UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL TRADE COMMISSION,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. 1:08-CV-01976-BBM-RGV
COMPUCREDIT CORP., ***et al.***,	)	
Defendants.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT COMPUCREDIT'S MOTION TO DISMISS

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I. INTRODUCTION

The Federal Trade Commission ("FTC") brings this action to remedy Defendants' deceptive marketing of credit cards. Among other things, CompuCredit has lured millions of subprime consumers into obtaining credit cards by claiming that those consumers would receive $300 in available credit. In fact, CompuCredit misrepresented the amount of available credit and failed to disclose adequately that it assessed as much as $185 in up-front fees reducing the available credit to as little as $115. As a result, many consumers went over-limit, incurring significant fees. The FTC seeks permanent injunctive relief to stop CompuCredit's deceptive conduct and equitable monetary relief to redress consumers victimized by CompuCredit's deception and incurred substantial monetary loss.

The FTC's action is fundamentally no different from the scores of consumer protection cases it brings each year against defendants hawking advanced free credit cards, suspect credit repair schemes, bogus dietary supplements or weight loss products, and other deceptively marketed goods or services. Yet CompuCredit would have this Court believe that the FTC's action against it will topple the nation's entire banking system.

Contrary to CompuCredit's dramatic but erroneous assertions, Congress, through Section 5 of the FTC Act, 15 U.S.C. § 45(a)(2), has "empowered and

directed" the FTC to prevent "persons, partnerships, or corporations" from engaging in deceptive acts or practices. Although the FTC Act specifically exempts certain classes of entities from FTC jurisdiction, such as banks, savings and loans, and federal credit unions, CompuCredit falls into none of those exempt categories. CompuCredit would have this Court re-write the FTC Act to exempt from FTC jurisdiction not only the specific entities identified by Congress but also any "person, partnership, or corporation" that engaged in particular activities. This Court should reject this invitation and deny CompuCredit's motion to dismiss.

This Court should also reject CompuCredit's erroneous assertions that this Court itself lacks jurisdiction to remedy CompuCredit's law violations. The FTC brings this action under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which empowers this Court to enter injunctive and other equitable relief against those found violating the FTC Act or any other law enforced by the FTC. CompuCredit bases its argument by reading in isolation one clause of 12 U.S.C. § 1818(i)(1) which nominally states that courts do not have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order issued by a federal banking agency. A plain reading of 12 U.S.C. § 1818 in its entirety, consistent with every reported court decision found that applies the provision, demonstrates that Section 1818(i)(1) is an anti-injunction provision that only limits attacks on

federal banking agency administrative proceedings or orders. Section 1818(i)(1) does not serve as a complete bar to the exercise of federal district court jurisdiction whenever a parallel FDIC proceeding exists, existed, or could exist. This Court should not adopt CompuCredit's erroneous and unsupported application of the statute. This Court has subject matter jurisdiction and should deny CompuCredit's motion to dismiss.

Unable to attack the FTC's jurisdiction or preempt this Court's jurisdiction, CompuCredit finally attempts to divert attention by claiming that this Court's lawful exercise of its jurisdiction in parallel with the FDIC would be both disruptive and unfair, relying upon unfounded and exaggerated speculation that parallel proceedings will yield undesirable consequences. CompuCredit's baseless assertions have no bearing on whether this Court, as a matter of law, has the power to hear this case, and therefore have no bearing on the issue of subject matter jurisdiction. Parallel government proceedings are commonplace in today's regulatory environment, and CompuCredit provides no reason to make this case the exception. Accordingly, CompuCredit's motion to dismiss should be denied.

II. STATEMENT OF FACTS

Through its Preliminary Statement and Background sections, CompuCredit would have this Court believe that it played a mostly passive role, as compared to the banks, in the marketing of credit cards. Thus, it argues, the FTC's action is an attempt to regulate the banks. The facts alleged in the FTC's Complaint and CompuCredit's own admissions in other actions,[1] however, paint a different picture — one in which CompuCredit was the primary player in this credit card marketing scheme. Thus, the FTC in this action, far from trying to regulate the banks, is merely exercising its lawful authority against the non-bank CompuCredit for CompuCredit's deceptive marketing practices.

The FTC filed its action against CompuCredit alleging violations of Section 5 of the FTC Act, 15 U.S.C. § 45, in connection with the marketing of credit cards to consumers with sub-prime credit ratings. The FTC alleges that CompuCredit: (1) misrepresented the amount of available credit consumers would

[1] In considering a motion to dismiss for lack of subject matter jurisdiction, the court "must consider the allegations in the plaintiff's complaint as true." *McElmurray v. Consol. Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir. 2007). In addition, the court may consider evidence outside of the pleadings to determine whether it has subject matter jurisdiction. *See Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001); *Bracewell v. Nicholson Air Svcs., Inc.*, 748 F.2d 1499, 1501 n.1 (11th Cir. 1984); *Sanchez v. Edgar*, 710 F.2d 1292, 1295 n.2 (7th Cir. 1983). Courts may also take judicial notice of matters of public record. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

receive on credit cards; (2) failed to disclose or disclose adequately that it would impose substantial up-front fees on certain credit card accounts; (3) failed to disclose or disclose adequately that it employed behavioral scoring models to reduce consumers' credit lines if consumers used their cards for certain types of transactions; and (4) misrepresented the terms under which it would issue certain credit card accounts to consumers with unrelated prior debts.

As set forth in the FTC's complaint, CompuCredit is not a bank but a Georgia corporation. (Compl. ¶ 5.) Through contractual arrangements with various banks,[2] CompuCredit has had the primary role marketing subprime credit cards to consumers nationwide. (*Id.* ¶ 11.) Under these contracts, CompuCredit has had the sole and exclusive right to solicit applications for certain credit cards; has created, designed, and distributed the marketing materials; established the credit cards' terms and conditions; developed the underwriting and credit criteria; administered the card programs; maintained customer service functions; and purchased all accounts receivables (except for certain one-time sums retained by the banks), including fees, finance charges, and principal balances on purchases

[2] The banks themselves are supervised by various federal banking regulators, including the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the Office of the Comptroller of the Currency ("OCC"). (*Id.* ¶ 11.)

and cash advances. (*Id.* ¶ 12.) CompuCredit has assumed the costs and risks for administering the credit card programs, and has represented and warranted to the banks, and assumed contractual responsibility for ensuring, that all solicitation materials and the terms and conditions for its credit cards comply with all applicable laws. (*Id.*) Indeed, the banks sole role in this scheme is to actually issue the credit cards and review and approve the credit cards' terms and conditions, underwriting and credit criteria, and solicitation materials. (*Id.* ¶ 13.) While the banks initially own the account receivables, on a daily basis they transfer 100% of those accounts (except for certain one-time sums) to CompuCredit. (*Id.*)

CompuCredit itself admits its substantial role in the marketing of credit cards at issue in the FTC's Complaint. For example, in its complaint filed in *CompuCredit Corp. et al. v. Columbus Bank and Trust Co. et al.*, Civil Action No. 08-EV-004730-F (Ga. State Ct.) (*see* Ex. 1), CompuCredit admits that it "provides substantial marketing and other services to CB&T relating to credit card accounts" and "purchases the receivables on the credit card accounts from CB&T on a daily basis." (Ex. 1 ¶ 2.) As part of these services, CompuCredit "conducts the marketing and servicing of the credit card accounts at its own expense. The bank reviews and approves all solicitations and communications to account holders, but it is CompuCredit that bears the cost of these activities." (*Id.* ¶ 21.) In its answer

to the FDIC's notice of charges in *In the Matter of CompuCredit*, Docket No. FDIC-08-139b (*see* Ex. 2), CompuCredit describes itself as a "specialty finance company and service provider that markets branded credit cards and related financial services for and on behalf of banks with which CompuCredit contracts" and as an "independent contractor" for the banks "to provide marketing and other services in accordance with CompuCredit's contract." (Ex. 2 at 3.) In its complaint filed in *CompuCredit Corp. v. FDIC*, Civil Action No. 1:08-CV-00430-GMS (D. Del.) (*see* Ex. 3), CompuCredit stresses it is an independent contractor of the Bank and not an institution-affiliated party ("IAP") of the Bank. (Ex. 3 ¶ 10.)

In short, the facts as alleged in the FTC's Complaint and CompuCredit's own statements in pleadings in other cases demonstrate that CompuCredit played a primary role in the credit card marketing scheme challenged in the FTC's Complaint. Thus, the facts, as well as the law, demonstrate that the FTC, far from attempting some "back door" regulation of the banks, is merely exercising its lawful authority to enforce the FTC Act against the marketing practices of CompuCredit.

III. THE FTC HAS JURISDICTION TO BRING AN ACTION AGAINST COMPUCREDIT FOR DECEPTIVE MARKETING

The FTC has jurisdiction over the deceptive acts and practices of non-banks, even if the non-banks perform services on behalf of a bank. Congress, through Section 5 of the FTC Act, has "empowered and directed" the FTC to prevent "persons, partnerships, or corporations" from engaging in unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45(a)(2). The FTC Act contains specific exemptions from FTC jurisdiction, including banks, savings and loan institutions, and federal credit unions. *Id.* The bank exemption specifies that "banks" are exempt, not, as CompuCredit would have this Court believe, "entities subject to the authority of a federal bank regulator" or "banking activities." "Bank" is defined as a specified set of entities, which does not include CompuCredit. CompuCredit asks this Court to rewrite the FTC Act to exempt not only the specific entities identified by Congress but also the activities of companies doing business with these entities. As discussed further, neither the plain language of the statute nor cases interpreting the statute support such a dramatic restriction of FTC jurisdiction.

CompuCredit's argument, that because it performs services for banks, the FTC's jurisdiction is precluded by the FTC Act and the Bank Service Company

Act ("BSCA"), 12 U.S.C. § 1861 *et seq.*, is misguided for several reasons. *First*, it ignores the plain language of the FTC Act, which grants the FTC jurisdiction over entities that, like CompuCredit, are not banks. *Second*, it ignores the fact that courts have regularly refused to extend the FTC Act bank and other exemptions to entities that do not fall within the stated exemption, even if that entity provides services for an exempt entity. *Third*, the plain language of the BSCA includes no limit on the FTC's existing jurisdiction, but merely extends banking agency authority to reach independent contractors. *Fourth*, Congress clarified in the Gramm-Leach Bliley Act ("GLBA"), 15 U.S.C. § 6801 *et seq.*, that the FTC has jurisdiction over non-banks even when they are affiliated with banks. *Fifth*, the FTC is exercising its congressional mandate by bringing this action against CompuCredit for deceptive credit card marketing practices, not usurping federal banking authority. Thus, the FTC has jurisdiction to bring this action against CompuCredit for its deceptive credit card marketing.

A. The Plain Language of the FTC Act Grants the FTC Jurisdiction Over CompuCredit

The plain language of the FTC Act and fundamental rules of statutory construction belie CompuCredit's argument that the FTC does not have jurisdiction over corporations doing business with banks. When interpreting the

language of a statute, courts begin with the plain language employed by Congress. *Park 'n' Fly v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *United States v. Smith*, 957 F.2d 835, 836 (11th Cir. 1992). If a statute speaks with clarity to a particular issue, then "judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1266 (11th Cir. 2006) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). Furthermore, when Congress enumerates certain exceptions to a rule, additional exceptions are not implied absent evidence of clear legislative intent. *Andrus v. Glover Contr. Co.*, 446 U.S. 608, 616-17 (1980); *United States, ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498-99 (11th Cir. 1991). Here, the FTC Act grants the FTC expansive jurisdiction and then outlines certain exceptions. The FTC Act provides, in relevant part, that the FTC has jurisdiction over "persons, partnerships, or corporations" engaged in interstate commerce except banks, savings and loan institutions, national credit unions, and other exemptions not relevant here. 15 U.S.C. § 45(a). The FTC Act defines the term "bank" as "the types of banks and other financial institutions referred to in section 57a(f)(2) of this title." 15 U.S.C. § 44. Section 57a(f)(2) defines banks as

> national banks and Federal branches and Federal agencies of foreign banks, . . . member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches,

> Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and [foreign branches or banking corporations authorized to do foreign banking business], [as well as] banks insured by the Federal Deposit Insurance Corporation and insured State branches of foreign banks.

15 U.S.C. § 57a(f)(2). Nowhere in the definition does the statute include in the exemption, or even suggest an intention to include, non-banks performing services for banks. Because the FTC Act's enumerated exemptions do not include non-banks that perform contractual services for banks, such as CompuCredit, and the definition of banks is limited to the specific list of entities in 15 U.S.C. § 57a(f)(2), under the plain meaning of the statute, CompuCredit does not fall within this exemption.

B. Courts Have Routinely Rejected the Type of Extension of FTC Act Exemptions that CompuCredit Suggests

The essential prerequisite for application of the FTC Act bank exemption is that the entity claiming exemption from FTC jurisdiction be a *bank*, and not simply engaged in activities on behalf of, or under contract with, a bank. Rather than focus on the activities of the entity, courts look to the entity's status in determining whether the bank exemption applies. *See FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1086 (C.D. Cal 1994) (defendant who provided credit card marketing and other services for a bank was not exempt from FTC jurisdiction); *FTC v.*

Green Tree Acceptance, Inc., 1987 U.S. Dist. LEXIS 16750, at *6-7 (N.D. Tex. Sept. 30, 1987) (FTC had jurisdiction to enforce the Fair Credit Reporting Act and Equal Credit Opportunity Act against a wholly-owned subsidiary of a savings and loan that provided services to the savings and loan). Moreover, courts have uniformly rejected attempts to extend other FTC Act exemptions from the FTC's jurisdiction to entities not falling within a stated exemption, even when engaged in activities on behalf of, or under contract with, an exempt entity. *See, e.g., Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005) (third-party telefunders calling on behalf of a nonprofit organization are subject to FTC jurisdiction even though the non-profit itself is not); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980) (firm that contracted with airlines to publish airline schedules was not exempt from FTC Act though air carriers are exempt); *FTC v. Saja*, 1997-2 Trade Cas. (CCH) ¶71,952 (D. Ariz. 1997) (telemarketing company for nonprofit organization could not invoke the FTC Act nonprofit exemption). Because the FTC bank exemption applies to banks, not to banking activities or to entities subject to banking agency supervision, CompuCredit's repeated recitation that banking activities are exempt from FTC jurisdiction is simply wrong.

In *Am. Standard Credit Systems*, the defendant ASCS argued that because it was an agent of the bank, and the bank was exempt from the FTC's jurisdiction, it

should also be exempt. *Am. Standard Credit Sys.*, 874 F. Supp. at 1086. Rejecting that argument, the court ruled that ASCS was not exempt from FTC enforcement actions. *Id.* Attempting to distinguish *Am. Standard Credit Systems*, CompuCredit contends that the credit card marketing company in that case had a different relationship with the bank through which it marketed credit cards and was not acting on behalf of the issuing bank. (Def. Mem. Supp. Mot. Dismiss at 21.) In fact, ASCS had a similar relationship with its bank as CompuCredit has with the banks that issue its products. Both ASCS and CompuCredit entered into agreements to provide banks with credit card marketing, solicitation, application, account processing, and other services related to the establishment of credit card accounts. *Compare Am. Standard Credit Sys.*, 874 F. Supp. at 1083 *with* Compl. ¶ 12. Like the defendant in *Am. Standard Credit Systems*, CompuCredit cannot hide behind the bank exemption to elude FTC jurisdiction.

C. The BCSA Does Not Strip the FTC of its Jurisdiction

Faced with the fact that the plain language of the FTC Act, consistent with relevant case law, confers jurisdiction over CompuCredit on the FTC, CompuCredit misstates the scope of the BSCA, enacted in 1962 and amended multiple times, to argue that federal banking agencies have *exclusive* jurisdiction over non-banks performing services for a bank. (*See* Def. Mem. Supp. Mot.

Dismiss at 17-18.) In other words, CompuCredit argues that the BSCA somehow repealed by implication the FTC Act's grant of jurisdiction.

The plain language of the BSCA, however, does not limit the FTC's jurisdiction. Rather, the BSCA ensures that banks cannot place any potentially relevant activities beyond the reach of the banking agencies by hiring non-banks to perform those activities. Plainly, the bank agencies' mandate to ensure the safety and soundness of banks would be frustrated if those agencies could not examine the performance of a bank's contractors.

While CompuCredit is correct that the BSCA grants banking agencies the authority to regulate and examine certain practices of certain non-banks, nothing in the statute expressly limits or restricts the FTC's ability to bring an enforcement action against CompuCredit. The BSCA provides that a banking agency may regulate and examine the performance by a non-bank of services for a bank "to the same extent as if such services were being performed by the depository institution itself on its own premises." 12 U.S.C. § 1867(c). The obvious purpose of this provision is to ensure that banks do not evade the regulatory jurisdiction of the FDIC by simply outsourcing functions that they previously performed in-house. CompuCredit, on the other hand, relies on this phrase to support its erroneous argument that the BSCA repeals FTC jurisdiction over non-banks performing

services on behalf of banks. (*See* Def. Mem. Supp. Mot. Dismiss at 18-19.) There is no language in the statute granting exclusive jurisdiction to the banking agencies or limiting the FTC's authority. To interpret that this language somehow repeals by implication the FTC's jurisdiction is to read words into the statute that simply do not exist.

Courts are rightly reluctant to strip one agency of jurisdiction automatically when another agency obtains the authority to regulate particular entities or practices. *FTC v. Ken Roberts, Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) ("Because we live in an age of overlapping and concurring regulatory jurisdiction, a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may.") (citing *Thompson Medical Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986)). Absent an affirmative showing of clear and manifest congressional intent, courts will not interpret a statute to "impliedly repeal" a pre-existing statute unless there exists an irreconcilable conflict with a later statute, such as imposition of incompatible or conflicting obligations. *Ken Roberts*, 276 F.3d at 592 (citing *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). In this case, CompuCredit cannot make an affirmative showing of a clear and manifest Congressional intent. Nothing in the BSCA itself or the legislative history of the BSCA or the FTC Act suggests that Congress intended to restrict the

FTC's jurisdictional mandate over companies that do business with banks. Indeed, Congress has amended Section 1867(c) three times since the BSCA's enactment without limiting the FTC's jurisdiction over non-bank entities covered under that Act.[3] In addition, during this same time period, Congress revisited the FTC Act bank exemption a number of times, and expressly extended the exemption on several occasions, but never to non-bank entities such as CompuCredit.[4] If Congress had intended to exempt from FTC Act jurisdiction non-banks performing services for banks, it knew how to do so expressly.

Furthermore, there is no irreconcilable conflict between the FTC Act and the BSCA; in fact, the two statutes easily coexist. The BSCA allows a banking agency to regulate and examine non-banks performing services on behalf of banks within its authority, while the FTC Act allows the FTC to bring enforcement actions

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[3] Bank Service Corporation Act of 1962, Pub. L. No. 87-856, § 5, 73 Stat. 1132, 1133 (1962); Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, Title III, § 308, 92 Stat. 3641, 3677 (1978); Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 709, 96 Stat. 1469, 1543-44 (1982); Financial Regulatory Relief Act of 2006, Pub. L. No. 109-351, Title VI, § 602(b)(5), 120 Stat. 1966, 1980 (2006).

[4] After expanding banking agency authority over savings and loan institutions, Congress expressly exempted them from FTC jurisdiction. Pub. L. No. 96-37, §1(a), 93 Stat. 95, 95 (1979). After expanding federal credit union agency authority over credit unions, Congress expressly exempted them from FTC jurisdiction. Pub. L. No. 100-86, Title VII, §715(a)(1), 101 Stat. 552, 655 (1987).

against these non-banks for all deceptive or unfair acts or practices. Simply because two statutes provide for overlapping jurisdiction does not create an irreconcilable conflict, and it is not uncommon for federal agencies to exercise concurrent jurisdiction.[5] As the chief counsel of the OTS[6] explained in a 1991 memorandum addressing the OTS' power to enforce consumer protection laws against certain non-banks pursuant to the Federal Deposit Insurance Act:

> The authority of the OTS is not diminished by the fact that the same set of actions, *e.g.* failure to provide proper disclosure to borrowers, may expose a savings association or savings association affiliate to potential enforcement actions by more than one government agency, *e.g.*, the OTS acting under the enforcement provisions of the FDIA and the FTC acting under the enforcement provisions of the Consumer Protection Acts.

Gen. Couns. Mem., 1991 OTS LEXIS 78, *6 (Dec. 27, 1991). To the extent that banking regulators have jurisdiction over the performance by non-banks of services for banks pursuant to the BSCA or the FDIA, this jurisdiction is concurrent with the FTC's long-standing jurisdiction.

Ignoring the plain language of the FTC Act and the BSCA, CompuCredit bases its argument on a repudiated opinion that the BSCA limits the FTC's

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[5] *See, e.g.,* Section V.A *infra*.

[6] The OTS, a sister banking agency to the FDIC, enforces the same laws for thrifts that the FDIC enforces for state-chartered banks.

jurisdiction. In that opinion, *In the Matter of Dillards Dept. Stores, Inc.*, 1995 F.T.C. LEXIS 62 (Mar. 16, 1995), an administrative law judge found that the BSCA conferred exclusive jurisdiction on the OCC for a non-bank performing services on behalf of a bank. Administrative law judges' determinations are subject to appeal *de novo* to the FTC. In *Dillards*, however, the FTC dismissed the case, on other grounds, and — relevant here — denied a motion to vacate the ALJ's decision as "unnecessary" because the decision had no legal effect. *In the Matter of Dillards Dept. Store, Inc.*, 1996 F.T.C. LEXIS 49, at *4 n.3 (Mar. 7, 1996). Further, although courts review administrative law judges' decisions with deference as to factual findings, conclusions of law are not presumed valid and warrant "close scrutiny." *See Cornelius v. Sullivan*, 936 F.2d 1143, 1145 (11th Cir. 1991). *See also Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 416 (2d Cir. 2005) (Court did not defer to ALJ's legal conclusion because it was based on a question of statutory interpretation). Moreover, in a subsequent matter, the FTC expressly rejected the *Dillard's* ALJ's legal analysis. The Commission, acting in an official capacity and making an official determination on a Petition to Quash a Civil Investigative Demand filed by Federated Department Stores on behalf of its non-bank subsidiary that serviced credit cards issued to Federated customers, stated:

> [We] subsequently dismissed the *Dillard's* matter on other grounds without reviewing the ALJ decision, and denied as unnecessary a motion to vacate the decision. Although that case is not now before the Commission on review of the ALJ's legal ruling on this legal point, we here conclude that the ALJ's determination of that legal point was incorrect.

Letter from Donald Clark, Secretary, Federal Trade Commission, to Federated Department Stores, Inc., at 4 n.6 (Feb. 23, 2001) (citations omitted) (*available at* http://www.ftc.gov/os/quash/010223fullcommissionpetltr.pdf) (*See* Ex. 4).[7] Apparently, even though the *Dillard's* ALJ opinion has been renounced by the Commission in an official determination and has no legal effect, CompuCredit relies on the opinion because it can find no other support for its untenable argument. To assert that the BSCA is a shield against FTC enforcement actions greatly distorts the purpose and language of the statute.

D. Congress's Reaffirmation of the FTC's Jurisdiction Over Non-Banks in the Gramm-Leach Bliley Act Demonstrates That Federal Bank Regulation Is Not So Pervasive as to Eliminate That Jurisdiction

Not only does the plain language of the FTC Act and BSCA grant the FTC jurisdiction over CompuCredit, but Congress reaffirmed the FTC's jurisdiction

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[7] Because ALJ decisions are issued pursuant to FTC delegation of the initial performance of the FTC's adjudicative fact-finding functions, and these functions are to be exercised in conformity with FTC decisions and policy directives, *see* 16 C.F.R. § 0.14, following the FTC's *Federated* decision, the *Dillard's* opinion has no precedential effect and ALJs must follow the analysis in *Federated*.

over non-banks, such as CompuCredit, in the Gramm-Leach Bliley Act. CompuCredit would have this Court believe that the broad regulatory system for banks is so pervasive as to create exclusive jurisdiction in federal banking agencies over every entity within their authority — including non-banks — in the absence of any indication of exclusivity in the text or history of the relevant laws. It is true that Congress established federal banking agencies with broad regulatory authority over entities that are involved in some manner with banks, and has extended that authority in varying degrees to bank parents, subsidiaries and other affiliates, bank service companies, independent contractors, and persons and firms participating in bank affairs such as bank officials and accounting and law firms. The banking agencies' authority is not so pervasive, however, as to justify in and of itself a presumption of exclusive jurisdiction over every entity within their authority.

In 1999, Congress reaffirmed the FTC's authority over non-banks when it declared that entities with even stronger ties to banks than CompuCredit, such as operating subsidiaries of banks and bank affiliates, are subject to FTC jurisdiction when those entities are not themselves banks. Section 133(a) of the GLBA clarified that the FTC has jurisdiction over any entity controlled directly or

indirectly by a bank that is "not itself a bank."[8] 15 U.S.C. § 41 note (a) (2000). Relying on this provision, the court in *Minnesota v. Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001), noted that state attorneys general may enforce the Telemarketing Sales Rule ("TSR") pursuant to 15 U.S.C. § 6103 against entities regulated by the FTC, and concluded that the state attorney general could enforce the TSR against a bank subsidiary engaged solely in mortgage loan servicing. According to the court, Section 133(a) created an "understandable and easily-administered bright-line rule setting forth which entities the FTC has authority over." *Id.* at 999. Because Fleet Mortgage was a bank subsidiary but not itself a bank, the court held that the OCC did not have exclusive jurisdiction over the company. *Id.*

CompuCredit argues that *Fleet* is inapplicable because: (1) the case did not involve the BSCA; and (2) Section 133(a) only applies to bank subsidiaries and

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[8] Section 133(a), clarifying the FTC's jurisdiction under the FTC Act, and not just for purposes of the GLBA itself, provides in full that:

> Any person that directly or indirectly controls, is controlled directly or indirectly by, or is directly or indirectly under common control with, any bank or savings association (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C.A. § 1813) and *is not itself a bank or savings association* shall not be deemed to be a bank or savings association for purposes of any provisions applied by the Federal Trade Commission *under the Federal Trade Commission Act.*

(Emphasis added).

affiliates. As discussed previously, the BSCA neither affects the allocation of jurisdiction established in the FTC Act nor grants exclusive law enforcement jurisdiction over non-banks performing contractual services for banks to the banking agencies. Furthermore, it is beyond belief that Congress would have expressly confirmed the FTC's authority over subsidiaries and other affiliates, but repealed – without comment – the FTC's authority over third-party independent contractors where the third party engaging in activity on behalf of a bank would be exempt from FTC jurisdiction but a bank's operating subsidiary engaging in the same activity would not be exempt. In statutory construction cases, however, the common mandate is to avoid such absurd results. *See, e.g., Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 n.3 (1993); *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 454-55 and n.9 (1989); *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1086 (11th Cir. 2002); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1188 (11th Cir. 1997) ("[S]tatutory language should not be applied literally if doing so would produce an absurd result.").

CompuCredit also argues that Section 133(a) of the GLBA proves that when Congress deems it necessary to amend federal banking laws, it does so expressly. However, nothing in the plain language of Section 133(a) or its legislative history suggests that Congress was "amending" the FTC Act to allow the FTC to pursue

operating subsidiaries or affiliates. In fact, the GLBA provision – by its own terms – is a "clarification" of the FTC's authority, and not an amendment. Indeed, the House Conference Report on the legislation provides that the GLBA does not expand or retract the FTC's jurisdiction. Instead, the GLBA reaffirms the Commission's jurisdiction and "simply makes it clear that [subsidiaries and affiliates] do not fall within the bank or savings association exemption because they are owned by [an exempt entity]." H. Conf. Report No. 106-434, 145 Cong. Rec. H11255, H11296 (Nov. 2, 1999).

The court's analysis in *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007) also demonstrates that federal banking law is not so pervasive as to eliminate all other agencies' jurisdiction over non-banks contracting with banks.[9] In that case, SPGGC had an agreement with Bank of America to "rent" the bank's identification number so that the company could market its gift cards as VISA cards to be used in Simon Malls. SPGGC marketed the cards, serviced the program, and collected all fees, while the bank only received Visa interchange fees generated on a per-transaction basis. *Id.* at 187. The bank retained review and approval authority over all terms and conditions for the gift cards, as well as design

[9] Unlike this case, *SPGGC* involved federal-state preemption issues, but the underlying analysis is instructive here.

of the cards and card carriers with which they were sold; however, SPGGC had sole authority to establish the terms and conditions of the gift cards. *Id.* The gift cards identified the bank as the issuer and were modeled after those used for the bank's own branded gift cards. *Id.* The Connecticut Attorney General sued SPGGC, alleging that the cards' dormancy fees violated the Connecticut Gift Card Law. SPGGC argued that because of its association with the bank, the Simon Giftcard was a national bank product and therefore the National Bank Act preempted the Connecticut Gift Card law, granting the federal banking regulator exclusive jurisdiction. *Id.* at 189-90. In rejecting this argument, the court noted that "it does not follow that a state's attempt to regulate the *third party's* conduct is necessarily preempted as it would be if directed toward the bank itself or toward an operating subsidiary." *Id.* at 190 (emphasis in original).[10]

Here, CompuCredit's relationship with the banks issuing the credit cards is similar to SPGGC's relationship with Bank of America. CompuCredit has "the sole and exclusive right" to design solicitation materials, establish the terms and conditions of the cards, develop underwriting and credit criteria, as well as administer the programs, and the banks have the right to review and approve

[10] The Court noted in its decision that the OCC asserted that the state was not preempted by the National Bank Act because SPGGC, and not the bank, had the primary role. *Id.*

solicitation materials, terms and conditions and underwriting criteria. (Compl. ¶¶ 12-13.) Although the court in *SPGGC* found that a portion of the Connecticut Gift Card law was preempted by the National Bank Act, nothing prevented a non-federal banking regulator, in this case the Connecticut Attorney General, from enforcing a consumer protection law against a non-bank marketer of payment cards issued by a bank. Therefore, *SPGGC* supports the conclusion that CompuCredit, as a non-bank, is subject to FTC jurisdiction.

E. The FTC's Enforcement Action Against a Credit Card Marketing Company Fulfills its Congressional Mandate and Does Not Usurp Regulatory Authority Over Banking Activities

CompuCredit contends that credit card marketing materials are subject to the specific provisions of Regulation Z, and are promulgated by the Federal Reserve Board pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* According to CompuCredit, the FTC has no authority to supplant the banking regulators and bring this case challenging deceptive credit card solicitations. However, Congress has expressly granted that authority to the FTC. As discussed above, Congress has "empowered and directed" the FTC to prevent corporations from engaging in unfair or deceptive acts or practices. 15 U.S.C. § 45(a)(2). The BSCA does not limit this mandate, nor does the TILA. Contrary to CompuCredit's argument, "courts are not at liberty to pick and choose among congressional

enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Mancari*, 417 U.S. at 551 (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). In other words, non-bank entities working with a bank, as separate companies, have an obligation, independent of the bank's own obligation, to comply with the FTC Act.

Moreover, the banking regulators do not consider a FTC action against a non-bank to be supplanting their authority. In letters to its financial institutions in 2002 and 2004, the agencies noted that the FTC has broad authority to enforce the FTC Act against non-banks and promised to "work with these other regulators as appropriate in investigating and responding to allegations of unfair or deceptive acts or practices that involve state banks and other entities supervised by the [Banking] Agencies." Financial Institution Letter 26-2004, March 11, 2004 (*see* Ex. 5); Financial Institution Letter 57-2002, May 30, 2002 (*see* Ex. 6). Because the plain language of the FTC Act subjects non-banks performing services for banks to FTC enforcement actions, and the plain language of the BSCA and the TILA does not amend Congress' initial grant of jurisdiction, CompuCredit is subject to FTC jurisdiction.

IV. 12 U.S.C. § 1818(i)(1) DOES NOT AFFECT THIS COURT'S JURISDICTION TO HEAR THIS CASE

This Court has the authority to grant permanent relief pursuant to the second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which states that "in proper cases the FTC may seek, and, after proper proof, the court may issue, a permanent injunction" against violations of "any provision of law enforced by the Federal Trade Commission."[11] 15 U.S.C. § 53(b); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *FTC v. Citigroup Inc.*, 239 F. Supp. 2d 1302, 1304 (N.D. Ga. 2001). CompuCredit's erroneous argument that 12 U.S.C. § 1818(i)(1) somehow withdraws subject matter jurisdiction in this case from this Court is based upon one clause of the provision read in isolation and supported by case citations taken out of context. Section 1818(i)(1), when read in the context of the entire statute and as consistently applied by the courts, is nothing more than an anti-injunction provision to limit collateral attacks on federal banking agency administrative proceedings and their results. Where, as here, the FTC is exercising its statutory mandate alleging *de novo* violations of Section 5 of the FTC, and not

[11] Subject matter jurisdiction is also premised on 28 U.S.C. §§ 1331, 1337(a), and 1345, which grant federal district courts original jurisdiction over civil actions arising under the laws of the United States, arising specifically under laws of the United States regulating commerce, and commenced by the United States or any agency thereof.

seeking to review or enjoin the FDIC's administrative proceeding against CompuCredit, Section 1818(i)(1) has no application.

Section 1818(i)(1) provides:

> [t]he appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 38 or 39 [12 USCS § 1831o or 1831p-1], and such courts shall have jurisdiction and power to order and require compliance herewith; *but except as otherwise provided in this section or under section 38 or 39 [12 USCS § 1831o or 1831p-1] no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order*.

12 U.S.C. § 1818(i)(1) (emphasis added). Contrary to CompuCredit's erroneous argument, the "but except" clause of Section 1818(i)(1) does not act as a complete bar to the exercise of federal district court jurisdiction whenever a parallel FDIC proceeding exists, existed, or could exist. Instead, Section 1818(i)(1)'s express limitations on federal court equitable jurisdiction protect a narrow class of administrative actions from premature judicial interference. CompuCredit's erroneous argument is based upon reading the "but except" clause of Section 1818(i)(1) in isolation. When read in context of Section 1818 in its entirety, Section 1818(i)(1)'s role as a procedural safeguard is clearly evident.

With Section 1818, Congress provided the means by which regulated parties could obtain judicial review of actions against them by the federal banking agencies. For example, Section 1818(h)(2) provides for plenary review of final cease-and-desist orders, stating that any party subject to an order issued after a final decision under Section 1818 may petition for review of that order in the appropriate United States Court of Appeals. 12 U.S.C. § 1818(h)(2). Once this jurisdiction is properly invoked, the court of appeals has exclusive jurisdiction to "affirm, modify, terminate, or set aside, in whole or in part, the order of the agency." *Id.* In short, Section 1818(i)(1) serves only to preclude collateral attack or review in federal district court of administrative enforcement actions other than as specifically provided for in Section 1818 itself.

CompuCredit cites no case to support its novel and over-expansive interpretation that Section 1818(i)(1) serves as an absolute jurisdictional ban on any action that might affect a parallel administrative action. On the contrary, the case law (including the cases cited by CompuCredit in its brief) unanimously agrees that Section 1818(i) divests federal district courts solely of jurisdiction to review or enjoin pending enforcement proceedings initiated under Section 1818, not to strip jurisdiction entirely.

A closer review of the cases cited by CompuCredit reveals that, rather than support CompuCredit's tenuous interpretation of Section 1818(i)(1), they in fact demonstrate the limited procedural nature of Section 1818(i)(1). For example, *Bd. of Governors of the Fed. Reserve Sys. v. Mcorp Fin.*, 502 U.S. 32 (1991), involved an adversary proceeding in bankruptcy against the Federal Reserve Board to enjoin the Board's administrative proceeding against it. *Id.* at 34. In affirming the dismissal of the adversary proceeding, the Court held that "the statute provides us with clear and convincing evidence that Congress intended to deny the District Court jurisdiction *to review and enjoin* the Board's ongoing administrative proceedings." *Id.* at 44 (emphasis added). Significantly, however, the bankruptcy proceeding itself was allowed to continue. Indeed, the Court recognized that "[i]f and when the Board's proceedings culminate in a final order, and if and when judicial proceedings are commenced to enforce such an order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction under 28 U.S.C. § 1334(b)." *Id.* at 41. In other words, even though the bankruptcy proceeding might "affect" the Board's final order (in the broad sense suggested by

CompuCredit),[12] Section 1818(i)(1) does not serve to strip all jurisdiction from the federal courts.

In *Henry v. Office of Thrift Supervision*, 43 F.3d 507 (10th Cir. 1994), the court of appeals affirmed the district court's dismissal of an action by a director to prevent the OTS from imposing an administrative asset freeze and seeking civil money penalties. *Id.* at 511. The Court held that "1818 provides *a comprehensive scheme for judicial review*" and that Section 1818(i)(1) precluded district court actions that amounted to review of banking agency administrative proceedings outside of that scheme. *Id.* at 513 (emphasis added). The Court found Henry's claims to be "tantamount to setting aside the consent orders" and therefore her claim directly contravened the language of 1818(i)(1). *Id.*

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[12] As with its novel interpretation of the FTC Act discussed above in Section III.D, CompuCredit's use of the "plain meaning" of the word "affect" would create absurd results, in that Section 1818(i)(1) would preclude any action that could have claim or issue preclusion, including a private right of action between CompuCredit and a bank for breach of contract. (*See, e.g.*, Ex. 1.) Further, under CompuCredit's over-expansive view of Section 1818(i)(1), even criminal prosecutions might be dismissed because of their possible "effect" on parallel administrative proceedings. As noted in Section III.D, there is an exception to the plain meaning rule of statutory construction to avoid absurd results. *See, e.g. Public Citizen*, 491 U.S. at 454-55 n.9 (plain meaning of word "utilized" would have produced odd absurd result); *Merritt*, 120 F.3d at 1188 ("statutory language should not be applied literally if doing so would produce an absurd result").

Likewise, in *Leuthe v. Office of Fin. Inst. Adjudication*, 977 F. Supp. 357 (E.D. Pa. 1997), the Court dismissed the claims of the plaintiff (who was the respondent in two FDIC proceedings) that the procedures for enforcement under the Financial Institutions Reform, Recovery and Enforcement Act were unconstitutional and illegal and the FDIC enforcement proceedings presently underway against him were null and void. *Id.* at 358. The Court noted that

> Section 1818 as a whole provides a detailed framework for regulatory enforcement *and for orderly review of the various stages of enforcement* . . . . With regard to the statute at issue, the courts have recognized that the procedure outlined in 12 U.S.C. § 1818(h)(2) places *judicial review of orders* issued pursuant to § 1818(h)(1) firmly in the hands of the Courts of Appeals while at the same time giving the district courts limited jurisdiction over three types of controversies stemming from the issuance of cease and desist orders.[13] Aside from these three instances, Congress has emphatically stated that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate or set aside any such notice or order."

Id. at 361-62 (emphasis added) (citations omitted). Because the plaintiff could seek meaningful review pursuant to Section 1818(h), the Court concluded it had no

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[13] Specifically, Section 1818(c)(2) grants district courts the authority to issue injunctive relief setting aside, limiting or suspending the enforcement, operation or effectiveness of temporary cease and desist orders. Under Section 1818(d), upon application of the appropriate agency, the district courts may issue an injunction to enforce the terms of temporary cease and desist orders. Finally, under Section 1818(i), the district courts have jurisdiction to order the enforcement of any outstanding notice or order issued by an agency under Section 1818. *Id.* at 362 n.2.

jurisdiction to "affect by injunction, declaratory judgment or otherwise" the enforcement proceedings at issue. *Id.* at 363.

CompuCredit's reliance on *Hindes v. FDIC*, 137 F.3d 148 (3rd Cir. 1998), is equally unavailing. *Hindes* involved a suit by the shareholders of a bank against the FDIC for wrongfully seizing the bank. *Id.* at 153. In particular, count IV of the shareholders' suit sought to review the FDIC's notice to the bank that it was operating in an unsafe and unsound manner. *Id.* at 159. The Court upheld the district court's dismissal of count IV on the basis of 12 U.S.C. § 1821(j), which restricts a federal court's ability to take action to restrain or affect the functions of the FDIC as conservator or receiver of a bank. *Id.* at 160. In dicta, the Court noted that the plaintiff's attempt to have the federal court review the FDIC's notice was precluded by Section 1818(i). *Id.* at 163-64. Significantly, although the shareholders' other counts against the FDIC were also dismissed, the basis for their dismissal was not that Section 1818(i)(1) divested the district court of jurisdiction because the shareholder action might "affect" an FDIC proceeding, whether ongoing or closed. *See id.* at 154-55. Notably, while the court reasoned that a declaratory judgment action challenging the notice's validity was tantamount to a direct order against the FDIC and therefore "affected" the FDIC's authority, the

court recognized that a parallel damages proceeding challenging the validity of the notice could proceed. *Id.* at 165.

Similarly, *Bd. of Governors of the Fed. Reserve Sys. v. DLG Fin. Corp.*, 29 F.3d 993 (5th Cir. 1994), involved an action by the plaintiffs to enjoin the Federal Reserve Board from investigating or bringing an administrative enforcement action against them, *id.* at 999, while *Groos Nat'l Bank v. Comptroller of the Currency*, 573 F.2d 889 (5th Cir. 1978), involved actions by the plaintiffs to enjoin the OCC from bringing enforcement proceedings. *Id.* at 894-95. In each case, the district court dismissed the plaintiffs' actions pursuant to Section 1818(i)(1), reasoning that Section 1818(i)(1) "evinces a clear intention that this regulatory process is not to be disturbed by *untimely judicial intervention*", *DLG Fin. Corp.*, 29 F.3d at 999 (emphasis added), and that "Section 1818 as a whole provides a detailed framework for regulatory enforcement *and for orderly review of the various stages of enforcement*." *Groos Nat'l Bank*, 573 F.2d at 894-95 (emphasis added).

Almost all of the reported cases found by the undersigned counsel in which Section 1818(i)(1) was used to remove jurisdiction from a district court involved lawsuits by regulated parties (or related third parties such as shareholders, officers, or directors) against a federal banking agency seeking to enjoin or otherwise thwart

that agency's administrative enforcement proceedings.[14] This further demonstrates Section 1818(i)(1)'s limited role in precluding collateral attack on federal banking agency administrative actions. *See CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 741 (D.C. Cir. 1995) ("To prevent regulated parties from interfering with the comprehensive powers of the federal banking regulatory agencies, Congress [through Section 1818(i)(1)] severely limited the jurisdiction of courts *to review ongoing administrative proceedings* brought by banking agencies.") (emphasis added). Only three reported cases were found in which a federal banking agency was not a named party. None of the cases support CompuCredit's expansive and erroneous interpretation of Section 1818(i)(1).

First, in *Massachusetts v. Fremont Investment & Loan*, 2007 U.S. Dist. LEXIS 95617 (D. Mass. Dec. 26, 2007), the Commonwealth sued Fremont Investment in state court alleging that its subprime mortgage loan practices violated state consumer protection laws. *Id.* at *1. The defendants removed the case to federal court basing their allegation of federal question jurisdiction on Section 1818(i)(1). *Id.* In particular, the defendants argued that the relief that might ultimately be granted should the Commonwealth prevail might conflict with

[14] In *Hindes*, the FDIC was named in its corporate capacity, not as a regulatory/enforcement agency; however, as discussed above, the case does not support CompuCredit's interpretation.

a prior FDIC order against the defendants. *Id.* at *2. The defendants argued that Section 1818(i)(1)'s preclusive effect was a "significant federal issue." *Id.* at *7. The court disagreed and granted the Commonwealth's motion to remand, holding that "12 U.S.C. § 1818(i)(1), by its own terms, does not have the extraordinary and complete preemptive force that is required to support federal-question jurisdiction." *Id.* at *8. Here, the FTC is also charging CompuCredit with violating consumer protection laws and Section 1818(i)(1) "does not have the extraordinary and complete preemptive force" that CompuCredit wrongly claims.

Second, in *Am. Fair Credit Ass'n v. United Credit Nat'l Bank*, 132 F. Supp. 2d 1304 (D. Colo. 2001), the plaintiff brought numerous claims against the defendant credit card bank. Invoking Section 1818(i)(1), the Court dismissed some of the plaintiff's claims on the grounds that if plaintiff were to prevail, it would require the defendant to pay money damages in direct contravention of a prior consent order between the defendant and the OCC, which prohibited the defendant from paying funds for any reason to the plaintiff. *Id.* at 1312. Because such an outcome would directly affect the enforcement of a consent order issued by the OCC, the court ruled it lacked jurisdiction over those claims.[15] *Id.* Here, none of

[15] Notably, the court, in its decision, referred to a November 2000 letter to the defendants' counsel from Brian C. McCormally, then Assistant Director of the (continued...)

the relief requested by the FTC would require CompuCredit to act in contravention of either any existing federal banking agency order or any order that might result from the parallel FDIC proceeding.[16] Notably, the court ruled it did have jurisdiction over the plaintiff's other claims, even though the resulting litigation might have some effect on the OCC proceeding. *Id.* at 1311-12.

Finally, in *Artoe v. Belmont Nat'l Bank*, 1992 U.S. Dist. LEXIS 6775 (N.D. Ill. May 18, 1992), the plaintiff shareholders brought an action seeking injunctive

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[15] (...continued)
Enforcement and Compliance Division of the OCC and presently counsel for CompuCredit, which stated in relevant part:

> We have [] had a chance to review [the motion to dismiss and Plaintiff's response]. We feel it is important to advise you that we do not agree with your position that the various Consent Orders entered into by [UCNB] and UICI divest the court of subject matter jurisdiction under 12 U.S.C. § 1818 (i) to the extent that it is alleged the court may not hear claims related to liabilities that accrued prior to imposition of the Orders, nor to the extent you are asserting that the [OCC] ordered UICI not to make any payments to . . . AFCA.

Id. at 1308. The court opined that "[t]he OCC's legal conclusion that jurisdiction exists over any disputes that 'accrued prior to the imposition of [UCNB's] Consent Order in February 2000' may be correct as far as it goes," *id.* at 1312; nevertheless, as discussed above, the court did dismiss those counts that would require payments in contravention to the consent orders.

[16] To the extent that there is a risk this Court could be asked to enter an order directly conflicting with an order issued in the parallel FDIC administrative proceeding, this Court could assess that possibility at that time, and not dismiss this action entirely. *See* Section V.B.1., *infra*.

relief for the defendant bank's violations of a prior cease and desist order entered by the OCC. *Id.* at *4. The court dismissed those claims, pursuant to Section 1818(i)(1), holding that the statute "bars private causes of action based on OCC Cease and Desist Orders." *Id.* at *5. Here, the FTC does not seek to enforce any existing federal banking agency order; rather, the FTC charged CompuCredit with *de novo* violations of Section 5 of the FTC Act, a statute the FTC has been charged by Congress to enforce.

Indeed, CompuCredit cites to no case (and can cite to no reported case) in which Section 1818(i)(1) was used to remove federal court jurisdiction in actions by third parties against regulated parties merely because the former action might "affect" in some broad fashion a federal banking agency administrative proceeding. As the cases discussed above demonstrate, when read in the context of the entire statutory framework of Section 1818, Section 1818(i)(1) limits federal district court jurisdiction only in instances where the federal action serves to review or enjoin a federal banking agency enforcement action in a manner not allowed by Section 1818 or where the inevitable outcome of the federal action would require the defendant to contravene an order issued in a federal banking agency enforcement action. None of these scenarios exists with the FTC's action against CompuCredit. As the Supreme Court expressly recognized, federal courts

can exercise concurrent jurisdiction with federal banking agency administrative proceedings, even though that exercise of concurrent jurisdiction may ultimately "affect" in some broad sense the latter proceeding.[17] *See Mcorp Fin.*, 502 U.S. at 41.

In short, Section 1818(i)(1) does not withdraw subject matter jurisdiction in this case, where the FTC is exercising its statutory mandate and has sued CompuCredit for violations of the FTC Act. Accordingly, this Court has subject matter jurisdiction over this case and CompuCredit's motion should be denied.

V. NO REASON EXISTS FOR THE COURT TO ABSTAIN FROM EXERCISING ITS JURISDICTION

The duty of federal courts to adjudicate disputes before them to the extent authorized by law is well settled. The Supreme Court has characterized the obligation of federal courts to exercise their jurisdiction as "virtually unflagging." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

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[17] As discussed more fully in Section V.A, in the context of injunction suits involving parallel proceedings, courts have routinely held that "[c]oncurrent jurisdiction does not necessarily entail conflicting jurisdiction. The mere existence of dual grounds of prescriptive jurisdiction does not oust either one of the regulating forums. Thus, each forum is ordinarily free to proceed to a judgment." *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984) (discussing that the exception to the Anti-Injunction Act allowing a federal court to enjoin other actions to protect its jurisdiction is not justified simply because the decisions of the other court could have preclusive effect).

Indeed, the Court has gone so far as to state that courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 403 (1821). *See also Int'l Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 238-39 (1971); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959); *College Park Holdings, LLC v. Racetrac Petroleum, Inc.*, 239 F. Supp. 2d 1322, 1328 (N.D. Ga. 2002).

The circumstances here fall far short of justifying a relinquishment of the Court's jurisdiction or a delay in its exercise. This is not a case in which the Court will be entering uncharted territory and should therefore stand aside in deference to a better qualified administrative agency. Rather, FTC Act cases fall squarely within the Court's competence, as demonstrated by the innumerable instances in which the Eleventh Circuit and this Court have presided over cases alleging deceptive trade practices under Section 5 of the FTC Act. *See, e.g.*, *FTC v. Peoples Credit First LLC*, 244 F. App'x 942 (11th Cir. 2007) (applying Section 5 to find direct mail solicitations offering credit card with $5,000 credit limit deceptive even though words were technically true); *FTC v. Capital Choice Consumer Credit, Inc.*, 157 F. App'x 248 (11th Cir. 2005) (affirming detailed findings of district court applying Section 5 to find defendants' credit solicitations

deceptive).[18] Indeed, the FDIC has indicated that it will look to FTC and federal court decisions in applying the FTC Act. (*See* Ex. 5 at 4 ("In analyzing a particular act or practice, the Agencies will be guided by the body of law and official interpretations for defining unfair or deceptive acts or practices developed by the courts and the FTC.").) Therefore, no basis exists for this Court to abstain or delay in exercising its jurisdiction. Instead of citing precedent to support its request that the Court surrender jurisdiction here, CompuCredit relies upon its own speculation that a "complicated mess" will ensue if this case proceeds. (Def. Mem. Supp. Mot. Dismiss at 30.) This sheer speculation cannot outweigh the Court's obligation to exercise jurisdiction in a case in which it is clearly competent to proceed.

The frequent occurrence of concurrent proceedings belies CompuCredit's assertion that the Court must step aside in favor of the FDIC to prevent a "complicated mess." Parallel proceedings occur on a routine basis, and tribunals have been able to coordinate them to ensure efficient and competent administration

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[18] *See also Gem Merch. Corp.*, 87 F.3d 466; *FTC v. Nat'l Urological Group*, 2008 U.S. Dist. LEXIS 44145 (N.D. Ga. June 4, 2008); *United States v. Prochnow*, 2006 U.S. Dist. LEXIS 92895 (N.D. Ga. Dec. 21, 2006); *FTC v. Alyon Techs., Inc.*, 2003 U.S. Dist. LEXIS18460 (N.D. Ga. Jul. 10, 2003); *FTC v. Windward Mktg., Ltd.*, 1997 U.S. Dist. LEXIS 17114 (N.D. Ga. Sept. 30, 1997); *FTC v. Career Assistance Planning, Inc.*, 1997 U.S. Dist. LEXIS 17191 (N.D. Ga. Sept. 19, 1997).

of justice. CompuCredit has failed to demonstrate why such coordination could not occur here.

A. Parallel proceedings are commonplace

CompuCredit would have this Court believe that, due to their disastrous consequences, parallel government proceedings virtually never occur. In fact, parallel proceedings are commonplace. In *FTC v. Clement*, 333 U.S. 683 (1948), the Supreme Court explicitly stated that multiple government agencies can simultaneously proceed against the same party on the same issue. *Id*. at 694. The Supreme Court's ratification of simultaneous proceedings in Clement "has been followed many times," both in the context of concurrent court and agency proceedings and in the context of dual agency proceedings. *Warner-Lambert v. FTC*, 361 F. Supp. 948, 952 (D.D.C. 1973). Indeed, it has been recognized that "ours is an age of overlapping and concurring regulatory jurisdiction." *Thompson Med. Co.*, 791 F.2d at 192. In keeping with that observation, federal jurisprudence is replete with examples of concurrent agency proceedings against the same parties arising from the same conduct.[19]

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[19] *See, e.g.*, *United States v. Lane Labs-USA Inc.*, 427 F.3d 219 (3d Cir. 2005) (parallel FTC and FDA proceedings); *Jones v. SEC*, 115 F.3d 1173, 1181 (4th Cir. 1997) ("it is not surprising that the District of Columbia Circuit has expressly recognized the validity of simultaneous investigations of the same

(continued...)

B. Parallel proceedings would be neither wasteful nor prejudicial

1. CompuCredit has exaggerated the risk of inconsistent rulings

The mere fact of parallel proceedings does not create an intolerable risk of inconsistent rulings. In this regard, the Court's decision in *College Park* is instructive. There, the defendant was prosecuting an appeal before a state environmental authority while defending a statutorily authorized citizen suit in this

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[19] (...continued)
conduct by the SEC and the DOJ"); *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994) (concurrent Postal Service, FDA, and FTC proceedings and investigations); *Thompson Medical Co.*, 791 F.2d 189 (concurrent FTC/FDA proceedings); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1175 (10th Cir. 1985) (holding that the Interstate Land Sales and Full Disclosure Act did not strip the FTC of its jurisdiction over interstate land sales even though the statute conferred enforcement authority with the Department of Housing and Urban Development); *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977) (concurrent FTC investigation and Federal Power Commission ratemaking proceeding); *United States v. 3963 Bottles*, 265 F.2d 332 (7th Cir. 1959) (Postal Service fraud complaint and action and FDA suit); *United States v. 42 Jars*, 264 F.2d 666 (3d Cir. 1959) (condemnation act brought by United States and Postal Service Fraud Complaint); *United States v. Warshak*, 2007 U.S. Dist. LEXIS 91741 (S.D. Ohio Dec. 13, 2007) (concurrent federal criminal investigation and investigations by the FTC and FDA); *Newby v. Enron Corp.*, 391 F. Supp. 2d 541, 570 (S.D. Tex. 2005) (parallel civil, criminal, and administrative proceedings); *Australia/Eastern U.S.A. Shipping Conference v. United States*, 1981 U.S. Dist. LEXIS 10121, at 29-30 (D.D.C. Dec. 23, 1981) ("[t]he Supreme Court has long held that the same parties may be proceeded against regarding the same conduct by more than one agency at the same time"); *Sterling Drug, Inc. v. FTC*, 1973-2 Trade Cas. (CCH) ¶ 95,779, at 95,781 (S.D.N.Y. 1973) (EPA's authority over labeling of disinfectant did not strip the FTC of its jurisdiction over disease prevention claim made in advertising).

Court. *College Park*, 239 F. Supp. 2d at 1325-26. Both proceedings stemmed from the same incident of environmental contamination. *Id.* The defendant in *College Park* contended that the Court should either stay or dismiss the case on grounds that the parallel proceedings could yield conflicting orders, and that they would disrupt "state efforts to establish a coherent policy . . . . " *Id.* at 1326. The Court rejected those arguments. It reasoned that it could avoid interference with agency prerogatives by considering the agency's institutional attitudes and tailoring relief consistent with the agency's previous orders. *Id.* at 1328.

A similar outcome prevailed in *Hydrocarbon Trading & Transport Co. v. Exxon Corp.*, 89 F.R.D. 650 (S.D.N.Y. 1981). There, the plaintiff filed complaints before a court and an administrative agency alleging the same claims, and the defendant moved for a stay of the federal proceeding in favor of the administrative case. *Id.* at 651. The court denied the stay motion, noting that the agency's position was well settled, as it already had an opportunity to construe the regulation at issue. *Id.* at 654. As a result, the court concluded that it need not await the agency's decision before proceeding in applying the regulation in the case before it. *Id.* at 653-54. The court further concluded that nonparty discovery and the adjustment of its own liability award to take into account the administrative order could further minimize the risk of inconsistent judgments. *Id.* at 654.

For analogous reasons, the risk of inconsistent judgments does not warrant abstention here.[20] As discussed above, the FDIC will likely look to Section 5 deception cases prosecuted by the FTC in federal court. Because CompuCredit has not explained why harmonization of parallel proceedings would be more difficult in this case than in any other, the Court can exercise its jurisdiction without undue fear of inconsistent rulings.

2. The cases are not identical

To persuade the Court to abandon this case, CompuCredit asserts that the FTC and FDIC are prosecuting identical and duplicative cases, obviating the need for this case to proceed. CompuCredit is wrong for several reasons.

First, CompuCredit's own assertions demonstrate as much. CompuCredit itself concedes that this proceeding and the FDIC proceeding will be governed by "differing substantive standards." (Def. Mem. Supp. Mot. Dismiss at 31.) Indeed,

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[20] Similarly, although CompuCredit has not moved to stay this action, any new arguments it might introduce to that effect should fail. CompuCredit bears the burden of proving that a stay would be reasonable in duration and based upon compelling reasons. *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). *See also Trujillo v. Conover & Co. Commc'ns, Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000). Because the FDIC's case has not progressed much, if any, further than these proceedings, CompuCredit can not establish that a ruling in the FDIC case will issue in a definite period of time. Also, the Court is undeniably competent to hear this case and therefore neither need nor should risk the loss of evidence and delay in relief that would occur if it awaited the FDIC's decision to guide these proceedings.

the FTC and FDIC may bear different burdens of proof in their respective proceedings. The FDIC has issued its notice of charges against CompuCredit as an IAP under Section 8(b)(1) of the FDI Act. Under Section 8(b)(1), the FDIC has jurisdiction to seek a cease-and-desist order or require an IAP to pay reimbursement or restitution for violations of law. 12 U.S.C. § 1818(b)(1). In its answer to the FDIC's notice of charges, CompuCredit has denied that it is an IAP, and asserted that it is an independent contractor (Ex. 2 at 3), and for obvious reason. If CompuCredit is an independent contractor, then the FDIC must demonstrate that CompuCredit acted in reckless disregard of the law, 12 U.S.C. § 1813(u)(a)(4), a burden that the FTC need not meet to prove its case.[21] Differing standards of proof would render these parallel proceedings even more distinct from each other than they already are. *Cf. Purdy v. Zeldes*, 337 F.3d 253, 259 (2d Cir. 2003) ("a litigant's failure to meet a higher burden of proof on an issue in a prior proceeding does not bar him from raising the same issue in a subsequent proceeding in which his burden will be lighter.").

Second, the FDIC suit covers CompuCredit's conduct only in its dealings with FDIC-regulated banks. The FTC's suit, however, also covers CompuCredit's

[21] This issue has yet to be resolved in the FDIC case. It would therefore be premature for the Court to dismiss or stay this case on grounds that the cases are virtually identical.

conduct in its dealing with banks supervised by other banking regulators such as the OCC and OTS. Dismissal of this suit would preclude relief for consumers who originated, or who will originate, through CompuCredit's relationships with non-FDIC institutions.

Finally, the available relief in the two proceedings differs. While the FDIC seeks a cease-and-desist order, the FTC seeks broader injunctive relief, based on the power of the courts to grant fencing-in relief in FTC actions. *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999); *FTC v. Wolf*, 1996 U.S. Dist. LEXIS 1760, at *26 (S.D. Fla. Jan. 30, 1996) ("broad injunctive provisions are often necessary to prevent transgressors from violating the law in a new guise"); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1296 (D. Minn. 1985) ("District courts have discretion to model orders to fit the exigencies of the particular case and the power to enjoin related unlawful acts which may be fairly anticipated from defendant's past conduct"). *See also FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC v. Nat'l Lead Co.*, 352 U.S. 419 (1957). Because of the availability of broader fencing-in relief in FTC cases, a dismissal of FTC proceedings in favor of FDIC proceedings would curtail the remedies contemplated by Congress under the FTC Act. As this Court recognized in *College Park*, availment of the court's

broader enforcement powers militates in favor of retention and exercise of jurisdiction in the face of parallel proceedings. *College Park*, 239 F. Supp. 2d at 1328 ("[T]he court can design effective, non-conflicting injunctive remedies by eliciting the expertise of the involved agencies while maintaining the court's substantial enforcement powers.").

3. Parallel proceedings will not prejudice CompuCredit

Contrary to CompuCredit's bald assertion, no potential exists that the FTC and FDIC could place CompuCredit at a strategic disadvantage by asking the Court or the FDIC to second-guess unfavorable rulings. (Def. Mem. Supp. Mot. Dismiss at 31.) This argument is simply a re-packaging of CompuCredit's assertion that the tribunals could reach different results. No mechanism exists through which either tribunal could second guess or review the other's evidentiary or other decisions. At most, one tribunal could consider the ultimate result in the other case.

Indeed, CompuCredit's real purpose is to place its deceptive practices beyond the reach of both the FTC and the FDIC. As discussed above, in the FDIC proceeding, CompuCredit argues it is merely an independent contractor which, if true, would place a higher burden of proof on the FDIC. Were this Court to decline to exercise its jurisdiction and a higher burden of proof were to apply in the FDIC proceedings, the FTC Act would apply with lesser force to CompuCredit

than to other entities equally subject to FTC enforcement powers. In other words, CompuCredit could escape liability altogether for FTC Act violations that could be proven under the applicable standard of proof in this case.[22]

VI. CONCLUSION

As discussed above, Sections 5 and 13(b) of the FTC Act give the FTC full jurisdiction over CompuCredit to enforce the FTC Act, and this Court subject matter jurisdiction and full equitable authority to remedy violations of the FTC Act. Neither the BSCA nor the FISA deprives either the FTC or this Court of that jurisdiction. Further, the existence of parallel civil and administrative law enforcement proceedings against CompuCredit does not affect the grants of jurisdiction conferred by Sections 5 and 13(b). Accordingly, for the reasons set

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[22] CompuCredit also mentions in passing that parallel proceedings will raise questions about necessary parties and asserts without support that the FDIC (presumably as plaintiff) and the banks (presumably as defendants) must be joined. With respect to the banks, it is unnecessary for all joint tortfeasors to be named as defendants in a single lawsuit. *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990). *See also FTC v. Hang-Up Art Enterps., Inc.*, 1995 U.S. Dist. LEXIS 21444 (C.D. Cal. Sept. 27, 1995) (dismissing affirmative defense that FTC failed to join other parties as there was no evidence parties would be subject to multiple or inconsistent obligations). Additionally, CompuCredit has failed to demonstrate why (i) the FDIC or the banks are necessary parties, (ii) the FDIC or the banks are indispensable, and (iii) this Court could not grant full and complete relief in this case without them.

forth herein, the FTC respectfully requests that this Court deny CompuCredit's motion to dismiss.

Dated: August 22, 2008

Respectfully submitted,

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RULE 7.1(D) CERTIFICATION

The undersigned hereby certifies, pursuant to Local Rule 7.1(D), that Plaintiff's Opposition to Defendant CompuCredit's Motion to Dismiss has been prepared using Times New Roman 14 point type.

/s/Gregory A. Ashe
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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2008, I electronically filed **PLAINTIFF'S OPPOSITION TO DEFENDANT COMPUCREDIT'S MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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