PREPARED BY THE COURT

CITIBANK N.A., Plaintiff(s), vs. SHALMAR MCKENZIE, Defendant(s).	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY Docket No: MON-DC-6506-24 Civil Action **ORDER**

THIS MATTER having been brought before the Court by way of Motion to Dismiss filed by Ballard Spahr LLP, attorneys for Plaintiff Citibank, N.A., and the Court having considered the pleadings submitted, having heard oral argument, and for good cause shown;

IT IS on this **18th** day of **December ,** 2024, **ORDERED** that;

1. Citibank's motion to dismiss is and be **GRANTED**.
2. The counterclaim filed by defendant Shalmar McKenzie is hereby

DISMISSED, with prejudice.

ORDERED that a copy of this order shall be deemed effectuated upon all parties upon its upload to eCourts. Pursuant to Rule 1:5-1(a), movant shall serve a copy of this Order upon all parties not electronically served within seven (7) days of the date of this Order.

/s/ *Gregory L. Acquaviva*
Hon. Gregory L. Acquaviva, J.S.C.

Statement of Reasons

Citibank seeks to recover credit card debt from Shalmar McKenzie. McKenzie filed a counterclaim alleging Citibank violated 12 CFR § 1026.51 – the so-called "Ability to Pay" provision of the Truth in Lending Act (TILA). Citibank moves to dismiss the counterclaim because there is no private right of action for this alleged violation and, alternatively, because the counterclaim is time barred. This court agrees.

Motion to Dismiss

On a Rule 4:6-2(e) motion, the court "must accept as true all factual assertions in the complaint" and accord the non-movant every reasonable inference. Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008). The court must only consider "the legal sufficiency of the alleged facts apparent on the face of the challenged claim." Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). "The court may not consider anything other than whether the complaint states a cognizable cause of action." Ibid.

TILA Right of Action

TILA encompasses broad consumer protections by "imposing mandatory disclosure requirements on those who extend credit to consumers." Mourning v. Family Publication Serv., 411 U.S. 356, 363 (1973). Thus, TILA protects borrowers "from unscrupulous creditor practices," Beneficial Fin. Co. v.

Swaggerty, 86 N.J. 602, 606 (1981), by assuring meaningful disclosure of credit terms empowering consumers to comparison shop, make informed choices, and guard against unfair practices. See Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412 (1998).

Among TILA's requirements is 15 U.S.C. § 1665e – the "Ability to Pay" provision – which requires card issuers to consider "the ability of the consumer to make the required payments."

That statutory provision is codified under 12 CFR § 1026.51, which requires lenders to reasonably ensure borrowers' repayment ability by examining, among other things, their assets and debt-to-income ratio. The regulation too requires lenders to enact reasonable policies to such ends.

McKenzie now asserts Citibank violated Section 1026.51 by failing to enact necessary policies and ensuring an ability to repay the credit.

Private rights of action under TILA, however, are limited to those permitted by 15 U.S.C. § 1640(a). Indeed, "Congress intended that [TILA] be enforced primarily by administrative agencies" – not private citizens. Jordan v. Montgomery Ward & Co., 442 F.2d 78, 81 (8th Cir. 1971). That is evident in Section 1640(a)'s plain text, authorizing civil causes of actions only for violations of 15 U.S.C. §§ 1631-1651, 1666, and 1667. Dispositive here is Section 1640(a)'s omission of Section 1665e in its list of privately enforceable terms.

Here, again, Mckenzie proceeds under 12 CFR § 1026.51, which is authorized by Section 1665e. The Ability to Pay provision is outside the scope of civil liability expressly delineated by Section 1640(a).

Where a question of statutory interpretation is posed, courts "begin with the statute's plain language – our polestar in discerning the Legislature's intent." L.W. v. Toms River Reg'l Schs. Bd. of Educ., 189 N.J. 381, 400 (2007) (Zazzali, C.J.). "If the language is plain and clearly reveals the statute's meaning, the [c]ourt's sole function is to enforce the statute according to its terms." Frugis v. Bracigliano, 177 N.J. 250, 280 (2003).

As here, plain statutory language "should be given its ordinary meaning." Merin v. Maglaki, 126 N.J. 430, 434 (1992). Thus, a court's function is not to "rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language." O'Connell v. State, 171 N.J. 484, 488 (2002); accord Craster v. Bd. of Comm'rs, 9 N.J. 225, 230 (1952) (observing it is not judiciary's function to "write in an additional qualification which the Legislature pointedly omitted").

Section 1640(a) unambiguously permits recovery for violations of only: "[15 USCS §§ 1631 et seq.], including any requirement under section 125 [15 USCS § 1635], subsection (f) or (g) of section 131 [15 USCS § 1641], or chapter 4 or 5 of this title [15 USCS §§ 1666 et seq. or 1667 et seq.]" Again, the Ability to Pay

provision of Section 1665e is notably omitted. Put simply, Section 1640(a)'s inclusion of certain sections appropriate for a private right of action suggests the exclusion of others – expression unius est exclusion alterius. See Evans v. Atlantic City Bd. of Educ., 404 N.J. Super. 87, 92 (App. Div. 2008) (collecting cases). It is not this court's role to broaden civil liability expressly proscribed by Congress.

Federal and state courts agree that causes of action not expressly authorized by Section 1640(a) are barred. See Jordan, 442 F.2d 78, 81 ("[I]t was the intent of the Congress not to provide private civil relief for violations of the credit advertising provisions."); see also McCabe v. Eureka, 664 F.2d 680, 682 (8th Cir. 1981) (absence of express right of action in Section 1640 is "implicit manifestation of an intent to deny such a remedy."); Fid. Mortg. Corp. v. Seattle Times Co., 304 F. Supp. 2d 1270, 1273 (W.D. Wash. 2004) (holding no private cause of action for TILA's credit advertising provision); Smeyres v. Gen. Motors Corp., 660 F. Supp. 31, 35 (N.D. Ohio 1986) ("[N]o private cause of action exists under Part C of Subchapter I of the Truth In Lending Act."); Huntington Nat'l Bank, NA v. Perdue, 2024-Ohioo-945, ___ N.E.3d ___, n.1 (Ohio Ct. App. March 13, 2024 (same).

McKenzie failed to cite to any contrary authority and admitted at oral argument to being unaware of such. The court's research was similarly unavailing.

To be sure "New Jersey courts have been reluctant to infer a statutory private right of action where the Legislature has not expressly provided for such action."

R.J. Gaydos Ins. Agency, Inc. v. National Consumer Ins. Co., 168 N.J. 255, 271 (2001). Determining an implied private cause of action, "ultimately . . . turns upon the Legislature's intent." Warren Cty. Bar Association v. Bd. of Chosen Freeholders of Cty. of Warren, 386 N.J. Super. 194, 200 (App. Div. 2006). Here, the Legislature's intent is clearly manifested by omitting any reference to the Ability to Pay provision in Section 1640(a).

"A pleading should be dismissed if it states no basis for relief and discovery would not provide one." Flinn v. Amboy Nat'l Bank, 436 N.J. Super. 274, 286 (App. Div. 2014). TILA does not, as a matter of law, provide a basis for relief for an alleged Ability to Pay provision violation. No facts can change that.

Accordingly, Citibank's motion to dismiss the counterclaim is granted.

TILA – Statute of Limitations

Citibank further contends this action is time barred. Specifically, 15 U.S.C. § 1640(e) imposes a one-year statute of limitations on TILA claims from the "date of the occurrence of the violation." Here, the alleged violation was a failure to ensure McKenzie's ability to repay occurred in June 2019 when the account was opened – well more than a year prior to the filing of this complain in May 2024.

In opposition, McKenzie does not allege timeliness, but rather seeks to sidestep the statute of limitations by reframing the counterclaim as an affirmative defense. That effort must fail.

In Beneficial Finance Co. v. Swaggerty, the Court held TILA recoupment defenses used to reduce a plaintiff's award amount are not subject to the statute of limitations, but setoff claims for damages are. 86 N.J. at 609. The Court held creditors are "protected against affirmative recoveries under the TILA after expiration of the one-year period. Only the creditor who invokes the power of the court will be confronted by a recoupment defense arising from its own failure to comply with the TILA." Id. at 615 (emphasis added). The Court noted "the recoupment defense retains vitality if the main action is timely." Id. at 615.

Essentially, where a defendant's TILA counterclaim is used to offset damages, such is not time barred. But where, as here, a defendant seeks affirmative damages, such a claim is subject to the statute of limitations.

Here, McKenzie did not assert TILA as an affirmative defense, but instead asserted it as a counterclaim seeking damages. Although McKenzie now seeks to change course and asserts that the counterclaim is a recoupment defense, [1] the request for damages reveals otherwise.

Nevertheless, the issue is academic. Although the counterclaim is time barred, as discussed at length above, there is no civil liability under the Ability to Pay provision. McKenzie's TILA counterclaim is dismissed.

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[1]Amendments to pleadings must be made through formal motions to amend – not in an opposition brief. See Labree v. Mobil Oil Corp., 300 N.J. Super. 234, 236-37, (App. Div. 1997).