STROOCK

AMICUS CURIAE LETTER

September 30, 2008

Honorable Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: **Brack v. Omni Loan Company, Ltd. et al.**
Case No. S166216

Dear Chief Justice George and Associate Justices:

Pursuant to California Rule of Court 8.500(g), the American Financial Services Association ("AFSA") submits this letter in support of the Petition for Review of defendants and petitioners Omni Financial of Nevada, Inc., formerly known as Omni Loan Company, Ltd., and FDN Holding Company, formerly known as Omni Financial Corporation (together, "Omni"), filed in the above-referenced matter. The Petition for Review should be granted. It raises the critical issue of whether the existence of a California regulatory scheme precludes the enforcement of a choice-of-law provision even when there is no material difference between California's regulatory scheme and that of the chosen state. Because the Court of Appeal's decision misapplied the well-established test for enforceability of choice-of-law provisions, this Court should grant review and reverse.

AFSA HAS AN INTEREST IN THIS MATTER

AFSA is a national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA encourages and maintains ethical business practices and supports financial education for consumers of all ages. AFSA has provided services to its members for over ninety years.

AFSA's 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers throughout the country. A central goal of AFSA is to ensure its

STROOCK & STROOCK & LAVAN LLP • LOS ANGELES • NEW YORK • MIAMI
2029 CENTURY PARK EAST, LOS ANGELES, CA 90067-3086 TEL 310.556.5800 FAX 310.556.5959 WWW.STROOCK.COM

members are accorded fair treatment in the courts, and to work diligently to make certain its members enjoy a uniform judicial approach to issues that affect them.

AFSA's government affairs groups formulate and actively advocate industry positions in legislative, regulatory and judicial settings, and meet to work on issues of common interest. The legal affairs group deals with all aspects of the legal environment facing the industry, including legislative issues, regulatory matters, and litigation.

AFSA monitors judicial treatment of issues critical to its members, and, on occasions such as this one, steps in to support its members with regard to judicial determinations that are sure to have significant consequences for the lending industry. In this instance, AFSA is especially concerned with the gravity of the Court of Appeal's misapplication of fundamental law, which threatens to undermine the enforceability of contractual choice-of-law provisions in California.

OMNI'S PETITION FOR REVIEW SHOULD BE GRANTED

While the Petition for Review presents multiple questions of law, AFSA is particularly interested in the following:

> [D]id the Court of Appeal err in . . . [v]iewing California law "as an integral whole" and in a vacuum, without comparing the two states' laws or identifying an actual conflict of laws that gives rise to the fundamental policy conflict, and ignoring the trial court's findings on the only potential conflict of laws?

The clear answer is yes. First, lenders who operate in multiple states have a strong interest in being able to select one state's law to govern their customer relationships, as having to operate under the laws of multiple states can significantly increase the cost of doing business. At the same time, consumers benefit from the streamlined regulation afforded by choice-of-law provisions because lower operating costs improve the safety and soundness of lenders and ultimately result in lower costs of credit. Thus, while choice-of-law provisions should not be enforced if the chosen state's law violates a fundamental public policy of California and California has a materially greater interest than the chosen state in enforcing its own laws, the parties' choice of law usually should be honored, particularly when there is no material difference between California law and the law of the chosen state. Here, the Court of Appeal refused to enforce a choice-

of-law provision despite the fact that the chosen law does not differ materially from California law. In so doing, it unnecessarily undermined both freedom of contract and the benefits that choice-of-law provisions afford both businesses and consumers.

Second, the choice-of-law analysis required by Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459 (1992), calls for courts to evaluate the differences between the laws of the forum and chosen states, not to look at California law in a vacuum. Here, the Court of Appeal considered the California Finance Lender's Law as a whole and essentially concluded that, because it is a regulatory scheme, it represents a fundamental public policy of California precluding enforcement of the Nevada choice-of-law provision at issue here. It erroneously ignored the fact that Nevada has a highly similar regulatory scheme, and that California's interest in protecting consumers will be fully protected by Nevada law if the parties' choice of law is respected. Indeed, the Court's reasoning would prevent enforcement of choice-of-law provisions even when the chosen law is completely identical to California law. This Court should reverse and make clear that the Nedlloyd analysis must be applied to the differences between California law and the law of the chosen state.

CHOICE-OF-LAW PROVISIONS PROVIDE IMPORTANT BENEFITS TO BOTH LENDERS AND CONSUMERS

The Court of Appeal's approach to the choice-of-law analysis is troubling because it significantly undermines the ability of lenders operating in multiple states to have their businesses governed by a single set of laws.

In Nedlloyd, the California Supreme Court affirmed the Restatement's "strong policy favoring enforcement" of choice-of-law provisions. 3 Cal. 4th at 465. That policy grows out of states' interests in comity, tolerance, protecting the parties' expectations, and obviating problems that would otherwise arise from differences in opinion and law among states. See Societe Nationale Aerospatiale Industrielle v. United States District Court, 482 U.S. 522, 555 n. 10, 107 S. Ct. 2542 (1987) (citing J. Story, Commentaries on the Conflict of Laws, Foreign and Domestic, § 35, at 34 (1834) (domestic courts enforce foreign laws "in order that justice may be done to us in return" in the foreign jurisdiction)).

Furthermore, Article IV, § 1 of the United States Constitution requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial

Proceedings of every other State." The purpose behind the Full Faith and Credit Clause is "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation . . . ." In re Mary G., 151 Cal. App. 4th 184, 201 (2007) (citation omitted). Indeed, "the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them." Restatement § 6, cmt. d.

Numerous courts, including the United States Supreme Court, have recognized the importance of permitting lending institutions to operate nationally under the laws of a single state. See, e.g., Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 738, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996). Even more so than other interstate businesses, national lenders fundamentally depend on the ability to operate under a uniform set of laws. As the Office of the Comptroller of the Currency ("OCC") has explained:

> When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents them from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure.

OCC Final Rule, Bank Activities and Operations, 69 Fed. Reg. 1904, 1908 (Jan. 13, 2004); see also Mackey v. MBNA Am. Bank, N.A., 343 F. Supp. 2d 966, 969-70 (W.D. Wash. 2004) ("Given the nationwide scope of [defendant]'s transactions, it has an obvious interest in uniform interpretation of its credit card agreements.").

The same policy considerations apply with equal force to state-chartered and state-licensed lenders that operate in multiple states. Regardless of what type of charter a lender has, uniform regulation of that lender provides the same benefits to the lender and consumers. AFSA therefore urges this Court to reaffirm that California favors the enforcement of choice-of-law provisions in most circumstances.

THE COURT OF APPEAL MISAPPLIED CALIFORNIA'S CHOICE-OF-LAW TEST

In Nedlloyd, this Court set forth a clear approach to the choice-of-law analysis. Where the chosen state has a "substantial relationship to the parties and their transaction," the choice-of-law provision is to be honored unless "the chosen state's law is contrary to a *fundamental* policy of California." Nedlloyd, 3 Cal. 4th at 466 (italics in original). If such a conflict exists, then the court must determine "whether California has a 'materially greater interest than the chosen state in the determination of the particular issue . . . '" Id. (quoting Restatement (Second) Conflict of Laws § 187(2)). If California's interest is not "materially greater" than the chosen state's, the choice-of-law should be enforced. Id. Importantly, a court only need engage in the "materially greater interest" inquiry if the chosen state's law and California's are "materially different" such that an "actual conflict" exists between them. Washington Mutual Bank, FA v. Superior Court, 24 Cal. 4th 906, 920 (2001).

Critically, Nedlloyd requires courts to evaluate whether the chosen state's law contradicts a California fundamental public policy, not merely whether California's law represents fundamental public policy. Put differently, it requires courts to compare the chosen law to California law, determine whether any provisions of the chosen state's law differ from California's, and then address whether those differing provisions contradict California fundamental public policy. See Nedlloyd, 3 Cal. 4th at 477 (Kennard, J., concurring). Here, the Court of Appeal did not do so. Instead, it found that the California law at issue represents fundamental public policy, then refused to enforce the choice-of-law provision notwithstanding the fact that Nevada law affords nearly identical protections.

As found by the trial court, the only difference between Nevada and California law is that California law requires certain information to be posted at the lender's place of business; Nevada law requires similar disclosures to be made in other ways. (9 RT 1524:17-1525:3, V AA 1412) Rather than consider whether the posting requirement violates California fundamental public policy, as the trial court correctly did, the Court of Appeal simply determined that California's Finance Lenders Law is "fundamental" and "unwaivable," and refused to enforce the choice-of-law provision.

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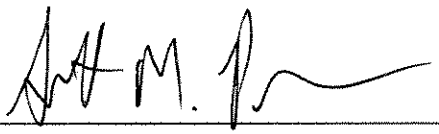
If left undisturbed, the Court of Appeal's decision will render choice-of-law provisions unenforceable even when there is no material difference between the laws of California and the chosen state. As a result, lenders operating in multiple jurisdictions will be forced to comply with every technical requirement of every state's laws, regardless of whether they are substantive or important. This will increase the costs of lender operations, undermining lender safety and soundness and ultimately increasing the cost and decreasing the supply of credit for consumers. This Court therefore should grant review and reverse.

Respectfully submitted,

STROOCK & STROOCK & LAVAN LLP
JULIA B. STRICKLAND
SCOTT M. PEARSON
DARIUS K.C. ZOLNOR

By: 
Scott M. Pearson

Attorneys for Amicus Curiae
AMERICAN FINANCIAL SERVICES ASSOCIATION

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action. My business address is: 2029 Century Park East, Los Angeles, California 90067-3086.

On September 30, 2008, I served the foregoing document(s) described as: **AMICUS CURIAE LETTER** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

- SEE ATTACHED SERVICE LIST -

☐ **(VIA PERSONAL SERVICE)** By causing to be delivered by messenger the document(s) listed above to the person(s) at the address(es) set forth above.

☒ **(VIA U.S. MAIL)** In accordance with the regular mailing collection and processing practices of this office, with which I am readily familiar, by means of which mail is deposited with the United States Postal Service at Los Angeles, California that same day in the ordinary course of business, I deposited such sealed envelope, with postage thereon fully prepaid, for collection and mailing on this same date following ordinary business practices, addressed as set forth below.

☐ **(VIA FACSIMILE)** By causing such document to be delivered to the office of the addressee via facsimile.

☒ **(VIA OVERNIGHT DELIVERY)** By causing such envelope to be delivered to the office of the addressee(s) at the address(es) set forth above by overnight delivery via Federal Express or by a similar overnight delivery service.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 30, 2008, at Los Angeles, California.

Diane Smith
[Type or Print Name]

Diane Smith
[Signature]

- SERVICE LIST –

Honorable Ronald M. George, Chief Justice
and Associate Justices
California Supreme Court
350 McAllister Road, Room 1295
San Francisco, CA 94102
Via Federal Express

Frank J. Fox
Lawrence J. Salisbury
Steven T. Wlodek
MAJORS & FOX LLP
401 West A Street, #2350
San Diego, CA 92101-7921
Via U.S. Mail

Mary A. Lehman
LAW OFFICE OF MARY A. LEHMAN
941 Orange Avenue
San Diego, CA 92118
Via U.S. Mail

Richard M. Segal
PILLSBURY WINTHROP SHAW PITTMAN LLP
501 West Broadway, Suite 1100
San Diego, CA 92101-3575
Via U.S. Mail

William T. Reid, IV
Lisa S. Tsai
DIAMOND MCCARTHY LLP
6504 Bridgepoint Parkway, Suite 400
Austin, TX 78730
Via U.S. Mail