UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Ramon Blanco, individually and on behalf of all those similarly situated,	:	CASE NO. 1:04-cv-230
Plaintiff,	:	
vs.	:	ORDER [Resolving Doc. No. 25]
KeyBank USA, N.A., JP Morgan Chase Bank, and Bank One National Banking Association	:	
Defendants.	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Defendants KeyBank USA, N.A., JP Morgan Chase Bank, and Bank One N.B.A. move to dismiss Plaintiff Ramon Blanco's Second Amended Complaint [Doc. 25]. The plaintiff opposes the motion [Doc. 30]. For the reasons that follow, the Court denies the defendants' motion to dismiss.

I. Background

For purposes of this motion to dismiss, the Court assumes as true the factual allegations pled in the Second Amended Complaint. In Florida, Plaintiff Ramon Blanco enrolled in a career training program offered by the Academy of Weston, Inc. To help finance that education, the plaintiff entered into a Student Enrollment Contract with the Academy that included certain financial terms and disclosures relating to his student loan. KeyBank arranged for and offered financing for the Plaintiff's student loan, and Plaintiff

executed a promissory note in favor of KeyBank. KeyBank also provided Plaintiff Blanco with a Truth in Lending Act (TILA) Disclosure Statement describing the amount financed, the interest rate used, and other required disclosures.

KeyBank received full value for the loans by selling them as part of a pool of loans that ultimately became KeyCorp Student Loan Trust 2002-A. JP Morgan and Bank One, as eligible trustees of the KeyCorp Student Loan Trust 2002-A, currently hold the notes executed by the Plaintiff. KeyBank services the loans.

At some point after the plaintiff executed the promissory note, but before he completed his education, the Academy closed its doors. Plaintiff Blanco never received the education for which the loan was intended to pay.

II. Legal Standard

The defendants seek dismissal under Fed. R. Civ. P. 12(b)(6) and say the plaintiff fails to state a claim. A court can grant a Rule 12(b)(6) motion when "it is clear that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief." *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). In ruling upon a motion to dismiss under Rule 12(b)(6), the Court accepts all of the allegations as true and construes the complaint "liberally in favor of the party opposing the motion." *Id.* While the Court accepts all well-pleaded allegations as true, the Court does not accept the "bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). Nor does the Court accept "unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

The Court will consider only the well-pleaded factual allegations in the amended complaint itself. *Glicker v. Mich. Liquor Control Comm'n*, 160 F.2d 96, 101 (6th Cir. 1947) ("In considering the motion to dismiss we are controlled by the allegations of the Complaint."). The Court does not "take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute a pleading under Rule 7(a)." 2 MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2002).

III. Analysis

The plaintiff raises two claims in his complaint. First, he alleges that KeyBank's disclosure statement did not comply with requirements under the federal Truth in Lending Act (TILA). Second, he says that the defendants violated Ohio's Retail Installment Sales Act (RISA).

A. TILA Violation

The Court first addresses whether the plaintiff adequately alleges a claim that Defendant KeyBank violated the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, and its implementing regulation, Regulation Z, 12 C.F.R. § 226. The plaintiff generally alleges that Defendant KeyBank failed to sufficiently describe the applicable index used for a variable rate loan.

The TILA is a disclosure statute enacted by Congress "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair billing and credit card practices." 15 U.S.C. § 1601(a) (1976), as amended. The "TILA is a remedial statute and should be construed liberally in favor of the consumer." *Jones v. TransOhio Savings Assoc.*, 747 F.2d 1037 (6th Cir. 1984).

Congress delegated to the Federal Reserve Board the authority to promulgate regulations to effectuate TILA's purposes. *See* § 1604(a); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 567 (1980) ("Congress has specifically designated the [Federal Reserve Board] . . . as the primary source for interpretation and application of the truth-in-lending law."). The Supreme Court has stated that the the "traditional acquiescence in admininstrative expertise is particularly apt under TILA" and has extended judicial deference to official staff interpretations, such as the Official Staff Commentary. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 & n.9 (1980).

The Federal Reserve Board's regulations prescribe both the content and form of disclosure. Under 12 C.F.R. § 226.18(f), a creditor subject to TILA who is extending credit where the annual percentage rate varies must disclose:

> (i) The circumstances under which the rate may increase.
> (ii) Any limitations on the increase.
> (iii) The effect of an increase.
> (iv) An example of the payment terms that would result from an increase.

12 C.F.R. § 226.18(f). The Official Staff Commentary to § 226.18(f)(i) further elaborates:

> 1. Circumstances. The circumstances under which the rate may increase include *identification of any index to which the rate is tied*, as well as any conditions or events on which the increase is contingent.
>
> – When no specific index is used, any identifiable factors used to determine whether to increase the rate must be disclosed.
>
> – When the increase in the rate is purely discretionary, the fact that any increase is within the creditor's discretion must be disclosed.
>
> – When the index is internally defined (for example, by that creditor's prime rate), the creditor may comply with this requirement by either a brief description of that index or a statement that any increase is in the discretion of the creditor. *An externally defined*

index, however, must be identified.

12 C.F.R. § 266, Supp. I., Off. Staff Interpretation, Subpart C, ¶ 226.18(f)(1)(i)1 (emphasis added).[1]

12 C.F.R. § 226.17 dictates the method and form of disclosure. Subsection (a) requires the creditor to make the disclosures "clearly and conspicuously in writing," and states: "The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under § 226.18." 12 C.F.R. § 226.17.

As to the segregation requirement, the Official Staff Commentary elaborates:

> The disclosures may be grouped together and segregated from other information in a variety of ways. For example, the disclosures may appear on a separate sheet of paper or may be set off from other information on the contract or other documents:
>
> – By outlining them in a box.
>
> – By bold print dividing lines.
>
> – By a different color background.
>
> – By a different type style.

12 C.F.R. § 226, Supp. I, Off. Staff Interpretation, Subpart C, ¶ 226.17(a)(1)1-2. There is no specific location requirement.

Although the statute does not expressly require any one specific format, compliance with the

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[1] Footnote 43 to 12 C.F.R. § 226.18(f)(1) provides an alternative to the (f)(1) disclosure: "Information provided in accordance with §§ 226.18(f)(2) and 226.19(b) may be substituted for the disclosures required by paragraph (f)(1) of this section." Section (f)(2) states:

> If the annual percentage rate may increase after consummation in a transaction secured by the consumer's principal dwelling with a term greater than one year, the following disclosures:
>
> (i) The fact that the transaction contains a variable-rate feature.
>
> (ii) A statement that variable-rate disclosures have been provided earlier.

19(b) requires a lengthy list of additional disclosures.

segregation regulations usually takes the form of the boldly outlined box, commonly referred to as the "Federal Box."

In this case, KeyBank employed the "federal box" for disclosing its variable interest rate. Regarding the variable rate, its disclosure stated:

> VARIABLE RATE: Your interest rate is based on a "Current Index," plus a "Margin." The interest rate on your loan may increase or decrease and will be adjusted quarterly on the 1st day of each January, April, July and October (the "Change Date") if the Current Index changes. The "Current Index" is London Interbank offered Rates ("LIBOR") published in the "Money Rates" section ofthe *Wall Street Journal* on the 20th day of the month preceding the "Change Date" (e.g., December, March, June, and September). The Margin added to the Current Index for your loan is 5.25%. . . .

See SACC, Ex. 1A.

The plaintiff argues that this disclosure is insufficient because there are various LIBOR rates and the disclosure can refer to any one of four different indices – the 1-month, 3-month, 6-month, or 12-month indices. The plaintiff alleges that KeyBank failed to state any more specific information about which LIBOR index applied in the federal box. The plaintiff says the only reference to which the specific LIBOR rate was used was in boilerplate language in the Promissory Note, a different document altogether. That boilerplate language identifies the specific LIBOR index as being the 3-month index. *See* SACC, Ex. 1A. ("You will use the three-month-LIBOR published on the 20th day preceding month without regard to the two-day delayed effective date.").

For their response, Defendant KeyBank points to the Official Staff Commentary, which states:

> In describing the variable rate feature, the creditor need not use any prescribed terminology. For example, limitations and hypothetical examples may be described in terms of interest rates rather than annual percentage rates. The model forms in Appendix H provide examples of ways in which the variable rate disclosures may be made.

Official Staff Commentary, 12 C.F.R. § 226, Supp. I. §§ 226.18(e)-(f). Use of the model forms provides a safe harbor compliance with the statute. *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283, 286 (7th Cir. 1997); *see also* 15 U.S.C. § 1604(b). The defendants argue that the KeyBank disclosure statement provides more information than required in the model forms, and thus they are not liable.

The defendants fail to acknowledge, however, that the KeyBank disclosure does not adhere to the model it appears to have chosen to follow. The disclosure that KeyBank uses aligns most closely with Model Form H-4(C). That model specifically requires the identification of an index. Given that the four LIBOR indices each pronounce a different interest rate, identifying "LIBOR" without referring to which specific LIBOR index is insufficient.

The Court thus denies Defendant KeyBank's motion to dismiss on Plaintiff's TILA claim. *B. RISA Violation*

The Court next addresses whether the plaintiff adequately alleges that the defendants are liable under Ohio's Retail Installment Sales Act (RISA), Ohio Rev. Code § 1317.032(C).

Section 1371.032 of RISA, a consumer protection statute, allows a consumer to make certain defenses as affirmative claims against the seller of goods or services obtained pursuant to a purchase money loan installment note, as well as against the holder of a purchase money loan installment note. The defenses include:

> (1) That the subject of the consumer transaction was not furnished or delivered by the seller in accordance with the agreed upon terms of the transaction;
> . . . .
> (4) That the subject of the consumer transaction did not conform to any express or implied warranty made by the seller.

Ohio Rev. Code § 1317.032(A). Section 1317.032(C) allows the consumer to "assert the cause of action to recover from the holder . . . of the purchase money loan installment note . . . the amount of any payments made to the holder, . . . If [certain conditions apply]." Ohio Rev. Code § 1317.032(C).

Here, the plaintiff alleges that KeyBank, as holder of the purchase money loan installment note, is liable for Academy's failure to "furnish[] or deliver[]" his training. The plaintiff thus seeks to recover from KeyBank the payments he made on his loan. Responding, Defendant KeyBank argues (1) that RISA does not apply to financial institutions such as KeyBank, and (2) even if it did, the National Bank Act preempts RISA.

1. Application of RISA to Financial Institutions

Independent loans from a bank or loan company are generally considered outside the purview of RISA. *See, e.g., Hanlin v. Ohio Builders and Remodelers*, 196 F. Supp.2d 572, 582 (N.D. Ohio 2001); *Bank One, Dayton, N.A. v. Doughman*, 59 Ohio App.3d 60 (Hamilton County 1988).

The language of sections 1317.031 and 1317.032, however, suggests that RISA may cover financial institutions in certain circumstances. As Judge Patricia Gaughn has noted in an unpublished opinion addressing the identical issue:

> Provisions 1317.031 and 1317.032 specifically permit a buyer who executes a purchase money loan installment note or a retail installment contract to assert certain defenses against "*any* holder, assignee, or transferee of the note or contract" [emphasis added]. Thus it appears that a financial institution that later obtains a retail installment contract or purchase money loan installment note may be subject to Sections 1317.031 and 1317.032. To exclude financial institutions from liability would essentially render these provisions meaningless because it is unlikely that one retail seller will assign or transfer the note or contract to a non-financial institution.

Abel v. KeyBank, N.A., 1:03-cv-524 (N.D. Ohio, Sept. 24, 2003) (unpublished opinion); *see also Ohio*

Consumer Law, § 11.10 (Harold Williams ed., 2005).

In addition, although a transaction between Defendant KeyBank and the plaintiff is not a "consumer transaction" within the meaning of the statute, the specific language of § 1317.032(C) requires only that a "consumer transaction" have occurred between buyer and *seller*:

> A buyer, who has a defense against a seller arising out of a consumer transaction that he is entitled to assert as a defense against a holder, assignee, or transferee of a purchase money loan installment note . . . and as a cause of action against the seller, may assert the cause of action to recover from the holder . . . the amount of any payments made to the holder . . .

Ohio Rev. Code § 1317.032(C). That the defense need only "aris[e] out of the consumer transaction" further broadens the scope of the provision.

Finally, the Court finds that the KeyBank loans may have constituted "purchase money loan installment notes," under RISA. In its definition of "purchase money loan installment note," RISA includes

> a cash advance that is received by a consumer from a creditor in return for a finance charge . . . , which is applied in whole or substantial part to a consumer transaction with a seller, who . . . cooperates with the creditor to channel consumers to the creditor on a continuing basis.

Ohio Rev. Code § 1317.01(Q). Because Plaintiffs allege that Academy cooperated with KeyBank to channel customers to Key on a regular basis, the Court finds that the loans between Plaintiff Blanco and Key may constitute purchase money installment notes for purposes of RISA.

2. Preemption

The question remains whether the National Bank Act preempts RISA.

The parties do not dispute that, of the three types of preemption – so-called field preemption, conflict preemption, and express preemption – conflict preemption is the applicable doctrine in the present

case. Conflict preemption occurs where the state law is in "irreconcilable conflict" with federal law. *Barnett Bank, N.A., v. Nelson*, 517 U.S. 25, 31 (1996).

> A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . . ," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), or where the state "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). Like congressional acts, federal regulations enacted by federal agencies may preempt state law. *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

As mentioned above, RISA permits a consumer to assert as affirmative claims against a holder in due course certain defenses it also had against the seller, for example, the seller's failure to "furnish[] or deliver[]" the subject of their transaction according to the terms of the transaction, or the failure of the subject of the consumer transaction to conform to the warranty made by the seller. Ohio Rev. Code § 1317.032(A), (C).

The Defendants argue that the National Bank Act, 12 U.S.C. § 24, preempts plaintiffs' RISA claim. That statute gives a national bank the power:

> Seventh. To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes.

12 U.S.C. § 24 (Seventh). Specifically, Defendants claim that RISA impermissibly interferes with the ability of national banks to negotiate promissory notes, lend money, and collect on outstanding loans.

National banks are subject to the operation of state law, except where the state laws "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 and County of San Francisco*, 309 F.3d 551, 561 (9th Cir. 2002) (quoting *First Nat'l Bank v. California*, 262 U.S. 366, 369 (1923)). The question is one of congressional intent.

Recently promulgated federal regulations state:

> (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.
>
> (2) A national bank may make non-real estate loans without regard to state law limitations concerning [inter alia]:
>
>> (iv) the terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term of maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan.
>
> . . .
>
> (e) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:
>
> (1) Contracts;
> (2) Torts;
> (3) Criminal law;
> (4) Right to collect debts;
> (5) Acquisition and transfer of property;
> (6) Taxation;
> (7) Zoning; and
> (8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

Section 7.4008.

In *Abel v. KeyBank*, 313 F. Supp. 2d 720, Judge Gaughn held that these regulations support the conclusion that the National Bank Act preempts RISA. She reasoned:

> In essence, the RISA provisions read into each promissory note (arising from a consumer transaction) a requirement that any holder, including a national bank, assume the liability of the seller under certain circumstances. The Court finds that this type of state imposed liability significantly interferes with a national bank's ability to negotiate promissory notes and lend money. As defendants point out, the RISA provision essentially requires national banks to become insurers for sellers vis a vis consumers. This will undoubtedly have a significant impact on the value of promissory notes issued in Ohio because such notes will likely be worth less than similar notes issued in states that do not impose RISA type liability. Moreover, RISA will significantly impair the ability of the national bank to collect money on promissory notes that qualify for RISA protection.

Id. at 727. As a decision of a sister court, the *Abel* decision is not binding upon this Court. For the reasons discussed below, this Court respectfully disagrees with the *Abel* court's holding.

First, *Abel* cites cases involving state laws that were either significantly more burdensome or more directly controlling than in the present case. For instance, in *Franklin Nat'l Bank of Franklin Square v. People*, the state statute in question *directly prohibited* banks from engaging in a form of advertising. *See* 347 U.S. 373, 74 S. Ct. 550, 98 L. Ed. 767 (1954) (finding that National Bank Act preempted state law that prohibited banks in New York, except state charter savings banks, from using the word "savings" in marketing). In *Assoc. of Nat'l Banks in Ins., Inc. v. Duryee*, 270 F.3d 397 (6th Cir. 2001), the Sixth Circuit found a state law that effectively "prohibit[ed] national banks from marketing insurance to a significant segment of their own customers" significantly interfered with the banks' functioning and was invalid. *Id.* at 410.

In the instant case, the state law does not directly control the federal bank activity. No party

suggests that RISA *prohibits* banks from negotiating promissory notes. Rather, it would have the incidental effect of encouraging all lenders – national or otherwise – to engage in a closer risk analysis in purchasing consumer promissory notes. While the statute could impose additional liability on national banks, altering the terms of liability does not constitute "obstruct[ing], impair[ing], or condition[ing] a national bank's ability to fully exercise its powers" to negotiate promissory notes. If, as Defendant seems to urge, the National Bank Act preemption were interpreted to include any action that merely burdens the bank's business operations, it would also make invalid other state and local regulations (such as state laws prohibiting discrimination in lending) that encumber banks' ability to negotiate commercial transactions. Likely, Congress did not intend to preempt these laws. Moreover, RISA affects other institutions, not just national banks. Rather national banks are merely caught up in the RISA's regulatory net with numerous other types of banks and commercial entities.

Several well-established court decisions hold that the federal bank law does not preempt other state laws that incidentally affect national banks' business transactions. *See, e.g., First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969) (finding that a Florida branch bank law applies to national banks); *Roth v. Delano*, 338 U.S. 226 (1949) (no interference with a national bank's federal functions result from a requirement that the bank make a report of unclaimed property to the state to permit the state to assert a right to such property under escheat laws); *First Nat'l Bank v. Drexler*, 184 So. 607 (La. App. 1938) (statute that authorized corporate officers to institute legal proceedings and to execute bonds in connection therewith is valid and applicable to national banks); *Peoples Sav. Bank v. Stoddard*, 359 Mich. 297 (1960) (no preemption of state antimonopoly action against national bank). As these cases reveal, where,

include the rule in their loan documents. In reply, the plaintiff admits that the rule does not require creditors to include the clause in their contracts.

The plaintiff cites *Staff Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses*, 41 Fed. Reg. 20022 (May 14, 1976), which limited certain consumer recoveries but said that the rule does not "eliminate any other rights the consumer may have as a matter of local, state, or federal statute" and "[i]f a larger affirmative recovery is available against a creditor as a matter of state law, the consumer would retain that right." *Id.* at 7.

The plaintiff's argument is persuasive. The agency's reference to the availability of state remedies is difficult to reconcile with an approach that precludes such remedies. Although national banks are not directly subject to the FTC's authority, the federal agency's discussion of state remedies for violation of the FTC holder rule suggests that holder rule was not intended to preempt state regulation.

In considering the various arguments then, the Court is persuaded that the National Banking Act does not preempt RISA in this instance. As a result, RISA permits Plaintiff Blanco to assert his breach of contract and warranty claims against the present holder of his promissory notes, the Defendant.

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss the Plaintiff's claims pursuant to Fed. R.

Civ. P. 12(b)(6) is **DENIED**.

IT IS SO ORDERED.

Dated: September 30, 2005

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE