UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TYRONE L. ROBINSON, individually and on behalf of other persons similarly situated, Plaintiff, v. BANK OF AMERICA, N.A., and Does 1 through 10, Defendants.	Case No. CV 11-03939-GHK (JEM) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE GRANTING BANK OF AMERICA, N.A.'S MOTION FOR JUDGMENT ON THE PLEADINGS

This Report and Recommendation is submitted to the Honorable George H. King, United States District Judge, pursuant to 28 U.S.C. § 636 and the Order Referring Action, dated July 22, 2011.

I. INTRODUCTION

On April 25, 2011, Plaintiff Tyrone L. Robinson, on behalf of himself and other persons similarly situated, filed suit against Defendant Bank of America, National Association or "N.A." ("BA") in the Superior Court of the State of California for the County of Los Angeles. His complaint for damages and restitution alleges: (1) fraud by omission; (2) deceptive practices in violation of the California Consumer Legal Remedies Act ("CLRA"); and (3) fraudulent, unlawful and unfair business practices in violation of California's Unfair

Competition Law ("UCL") under California Business and Professions Code Section 17200. Specifically, Plaintiff alleges that BA failed to disclose in the written documents explaining the terms for Cash Pay accounts that consumers have the ability to avoid account maintenance fees.

The action was removed to federal court on May 6, 2011, pursuant to the Class Action Fairness Act, 28 U.S.C. §§ 1332(d) and 1441(a).

On September 19, 2011, Defendant BA filed the instant Motion for Judgment on the Pleadings ("Motion") pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. On September 26, 2011, Plaintiff filed an Opposition to the Motion. Defendant filed a Reply on October 3, 2011.

The Court determined that BA's Motion was appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D.R. 7-15. Accordingly, the hearing scheduled for October 17, 2011, was taken off calendar.

After carefully reviewing the pleadings, the Court respectfully recommends that the Motion be granted on the ground that the National Bank Act of 1864 ("NBA"), 12 U.S.C. § et seq., and its implementing regulations, in particular 12 C.F.R. § 7.4007(b)(3), preempt Plaintiff's state law causes of action.

II. LEGAL STANDARD

Rule 12(c) of the Federal Rules of Civil Procedures provides: "After the pleadings are closed – but early enough not to delay the trial – a party may move for judgment on the pleadings." On a Rule 12(c) motion, the court must accept as true all the material facts alleged in the complaint and must draw all reasonable inferences in favor of the non-moving party. Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009); General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989). "A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir. 1998).

III. PLAINTIFF'S COMPLAINT

Plaintiff's complaint alleges that BA fails to disclose that account maintenance fees charged to consumers with a Cash Pay account can be avoided by going to a branch location and withdrawing funds from the account. (¶ 1.) Plaintiff alleges that "by omitting this material fact from the written documents explaining the terms and conditions for Cash Pay accounts, and concealing that consumers have the ability to avoid Cash Pay account maintenance fees, Defendant misleads consumers with Cash Pay cards and induces them to refrain from going to a branch location to withdraw funds . . . to avoid imposition of account maintenance fees." (¶ 1.)

As an example, Plaintiff was employed by U-Haul as an auto technician for two years. (¶ 6.) During his employment, Plaintiff was paid wages through a Cash Pay card for which Defendant charged Plaintiff account maintenance fees. (¶ 6.) In August 2009, Plaintiff was charged a monthly maintenance fee of $1.50 on his closing balance of $7.38. (¶ 6.) Plaintiff read and agreed with BA's written terms and conditions for Cash Pay accounts, which disclose the monthly account maintenance fee. (¶ 6.) BA's written terms and conditions do not disclose that Plaintiff could avoid the maintenance fee by going to a branch location and withdrawing funds from his Cash Pay account. (¶ 6.) Plaintiff claims that, had he known that he could have avoided the fee, he would have gone to a branch location. (¶ 6.)

Plaintiff contends that BA's written terms and conditions for Cash Pay accounts are incomplete and misleading (¶ 15), that BA had a duty to disclose that account maintenance fees can be avoided (¶ 16), and that BA intentionally omitted this fact from the written terms and conditions. (¶ 17.) Plaintiff alleges that BA's failure to disclose that account maintenance fees can be avoided deceived consumers and caused Plaintiff and others to lose money.

Plaintiff alleges fraud by omission, deceptive practices in violation of the CLRA, and unfair competition under the UCL. (¶ 1.) Plaintiff seeks restitution of account maintenance

fees and damages, including punitive damages, plus attorneys' fees and costs. (¶¶ 2-3, p. 11.)

IV. DISCUSSION

BA seeks judgment on the pleadings under Rule 12(c) because, it contends, Plaintiff's state law claims are preempted by the NBA. The Court agrees.[1]

A. Relevant Law And Background

There are three ways Congress may preempt state law: by expressly saying so, by so occupying a field that no room is left for states to regulate, and where state law actually conflicts with federal law. See generally Bank of Am. v. City and County of San Francisco ("Bank of Am."), 309 F.3d 551, 558 (9th Cir. 2000); Montgomery v. Bank of America Corp., 515 F. Supp. 2d 1106, 1109-1110 (C.D. Cal. 2007). Cases in the Ninth Circuit have determined that express preemption and field preemption are inapplicable to the NBA and its regulations. Montgomery, 515 F. Supp. 2d at 1109 (no express preemption); Martinez v. Wells Fargo Home Mortgage, Inc., 598 F.3d 549, 555 (9th Cir. 2010) (no field preemption). BA asserts conflict preemption here. Where Congress does not expressly preempt state laws, the Court may imply preemption when state law actually conflicts with federal law. See generally Montgomery, 515 F. Supp. 2d at 1110.

The NBA was enacted to establish a national banking system and to protect banks from intrusive state regulation. See generally Bank of Am., 309 F.3d at 561; Montgomery, 515 F. Supp. 2d at 1110. The Ninth Circuit has held that "[s]tate 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." Bank of Am. v. City, 309 F.3d at 561. BA is a national bank subject to the NBA.[2]

---

[1] Because BA's preemption claim is dispositive, the Court does not address BA's other challenges to the complaint.

[2] BA presented a Request for Judicial Notice of its Articles of Association indicating that it is a National Association operating under national banking laws and regulations. Plaintiff did not oppose BA's Request for Judicial Notice, which the Court recommends be approved.

The NBA grants national banks the power to exercise all "incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). NBA regulations expressly provide: "A national bank may charge its customers non-interest charges and fees, including deposit account service charges." 12 C.F.R. § 7.4002(a). The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. 12 C.F.R. § 7.4002(b)(2). The NBA and its regulations preempt conflicting state limitations on the authority of national banks to collect fees. Bank of Am., 309 F.3d at 563-64. Thus, BA asserts that the NBA preempts any state law claim based on BA charging monthly account maintenance fees. Plaintiff does not challenge BA's right to charge service fees or to set the amount of those fees, so long as it discloses how consumers can avoid the fees.

Plaintiff's complaint is "fundamentally premised on the allegation that Defendant misleads consumers by failing to make material disclosures." Plf.'s Memo. of Points and Authorities in Opposition at 1:18-19 (emphasis added). NBA regulations, however, provide: "A national bank may exercise its deposit-taking powers without regard to state law limitations concerning . . . [d]isclosure requirements." Id. at § 7.4007(b)(3) (emphasis added). BA asserts that § 7.4007(b)(3) preempts Plaintiff's state law claims regarding inadequate disclosures in the written documents regarding its Cash Pay accounts, such as the failure to disclose that monthly account maintenance fees can be avoided.

B. Analysis

The gist of each of Plaintiff's state law claims is that BA failed to disclose adequately that its monthly account maintenance fee could be avoided. Plaintiff's First Cause of Action for fraud by omission asserts that BA had a duty to disclose that consumers could avoid monthly account maintenance fees and failed to do so. (¶¶ 15, 16.) The Second Cause of Action asserts that BA's failure to disclose that consumers can avoid monthly account maintenance fees is a deceptive practice under the CLRA. (¶ 24.) The Third Cause of Action alleges that BA's failure to disclose that consumers can avoid monthly account

maintenance fees constitutes fraudulent, unlawful and unfair business practices under the UCL. (¶ 32.) Plaintiff's state law claims asserting disclosure obligations and a failure to disclose that monthly account maintenance fees can be avoided are "state law limitations concerning . . . [d]isclosure requirements" that plainly conflict with 12 C.F.R. § 7.4007(b)(3).

This case is quite similar to Montgomery. Plaintiff in that case claimed that BA failed to disclose adequately its non-sufficient funds/overdraft fees policy. The Court ruled that "to the extent Plaintiff contends that defendants' conduct constitutes unfair and deceptive business practices pursuant to the UCL and the CLRA, these claims are in conflict with the NBA and the regulations promulgated thereunder." Montgomery, 515 F. Supp. 2d at 1113. The Court also ruled that "to the extent plaintiff's state law claims are based upon defendants' alleged improper disclosure of the NSF/OD fee structure, these claims are expressly preempted by 12 C.F.R. § 7.4007, providing that '[a] rational bank may exercise its deposit-taking powers without regard to state law limitations concerning . . . disclosure requirements.'" Id. at 1114. Robinson's attempts to distinguish Montgomery are unavailing. Montgomery's holding is not dicta. The Court expressly found that § 7.4007 preempted Plaintiff's UCL and CLRA claims alleging inadequate disclosures.

Plaintiff argues that state laws of general application that require all businesses to refrain from misrepresentations, and from fraudulent, unfair or illegal behavior, are not specific disclosure requirements preempted by the NBA, citing Smith v. Wells Fargo Bank, 135 Cal. App. 4th, 1463, 1484 (2005) (holding claims for false and misleading advertising in violation of the UCL and CLRA are not preempted by § 7.4007(b)(2)). Smith, however, assumed a general presumption against preemption because "preemption of state laws by federal law or regulation generally is not favored." Id. at 1476. Montgomery, however, notes that federal courts are not bound by California state court decisions and Smith is wrong in stating that the usual presumption against federal preemption of state laws applies to banking. Montgomery, 515 F. Supp. 2d at 1113. The Ninth Circuit specifically has held that "the presumption against preemption of state law is inapplicable" to banking. Bank of Am., 309 F.3d at 558-59.

Plaintiff is correct that the Ninth Circuit in Martinez recognized no per se rule preempting imposition of state laws of general applicability on federal banking activities: "State laws of general application, which merely require all businesses (including national banks) to refrain from fraudulent, unfair, or illegal behavior, do not necessarily impair a bank's ability to exercise its real estate lending powers" or by extension other federally authorized powers. Martinez, 598 F.3d at 555 (emphasis added). The correct legal standard for whether conflict preemption bars the application of those or any laws was stated recently in Watters v. Wachovia Bank, N.A., 550 U.S. 1, 12 (2007): "States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's . . . exercise of its powers. But when State prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way."

Thus, even though it found that the UCL was not designed to regulate real estate lending, Martinez nevertheless preempted a UCL claim alleging excessive fees on a home mortgage refinancing because of actual conflict with NBA regulations relating to the setting and disclosure of fees. Quite similar to § 7.4007(b)(3), 12 C.F.R. § 34.4(a) provides that national banks may make real estate loans "without regard to state law limitations concerning . . . disclosure." Thus, Plaintiff's argument that the UCL and CLRA do not impose affirmative disclosure requirements or relate to disclosure of information or require any kind of disclosure miss the point.[3] What matters under Martinez and Watters is not whether these general state laws were designed to regulate disclosures in deposit-taking, but whether their application to a specific federal banking activity conflicts with an NBA regulation or prevents or interferes with an enumerated or incidental power granted by the NBA. Here it does: § 7.4007(b)(3) expressly preempts the asserted State law limitations on

[3] Plaintiff's argument that these state laws do not require disclosure is inconsistent with the allegation in the complaint that BA had a duty to disclose that the monthly account maintenance fee can be avoided. (¶ 16.)

deposit-taking concerning disclosures because they impose a duty to disclose and have the effect of regulating how BA discloses its fees.

In his final argument against preemption, Plaintiff seeks refuge in a savings clause exception to § 7.4007(b)(3). Plaintiff interprets § 7.4007(c) to mean that general state laws prohibiting false or deceptive representations are expressly excluded from NBA preemption. More specifically, Plaintiff contends that § 7.4007(c)(2) provides that general state laws regarding torts are not preempted because they "are not inconsistent with the deposit-taking powers of national banks."

Plaintiff overstates or misstates § 7.4007(c)(2), which provides in full:

> (c) State laws that are not preempted. State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent consistent with the decision of the Supreme Court in Barnett Bank of Marin County, N.A., v. Nelson, Florida Insurance Commissioner, et al., 517 U.S. 25 (1996): . . .
>
> (2) Torts . . . .

Plaintiff offers no analysis of Barnett Bank or any explanation of how non-preemption would be consistent with it, essential before concluding that state law tort claims can be asserted against specific federal banking activities. Plainly, § 7.4007(c)(2) does not exempt all torts. Barnett held preempted a state law prohibiting national banks from selling insurance that was in direct conflict with the NBA which authorized them to do so. Id. at 37. Barnett established the standard reaffirmed in Watters that states may regulate national banks "where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers." Id. at 33. The import of this holding is that at the least state laws in direct conflict with NBA laws and regulations are preempted, including state tort laws. Here, application of a state common law fraud doctrine, the CLRA and the UCL is directly contrary to § 7.4007(b)(3) and would prevent or significantly interfere with BA's

authorization to "exercise its deposit-taking powers without regard to state law limitations concerning . . . [d]isclosure requirements."

The Court's conclusion is not inconsistent with the recent Ninth Circuit decision in Aguayo v. U.S. Bank, 653 F.3d 912 (9th Cir. 2011), cited by Plaintiff. Aguayo addresses application of a similar savings clause excluding state debt collection laws from preemption. The Court determined that post-repossession notices required by California's Rees-Levering Automobile Sales Finance Act informing the borrower of the amount of the indebtedness were not "disclosures" or "credit related documents" expressly preempted by NBA regulations (id. at 925-928) and fell within a savings clause for state laws concerning debt collection and the right to collect debts. Id. at 923-25. In other words, there was no actual conflict between state and federal law. Plaintiff claims that Aguayo gives the term "disclosure" a very limited meaning. The Court finds no support for that assertion in Aguayo, which carefully distinguishes between a disclosure and a notice, defining a disclosure as a term "commonly used to an informational statement of terms prior to entering a transaction; something a borrower . . . would have received when signing the contract." Id. at 926. Here, the written documents explaining the terms for Cash Pay account cardholder agreements, the very documents attached to the Complaint that Plaintiff asserts failed to disclose that maintenance fees could be avoided, obviously fit Aguayo's definition of a disclosure under § 7.400(b)(3).

Plaintiff's state law claims, all asserting BA's failure to disclose that account maintenance fees can be avoided, are preempted.

V. CONCLUSION

The Court recommends that BA's Motion for Judgment on the Pleadings be granted and this case dismissed with prejudice. Although leave to amend generally should be freely granted under Rule 15(a), in this case the Court has determined that the allegation of other facts consistent with the challenged pleading "could not possibly cure the deficiency," and dismissal with prejudice is appropriate. See Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

RECOMMENDATION

THE COURT, THEREFORE, RECOMMENDS that the District Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) granting Bank of America, N.A.'s Motion for Judgment on the Pleadings; and (3) directing that Judgment be entered dismissing this case with prejudice.

DATED: October 19, 2011

/s/John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

PROPOSED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TYRONE L. ROBINSON, individually and on behalf of other persons similarly situated, Plaintiff, v. BANK OF AMERICA, N.A., and Does 1 through 10, Defendants.	Case No. CV 11-03939-GHK (JEM) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the pleadings, the records on file, and the Report and Recommendation of the United States Magistrate Judge. The Court accepts the findings and recommendations of the Magistrate Judge.

IT IS HEREBY ORDERED that Defendant Bank of America, N.A.'s Motion for Judgment on the Pleadings be granted and that Judgment be entered dismissing this action with prejudice.

DATED: _____

_____
GEORGE H. KING
UNITED STATES DISTRICT JUDGE

PROPOSED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TYRONE L. ROBINSON, individually and on behalf of other persons similarly situated, Plaintiff, v. BANK OF AMERICA, N.A., and Does 1 through 10, Defendants.	Case No. CV 11-03939-GHK (JEM) **JUDGMENT**

In accordance with the Order Accepting Findings and Recommendations of United States Magistrate Judge filed concurrently herewith,

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice.

DATED: _____

_____
GEORGE H. KING
UNITED STATES DISTRICT JUDGE