competition, Business &
19 Professions Code § 17200 (the “UCL”) and propounded the same discovery requests
20 sought in the subpoena that he had withdrawn in November 2020.⁷

21 Credit One is entitled to summary judgment on its claims for relief because there
22 are no disputed issues of material fact: (i) Credit One is a national bank; (ii) the District
23 Attorney has brought an enforcement action against Credit One challenging its credit card

24 _____

25 ⁶ See Complaint, ECF No. 1, at 4:15-17 (italics added).
26 ⁷ See Declaration of Raymond Y. Kim (“Kim Decl.”), **Exhibit B**, District Attorney’s Complaint.
27 Although the District Attorney withdrew the subpoena for Credit One’s books and records, he
28 attempts to conduct the very same unlawful investigation through the enforcement action. *Id.*,
Exhibit A, District Attorney’s Investigative Subpoena; **Exhibit C**, District Attorney’s Requests for
Production to Credit One. This is still prohibited by the National Bank Act, OCC regulations, and Dodd-
Frank Act.

1 lending operations; and (iii) the District Attorney is not the Attorney General of the State
2 of California. Based on these undisputed facts, no rational trier of fact could conclude that
3 the District Attorney has not violated the exclusive visitorial powers that Congress has
4 vested in the OCC under the National Bank Act. Accordingly, Credit One respectfully
5 requests that this Court grants summary judgment in favor of Credit One, and thereby
6 enjoin the District Attorney, his agents, and all persons acting in concert with the District
7 Attorney from (1) investigating, requesting or issuing subpoenas for information
8 concerning, *or taking any other action to enforce federal and state lending, debt*
9 *collection, and consumer laws against [Credit One], with respect to its credit card*
10 *lending operations*, or (2) otherwise exercising visitorial powers with respect to Credit
11 One in violation of Section 484 of the National Bank Act.

12 **II. UNDISPUTED AND STIPULATED MATERIAL FACTS**

13 The parties stipulated that resolution of this case turns on a question of law, no
14 genuine issues of material fact are in dispute, no discovery is needed, and no witnesses or
15 trial will be required. *See* Joint Scheduling Report and Discovery Plan, ECF No. 26, §§ 9-
16 15. The parties also stipulated to the undisputed material facts relevant to this Motion,
17 which are also provided in the accompanying Statement of Undisputed Facts:

- 18 1. Plaintiff Credit One Bank, N.A. is a national banking association
19 chartered by the Office of the Comptroller of the Currency
20 pursuant to the National Bank Act.
- 21 2. The District Attorney Michael A. Hestrin is the District Attorney
22 of Riverside County, California.
- 23 3. In his capacity as District Attorney of Riverside County, the
24 District Attorney enforces and regulates criminal and civil laws
25 in the County of Riverside.
- 26 4. On March 26, 2021, the District Attorney filed an enforcement
27 action in the California Superior Court for Riverside County
28 against Credit One entitled, *The People of the State of California*

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1 v. *Credit One Bank, N.A.*, bearing case number CVRI2101654 (the
2 “State Enforcement Action”). See Kim Decl., **Exhibit B**.

3 See Joint Scheduling Report and Discovery Plan, ECF No. 26, § 13.

4 **III. LEGAL ARGUMENT**

5 **A. Legal Standard on Summary Judgment Motion**

6 The moving party initially bears the burden of proving the absence of a genuine
7 issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “When the
8 party moving for summary judgment would bear the burden of proof at trial, it must
9 come forward with evidence which would entitle it to a directed verdict if the
10 evidence went uncontroverted at trial. In such a case, the moving party has the initial
11 burden of establishing the absence of a genuine issue of fact on each issue material to
12 its case.” *C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc.*, 213 F.3d
13 474, 480 (9th Cir. 2000) (citations omitted). If the movant meets its burden, the
14 burden shifts to the nonmovant to show summary adjudication is not
15 appropriate. *Celotex*, 477 U.S. at 317, 324. As demonstrated below, the undisputed
16 material facts establish that Credit One is entitled to the requested relief as a matter of law.

17 **B. The District Attorney’s State Enforcement Action Is An Improper**
18 **Exercise Of Visitorial Powers Over Credit One**

19 **1. Visitorial Powers Over A National Bank Are Delegated Only To The**
20 **OCC And “Any Attorney General (Or Other Chief Law**
21 **Enforcement Officer) Of Any State”**

22 Since the Lincoln Administration, by enacting the National Bank Act Congress
23 created the OCC and vested visitorial powers over national banking associations
24 exclusively in the OCC. Specifically, the National Bank Act provides: “No national bank
25 shall be subject to any visitorial powers except as authorized by Federal law, vested in the
26 courts of justice or such as shall be, or have been exercised or directed by Congress or by
27 either House thereof or by any committee of Congress or of either House duly
28 authorized.” 12 U.S.C. § 484. The OCC has since prescribed regulations authorizing only

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1 the OCC to exercise “visitorial powers,” and prohibiting “state officials” from exercising
2 “visitorial powers” over national banks:

3 Under 12 U.S.C. 484, only the OCC or an authorized representative of the
4 OCC may exercise visitorial powers with respect to national banks. State
5 officials may not exercise visitorial powers with respect to national banks[.]

6 12 C.F.R. § 7.4000(a)(1). “Visitorial powers” include: (i) “conducting examinations,
7 inspecting or requiring the production of books or records of national banks, or
8 prosecuting enforcement actions, except in limited circumstances authorized by federal
9 law”; and (ii) “enforcing compliance with any applicable Federal or state laws”
10 concerning “regulation and supervision of activities authorized or permitted pursuant to
11 federal banking law.” 12 C.F.R. § 7.4000(a)(1); 12 C.F.R. § 7.4000(a)(2)(iii) and (iv).

12 More recently, in *Cuomo v. Clearing House Ass’n, L.L.C.*, the Supreme Court held
13 that in addition to the OCC a “state attorney general” may bring “suit to enforce state law
14 against a national bank.” 557 U.S. 519, 536 (2009). Congress codified the *Cuomo*
15 holding in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12
16 U.S.C. § 25b(i), (the “Dodd-Frank Act”), and affirmed that an enforcement action
17 may be brought by the state attorney general “or other chief law enforcement officer”
18 of the State:

19 In accordance with the decision of the Supreme Court of the United
20 States in *Cuomo v. Clearing House Assn., L. L. C.* (129 S.Ct. 2710
21 (2009)), no provision of title 62 of the Revised Statutes which relates
22 to visitorial powers or otherwise limits or restricts the visitorial
23 authority to which any national bank is subject shall be construed as
24 limiting or restricting the authority of any *attorney general (or other*
25 *chief law enforcement officer) of any State* to bring an action against a
26 national bank in a court of appropriate jurisdiction to enforce an
27 applicable law and to seek relief as authorized by such law.

28 12 U.S.C. § 25b(i) (emphasis added).

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1 Dodd-Frank Act’s Congressional directive is clear and unmistakable – actions by
2 the States to enforce non-preempted law against a national banking association is limited
3 to actions brought in the courts, and only those brought by the attorney general “or other
4 chief law enforcement officer” of any State. 12 U.S.C.A. § 25b(i).

5 **2. Based On A “Common Understanding” Of The Dodd-Frank**
6 **Act’s Plain Language, The District Attorney May Not Pursue A**
7 **State Enforcement Action Against Credit One**

8 The National Bank Act, Dodd-Frank Act, and OCC regulations unequivocally
9 show that Congress did not intend for local district attorneys to have visitorial powers over
10 national banks. Congressional intent may be inferred from the plain language of the
11 statute. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,
12 511 U.S. 164, 177-179 (1994) (“Congress knew how to impose aiding and abetting
13 liability when it chose to do so.”); *Pinter v. Dahl*, 486 U.S. 622, 650 (1988) (“When
14 Congress wished to create such liability, it had little trouble doing so”). Specifically here,
15 if Congress had intended to authorize local district attorneys to exercise visitorial powers,
16 it could have done so in the Dodd-Frank Act by providing that the National Bank Act
17 shall not be “construed as limiting or restricting the authority of any *State or political*
18 *subdivision thereof.*” Federal statutes are replete with provisions that use the language
19 “State or political subdivision thereof” to identify the government entities subject to the
20 statute. In fact, there are fifteen such examples in Title 12 alone (the federal title relating
21 to banks and banking). *See, e.g.,* 12 U.S.C. § 1748h-3(b) (“Nothing in this subchapter
22 shall be construed to exempt any real property which has been or is hereafter acquired and
23 held by the Secretary under section 1748h–1 or 1748h–2 of this title from taxation by *any*
24 *State or political subdivision thereof[.]*”) (emphasis added); 12 U.S.C. § 2279g (“*No State*
25 *or political subdivision thereof* may treat the merger or consolidation of two or more
26 institutions of the Farm Credit System under this subchapter or title IV of the Agricultural
27 Credit Act of 1987 as resulting in a change of ownership of any property owned by any of
28 such merging or consolidating institutions[.]”) (emphasis added); 12 U.S.C. § 1750e

1 (“Nothing in this subchapter shall be construed to exempt any real property acquired and
 2 held by the Secretary under this subchapter from taxation by *any State or political*
 3 *subdivision thereof*.”) (emphasis added).⁸ If the plain language of Section 25b(i) was not
 4 clear enough, the fact that Congress declined to use the language “State or political
 5 subdivision thereof” establishes that Congress intended to limit enforcement actions by
 6 state attorneys general (or their state equivalent), and did not permit such actions to be
 7 brought by lower state officials, such as local prosecutors of every county, parish, town or
 8 city.

9 The context, text, and placement of the phrase “other chief law enforcement
 10 officer” supports this interpretation. Specifically, Dodd-Frank provides that the National
 11 Bank Act shall not be construed as limiting the authority of “any attorney general (*or*
 12 *other chief law enforcement officer*) of any State to bring an action[.]” 12 U.S.C. §
 13 25b(i) (italics added). The phrase “other chief law enforcement officer” directly follows
 14 in parenthesis, “attorney general,” and is preceded by the conjunction “or.” Courts should
 15 interpret this phrase “methodically, using traditional tools of statutory interpretation, in
 16 order to confirm their assumptions about the ‘common understanding’ of words.”
 17 *Facebook v. Duguid*, 141 S. Ct. 1163, 1170 n.5 (2021).

18 The Merriam Webster dictionary defines “chief” as: (i) “accorded highest rank or
 19 office”; and (ii) “of greatest importance or influence.” *Merriam-Webster Dictionary*,
 20 Chief, (available at: <https://www.merriam-webster.com/dictionary/chief>). Also, the
 21 Merriam Webster dictionary defines “or” as a conjunction: (i) “used as a function word to
 22 indicate an alternative”; and (ii) “the equivalent or substitutive character of two words or
 23 phrases.” *Merriam-Webster Dictionary*, Or (available at: [https://www.merriam-](https://www.merriam-webster.com/dictionary/or)
 24 [webster.com/dictionary/or](https://www.merriam-webster.com/dictionary/or)). Based on a common understanding of these definitions, a
 25 plain reading of “any attorney general (or other chief law enforcement officer)”
 26

27 ⁸ See also 12 U.S.C. § 2148; 12 U.S.C. § 1747j; 12 U.S.C. § 1706b; 12 U.S.C. § 1741; 12 U.S.C. § 1714;
 28 12 U.S.C. § 3012; 12 U.S.C. § 3403; 12 U.S.C. § 1768; 12 U.S.C. § 2160; 12 U.S.C. § 90; 12 U.S.C. §
 1757; 12 U.S.C. § 1464.

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1 establishes that Congress intended for “other chief law enforcement officer” to mean the
2 highest State official with a title equivalent to the attorney general.

3 There is nothing in the phrase “other chief law enforcement officer” of the State
4 that suggests Congress intended to include local prosecutors, such as prosecutors of a
5 county or city. The phrase “*other chief law enforcement officer*” is in the singular
6 form, and preceded by the conjunction “or,” which presupposes that only the single
7 highest ranking legal official of the State is the subject of the Dodd-Frank Act.
8 Indeed, the more commonsense explanation is that the phrase “or other chief law
9 enforcement officer” is intended to allow for the possibility that the chief law enforcement
10 officer of a State or U.S. territory does not hold the formal title of “attorney general.” This
11 is certainly true in the Commonwealth of Puerto Rico, where the chief law enforcement
12 officer is titled as the “Secretario de Justicia de Puerto Rico,” or “Secretary of Justice of
13 Puerto Rico.” *See* Puerto Rico Department of Justice website, available at:
14 <http://www.justicia.pr.gov/> (last visited September 17, 2021). Were it not for the noted
15 parenthetical, the expansion of visitorial powers to the “attorney general” of a State would
16 not extend to Puerto Rico.

17 For avoidance of any doubt, Credit One is not arguing that lower state officials may
18 never enforce any state or local laws against a national bank, as it is possible, *arguendo*,
19 that a local government may enforce local zoning laws, or fire safety or building codes
20 against a national bank. This much is suggested by the OCC’s regulation, referenced
21 above, that includes within the definition of visitorial powers “enforcing compliance with
22 any applicable Federal or state laws” concerning “regulation and supervision of activities
23 authorized or permitted pursuant to federal banking law.” 12 C.F.R. § 7.4000(a)(2)(iii)
24 and (iv). Activities that are wholly outside of federally-authorized activities, such as fire
25 and building safety codes, may be within the scope of local government enforcement.
26 Federally-authorized banking activities, such as lending and account servicing, are not.
27 *See, e.g.*, 12 U.S.C. § 24 (Seventh) (national banks may engage in the “business of
28 banking” “by loaning money on personal security” and “by discounting and negotiating

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1 promissory notes, drafts, bills of exchange, and other evidences of debt”); 12 C.F.R. §
 2 7.4008(a) (“A national bank may make, sell, purchase, participate in, or otherwise deal in
 3 loans and interests in loans that are not secured by liens on, or interests in, real estate,
 4 subject to such terms, conditions, and limitations prescribed by the Comptroller of the
 5 Currency and any other applicable Federal law.”); OCC Interp. Ltr. Dated Jan. 30, 1992,
 6 1992 WL 266687, at *1 (OCC, Jan. 30, 1992) (“Servicing the loans is an ‘incidental
 7 power ... necessary to carry on the business of banking[.]”); *Parks v. MBNA Am. Bank,*
 8 *N.A.*, 54 Cal. 4th 376, 386–87 (2012) (“[T]he NBA broadly authorizes national banks to
 9 exercise ‘all such incidental power as shall be necessary to carry on the business of
 10 banking.’ This broad power expressly includes ‘loaning money on personal security.’”)
 11 (citation omitted); *Dailey v. Bank of America, N.A.*, 2014 WL 12845788, at *4 (E.D.
 12 Tenn. September 30, 2014) (“The plaintiff argues that BOA must be licensed with
 13 Tennessee to collect on debts arising out of real estate lending. Such a requirement, this
 14 Court determines, is an exercise of visitorial powers that is prohibited by the NBA
 15 because it would infringe upon the OCC's exclusive authority to regulate national
 16 banks.”). Because Congress left no room for state officials other than the attorney general
 17 to enforce state law to curtail the banking activities of national banks, the prosecution of
 18 any enforcement action by any other state official that targets the substantive banking
 19 activities of national banks is foreclosed by federal law.

20 Against this backdrop, the Court should grant summary judgment in favor of Credit
 21 One and issue an injunction enjoining the District Attorney from attempting to enforce the
 22 UCL, or any other state consumer law affecting Credit One’s lending operations. Credit
 23 One is a national bank. Statement of Undisputed Facts (“SUF”) No. 1. On March 26,
 24 2021, the District Attorney filed an enforcement action in the California Superior
 25 Court for Riverside County against Credit One alleging violations of the UCL based
 26 on Credit One’s banking activities. SUF No. 4. The District Attorney is not the State
 27 Attorney General “or highest chief law enforcement officer” of the State of
 28 California. SUF No. 2. As such, the State Enforcement Action is an improper

1 exercise of visitorial powers, and the District Attorney should be barred from further
2 pursuing the action and seeking Credit One’s records.

3 **IV. CONCLUSION**

4 In this lawsuit, Credit One alleges that the District Attorney’s attempts to curtail or
5 restrict the banking activities of national banks through the prosecution of enforcement
6 actions is foreclosed by the exclusive visitorial power vested in the OCC. There is no
7 debate that the District Attorney has attempted to and is in fact in the process of
8 attempting to enforce California law to address the banking activities of Credit One, that
9 Credit One is a national banking association, and that the District Attorney is not the
10 California Attorney General. Whatever the District Attorney’s motives might be, and
11 even if he in earnest disagrees with the statute that Congress has written, the forum for the
12 result he seeks – expansion of the authority for lower state officers to enforce consumer
13 law against national banks – lies not with the courts but rather with Congress.

14 Accordingly, Credit One respectfully requests that the Court grant summary
15 judgment in favor of Credit One, and issue an injunction enjoining the District Attorney
16 from attempting to enforce the UCL, or any other state consumer law, to restrict the
17 banking activities of national banking associations, including Credit One.

18 Dated: September 17, 2021

19
20 /s/ Raymond Y. Kim
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