UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JESSICA POWNALL, individually, and on behalf of all others similarly situated,

Plaintiff,

v. Case No.: 1:10-CV-00894-JG

PNC BANK, a National Association, as successor in interest to NATIONAL CITY BANK.

Defendant.
_______________________________________ /

MEMORANDUM IN OPPOSITION TO DEFENDANT, PNC BANK'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

A. ANDERSON B. DOGALI- *Pro Hac Vice*
Fla. Bar No.: 615862
Email: adogali@forizs-dogali.com
BRIAN A. HOHMAN-*Pro Hac Vice*
Fla. Bar No.: 0764671
Email: bhohman@forizs-dogali.com
4301 Anchor Plaza Parkway, Suite 300
Tampa, FL 33634
Phone: (813) 289-0700
Fax: (813) 289-9435

MATTHEW R. WILSON (0072925)
DAVID P. MEYER & ASSOCIATES, CO., LPA
1320 Dublin Road, Suite 100
Columbus, Ohio 43215
Phone: (800) 827-6537
Fax: (614) 224-6066
Email: mwilson@dmlaws.com
Attorneys for Plaintiff, Jessica Pownall individually, and on behalf of all others similarly situated.

TABLE OF CONTENTS

STATEMENT OF ADHERENCE TO LR. 7.1

This Memorandum in Opposition to the Motion to Dismiss adheres to the page limitations set forth in Local Rule 7.1 of the Ohio District Court for the Northern District of Ohio for a Standard track. To date, the present action has not yet been assigned to a track pursuant to the differentiated case management system. The Court, however, in its Case Management Conference Scheduling Order, [DOC #14], recommended the Standard track.

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

OFFICIAL STAFF COMMENTARY TO 12 C.F.R. S. 226

FEDERAL RULES OF CIVIL PROCEDURE

STATE CASES

REFERENCE MATERIALS

BRIEF STATEMENT OF THE ISSUES

Whether, pursuant to Fed. R. Civ. P. 12(b)(6), Pownall has stated a claim upon which relief can be granted for Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, or violations of the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601, *et. seq*.

I. PRELIMINARY STATEMENT

Plaintiff, Jessica Pownall, on behalf of herself and others similarly situated ("Pownall") filed a class action against Defendant, PNC Bank, a National Association, as successor in interest to National City Bank ("PNC"), based on PNC's improper assessment of finance charges against Pownall and Class Members, despite timely payment, in violation of the Cardholder Agreement, TILA and the Federal Reserve Board's Regulations implementing TILA.

In sum, Pownall alleges that she paid, and PNC received, the full amount of her credit card balance on the due date as indicated on her Periodic Statement. Despite her timely payment and in contrast to the terms of the Cardholder Agreement ("Agreement") and Periodic Statement ("Statement")[1] (respectively, Exhibits A and B to the First Amended Complaint[2]), PNC imposed finance charges against Pownall's account, thus breaching the contract. PNC, however, points to language submerged within a paragraph relating to a different subject entitled "Crediting of Payments (Payments mailed through the United States Postal Service)," which states that when a cardholder pays their balance in full at a branch bank, like Pownall did, "crediting" of those payments *may* be delayed up to five (5) days. The use of the word "crediting" in this provision is crucial, as pursuant to other provisions of the Agreement and Statement, finance charges would be avoided if the full balance was "paid" or "received" on or before the due date.

To an ordinary cardholder, PNC's documents are conflicting, confusing and ambiguous. Thus, Pownall, and others like her, cannot be assessed finance charges when they make full credit card payments to PNC on the due date. PNC breached its contract with Pownall and others similarly situated.

Further, PNC violated the Truth in Lending Act ("TILA") because the Contract

[1] Together, the Agreement and Statement will be referred to as the "Contract Documents."
[2] Herein, the First Amended Complaint will be referred to as "Complaint" and cited as "Compl."

Documents contained contradictory and ambiguous terms and failed to clearly and conspicuously describe how finance charges would be assessed. Moreover, PNC assessed finance charges to Pownall that are contrary to TILA. PNC charged Pownall thirty-two (32) days of finance charges between the date she tendered payment and the date the payment was posted. PNC can only impose finance charges for the period between receipt of the payment and posting in compliance with TILA and 12 C.F.R. § 226.10. As such, Pownall states a cause of action for violation of TILA.

II. POWNALL'S ALLEGATIONS

Pownall, in the Complaint,[3] asserts four causes of action against PNC: Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing,[4] and two claims for violation of TILA, 15 U.S.C. § 1601, *et seq*. Pownall seeks damages and equitable relief for herself, and for a nationwide class of persons similarly situated. The Complaint alleges that Pownall made her periodic credit card payment in full at a PNC branch bank on the "due date," as reflected on her Statement. Despite the fact that Pownall timely made and PNC timely received her payment in full, PNC did not post that payment to her account until two (2) days later, resulting in finance charges for the full billing cycle, in violation of the Contract Documents. When viewing the allegations in a light most favorable to Pownall, Pownall states a cause of action for Breach of Contract and violations of the TILA. As such, the Court must deny PNC's Motion to Dismiss.

[3] Pownall's initial Complaint was filed on April 26, 2010. The First Amended Complaint is, in substance, identical to Pownall's original Complaint except as to the corporate identity of the Defendant. In the original Complaint, Pownall identified the Defendant as National City Bank, when at such time, National City Bank had merged with PNC Bank, a National Association. Thus, the proper Defendant is now PNC Bank, a National Association, as successor in interest to National City Bank.

[4] Pownall does not contest the dismissal of the Count for Breach of the Covenant of Good Faith and Fair Dealing.

III. ARGUMENT

A. Legal Standard in Reviewing a Motion to Dismiss

In deciding a motion to dismiss under Rule 12(b)(6), "the Court must construe the complaint liberally in a light most favorable to the non-moving party," and the Court must also, "accept as true all of the factual allegations contained in the complaint." *Bloch v. Ribar*, 156 F. 3d 673, 677 (6th Cir. 1998); *Erickson v. Pardus,* 551 U.S. 89, 93 (2007); Fed. R. Civ. P. 12(b)(6). The rules merely require "'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statements need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson,* 551 U.S. at 93; Fed. R. Civ. P. 8(a)(2). Furthermore, a court, when ruling on a motion to dismiss, can properly consider any exhibits attached to the complaint. *See Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007). Finally, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Bowman v. U.S.*, 512 F. Supp. 2d 1056, 1060-61 (N.D. Ohio 2007).

B. Pownall States a Cause of Action for Breach of Contract

In Ohio, to state a claim for breach of contract, Pownall must have alleged the following elements: (1) a contract existed, (2) Pownall fulfilled her obligations, (3) PNC unlawfully failed to fulfill its obligations, and (4) damages resulted from this failure. *See Rainworks Ltd. v. Mill-Rose Co*., 609 F. Supp. 2d 732 (N.D. Ohio 2009). As will be shown by Pownall *infra*, the Complaint sufficiently and specifically alleges each element necessary to state a claim for breach of contract. Compl. ¶¶ 39 - 46.

PNC does not deny that a contract existed; as a result, the first element of a breach of contract claim is satisfied. The Complaint satisfies the pleading requirements for the second element by alleging Pownall timely tendered her payment in full, thus complying with her obligations under the contract. Compl. ¶¶ 20-21. The Complaint further alleges that PNC failed to timely post Pownall's payment and improperly assessed thirty-two (32) days of finance charges against her account. Compl. ¶¶ 22-24. Therefore, the Complaint alleges PNC breached the contract, causing Pownall damages. Compl. ¶¶ 44-46. These allegations satisfy the pleading requirements for the third and fourth elements of the breach of contract claim. As a result, the Court should deny PNC's Motion to Dismiss Count I of the Complaint.

PNC fails in its attempt to argue that the Contract Documents plainly and unambiguously provided that (1) payments made at branch banks could take up to five (5) days to post and (2) if the payment was *received* by the due date but not *posted* until after the due date, the Defendant was entitled to assess finance charges for the full billing cycle. As set forth below, the Defendant's argument is flawed on many levels.

Contractual terms are ambiguous if the meaning of the terms cannot be deciphered from reading the entire contract or if the terms are reasonably susceptible to more than one interpretation. *See Money Station, Inc. v. Electronic Payment Serv., Inc.* 136 Ohio App. 3d 65, 71 (1999); *American Druggists' Ins. Co. v. Equifax, Inc*., 505 F. Supp. 66, 68-69 (S.D. Ohio 1980) (stating ambiguity exists where a contract is susceptible to two (2) or more reasonable interpretations). If a court determines that a contract provision is ambiguous, then it "may use traditional methods of contract interpretation to resolve the ambiguity, including drawing inferences and presumptions and introducing extrinsic evidence." *Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F. 3d 889, 893 (6th Cir. 1996).

Contractual ambiguity can arise through the language, terms and provisions of the contract, as well as the location of those terms within the contract. *See Schmidt v. Pacific Mut. Life Ins. Co.*, 268 Cal. App. 2d 735 (Cal. App. 1st Dist. Div. 3 1969) (finding placement of provision excluding coverage within a paragraph providing coverage rendered contract ambiguous). Also, it is well established under Ohio law that ambiguity within a contract is to be construed against the drafter. *See Dickson v. Ball Corp*., 849 F. Supp. 607, 611 (S.D. Ohio 1994) ("Under Ohio law, any doubt with respect to contractual terms is to be construed against drafter.") As will be discussed below, the language of the Contract Documents and the placement of certain language within those Contract Documents render the Contract Documents ambiguous. At a minimum, construing the ambiguity against the drafter and drawing all reasonable inferences in favor of the non-movant, it is clear that Pownall has stated a claim for Breach of Contract.

The Contract Documents attached to the Complaint and the provisions quoted within the Complaint demonstrate that Pownall complied with the contractual terms such as to avoid finance charges or, at a minimum, an ambiguity exists that must be interpreted in Pownall's favor. Specifically, the Complaint alleges that the Contract Documents both indicate in multiple provisions that if Pownall made her payment in full by the due date, which she did, then finance charges would be avoided. Compl. ¶¶ 10, 12-13. A common sense reading of the Contract Documents demonstrates that Pownall has stated a claim for Breach of Contract. *See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F. 3d 535, 545 (6th Cir. 2007) (quoting *Kellogg Co. v. Sabhlok*, 471 F. 3d 629, 636 (6th Cir. 2006) ("[C]ontracts must be construed consistent with common sense and in a manner that avoids absurd results.")). The provisions of the Agreement and Statement simply fail to inform cardholders how to avoid finance charges, and it is anything but clear how cardholders avoid finance charges when paying by the due date.

1. The Contract Terms are Ambiguous

In large part, the ambiguity here arises from the use of the terms “paid,” “received” or “receipt,” “post,” and “crediting” as these terms relate to payments of cardholder balances and PNC’s ability to assess finance charges.[5] The Contract Documents fail to define these terms, and as set forth in detail below, the distinction in the application of these terms is counterintuitive to a cardholder and creates contradictions and ambiguities within the various provisions of the Contract Documents.

PNC’s Memorandum demonstrates the ambiguities and contradictions that exist in the Contract Documents. In its Memorandum, PNC asserts that “receipt” means “the date payment would be posted” and then states, “payment would be posted within five days” of the date payment is “received” at the branch bank. This demonstrates the circular and illogical nature of PNC’s interpretation of the Contract Documents. Specifically, PNC’s argument demonstrates that the Contract Documents require posting of payments made at the branch bank as of the date the payment is made at the bank, or at a minimum, the use of the words “receipt,” “post,” and “credit” are ambiguous.

The Agreement itself fails to include any provisions that inform cardholders that PNC will impose finance charges when cardholders pay their balance in full on or before the due date.

[5] As defined by the Merriam Webster Dictionary, “receive”, for relevant purposes, means “to come into possession of; to act as a receptacle or container for.” *See* "receive." Merriam-Webster Online Dictionary. 2010. Merriam-Webster Online. 14 July 2010. http://www.merriam-webster.com/dictionary/receive.Whereas “post”, for relevant purposes, means “to transfer or carry from of original entry to a ledger; to make transfer entries in.” *See* "post." Merriam-Webster Online Dictionary. 2010. Merriam-Webster Online. 14 July 2010. http://www.merriam-webster.com/dictionary/post. Finally “credited” or credit is defined as “to enter upon the credit side of an account or “to place an amount to the credit of”. *See* "credited." Merriam-Webster Online Dictionary. 2010.Merriam-Webster Online. 16 July 2010. http://www.merriam-webster.com/dictionary/credited.

Specifically, the Agreement states:

> MINIMUM PAYMENT; APPLICATION OF PAYMENTS. You must **pay** at least the "Minimum Payment" each month by the due date shown on your Statement.....Although we **post** your payments as of the day we **receive** them as described on your Statement, your Credit Limit and/or Cash Advance Limit may not be restored for up to 15 days after we post your payment.
>
> WHEN FINANCE CHARGES WILL BE ADDED TO YOUR ACCOUNT.
>
> A) PURCHASES. We will charge finance charges on purchases from the date of each transaction. Finance charges will continue to be imposed until the date payment in full of the New Balance is **posted** to your Account. ***You may avoid finance charges on new purchases appearing on your current Statement if you paid in full the New Balance shown on your previous statement and your payment was received by the due date.***

Compl., ¶ 10 (emphases added). The Statement, in a Section titled, "Grace Period," states:

> Grace Period: **You may avoid finance charges on the Purchases portion of your New Balance if you paid** in full your previous New Balance by your due date.

Compl. ¶ 13 (emphasis added). Simply stated, cardholders reading the Agreement in conjunction with the Statement (specifically, the due date on the Statement and the Grace Period section on the back of the Statement) will believe that if they "pay" their balance in full on or before the due date specified on the Statement, then finance charges will be avoided. Because Pownall paid her balance in full by the due date, the language quoted above indicates PNC improperly imposed finance charges against Pownall.

The remaining relevant provision to the breach of contract discussion is found on the back of the Statement, in a section titled "Crediting of Payments (Payments mailed through the United States Postal Service),"[6] which states:

> **Crediting of Payments (Payments mailed through the United States Postal Service):** If payments are received by us at P.O. Box 856177, Louisville, KY 40285-6177 by 1:00 P.M. Eastern Time, they will be credited as of that day, excluding holidays. Payment received after 1:00 P.M. Eastern Time, will be

[6] This section of the Statement will be referred to herein as the "**U.S. Mail Section.**"

> credited as of the following day, excluding holidays. Do not send cash payments. The top portion of this statement must accompany your payment and only one payment can be inserted in the envelope provided. The payment address must be placed in the window of the envelope. Do not fold check or top portion of this statement. Paper clips, staples, tape, or other correspondence should not be included with your payment. If you make a payment at any other authorized banking location (branch) or if you fail to follow these payment instructions, the **crediting** of such payment to your account may be delayed up to 5 days. Payments made online, through the automated phone system, with a Service Representative, or through any other available channel will be credited in accordance with the disclosure given at the time payment is initiated for that payment channel.

Compl., ¶ 12 (emphasis added). This provision contains absolutely no wording related to finance charges at all. Given the other provisions of the Contract Documents relating to finance charges state that finance charges will be avoided if payment in full is "made," "paid" or "received," there is no reason for the cardholder to believe that a possible delay in "crediting" would result in a finance charge. In fact, PNC's entire argument that it was entitled to impose finance charges hinges on the language tucked in the middle of the above-quoted U.S. Mail Section. Although the title to this section, as well as the first six sentences of the section, indicate that the section applies only to payments by U.S. Mail and provides specific instructions for mailing such payments, it is here where PNC hides the lone disclosure that payments made at branch banks "may" be "credited" to the cardholders account up to five (5) days after payment is made. This lone statement, highly unlikely to be read by someone making a payment other than by U.S. Mail, directly contradicts the other stand-alone sections of the Agreement and Statement which indicates that when PNC receives payment in full by the due date (regardless of the manner of payment), finance charges will be avoided. At a minimum, these contract provisions create an ambiguity that must be construed against the drafter under Ohio law.

2. The Placement of the Provision PNC Relies Upon to Support Its Actions is Illogical and Inharmonious, Thus Rendering the Contract Ambiguous

Courts have found ambiguity in the inclusion of inharmonious phraseology within illogical and discordant provisions of a contract. *See Schmidt v. Pacific Mut. Life Ins. Co.*, 268 Cal. App. 2d 735 (Cal. App. 1st Div. 1969). In *Schmidt*, the court rejected the defendants argument that the contractual language was unambiguous. In so doing, the court found the contract was ambiguous because the language upon which the defendant was relying was located in an unexpected place. Interpreting an insurance contract, the court found that an exclusionary clause was not clear, conspicuous or plain where it was "inserted incidentally in a paragraph dealing the promised benefits," reasoning that the reasonable expectations of a policyholder were "disappointed by a literal application of contract language." *Id.* at 739-41. As a result, even though the particular words may have been clear, their location in an illogical and inharmonious location in the contract rendered the provision ambiguous and unenforceable. *Id.*

The same is true here. PNC placed the language regarding delaying of crediting of payments at branch banks within and abruptly following a detailed discussion about the mechanics of paying by U.S. Mail, within a section which is labeled to indicate application only to payments by U.S. Mail. This illogical positioning of language relating to potential delay in crediting of payments made at branch banks renders the Contract Documents ambiguous.

The late fee provision of the Agreement demonstrates further ambiguity. Specifically, the Agreement states: "Late Payment. We may charge a late fee to your Account if you do not pay at least the Minimum Payment by the due date." Compl., Exh. A. As reflected on Exhibit C to the Complaint, although PNC imposed a finance charge against Pownall's account, PNC did not impose a late fee. This lack of action by PNC indicates that, at least with respect to late fees, PNC found that when Pownall made her payment in full at the branch bank, she "paid" the

"Minimum Payment by the due date" and avoided a late fee. The inconsistent application of its own Contract Documents to Pownall's account demonstrates ambiguity, and breach of contract.

3. Trombley is Distinguishable Both Legally and Factually

The case cited by PNC on to support its argument that the Breach of Contract claim should be dismissed is *Trombley v. Bank of America Corp*., 675 F. Supp. 2d 266 (D. R.I. 2009). *Trombley* does not apply here.

In *Trombley,* Bruce Trombley made a credit card payment on a weekend due date at a branch bank, and the bank imposed a late fee, arguing that the contract documents in that case permitted the bank to delay posting of the payment up to five days.[7] *Id*. at 270. The plaintiff asserted a breach of contract claim, arguing the bank should not have imposed a late fee because he paid his bill on the due date. *Id*. at 270. In *Trombley*, the Bank of America monthly statement specifically directed credit cardholders to a section entitled simply "payment."[8] The "payment" section specifically described the various payment methods and the timeframe in which "crediting" would happen. The *Trombley* agreement clearly stated that finance charges would be imposed until the payment was credited. The district court ultimately dismissed the breach of contract count. *Id.* at 270.

PNC's alleged unlawful actions are factually and legally distinct from those in *Trombley*. Put simply, *Trombley* involved a completely different contract. PNC cannot simply take two (2)

[7] *Trombley* actually involved two plaintiffs; however, Trombley was the only plaintiff to make his payment at a branch bank. Thus, PNC bases its argument on this issue solely on the claims made by Trombley.

[8] Specifically, the statement in *Trombley* read: "We credit your payments as of the date received, if the payment is (1) received by 5 p.m. (Eastern Time); (2) received at the address shown in the upper left-hand corner of the front of your monthly statement; (3) paid with a check drawn in U.S. dollars on a U.S. financial institution or a U.S. dollar money order, and (4) sent in the return envelope with only the top portion of your statement accompanying it. Payments received after 5 p.m. on any day including the Payment Due Date, but that otherwise meet the above requirements, will be credited as of the next day. Credit for any other payments may be delayed up to five days." *Id*. at 270.

facially similar cases and say the result should be the same without examining the language of the contracts in each case. A closer look at the Contract Documents reveals key distinctions. In *Trombley*, the provision that addressed payments at branch banks was within a paragraph that was titled "When Your Payment Will be Credited To Your Account." Affidavit of Nancy J. Miller in Support of Bank of America Corp.'s Motion to Compel Arbitration and Stay Proceedings at 13, *Trombley v. Bank of America Corp.*, 675 F. Supp. 2d 266 (D. R.I. 2009) (Doc. 40). Here, the title to the U.S. Mail Section leads to an ambiguity because it gives no indication that the provision also applies to branch bank payments. As explained above, the U.S. Mail Section contradicts the "Grace Period" section of the Statement and the Agreement. Unlike *Trombley*, as described above, the Contract Documents here confusingly employed the undefined words "post," "receive" and "credit." Thus, because the Contract Provisions here are distinctly different than those in *Trombley*, both in the language of the Contract Documents as a whole and the placement of the relevant provisions, *Trombley* is inapplicable. Therefore, Pownall states a cause of action for Breach of Contract and the Court should deny PNC's Motion to Dismiss.

C. Pownall States a Claim for Violation of TILA Under Count III

In Count III of the Complaint, Pownall alleges PNC violated TILA because the language in the Agreement and the Statement is contradictory, confusing and wrongfully induces cardholders to believe finance charges will not be assessed if they tender a full credit card payment by its due date, regardless of the method of payment. Furthermore, Count III alleges specifically that the U.S. Mail Section is intentionally misleading, ambiguous and confusing, as it leads credit cardholders to believe that this section *only* applies to cardholders who are tendering a payment through mail. *See Jackson v. Check N Go of Illinois, Inc.*, 193 F.R.D. 544, 549 (N.D. Ill. 2000) ("No one reading the heading ("Method of Payment") or even skimming the start of the sentence would guess that the text contained anything about the security.”). As such, Pownall asserts that PNC violated TILA, 15 U.S.C. § 1601, *et seq.*, because the terms of when and how a payment can be made to avoid finance charges are not “clear and conspicuous,” as TILA requires.

1. TILA was Enacted to Ensure Clear and Conspicuous Disclosures to Consumers

TILA is the foundation of consumer credit legislation. *See* 15 U.S.C. § 1601, *et seq.* Congress enacted 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.” *Id.* at § 1601(a). TILA was designed to protect borrowers who are not on equal footing with creditors either in bargaining power or with respect to knowledge of credit terms. *See Thomka v. A.Z. Chevrolet, Inc*., 619 F. 2d 246 (3d Cir. 1980) (stating TILA passed to aid the unsophisticated consumer). Furthermore, TILA is remedial and must be “liberally construed in favor of borrowers.” *See Inge v. Rock. Fin. Corp*., 281 F. 3d 613, 621 (6th Cir. 2002). “A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor’s intent.” *In re Fox,* 391 B.R. 772, 776 (Bankr. N.D. Ohio 2008) (*quoting Smith v. Fidelity Consumer Discount, Co.*, 898 F. 2d 896, 898 (3d Cir. 1990)); *Gaydos v. Huntington Nat. Bank*, 941 F. Supp. 669, 672 n. 2 (N.D. Ohio 1996) (stating courts strictly construing TILA traditionally find liability for even the slightest failure to disclose required information).

In enacting TILA, Congress delegated broad authority to the Federal Reserve Board to promulgate the necessary regulations to render it effective. *See Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 365 (1973). The Federal Reserve Board took this direction and implemented TILA through "Regulation Z." *See* 12 C.F.R. § 226 *et seq*. The Federal Reserve Board additionally issued "Official Staff Commentary," interpreting both Regulation Z and TILA. *See Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 565 (1980). As recognized in *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981), a case relied upon by PNC, "absent some obvious repugnance to the statute, the Board's regulation implementing this legislation should be accepted by the courts, as should the Board's interpretation of its own regulation." In fact, Official Staff Commentary interpreting TILA or Regulation Z is dispositive, unless demonstrably irrational. *Ford Motor Credit*, 444 U.S. at 565.

2. Disclosures under TILA and Regulation Z

As alleged in the Complaint, the Contract Documents here completely fail to "clearly and conspicuously" disclose the manner in which finance charges will be applied against cardholder accounts. TILA generally requires all open-ended credit disclosures, such as those in this case, to be made "clearly and conspicuously." *See* 12 C.F.R. § 226.5(a)(1). "Conspicuous" refers to whether the disclosure draws the consumer's attention. *See Landreneau v. Fleet Fin. Group*, 197 F. Supp. 2d 551, 556 (M.D. La. 2002); *Burghy v. Dayton Racquet Club, Inc.*, --F. Supp.--, 2010 WL 728282, 5 (S.D. Ohio Feb. 26, 2010) (noting the UCC defines conspicuous as "so written, displayed, or presented that a reasonable person against [whom] it is to operate ought to have noticed it."). Specifically, the location of disclosures within the Contract Documents can violate TILA's "conspicuous" disclosure requirement where language is placed in a manner where attention cannot be reasonably expected to be called to it. *See Landrenau*, 197 F. Supp. 2d at 556 (denying defendant's summary judgment motion; finding general issues of material fact existed as to whether the location of information placed in the contract documents rendered the disclosure in violation of TILA's conspicuous requirement).

Furthermore, disclosures are not "clear" if a disclosure is capable of more than one plausible interpretation. *See Williams v. Empire Funding Corp.*, 109 F. Supp. 2d 352 (E.D. Pa. 2000); *In re Apgar*, 291 B.R. 665 (Bankr. E.D. Pa. 2003) (notice of right to cancel given to co-owner not "clear" as it could be read at least four (4) different ways). Moreover, contradictions that arise when the Agreement and Statement are read together can render the documents in violation of TILA's clear and conspicuous standard.[9]

Moreover, a principal tenet of TILA is to assure "meaningful" disclosures. *See* 15 U.S.C. § 1601, *et seq*. Consequently, the issuer must not only disclose the required terms, it must do so accurately. The accuracy demanded prohibits not only literal falsities, but also misleading statements. *See Rossman*, 280 F. 3d at 390-91; *Smith v. Chapman*, 614 F. 2d 968, 977 (5th Cir. 1980) ("A misleading disclosure is as much a violation of TILA as a failure to disclose at all.").

Finally, the Official Staff Commentary to Regulation Z requires consistent terminology in the initial and periodic disclosure statements, stating in part:

> Consistent terminology. Language on the initial and periodic disclosure statements must be close enough in meaning to enable the consumer to relate the 2 sets of disclosures; however, the language need not be identical.

Official Staff Commentary, 12 C.F.R. § 226.6. As the Court will see *infra*, the terms are not "*clear and conspicuous*" but rather, are confusing and misleading, and thus, in violation of TILA's requirements.

[9] *See Rossman v. Fleet Bank (R.I.) Nat. Ass'n*, 280 F. 3d 384 (3d Cir. 2002) (holding initial disclosures in a credit card transaction did not clearly and conspicuously disclose contract terms where an annual fee was imposed within months after the opening of the account despite the claim that there was no annual fee; such a disclosure implies that there will be no fee for at least a year); *Bryson v. Bank of New York*, 584 F. Supp. 1306 (S.D.N.Y. 1984) (denying motion to dismiss where credit card billing statement failed to comply with TILA requirements by failing to clearly advise cardholders that finance charges would be avoided only by payment of the full balance by the due date); *In re Ralls*, 230 B. R. 508 (Bankr. E.D. Pa. 1999).

3. *The Placement of the Language Governing Branch Bank Payments is Impermissibly Buried with a Section Titled Payments by U.S. Mail, Thus Violating TILA*

Creditors are not permitted, under TILA, to bury disclosures in paragraphs with illogical headings. *Jackson*, 193 F.R.D. 544, 549. In *Jackson*, the court found the defendant violated TILA by "burying" a "hidden" disclosure regarding security within a paragraph titled "Method of Payment." *Id.* Specifically, the court stated no one reading the heading "Method of Payment" or "skimming" the start of the sentence underneath that heading would "guess that the text contained anything about security." *Id.* at 549. *Landreneau* reached a similar finding, holding general issues of material fact existed as to the defendant's compliance, or lack thereof, with TILA's conspicuous requirement, based on the location of the particular disclosure in the contract. *Landreneau*, 197 F. Supp. 2d at 556.

Similarly here, PNC's placement of the branch bank payment instructions under a heading titled "Crediting of Payments (Payments Mailed through the United States Postal Service)" violates TILA because no reasonable cardholder either reading the title to the U.S. Mail Section or skimming the text of the section would guess that it applies to branch bank payments.

The U.S. Mail Section fails to clearly and conspicuously inform the cardholder that payment at a branch bank could result in finance charges, even where that payment is timely. The title of the provision, as well as the first six (6) sentences of that provision, clearly apply solely to payments by U.S. Mail and to any ordinary consumer, a logical reading of the Statement would *<u>not</u>* lead to the conclusion that payment at a branch bank could result in finance charges.

As discussed above, Pownall and other cardholders reading the Contract Documents here would believe that if they paid their balance in full on or before the due date, they would avoid a finance charge pursuant to the clear language of the Agreement and the Grace Period Section of the Statement. To an ordinary consumer like Pownall, the mere fact that payment was made by tendering a check to a branch bank on the due date would not result in a finance charge.

4. The Agreement and Statement do not "clearly and conspicuously" tell a cardholder how to avoid finance charges

As alleged in the Complaint and discussed *supra*, PNC's TILA disclosures in the Agreement and Statement are confusing and misleading in violation of TILA. As discussed *supra*, the terms "post," "receive," and "credited" are not defined in the Agreement or Statement, and the U.S. Mail Section of the Statement directly contradicts the Agreement and other sections of the Statement, including the Grace Period Section. The rationale supporting a finding that the Contract Documents are ambiguous equally applies to the ambiguous and misleading nature of those Contract Documents under TILA.

To reconcile the terms in the Agreement and Statement under TILA, PNC's TILA disclosures must meet an objective standard, providing the relevant information in a form that a "reasonable person" would understand. *Rendler v. Corus Bank, N.A.*, 272 F. 3d 992, 999 (7th Cir. 2001). The "sufficiency of TILA-mandated disclosures is to be viewed from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor." *See Cemail v. Viking Dodge, Inc.*, 982 F. Supp. 1296, 1302 (N.D. Ill.1997) (denying summary judgment; finding conflicts between the cardholder agreement and statement regarding payment of disputed amounts.)

As discussed more fully *supra*, even if ordinary consumers paying at a branch bank would be inclined to read the U.S. Mail Section, they would not find any language indicating finance charges would be imposed if payment was made at a branch bank on or before the due date. The confusing use of “credit,” “post,” “paid,” and “receive,” along with the obviously misleading title of the U.S. Mail Section, lead to the inescapable conclusion that the Contract Documents here violate TILA. From an objective viewpoint, a reasonable person would not understand how to avoid finance charges because of PNC’s use of these terms in its Agreement and Statement. Thus, to the “ordinary consumer” the terms are not “clear and conspicuous,” but are misleading and confusing and violate TILA disclosure requirements.

For these reasons, the terms in the Agreement and the Statement are not “clear and conspicuous” because the provisions cited *supra* lead the “ordinary consumer” to believe if they “pay” their balance in full, then they will avoid finance charges. *See* Compl., ¶¶ 10, 12, 13, 64. This confusion is compounded by the small font in the Agreement and Statement which is itself a violation of the TILA. *See* 12 C.F.R. 226.5a.

PNC, in bold letters, argues TILA does not require the creditor to disclose how payment should be made. *See* 12 C.F.R. §§ 226.6 and 226.7. To the contrary, TILA requires that if a creditor, such as PNC, specifies requirements for payment, then they must be “reasonable.” *See* Official Staff Commentary, 12 C.F.R. § 226.10(b)(2). While PNC specifies the method of payment, it places the consequences of not making a mailed payment in the section of the Statement specifically related to payments by mail. This practice is not “reasonable” as it does not inform cardholders of how they can avoid finance charges as they are not likely to read this section if they are not making payments by mail.

The confusion created by the terms in PNC’s Agreement and Statement, and PNC’s determination that Pownall’s payment does not warrant a late fee but warrants a finance charge, require denial of PNC’s dispositive motion. For the same reasons, it is premature for the Court to decide whether the terms of the Agreement and Statement are "confusing" because determining whether the TILA disclosures are "confusing" is a question of fact. *See King v. Long Beach Mortg. Co.*, 672 F. Supp. 2d 238, 250 (D. Mass. 2009) (stating ordinarily, whether TILA disclosures are confusing to the average consumer is a question of fact); *see also Peterson-Price v. U.S. Bank Nat. Ass'n*, 2010 WL 1782188 (D. Minn. May 4, 2010); *Griggs v. Provident Consumer Discount Co*., 503 F. Supp. 246, 250 (E.D. Pa. 1980). Even if the Court decides that this is an issue of law, at the very least, these provisions are misleading and confusing – which is a violation of TILA in and of itself. *See Rossman v. Fleet Bank (R.I.) Nat. Ass'n*, 280 F. 3d 384, 390-391 (3d Cir. 2002); *Gennuso v. Commercial Bank & Trust Co*., 566 F.2d 437, 443 (3d Cir. 1977) (recognizing violation based on misleading disclosure); *Smith v. Chapman*, 614 F. 2d 968, 977 (5th Cir. 1980) ("A misleading disclosure is as much a violation of TILA as a failure to disclose at all."). Thus, Count III states a cause of action under TILA and the Court must deny the Motion.

D. Count IV States a Cause of Action for Violation of TILA

In Count IV, Pownall alleges PNC violated TILA by unlawfully assessing finance charges in excess of those permitted by TILA and the Federal Reserve Board ("FRB"). *See infra.* Specifically, PNC improperly assessed finance charges against Pownall's account for the entire billing cycle, even though she paid her balance in full on the due date at a branch bank. Pownall asserts that, if PNC was permitted to assess finance charges at all, *at most*, TILA permits a maximum assessment of finance charges for only the two (2) days between the date she timely paid her balance in full and the date the payment was "credited." The Official Staff Commentary on this is abundantly clear and is completely dispositive of this issue. *See* Official Staff Commentary, 12 C.F.R. § 226.10(b)(3); *see Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565, 100 S. Ct. 790 (1980) ("Unless demonstrably irrational, [FRB] staff opinions construction the Act or Regulation should be dispositive."). In the Official Staff Commentary, 12 C.R.F. § 226.10(b)(3), the Federal Reserve Board instructs creditors as follows:

> If the creditor accepts a non-conforming payment (for example, payment at a branch office), when it had specified that payment be sent to headquarters, finance charges may accrue for the period between the receipt and the crediting of payments.

As this Commentary makes clear, PNC could only implement finance charges for the time period between the date of payment (here, June 6, 2009) and the date the Pownall's Statement reflects that payment was posted (June 8, 2009).

However, without providing any justifiable rationale for doing so, PNC argues it was permitted to impose a finance charge on the previous balance for the entire billing cycle. PNC, without proper support and in contradiction to the Official Staff Commentary, quoted *supra*, argues the Commentary does not prohibit a bank from imposing customary finance charges otherwise provided for in the Agreement when a payment is made on or before the due date at a branch bank. PNC's blanket statement (without legal support) that it can impose finance charges which fly in the face of dispositive Official Commentary cannot be accepted. PNC has failed to cite any case that permits creditors to summarily ignore the dictates of the FRB as provided in the Official Commentary. PNC's arguments are further contradicted by its actions as it considered Pownall's payment to be "payment in full" sufficient to avoid a late fee, but still assessed a finance charge for the full billing cycle.

At this stage in the proceedings, considering the allegations in the light most favorable to the non-movant, and in light of the Official Commentary, the Court must DENY PNC's motion as it relates to Count IV.

III. CONCLUSION

PNC's Agreement and Statement is littered with contradictory, misleading, confusing and ambiguous terms. When the Complaint is read in the light most favorable of Pownall, as it must be at this stage, it is clear that dismissal is not warranted. For all these reasons, PNC Bank's Motion to Dismiss should be denied.

Respectfully submitted,

___/s/ Brian Hohman____________

A. ANDERSON B. DOGALI- *Pro Hac Vice*
Fla. Bar No.: 615862
Email: adogali@forizs-dogali.com
BRIAN A. HOHMAN-*Pro Hac Vice*
Fla. Bar No.: 0764671
Email: bhohman@forizs-dogali.com
4301 Anchor Plaza Parkway, Suite 300
Tampa, FL 33634
Phone: (813) 289-0700
Fax: (813) 289-9435

MATTHEW R. WILSON (0072925)
DAVID P. MEYER & ASSOCIATES, CO., LPA
1320 Dublin Road, Suite 100
Columbus, Ohio 43215
Phone: (800) 827-6537
Fax: (614) 224-6066
Email: mwilson@dmlaws.com
Attorneys for Plaintiffs, Jessica Pownall individually, and on behalf of all others similarly situated.

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2010, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

___/s/ Brian Hohman____________

From: Hohman, Brian A.
Sent: Wednesday, August 04, 2010 5:06 PM
To: Marro, Fran
Subject: FW: Activity in Case 1:10-cv-00894-JG Pownall v. National City Bank Opposition

For some reason, you weren't on the service list. I'll call tomorrow. We are done!!!!

Thanks for your help.

Brian A. Hohman
Attorney

4301 Anchor Plaza Parkway, Suite 300
Tampa, FL 33634
T: 813.289.0700 F: 813.289.9435
E-mail: bhohman@forizs-dogali.com
Website: www.forizs-dogali.com

From: ohndecf@ohnd.uscourts.gov [mailto:ohndecf@ohnd.uscourts.gov]
Sent: Wednesday, August 04, 2010 5:07 PM
To: OHNDdb_NEF@ohnd.uscourts.gov
Subject: Activity in Case 1:10-cv-00894-JG Pownall v. National City Bank Opposition

U.S. District Court

Northern District of Ohio

Notice of Electronic Filing

The following transaction was entered by Hohman, Brian on 8/4/2010 at 5:06 PM EDT and filed on 8/4/2010

Case Name:	Pownall v. National City Bank
Case Number:	1:10-cv-00894-JG
Filer:	Jessica Pownall
Document Number:	21

Docket Text:
Opposition to [10] Motion to dismiss Plaintiff's First Amended Complaint filed by Jessica Pownall. (Hohman, Brian)

1:10-cv-00894-JG Notice has been electronically mailed to:

A. Anderson B. Dogali adogali@forizs-dogali.com

Anthony J. O'Malley ajomalley@vssp.com, dmkamp@vorys.com

Brian A. Hohman bhohman@forizs-dogali.com

David Polan Meyer dmeyer@dmlaws.com, docket@dmlaws.com

Marcel C. Duhamel mcduhamel@vorys.com, eadavis@vorys.com, jnflanders@vorys.com

Matthew R. Wilson mwilson@dmlaws.com

Maureen Haney Tracey mphaney@vorys.com, tmstanko@vorys.com

1:10-cv-00894-JG Notice has been delivered by other means to:

Christopher J. Meyer
Vorys, Sater, Seymour & Pease - Cleveland
2100 One Cleveland Center
1375 East Ninth Street
Cleveland, OH 44114

The following document(s) are associated with this transaction:

Document description:
Main Document

Original filename:
n/a

Electronic document Stamp:

[STAMP OHNDStamp_ID=875560366 [Date=8/4/2010] [FileNumber=4450456-0] [
2f4b9b3cae147deed93fafcb5f4c32b9809562ed9c4f9f8dc7a57c7410b22ce148d9fd
d77a492781dae3239398373cb73bf02857fdc5f0943aef6c283c6bd661]]