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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

PENI COX, an individual, Plaintiff, v. RECONTRUST COMPANY, N.A., BANK OF AMERICA HOME LOANS SERVICING, LP; BANK OF AMERICA, FSB, NEW LINE MORTGAGE, DIVISION OF REPUBLIC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; AND DOES 1-5, Defendants.	**MOTION TO DISMISS** Case No. 10-cv-00492 Honorable Clark Waddoups Magistrate Judge Alba

Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, Defendants ReconTrust Company, N.A., BAC Home Loans Servicing, LP (erroneously sued as "Bank of America Home Loans Servicing, LP"), Bank of America, N.A. (erroneously sued as "Bank of America, FSB"), and Mortgage Electronic Registration Systems, Inc. (collectively "Defendants") respectfully move for an order dismissing with prejudice Plaintiff's first and second causes of action.[1]

Plaintiff's claims are premised on the argument that Defendants cannot conduct foreclosure activities in Utah because ReconTrust is not registered to conduct business in Utah. Plaintiff's claims fail as a matter of law. The Court has already found that the statutes upon which Plaintiff relies for her claims, Utah Code §§ 16-10a-1501 and 57-1-21, are preempted by the National Bank Act, to the extent the state statutes purport to apply to foreclosure activities of national banks.

Moreover, Utah Code § 16-10a-1501 explicitly states that enforcing mortgages or security interests in property does not constitute "transacting business" and therefore Utah's requirement to apply for authority to transact business does not apply to Defendants' activities at issue in this case.

[1] Plaintiff has moved to dismiss her third, fourth and fifth causes of action, as well as New Line Mortgage as a defendant. [Doc. # 49.] Defendants agree with Plaintiff that her third, fourth and fifth causes of action should be dismissed. Accordingly, this motion to dismiss addresses Plaintiff's two remaining claims.

Because Plaintiff's first and second claims fail as a matter of law, Defendants respectfully request that the Court dismiss those claims with prejudice. This motion is supported more fully by the accompanying memorandum incorporated herein by reference.

DATED: July 2, 2010 VANTUS LAW GROUP, P.C.

/s/ Richard F. Ensor
Attorneys for Defendants ReconTrust Company, N.A., BAC Home Loans Servicing, LP (erroneously sued as "Bank of America Home Loans Servicing, LP"), Bank of America, N.A. (erroneously sued as Bank of America, FSB), and Mortgage Electronic Registration Systems, Inc.

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that on this 2nd day of July 2010, a true and correct copy of the foregoing was filed with the Clerk of Court via ECF and was therefore served by electronic mail to the following:

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH - CENTRAL DIVISION

PENI COX, an individual, Plaintiff, v. RECONTRUST COMPANY, N.A., BANK OF AMERICA HOME LOANS SERVICING, LP; BANK OF AMERICA, FSB, NEW LINE MORTGAGE, DIVISION OF REPUBLIC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; AND DOES 1-5, Defendants.	**DEFENDANTS' MEMORANUDM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT** Case No. 10-cv-00492 Honorable Clark Waddoups Magistrate Judge Alba

TABLE OF CONTENTS

Page

I. INTRODUCTION

On June 26, 2010, Plaintiff Peni Cox ("Plaintiff") filed a motion seeking leave to dismiss defendant New Line Mortgage and her third, fourth and fifth causes of action asserted in the Amended Complaint. Defendants agree that the Court should dismiss New Line Mortgage and Plaintiff's third, fourth and fifth causes of action.[1] Accordingly, Defendants have limited this motion to Plaintiff's first and second causes of action, both of which are premised on Utah state statutes which this Court has already held are preempted by federal law. (Memo. Dec. [Doc. # 45] at 13-14, 17.). Given the Court's prior ruling, the Court should grant Defendants' motion to dismiss these claims with prejudice and, after dismissing the remaining causes of action as Plaintiff requests, enter judgment in favor of the Defendants.

II. PROCEDURAL HISTORY AND FACTS

In August, 2007, Plaintiff borrowed $126,000 from New Line Mortgage, which was used to purchase a house in St. George, UT 84770. (Amended Complaint, [Doc. # 13] (hereinafter "AC") ¶ 15.) Two years later, Plaintiff defaulted on her loan, and ReconTrust initiated a foreclosures. (AC ¶¶ 18-20.)

In response, on April 29, 2010 Plaintiff filed a Complaint in the Fifth Judicial District against Defendants. (Memo. Dec. [Doc. # 45] at 2.) On May 26, 2010, Defendants removed this action to this Court, and filed a motion to dissolve the preliminary injunction entered by the state court. [*See* Doc. ## 1 and 17-22.] After briefing and argument, this Court entered an order dissolving the state court injunction based on principles of federal preemption and subsequently issued a memorandum opinion. (6/11/10 Order [Doc. # 42]; Memo. Dec. [Doc. # 45].) .

With her proposed amended complaint, Plaintiff continues to claim that ReconTrust is not authorized to conduct business in Utah under Utah Code § 16-10-1501, and is similarly ineligible to conduct a trustee's sale under Utah Code § 57-1-21. (SAC ¶¶ 27-28, 38-29.) Yet,

[1] Defendants do object, however, to Plaintiff's request to add "Doe" plaintiffs and to re-assert her remaining claims—the first and second causes of action—on behalf of an unspecified class of persons. *See* Defendants' Response to Plaintiff's Motion to Amend [Doc. # 51].

this Court's preemption decisions disposes of both of these claims. (*See* Memo. Dec. [Doc. # 45] at 13-14, 17.)

III. LEGAL ANALYSIS AND ARGUMENT

A. Legal Standard Governing Rule 12(b)(6) Motion To Dismiss

A party may move to dismiss a complaint under Rule 12(b)(6) where the Plaintiff has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. Rule 12(b)(6). For the purposes of a 12(b)(6) motion, the allegations of fact in a complaint are accepted as true and construed in the light most favorable to the Plaintiff. *Sutton v. Utah State School for Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). However, in ruling on a Rule 12(b)(6) motion, the court need not accept as true conclusory allegations or legal characterizations cast in the form of factual allegations. *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Moreover, a complaint should be dismissed when it fails to state a cognizable legal theory. *See Bixler v Foster*, 596 F.3d 751, 757 (10th Cir. 2010).

B. No Claims Have Been Alleged As to Any Defendant Other Than ReconTrust

Plaintiff's first and second causes of action are directed solely against Defendant ReconTrust. There are no allegations that any of the other Defendants, including BAC Home Loans Servicing, LP (erroneously sued as "Bank of America Home Loans Servicing, LP"), Bank of America, N.A. (erroneously sued as "Bank of America, FSB"), and Mortgage Electronic Registration Systems, Inc. ("MERS") are subject to or failed to comply with these state statutes. In fact, at the June 10, 2010 hearing, Plaintiff confirmed that these claims were directed toward ReconTrust only and that Plaintiff does not assert any such claims against the other Defendants. (*See* Exh. 1 (6/10/10 Hearing Transcript) at 48:16-49:20.) For this reason alone, Plaintiff's complaint should be dismissed as to BAC Home Loans Servicing, LP (erroneously sued as "Bank of America Home Loans Servicing, LP"), Bank of America, N.A. (erroneously sued as "Bank of America, FSB"), and MERS.

C. Plaintiff's Claims Against ReconTrust Under Utah Law Are Preempted By The National Bank Act.

This Court already has conducted a thorough and well-reasoned preemption analysis of Utah Code § 57-1-21 and Utah Code § 16-10a-1501, and found that both statutes are preempted by the National Bank Act because "Congress intended that federal statute exclusively control the area of allowing a national bank to transact business nationwide." (Memo. Dec. [Doc. 45] at 10, 13-14, 17.) The National Bank Act, 12 U.S.C. § 21 *et seq.*, was enacted in 1864 and "its legislative history, and its historical context makes [it] clear that . . . Congress intended to facilitate a 'national banking system' when it created the Act." *Marquette Nat'l Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 315 (1978). Thus, by enacting the National Bank Act, Congress intended that a national bank or its operating subsidiary would be subject to regulations promulgated by the Office of the Comptroller of the Currency ("OCC") and not the licensing, reporting, and visitorial regimes of the individual states where it operates. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 7 (2007); *City & County of S.F.*, 309 F.3d at 561 (holding that the National Bank Act was created to protect national banks from an abundance of intrusive regulation promulgated by individual states); *see also* Cong. Globe, 38th. Cong., 1st Sess., 1451 (1864) (noting that the "object" of the National Bank Act was to "establish a national banking system" free from state regulation). By virtue of this comprehensive statutory scheme, "National banks are 'instrumentalities of the federal government, created for a public purpose, and . . . subject to the paramount authority of the United States.'" *City & County of S.F.*, 309 F.3d at 561 (*quoting Marquette Nat'l Bank v. First of Omaha Svc. Corp.*, 439 U.S. 299, 308 (1978)). And, "State attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties." *City & County of S.F.*, 309 F.3d at 561 (*citing First Nat. Bank v. California*, 262 U.S. 366, 369 (1923)).

1. Plaintiff Fails To State A Claim Under Utah Code § 57-1-21, Because The National Bank Act Preempts State Trustee Regulations Against National Banks Which Allow Competitors To Act As Trustees.

A national bank's authority to act as a trustee is granted under 12 U.S.C. § 92a of the National Bank Act. Section 92a permits "national banks to act as trustees 'when not in contravention of State or local law.'" (Memo. Dec. [Doc. 45] at 14.) A national bank's position as a trustee "shall not be deemed to be in contravention of State or local law" if a "state allows a competitor of a national bank to act as a trustee." *Id*.; 12 U.S.C. § 92a(b). In other words, where a state law regulation allows a national bank's competitor to act as a trustee, a national bank may also act as a trustee pursuant to section 92a. (Memo. Dec. [Doc. 45] at 14.) However, where state regulation allows a competitor to act as a trustee, but prohibits a national bank from doing so, section 92a preempts the state law regulation and permits a national bank to act as a trustee. *Id*.; *see also Zabriskie v. ReconTrust, et al.*, Case No. 2:08-CV-00155-BSJ (Doc. No. 31, dated Nov. 12, 2008).

Here, Utah Code § 57-1-21 provides a list of persons eligible to act as trustees in Utah, these include members of the Utah state bar, depository institutions, and title insurance companies. Utah Code § 57-1-21. ReconTrust is *not* permitted to serve as a trustee under this Utah regulation. This restriction on ReconTrust's ability to act as a trustee clearly conflicts with 12 U.S.C. § 92a(b) because Utah Code § 57-1-21 "allows a 'depository institution,' which is unquestionably a competitor of a national bank, to act as a trustee." (Memo. Dec. [Doc. 45] at 14.) Accordingly, a claim under § 57-1-21 is preempted by the National Bank Act, and should be dismissed with prejudice. *Id*.

2. Plaintiff Cannot State A Claim Under Utah Code § 16-10a-1501 Because The Comptroller Of The Currency Has Exclusive Authority To Authorize National Banks To Conduct Business.

Congress granted the Comptroller the power to "determine whether the [national banking] association is lawfully entitled to commence the business of banking." 12 U.S.C. § 26.

Thus, if the Comptroller determines that a national bank can commence the business of banking, "the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business." 12 U.S.C. § 27(a). Further, the Comptroller's ultimate control over the certification of national banks "shall apply in the several states." 12 U.S.C. § 42. Given these provisions, Congress clearly intended "to completely preempt the area of requirements a national bank must meet before conducting business nationwide." (Memo. Dec. [Doc. 45] at 13.).

Here, however, Utah Code § 1501 and 1502 purport to regulate a national bank's ability to transact business in Utah. Specifically, section 1501 mandates that a "foreign corporation may not transact business in this state until its application for authority to transact business is filed by the division." Utah Code § 16-10a-1501. Where a foreign corporation's application is not approved and filed by the appropriate division, that corporation may not maintain a proceeding in any Utah state court. Utah Code § 16-10a-1502(1). Moreover, if a foreign corporation is found to be in violation of these provisions, section 1502(5) permits a court to issue "an injunction restraining the further transaction of the business of the foreign corporation and the further exercise of any corporate rights and privileges in this state." Utah Code § 16-10a-1502(5). These statutes purport to "set out competing state requirements for a bank to transact business, assign a competing authority to judge if the requirements are met, and provide for competing remedies for a banks' failure to meet the state's requirements." (Memo. Dec. [Doc. 45] at 10.) However, sections "26, 27, and 42 of the National Bank Act leave no room for Utah Code Ann. §§ 16-10a-1501 and 1502" to regulate national banks. (*Id*.) Accordingly, Utah Code §§ 16-10a-1501 and 1502 are preempted because the Comptroller is "intended to be the exclusive authority on what a national bank must do to transact business in any state" under 12 U.S.C. §§ 26-27, 42. (*Id*. at 11.)

IV. CONCLUSION

Plaintiff's SAC fails to allege any claim upon which relief may be granted. This Court's Memorandum Opinion holding that Plaintiff's Utah statutory claims are preempted by the National Bank Act is dispositive. Moreover, Plaintiff does not state an actionable claim against BAC Home Loans Servicing, LP (erroneously sued as "Bank of America Home Loans Servicing, LP"), Bank of America, N.A. (erroneously sued as "Bank of America, FSB"), or MERS. Accordingly, Plaintiff's claims against all Defendants fail, and should be dismissed with prejudice.

DATED: July 2, 2010 Vantus Law Group

By /s/ Richard F. Ensor
Richard F. Ensor
Attorneys for Defendants ReconTrust Company, N.A., BAC Home Loans Servicing, LP (erroneously sued as "Bank of America Home Loans Servicing, LP"), Bank of America, N.A. (erroneously sued as Bank of America, FSB), and Mortgage Electronic Registration Systems, Inc.

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that on this 2nd day of July 2010, a true and correct copy of the foregoing was filed with the Clerk of Court via ECF and was therefore served by electronic mail to the following:

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/s/ Richard F. Ensor

010351/

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
PENI COX,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:10-CV-492CW
	)	
RECONTRUST COMPANY, et al.,	)	
	)	
Defendants.	)	

Transcript of Motion Hearing

BEFORE THE HONORABLE CLARK WADDOUPS

June 10, 2010

Karen Murakami, CSR, RPR
144 U.S. Courthouse
350 South Main Street
Salt Lake City, Utah 84101
Telephone: 801-328-4800

understand the preemption argument as to ReconTrust, does it make any difference that in some sense as well the beneficiary of this is MERS?

MR. ARNOLD: I don't believe it does make any difference, Your Honor, because, number one, the alleged lack of registration was with respect to ReconTrust, so the issue is whether ReconTrust can act as a trustee. ReconTrust is authorized and has that power under federal law, so it has that power. And we would argue that that is federally preemptive and governs under the Supremacy Clause. If I've addressed your question -- I'm happy to address it further if you like.

THE COURT: I think I understand your position.

Mr. Barlow, I have a question. This injunction purports to enjoin action on behalf of all of the defendants. Based on the pleading in the Complaint, the only action taken by any of the defendants that could possibly be enjoined is action by ReconTrust. How can the injunction survive against all of the other defendants who have taken no action in the State of Utah under your alleged pleadings?

MR. BARLOW: Your Honor, I believe I'm only pleading that in the Complaint that ReconTrust is in

violation of the statute, and the injunction specifically stated ReconTrust. It named the defendants as defendants, but the injunction was against ReconTrust.

THE COURT: So your reading of the injunction is that it doesn't run against any of the defendants other than ReconTrust?

MR. BARLOW: That's my reading of the injunction. That's what I asked for. That was my intent when I asked it.

THE COURT: As I read the injunction, I don't think it is so phrased. I think it's broad enough to enjoin all of the defendants. I take it you wouldn't have any objection at least to the injunction being dissolved as to all of the other defendants.

MR. BARLOW: As to the other defendants outside of ReconTrust.

THE COURT: Yes.

MR. BARLOW: That's correct. It was my intent to name ReconTrust specifically.

THE COURT: All right. Unless there's something further the parties want, I'm going to take this under submission. I expect to rule very quickly, hopefully by the end of the day today. If it becomes more complicated than I believe it will be, it may be by