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United States District Court,
N.D. Georgia, Atlanta Division.

Brian STEIN, individually and
on behalf of a class, Plaintiff,
v.
TITLEMAX OF GEORGIA,
INC., Defendant.

CIVIL ACTION FILE NO.
1:19-CV-00669-WMR-WEJ
|
Signed 07/25/2019

Attorneys and Law Firms

Shimshon E. Wexler, The Law Offices of Shimshon Wexler, PC, Atlanta, GA, for Plaintiff.

Alixandria Lynn Davis, Christopher A. Wiech, S. Derek Bauer, Ryan E. Harbin, Baker & Hostetler, LLP, Atlanta, GA, for Defendant.

FINAL REPORT AND RECOMMENDATION

WALTER E. JOHNSON, UNITED STATES MAGISTRATE JUDGE

***1** Plaintiff, Brian Stein, alleges that defendant, TitleMax of Georgia, Inc. ("TitleMax"), violated the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq. (See generally Compl. [1].) In its Motion to Dismiss [8], TitleMax asserts that the case should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because plaintiff lacks Article III standing as he sustained no "injury-in-fact." TitleMax further argues that the case should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. In the alternative, defendant contends that the Court should dismiss or stay this action under the Colorado River abstention doctrine given the pendency of a case raising similar issues in the State Court of DeKalb County, Georgia. [1] For the reasons set forth below, the undersigned **REPORTS** that plaintiff has failed to state a claim for which relief can be granted and **RECOMMENDS** that Defendant's Motion to Dismiss or Stay Complaint [8] be **GRANTED**.

1 Defendant does not mention Colorado River abstention in its Reply. Given that the argument was made in the alternative and that defendant appears to have abandoned it, the undersigned does not consider it further.

I. FACTUAL ALLEGATIONS

Plaintiff alleges that TitleMax is in the business of providing loans in the form of pawn transactions where motor vehicles serve as collateral. (Compl. ¶ 18.) On December 26, 2018, plaintiff alleges that he borrowed $100 from TitleMax. (Id. ¶ 19.) TitleMax gave $100 to plaintiff and included in the amount financed an $18 lien filing fee, which brought

the total amount financed to $118. For reasons explained below, that fee was never paid to the state of Georgia to register a lien on the vehicle. (Id. ¶ 20.) Nevertheless, TitleMax wrote in the Federal Truth in Lending Disclosures that the amount financed was $118, and upon plaintiff's repayment, it collected the $18 plus interest on a $118 debt. (Id. ¶ 21.)

The TILA mandates the disclosure of certain important terms of credit agreements including the annual percentage rate ("APR") and the total finance charge. 15 U.S.C. § 1632. The TILA also lets lenders like TitleMax pass along expenses, like lien filing fees, to the customer. Id. § 1605(d)(1). In plaintiff's view, because TitleMax failed to remit this fee and record a lien before plaintiff repaid his loan, the $18 was not a rightfully collected filing fee, but rather a fee that should have been included as part of the finance charge. (See Compl. ¶¶ 18-23.) Plaintiff argues that TitleMax's failure to include the fee as part of the finance charge led to two inaccuracies in the mandated TILA disclosures. First, TitleMax wrote that the finance charge on the loan was $16.51 when, in plaintiff's opinion, it was really $34.51. Second, TitleMax wrote that the APR was 170.23% when it was actually more than double that rate. (Id. ¶¶ 22-23.) [2]

2 Plaintiff has made allegations in his Opposition to Defendant's Motion to Dismiss [9] that are not found in the Complaint. Unless those facts are also found in a document that is central to the plaintiff's claims and undisputed (see infra note 3), or are matters of which a court may take judicial notice, they will not be considered. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

***2** TitleMax contends that the bare-boned allegations from the Complaint only partially describe what happened here. TitleMax shows that the pleadings in the DeKalb County State Court case between the parties, such as the Complaint (filed with Def.'s Mot. as Ex. A [8-1], at 29-39), the Verified Answer and Affirmative Defenses to Complaint and Counterclaim Against Plaintiff (filed with Def.'s Mot. as Ex. B [8-1], at 40-60), and the Pawn Agreement between the parties (filed as Ex. A to the Verified Answer [8-1], at 61-68), and other matters of which this Court may take judicial notice, tell the following story. [3]

3 In deciding a motion to dismiss, "a court limits its consideration to the pleadings and exhibits attached thereto." Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000) (citations omitted). If matters outside the pleadings are presented for consideration, a court generally must exclude the document or else convert the motion to one for summary judgment under Rule 56. See

Fed. R. Civ. P. 12(c). However, a document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment if the attached document is: (1) central to the plaintiff's claim and (2) undisputed. Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002) (explaining that " '[u]ndisputed' in this context means that the authenticity of the document is not challenged"); see also Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997) ("where the plaintiff refers to certain documents in the complaint and these documents are central to the plaintiff's claim, then the court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment."). In ruling on a motion to dismiss, a court may also take judicial notice of public records not attached to the complaint without converting the motion to one for summary judgment. See Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1280 (11th Cir. 1999). Thus, the Court considers the DeKalb County State Court Complaint (filed with Def.'s Mot. as Ex. A [8-1], at 29-39), the Verified Answer and Affirmative Defenses to Complaint and Counterclaim Against Plaintiff (filed with Def.'s Mot. as Ex. B [8-1], at 40-60), and the Pawn Agreement between the parties (filed as Ex. A to the Verified Answer [8-1], at 61-68).

On December 26, 2018, under the terms of the Pawn Agreement between plaintiff and TitleMax, Mr. Stein obtained $100 from TitleMax and pledged his car as collateral. In all, plaintiff agreed to pay $134.51 to TitleMax by January 25, 2019. (Pawn Agmt. [8-1], at 62.) The Pawn Agreement's TILA disclosures, which were calculated based upon the assumption that plaintiff would repay on the maturity date of January 25, 2019,[4] provide as follows:

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	Amount Financed	Total of Payments
The cost of your credit rates as a yearly rate.	The dollar amount the credit will cost you.	The amount of credit provided to you or on your behalf.	The amount you will have paid after you have made all payments as scheduled.
170.23%	$16.51	$118.00	$134.51

> Section 3 states that "[t]he Truth-in-Lending disclosures provided above assume that you will pay all amounts owing hereunder on the Maturity Date." (Pawn Agmt. [8-1], at 63.)

(Id. at 62-63.) In addition, the Pawn Agreement expressly notes the following:

> **Security:** You are giving a security interest in the Vehicle described above.
>
> **Lien Filing Fee:** $18.00
>
> **Prepayment:** If you pay off early, you will not be entitled to a refund of part of the finance charge.

(Id. at 62.)

***3** Further, the Pawn Agreement's TILA disclosures itemized the amount financed like this:

Itemization of Amount Financed:	
Amount given to you directly:	$100.00
Plus: Amount paid on my account (Transaction # N/A)	$0.00
Plus: Amount paid to public official for Lien Filing Fee	$18.00
Plus: Amount paid to others on your behalf:	
Payment to: N/A	$0.00
Payment to:	N/A
Equals: Amount Financed/Principal Amount	$118.00

(Pawn Agmt. [8-1], at 63.)

In addition, Section 1 of the Pawn Agreement states that TitleMax charges a lien filing fee that "will not exceed any fee actually charged by the appropriate state to register such lien and will only be charged if [TitleMax] actually registers such lien." (Pawn Agmt. [8-1], at 63.)

Section 2 describes the Pawnshop Charge like this:

> The Pawnshop Charge for the initial 30-day period of the Pawn Transaction is 13.9900% of the principal amount advanced, with a minimum Pawnshop Charge of $10.00 for such period. The Pawnshop Charge shall be deemed earned, due, and owing as of the Pawn Date [i.e., December 26, 2018].... The Annual Percentage Rate ("APR") for the initial 30-day period of this Pawn, and each of the first two renewal periods thereafter, is 170.23%, and the amount to redeem the Vehicle during each such period is $134.51.

(Id.)

Section 3 of the Pawn Agreement provides that "[y]ou may prepay in full at any time without additional charge, fee or penalty. If you prepay the Pawn in full, then you will not be entitled to a rebate and/or refund of any part of the Pawnshop Charge of this Pawn." (Pawn Agmt. [8-1], at 63.) In other words, whether plaintiff

paid back his pawn on the second, fifth, or thirtieth day, he agreed to pay the same amount of Pawnshop Charges ($16.51) to TitleMax. Further, Section 3 of the Pawn Agreement gave plaintiff the opportunity to rescind the agreement "by the close of business on the business day following the date of [the] Agreement." (Id.)

On December 31, 2018, plaintiff returned to TitleMax to repay his pawn. He paid $134.51, leaving an account balance of $0. (Ver. Ans. Counterclaim ¶ 10 [8-1], at 55; see also Pawn Agmt. § 1 [8-1], at 63.) In the intervening four days between the date of the pawn and plaintiff's payment —between the day after Christmas and New Year's Eve—TitleMax had not yet recorded the lien on plaintiff's car title with the Georgia Department of Revenue. (Ver. Ans. Counterclaim ¶ 11 [8-1], at 55.) Due to plaintiff's right to rescind the agreement within one business day, TitleMax had only one full business day (Friday, December 28, 2018) to record the lien before plaintiff returned to repay the pawn.

On January 14, 2019, TitleMax received a handwritten letter from plaintiff's counsel, purporting to provide notice of a dispute and an opportunity to cure under Section 11 of the Pawn Agreement. (Ver. Ans. Counterclaim ¶ 13 [8-1], at 55.) Like the allegations made in the Complaint, the letter complained of being charged $18 for a lien that was not recorded on plaintiff's car title and being charged interest on the $18 lien fee. (See Jan. 14 letter, filed as Ex. D to Ver. Ans. [8-1], at 73-75.) The next day, TitleMax acknowledged receipt of the letter and indicated, among other things, that it would investigate plaintiff's dispute. (Ver. Ans. Counterclaim ¶ 14 [8-1], at 55; see also Jan. 15 letter, filed as Ex. E to Ver. Ans. [8-1], at 76-77.) On January 31, 2019, TitleMax wrote plaintiff's counsel, indicating that it had completed its investigation. (Ver. Ans. Counterclaim ¶ 15 [8-1], at 55; see also Jan. 31 letter, filed as Ex. F to Ver. Ans. [8-1], at 78-80.) TitleMax explained that the Pawnshop Charges became due and owing on the date of the pawn regardless of early payment. (Id.) Nevertheless, in what TitleMax now calls a good faith effort to resolve the dispute, it refunded the $18 lien fee to plaintiff, though disclaiming any obligation to do so. (Id.) TitleMax sent plaintiff the $18 refund check directly, via certified mail, and he signed for it. (Ver. Ans. Counterclaim ¶¶ 24-25 [8-1], at 56; see also certified mail receipt [8-1], at 81.)

***4** On February 5, 2019, plaintiff filed the aforementioned case in the State Court of DeKalb County, Georgia. He filed the instant one-count Complaint alleging a non-specified TILA violation three days later. On February 11, 2019, plaintiff's counsel returned the $18 check to TitleMax as "uncashed and unacceptable." (Ver. Ans. Counterclaim ¶ 26 [8-1], at 57; see also Feb. 11 letter, filed as Ex. H to Ver. Ans. [8-1], at 92-94.)

II. ANALYSIS

A. Rule 12(b)(1)

When a defendant challenges a plaintiff's standing by bringing a Rule 12(b)(1) motion, the plaintiff bears the burden to establish that jurisdiction exists. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).[5] "A plaintiff seeking to establish Article III standing must satisfy three elements." Albu v. Home Depot, Inc., No. 1:15-CV-00412-ELR, 2016 WL 1169196, at *6 (N.D. Ga. Mar. 4, 2016).

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61 (citations omitted). "All three elements are an 'irreducible constitutional minimum,' and failure to show any one results in a failure to show standing." Koziara v. City of Casselberry, 392 F.3d 1302, 1305 (11th Cir. 2004) (quoting Lujan, 504 U.S. at 560). Moreover, as the Supreme Court recently clarified, injury to a legal interest must be "concrete" as well as "particularized" to satisfy the injury-in-fact element of standing. Spokeo, 136 S. Ct. at 1547. To be "concrete," an injury "must actually exist," that is, it must be "real, and not abstract." Strubel v. Comenity Bank, 842 F.3d 181, 188 (2d Cir. 2016) (quoting Spokeo, 136 S. Ct. at 1547.)

5 The standing doctrine stems from Article III of the Constitution, which limits the judicial power of federal courts to "actual cases or controversies." Spokeo v. Robins, 136 S. Ct. 1540, 1547 (2016). "The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." Id.

Congress enacted the TILA "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 credit billing and credit card practices." 15 U.S.C. § 1601. Because the TILA is a remedial consumer protection statute, it should be construed liberally in favor of the consumer. Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 707 (11th Cir. 1998). The TILA accomplishes this goal by mandating the disclosure of important terms like the APR and finance charge and by providing guidance about how those terms should be calculated. Of interest here is section 1605(d)(1)'s stipulation that creditors may exclude lien filing fees from the finance charge so long as the fees and charges are "prescribed by law" and "actually are

or will be paid to public officials....” 15 U.S.C. § 1605(d)(1).

***5** Plaintiff challenges the accuracy of TitleMax's TILA disclosures, which stated that his loan's APR was 170.23% and that his finance charge was $16.31. The alleged inaccuracy resulted from TitleMax listing the amount financed as $118, which included the $18 lien filing fee that was never remitted yet fully paid by plaintiff when he repaid the loan. Because TitleMax never remitted the $18 to record the lien and collected the fee, plaintiff argues that the $18 should have been included in the finance charge. If the $18 had been included in the finance charge, then the finance charge and APR sections of the initial disclosures would have been different. Essentially, plaintiff argues that events occurring after he signed the agreement, i.e., his repayment of the full $134.51, including the $18 filing fee, and TitleMax's failure to remit the fee to record a lien, retroactively rendered the initial disclosures inaccurate and resulted in a TILA violation.

Tempted by plaintiff's desire to focus on events that occurred after the agreement was signed, TitleMax makes several arguments that challenge plaintiff's standing to sue, primarily arguing that plaintiff suffered only a procedural harm and not a concrete injury in fact. (Def's Mem. [8-1] 12-19; Reply 9-14.) Although the undersigned declines to join the parties in their venture into standing jurisprudence, the following observations are germane.

TitleMax's argument that its failure to record a lien in no way harmed plaintiff overlooks plaintiff's allegation that he paid an $18 lien filing fee plus interest for a service that was never performed under an agreement that said he would only be charged a lien filing fee if TitleMax actually registered a lien. The fact that plaintiff is out $18 plus interest is an actual, factual, concrete, and particularized injury. The question here is not whether plaintiff has alleged a potential injury but whether plaintiff has alleged an injury that is also a violation of the TILA.

Further, plaintiff contends that both the stated APR and finance charges were rendered inaccurate or misleading due to TitleMax's collection of this fee. The mandate to accurately disclose the APR and finance charge serves to protect a consumer's concrete interest in avoiding the uninformed use of credit, which is a core objective of the TILA. See Strubel, 842 F.3d at 190-91 (noting that deprivation of a core TILA right gives rise to a risk of real harm to the consumer's concrete interest in the informed use of credit). Because there is a “real risk of harm” stemming from inaccurately stating the interest rate and financing charge, plaintiff has a concrete interest in not being deceived or misled as to the terms of the credit agreement. See id.

TitleMax also argues that its attempt to refund the $18 lien fee effectively cured any harm that plaintiff suffered. Not so.

Plaintiff paid interest on the $18, and if TitleMax indeed violated the TILA, plaintiff might be entitled to statutory damages in excess of $18. Again, the question here is whether plaintiff's alleged harm falls within the scope of the protections afforded by TILA's mandate for accurate, conspicuous, and candid initial disclosures.

B. Rule 12(b)(6) and Plaintiff's TILA Claim

In determining whether a complaint states a claim upon which relief can be granted, courts accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. Clark v. Riley, 595 F.3d 1258, 1264 (11th Cir. 2010). A complaint must allege facts that, if true, "state a claim to relief that is plausible on its face," i.e., the allegations must "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted). The plausibility standard requires that a plaintiff allege sufficient facts "to raise a reasonable expectation that discovery will reveal evidence" that supports the plaintiff's claim. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007).

***6** The TILA mandates that the APR and finance charge should be clearly and conspicuously disclosed in accordance with regulations drafted by the Federal Reserve Board. 15 U.S.C. § 1604. The applicable regulations (referred to as "Regulation Z") required TitleMax to make written disclosures of specific details (e.g., APR and finance charge) that accurately reflect the terms of the legal obligations between the parties. 12 C.F.R. § 1026.17(a)(c); Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114, 1121 (9th Cir. 2009). Such disclosures are required in order to make the agreement accessible to the consumer. Rossman v. Fleet Bank, 280 F.3d 384, 389 (3d Cir. 2002). Furthermore, the accuracy of the representations contained in the disclosures is measured at the time those representations are made. Id. at 391; see also Nash v. First Fin. Sav. & Loan Ass'n, 703 F.2d 233, 239 (7th Cir. 1983); Scroggins v. LTD, Inc., 251 F. Supp. 2d 1277 (E.D. Va. 2003). Here, the allegations fail to show that the Pawn Agreement's disclosures were a literally false representation of the parties' legal obligations at the time of signing. Unlike cases that plaintiff cites where the creditor assessed a fee in excess of the amount the state charged for the service, [6] at the time TitleMax made the disclosure, the $18 fee was an accurate statement of the amount charged by the state of Georgia. Recording a Lien and Security Interest on a Title, Georgia Department of Revenue (last visited July 16, 2019) https://dor.georgia.gov/recording-lien-and-security-interest-title.

6 See e.g., In re Fryer, 183 B.R. 322 (S.D. Ga 1995) (violation of TILA where defendant charged plaintiff $13.00 over the actual cost of recording a title lien).

The TILA's accuracy mandate bars not only literal falsities, but also misleading statements. Rossman, 280 F.3d at 391 (citing Smith v. Chapman, 614 F.2d 968, 977 (5th Cir. 1980)).[7] For example, in Rossman, the credit card agreement at issue stated that the card had no annual fee. 280 F.3d at 387-89. There was, however, a change-of-terms provision buried in the contract that potentially allowed the creditor to alter the terms of the agreement and impose a fee, which the creditor started doing about six months after the agreement was signed. Id. The Third Circuit concluded that the inadequately disclosed change-in-terms provision could have made the no-annual-fee statement misleading. Id. at 394-95.

7 The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions handed down before the close of business on September 30, 1981. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

Plaintiff does not allege and does not argue that the text of the Pawn Agreement was misleading in the way the Rossman agreement was misleading. At the time the Pawn Agreement was signed, it clearly stated the amount financed, itemized the lien filing fee, stated that the fee would only be charged if a lien was recorded, and disclosed the APR and finance charge based on the assumption that the pawn would be repaid on the maturity date of January 25, 2019.

Since plaintiff does not allege that the Pawn Agreement's disclosures were actually false or that its terms were a misleading representation of the parties' obligations at the time the agreement was signed, the question at issue then becomes a variation of a question that the drafters of both the TILA and Regulation Z contemplated and answered. That question is whether accurate and candid initial disclosures can retroactively be rendered inaccurate by subsequent events such as deviation from the terms of a contract.

Plaintiff insists that the answer is yes. But plaintiff's arguments in support of that answer run into a thicket of obstacles, the most formidable being the plain language of section 1634 and the accompanying regulations. Section 1634 of the TILA states that "if information disclosed in accordance with [the TILA] is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures the inaccuracy resulting therefrom does not constitute a violation of ... [the TILA]." 15 U.S.C. § 1634 (emphasis added). Likewise, 12 C.F.R. § 1026.17 states that if "a disclosure becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures, the inaccuracy is not a violation of [the general disclosure requirements]."

***7** District courts have disagreed about the scope of section 1634's subsequent events safe harbor. For example, in

Scroggins v. LTD, the plaintiff signed a financing agreement when purchasing a car. 251 F. Supp. 2d at 1278-79. Under the agreement, the dealership collected $38.50 for registration fees. Id. Because the dealer had trouble finding financing, the dealership never paid the registration fee to the Department of Motor Vehicles and instead issued the plaintiff a series of temporary car tags while it continued to search for financing. Id. at 1279-80. When providing financing in line with the terms of the agreement proved untenable, the dealer asked the plaintiff to return the car having never remitted the $38 fee to the state. Id. Plaintiff sued arguing that both the dealership's failure to extend credit and its failure to remit the registration fee constituted violations of the TILA. Id.

Relying on section 1634, the Scroggins court found that the complaint failed to state a claim and dismissed it under Rule 12(b)(6). 251 F. Supp. 2d at 1281-82. The court reasoned that both the failure to extend credit and the failure to actually pay the registration fee were subsequent events that had no bearing on the accuracy of the initial disclosures. Id. Accurate disclosures do not become TILA violations because they were rendered inaccurate by subsequent events. Id.

Plaintiff cites authority to the contrary, see Travis v. Boulevard Bank N.A., 880 F. Supp. 1226, 1231 (N.D. Ill. 1995), and insists that immunity for inaccuracies caused by subsequent events is not to be given to the creditor when the creditor causes the events that result in the inaccuracies. In Travis, the creditor procured insurance against the plaintiff's default and improperly charged the plaintiff for the insurance. Id. 1229-30. The Travis court held that this deviation from the terms of the contract constituted a new extension of credit that required additional disclosures. Id. However, in dicta, the court addressed the creditor's argument that under the regulations interpreting section 1634 its unauthorized insurance purchase was a subsequent event that could not render the initial disclosures inaccurate. Id. at 1230. The district court concluded that creditors are not afforded protection for inaccuracies caused by subsequent events when the creditor causes the events that result in the inaccuracies. Id.

The Travis court reached this conclusion not by examining the language of section 1634 but by generalizing from a hypothetical provided in the staff commentary to Regulation Z. 880 F. Supp. at 1230. That example of a subsequent event involved a customer's failure to fulfill a promise to a creditor. Id. Because the commentary's example involved a plaintiff's action, the district court extrapolated the rule that a defendant's departure from a contract could not constitute a subsequent event. Id. The Travis court also expressed a fear that extending the subsequent event safe harbor to inaccuracies caused by the creditor would transform the TILA into a vehicle for fraud by creditors. Id.

The undersigned neither finds the Travis court's reasoning convincing nor shares the Travis court's fears about turning the TILA into a vehicle for fraud. As explained below, the TILA grants rights that are ancillary to common law breach of contract, fraud, and other state law remedies. It affords those seeking credit a right to be free from confusing, misleading, and inaccurate contracts, especially those contracts that would otherwise be binding. It is not a regulatory apparatus designed to govern the ins-and-outs of the credit industry. HR. Rep. No. 1040 (1967), as reprinted in 1968 U.S.C.C.A.N. 1962, 1963 ("The basic purpose of the truth in lending bill is to provide a full disclosure of credit charges to the American consumer. The bill does not in any way regulate the credit industry....") Adoption of the Travis court's rule would expand TILA's narrow focus on disclosures and read in a broader breach of contract remedy.

***8** While the commentary to Regulation Z details a plaintiff-caused subsequent event, section 1634 says that "any act, occurrence, or agreement subsequent to the delivery of the required disclosures ... does not constitute a violation of [the TILA]," and 12 C.F.R. § 1026.17(e) states that "if a disclosure becomes inaccurate because of an event that occurs after the creditor delivers the required disclosures, the inaccuracy is not a violation of this part...." It is difficult to square the statute's and regulation's use of broad and unqualified language with the Travis court's conclusion that protection for inaccuracies caused by subsequent events is not extended to the creditor when the creditor causes the events that resulted in the inaccuracy.

Plaintiff's reliance on Travis is not his only attempt to skirt the plain language of the TILA and Regulation Z. Plaintiff cites staff commentary for Regulation Z in support of his proposition that TitleMax improperly excluded the fee from the finance charge, and thereby inaccurately stated the finance charge because it never "actually" paid the fee. The commentary at issue addresses 12 C.F.R. § 1026.4(e)(1), which states that "fees prescribed by law that actually or will be paid to public officials" in order to record a lien "may be excluded from the finance charge." The commentary that plaintiff cites drops the phrase "or will be paid," and states that "[s]ums must be actually paid to public officials to be excluded from the finance charge...." Consumer Financial Protection Bureau's Official Staff Comment. on Reg. Z, Fed. Res. Reg. Serv. 6-6165.3 (F.R.R.S.), 2012 WL 311277, at *1 (June 1, 2018); see also Sur-reply [19] 13.

While the most natural reading of the commentary supports plaintiff's proposition that money must actually change hands in order for the fee to be excluded from the finance charge, the commentary's wording and its implication that a subsequent event can render an otherwise accurate finance charge inaccurate is difficult to square with not only the broad, unqualified language of section 1634's subsequent events safe

harbor but also with the phrase "or will be paid," which is found in both 12 C.F.R. § 1026.4(e)(1) and TILA section 1605(d)(1).

One must follow the chain of authorities all the way down the line, from the statute, to Regulation Z, to a staff commentary, in order to find support for plaintiff's position. The statue's and the regulation's use of "will be paid" show that the drafters contemplated situations where the fee would not be paid contemporaneously but paid at a later date. The wording of the statute and regulation do nothing to imply that a subsequent failure for money to actually change hands would retroactively render otherwise accurate initial disclosures inaccurate. Further, unlike the wording of the staff commentary, the statute's and Regulation Z's use of the phrase "or will be paid" fits more comfortably with section 1634's subsequent event safe harbor.

Not only does the plain language of the statute place an emphasis on the accuracy of disclosures, but also several circuit court decisions reiterate that the TILA focuses on whether initial disclosures were an accurate, conspicuous, and candid representation of the parties' legal obligations. See Rossman, 280 F.3d at 393-96; Rendler v. Corus Bank, 272 F.3d 992, 996 (7th Cir. 2001); De Mando v. Morris, 206 F.3d 1300, 1303 (9th Cir. 2000); Nash, 703 F.2d at 239.

The Rossman court's analysis provides an apt example that highlights the TILA's focus on the accuracy of disclosures. There, the plaintiff's TILA claim survived in part because the creditor, though it had advertised a no-annual-fee credit card, claimed it had the authority to impose an annual fee under the agreement's change-in-terms provision. 280 F.3d at 395. While the court found the creditor's failure to disclose the change-in-terms provision potentially misleading, it noted that a final determination on whether the no-annual-fee statement was actually misleading would turn on an assessment of the change-in-terms provision's wording. Id. If the change-in-terms provision did not permit the imposition of an annual fee, then the statement "no annual fee" would have been an adequate disclosure. Id. The court concluded that the plaintiff's TILA claim would survive only if the agreement permitted the creditor to impose the fee; if the agreement did not, then the original disclosure would have accurately reflected the parties' legal obligations, meaning that while the plaintiff might have had a potential breach of contract claim, she would not have had a claim under the TILA. Id.

***9** Here, the allegations detail what may constitute the breach of an agreement that otherwise conspicuously and candidly disclosed the credit terms. To conclude that TitleMax's alleged collection of a lien fee without recording a lien was not a subsequent event, would be to "impermissibly read into TILA a breach of contract remedy the statute does not

contain." Scroggins, 251 F. Supp. 2d at 1281. The Pawn Agreement accurately detailed the responsibilities of the parties, and unlike the creditor in Rossman, TitleMax did not rely on an undisclosed provision to dubiously collect an $18 fee.

Like the arguments in Scroggins, plaintiff's arguments do nothing to call into question the accuracy of the initial disclosures at the time plaintiff signed the agreement and focus solely on the effects that a subsequent event had on otherwise accurate initial disclosures. TitleMax permissibly passed a lien recording fee along to plaintiff and accurately disclosed the nature of the various fees and the details of the transaction. Under section 1634, potential deviation from those terms is generally irrelevant for the purposes of the TILA.

Plaintiff's final argument asks the Court to assume that TitleMax always intended to collect the filing fee regardless of the contract's provisions and never remit it to the state regardless of when plaintiff repaid the pawn. This argument has two flaws.

First, the Complaint neither explicitly alleges that TitleMax intended to impose a lien fee for a lien that it never intended to file nor does it contain allegations that would support such an inference. While the Court must make reasonable inferences in plaintiff's favor, it does not have to adopt plaintiff's inference. See Iqbal, 129 S. Ct. at 1949 (stating that allegations must allow court to draw reasonable inference that defendant is liable for misconduct alleged). Given the threadbare allegations in the Complaint, the nature of TitleMax's business, and the peculiar timing of the underlying events, the undersigned is reluctant to infer the existence of a dubious scheme and assume that TitleMax was always acting with questionable intentions.

Second, even if plaintiff were allowed to amend the Complaint to add details about TitleMax's intent, his claim would still fail because a creditor's undisclosed intent to act inconsistent with its disclosures is irrelevant in determining the sufficiency of those disclosures. In re Capital One Bank Credit Card Interest Rate Litig., 51 F. Supp. 3d 1316, 1348 n.292 (N.D. Ga. 2014), as corrected (Nov. 3, 2014), aff'd sub nom. Barker v. Capital One Bank (USA), N.A., 622 F. App'x 894 (11th Cir. 2015) (citing Hauk v. JP Morgan Chase Bank USA, 552 F.3d 1114, 1122 (9th Cir. 2009)); but see Rossman, 280 F.3d at 396-400.

While there are sound reasons to conclude that intent is irrelevant, not all courts have agreed. In fact, the Rossman court deviated from its sharp focus on disclosures and, in the last portion of the opinion, concluded that a disclosure that is adequate when viewed in isolation could still be misleading, and thereby give rise to a TILA claim, if the creditor's undisclosed intent was inconsistent with its disclosure. Rossman, 280 F.3d at 400.

The undersigned disagrees with this conclusion. The Rossman court seemed particularly motivated by the concern about people opening credit card accounts, carrying a balance that they could not easily pay off, and then having a fee imposed on them without being able to pay off the account and close it. See id. at 397-99. The concern of trapping someone in an agreement and subjecting them to a reoccurring annual fee is not present here. More problematic is the fact that the Rossman court's conclusion on intent moves the focus off of disclosures and the terms of the agreement and expands the scope of the TILA without reconciling its conclusion with section 1634.

***10** The Ninth Circuit rejected Rossman's conclusions on intent in Hauk, finding that a creditor's future intent was irrelevant. 552 F.3d at 1119. The plaintiff in Hauk alleged that Chase had offered him a promotional interest rate on a balance transfer that it never intended to honor because Chase knew at the time it sent him the agreement that he no longer qualified for the offer. Id. at 1118-20. While Chase may have breached the credit agreement by imposing a higher interest rate, the injury that the plaintiff suffered neither resulted from a lack of TILA disclosures nor gave rise to a claim under the TILA. Id. at 1120-21. The Hauk court reasoned that while an inaccurate disclosure that itself breaches a credit agreement may also violate the TILA, the breach of a credit agreement based on conduct independent of the disclosure does not necessarily give rise to a TILA claim. Id. To support that holding, the Hauk court noted that the legislative history and other circuit court opinions indicate that the TILA does not in any way regulate the credit industry. Id. That is, it "does not substantively regulate consumer credit but rather requires disclosures of certain terms ... before consummation of a consumer credit transaction." Id. at 1120 (quoting Rendler v. Corus Bank, 272 F.3d 992, 996 (7th Cir. 2001)). The TILA's basic purpose is to provide full and widespread disclosure of important credit terms. S. Rep. 100-259, at 3 (1987), as reprinted in 1987 U.S.C.C.A.N. 3936, 3938; H.R. Rep. No. 1040 (1967), as reprinted in 1968 U.S.C.C.A.N. 1962, 1963.

While the Hauk court does not address section 1634's subsequent events safe harbor, the Hauk court's conclusion that the TILA provides a remedy ancillary to breach of contract and that intent is irrelevant aligns with section 1634's broad language. The Rossman court neither reconciled its reasoning with section 1634 nor the TILA's legislative history. Thus, the Hauk court's finding that intent is irrelevant is better aligned with the TILA's language, the legislative history, and much of the existing case law.

Given that plaintiff's arguments and allegations focus solely on the effects of subsequent events and TitleMax's intent, allowing plaintiff to amend the Complaint would be a futile attempt to circumvent the TILA's plain language and to impermissibly expand the scope of the

TILA's protections. See Patel v. Ga. Dep't BHDD, 485 F. App'x 982, 983 (11th Cir. 2002) (per curiam) (noting that futility justifies the denial of leave to amend where the complaint as amended would still be subject to dismissal). Moreover, "[f]iling a motion is the proper method to request leave to amend a complaint." Long v. Satz, 181 F.3d 1275, 1279 (11th Cir. 1999) (per curiam). A motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of the proposed amendment. Id. Thus, when a request for leave to amend is included only in a memorandum filed in opposition to a motion to dismiss, and the request fails to attach the proposed amendment or set forth the substance of the proposed amendment, a district court does not abuse its discretion in denying plaintiff leave to amend. Id.; see also Rosenberg v. Gould, 554 F.3d 962, 967 (11th Cir. 2009) (district court did not abuse its discretion in denying request for leave to amend where the request was merely included in a footnote and did not "describe the substance of [the] proposed amendment"). Here, plaintiff requested leave to amend only in his Response and neither set forth the substance of a proposed amendment nor attached a copy of a proposed amendment. (See Resp. 26.) Thus, the undersigned **RECOMMENDS** that plaintiff's request to amend the Complaint be **DENIED.**

Further, because plaintiff's alleged harm lies beyond the scope of the TILA's coverage, the undersigned **REPORTS** that plaintiff has failed to state a claim and **RECOMMENDS** that Defendant's Motion to Dismiss or Stay Complaint [8] be **GRANTED** and that plaintiff's TILA claim be **DISMISSED**.

III. CONCLUSION

For the reasons explained above, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss or Stay Complaint [8] be **GRANTED** and that this case be **DISMISSED**.

SO RECOMMENDED, this 25th day of July, 2019.

All Citations

Not Reported in Fed. Supp., 2019 WL 5549265

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