FACTS

Plaintiff Laura Smith's deceased father acquired certain certificates of deposit in 2___. Unknown to plaintiff or anyone else, the deposit certificates remained in a safe deposit box until they were discovered in 2___. The money has not escheated.

Granite Savings and Loan Association ("GSLA") accepted the deposits and issued the deposit certificates. In September 2___, the Federal Home Loan Bank Board ("FHLBB") placed GSLA into involuntary receivership and appointed the FSLIC as receiver. The FHLBB also authorized the formation of a new entity, Granite Savings, A Federal Savings and Loan Association ("Granite American"), to which the FSLIC assigned GSLA's assets under an acquisition agreement.

ISSUE

The accounts in question did not appear in the records involved in the insolvency proceedings, and do not now appear in defendant's books. Is defendant Granite American nevertheless responsible for the certificates' payment?

DISCUSSION

1. Neither the *D'Oench* doctrine nor 12 U.S.C. § 1823(e) apply in this case.

a. The doctrine and its statutory outgrowth

In *D'Oench, Duhme & Co. v. FDIC* (1942) 315 U.S. 447, 86 L.Ed. 956, 62 S.Ct. 676, a brokerage firm sold bonds, which turned out to be worthless, to an FDIC insured bank. To accommodate the bank, the firm executed demand notes payable to the bank in the bonds' face amount and secured by them so that the bank could substitute the notes for the bonds and show a "good" asset on its books. Although the notes were unconditional, the bank promised the firm that it would never demand payment. Neither the notes' language nor anything else in the bank's records disclosed the agreement not to call the notes. The bank later failed and the FDIC was appointed receiver. When the FDIC tried to enforce the notes, the firm asserted as a defense the bank's agreement.

The supreme court disallowed the defense, inferring from the National Banking Act a general federal policy to protect the FDIC from misstatements of an insured bank's assets. Based on that policy, the court held that the firm was estopped to assert the side agreement as a defense, not because it intended to defraud, but because its conduct allowed the bank to overstate its assets.

> The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled.
>
> *Id*. at 460.

Eight years after *D'Oench* was decided, Congress enacted 12 U.S.C.

§ 1823(e). Section 1823(e)(1) currently provides:

> No agreement which tends to diminish or defeat the interest of the Corporation [the FDIC] in any asset acquired by it under this section or § 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement —
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

2. The *D'Oench* doctrine and § 1823(e) are not coextensive.

The *D'Oench* doctrine is federal common law. Where a statute is exactly co-extensive with a federal common law doctrine, the doctrine vanishes (i.e., is preempted) because there is no longer any need for it. *In re NBW Commercial Paper Litigation* (D.D.C. 1992) 826 F.Supp. 1448, 1458 ("*In re NBW*"). The courts have repeatedly recognized that § 1823(e) does not preempt the *D'Oench* doctrine. *Id.*, at 1459-1460; *FDIC v. McClanahan* (5th Cir. 1986) 795 F.2d 512, 514 fn. 1; *Weber v. New West Fed. Sav. & Loan Assn.* (1992) 10 Cal.App.4th 97, 104-105.

Although courts have often referred to a certain claim or defense as being barred by both the *D'Oench* doctrine and § 1823(e), such statements are misleading

"because federal common law, by its nature, ceases to exist when a statute replaces it." *In re NBW, supra*, at 1465. Thus, "[t]he only manifestations of *D'Oench* which still exist are those which are not covered by the statute." *Ibid*. "*D'Oench* can best be described as a safety net which Congress has left to insure that the specific wording of the statute does not prevent the true application of Congress' policies." *Id*. at 1460-1461.

These considerations suggest a two-part analysis here. First, does § 1823(e) relieve defendant of the obligation to pay the certificates? If not, does the *D'Oench* doctrine do so? Plaintiff contends that neither § 1823(e) nor the *D'Oench* doctrine apply to this case.

a. Section 1823(e) does not apply.

By its terms, § 1823(e) applies only to the FDIC, and it is well settled that § 1823(e) does not apply to the FSLIC. See, e.g., *Hall v. FDIC* (6th Cir. 1990) 920 F.2d 334, 338 fn. 7 ("Although § 1823(e) applies by its terms to FDIC only, we have held that the *D'Oench* doctrine applies to FSLIC and FDIC.").[1]

In *In re Century Centre Partners Ltd*. (9th Cir. 1992) 969 F.2d 835, the FSLIC took over a savings and loan's assets as receiver, transfering them to a new depository institution, which then transferred them back to the FSLIC in its corporate capacity. The FSLIC then assigned the assets to the FDIC "for management" under FIRREA. The court concluded that § 1823(e) did not apply:

[1] Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the FSLIC was abolished and the Resolution Trust Corporation ("RTC") was appointed successor to those FSLIC interests as to which the FSLIC was appointed as conservator or receiver on or after January 1, 1989. *Vernon v. RTC* (11th Cir. 1990) 907 F.2d 1101, 1102 fn. 1. FIRREA also extended the protection of § 1823(e) to the RTC. *In re NBW, supra*, 826 F.Supp. at 1459. The protection of § 1823(e) was never extended to the FSLIC, and its extension to the RTC after the transactions here in question can have no bearing on the present case.

> The statute, § 1823(e), only applies to assets that the FDIC acquires "either as security for a loan or by purchase or as receiver of an insured depository institution." The FDIC has acquired the assets of FSLIC not as its own funds but as their manager. [Citation.] These funds have not been acquired by purchase nor as security, nor have they been acquired by the FDIC being the "receiver" of an insured depository institution. Consequently, 12 U.S.C. § 1823(e) does not apply in this case.
>
> *Id*., at 840.

The fact that the FSLIC held the assets both as receiver and in its corporate capacity did not make the statute apply.

In *Webb v. Superior Court* (1990) 225 Cal.App.3d 990, the plaintiff borrower made an unrecorded side agreement with a savings and loan that later failed (GSLA). The FSLIC took over as receiver and then assigned the assets to a new savings and loan (New West). In litigation with the assignee, the borrower was estopped by the *D'Oench* doctrine, but not by § 1823(e), to assert the unrecorded side agreement:

> Webb contends that 12 United States Code § 1823, which codified the *D'Oench, Duhme* doctrine, does not apply to this case because, by its terms, it applies to the FDIC only. We agree. Webb is estopped by the doctrine as stated by the United States Supreme Court, he is not estopped by the statute.
>
> *Id*. at 1001-1002.

Hall, *Century Centre*, and *Webb* make it plain that § 1823(e) does not apply to the present case because it does not apply to the FSLIC. But even if the statute did apply to the FSLIC, it still would not apply here. First, the statute covers only agreements that tend to diminish or defeat the corporation's interest in any "asset." In *Murphy v. FDIC* (9th Cir. 1994) 38 F.3d 1490, the holder of certain letters of credit sought to compel the FDIC to pay them after the issuing bank failed. The FDIC

argued that § 1823(e) estopped the plaintiff from enforcing the letters, but the court disagreed because the letters were not assets. "A letter of credit is not an asset of the bank. It is a liability . . . . The statute protects against inflated assets. It does not operate on liabilities." *Id*. at 1500-1501. Like the letters of credit in *Murphy*, the certificates of deposit here at issue are not assets. GSLA accepted the deposits, and the certificates it issued evidenced an obligation to pay.

Furthermore, there is no indication that § 1823(e) was intended to apply to regular deposits:

> Nor does the court find an intent by Congress to radically alter the day-to-day transactions of the banking industry by requiring all customers and business associates of a bank to demand that all issues and agreements be placed before the board of directors (or the loan committee).
>
> *In re NBW*, *supra*, 826 F.Supp. at 1464.

The FDIC and FSLIC were created to protect depositors. To hold that a depositor could not recover its money because neither the board of directors nor loan committee (as required by § 1823(e)(1)(C)) approved the transaction would be ludicrous.

In sum, § 1823(e) does not apply in this case because it does not apply to the FSLIC. The certificates of deposit are not "assets," and such regular deposits are not "agreements" within the meaning of the statute.

b. The *D'Oench* doctrine does not apply.

The *D'Oench* doctrine, unlike § 1823(e), protects the FSLIC as well as the FDIC. *Webb*, *supra*, 225 Cal.App.3d at 999. Moreover, it is well settled that the doctrine protects both FDIC's and FSLIC's assignees and "bridge banks"—i.e., institutions the FDIC and FSLIC authorized to operate failed banks and savings and

loans. *Weber, supra*, 10 Cal.App.4th at 105.

But the doctrine is an equitable rule of estoppel. *Walsh v. New West Fed. Sav. & Loan Assn.* (1991) 234 Cal.App.3d 1539, 1543. As the original *D'Oench* case stated, for the doctrine to apply the party must have "lent" itself to a "scheme or arrangement" that is likely to mislead. The doctrine has been expanded over the years to include not only actual side agreements such as the one in the original *D'Oench* case, but virtually any unrecorded condition or representation. See, e.g., *In re NBW, supra*, 826 F.Supp. at 1454-1455; *Langley v. FDIC* (1987) 484 U.S. 86, 93, 98 L.Ed.2d 340, 108 S.Ct. 396. For example, the doctrine estops a borrower from asserting bank officers' fraud as a defense because the debtor, by failing to ensure that the representations were expressed in the loan documents, lent itself to an arrangement likely to mislead bank examiners. *Castleglen, Inc. v. Commonwealth Savings Assn.* (D.Utah 1989) 728 F.Supp. 656, 669. The doctrine not only prevents the defensive use of such unrecorded "agreements," but also their offensive use as the basis for claims of fraud or breach of contract. *Walsh, supra*, 234 Cal.App.3d at 1544.

Although the *D'Oench* doctrine has been applied to bar claims and defenses in a wide variety of circumstances since its original formulation, the essential prerequisite to its application remains participation in "some sort of agreement or 'arrangement' which would tend to deceive bank examiners." *In re NBW, supra*, 826 F.Supp. at 1466. Absent participation in some such agreement or arrangement, the doctrine cannot be invoked to defeat a party's claim or defense.

In *Murphy, supra*, the letters of credit the plaintiff sought to enforce were in the bank's files but were not reflected in its books of account and ledgers. Even so, the court held that their absence from the records did not entitle the FDIC to rely on the *D'Oench* doctrine because the plaintiff was in no way responsible for that fact.

> Whatever secret agreements may or may not have existed, and whatever Hilger [the failed bank's chairman and CEO] and his associates may have caused to be put on the Bank's books, Murphy's innocence of any such scheme precludes application of the *D'Oench, Duhme* equitable estoppel . . . . [B]ecause . . . Murphy did not lend himself to whatever scheme might keep them hidden from bank regulators, *D'Oench, Duhme* could not bar recovery. *Id*., 38 F.3d at 1498-1499.

CONCLUSION

As in *Murphy*, the *D'Oench* doctrine cannot be invoked in the present case to bar plaintiff's claim for payment of the certificates of deposit because plaintiff is in no way responsible for the fact that the certificates were not reflected in the books when the FSLIC acted as receiver. The deposits were made and the certificates were issued just as in thousands of other such transactions. The case involves no side agreements or oral conditions or representations, but simply a claim for payment of the certificates. Because plaintiff did not lend himself to a scheme or arrangement that was likely to deceive the FSLIC, he cannot be equitably estopped from asserting his claim for payment of the certificates.