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SUNAE KIM, on behalf of herself and the putative class, Plaintiff, vs. PARIS BAGUETTE AMERICA, INC.; PARIS BAGUETTE USA, INC., PARIS BAGUETTE – BON DOUX, INC; and PARIS BAGUETTE FAMILY, INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET No. BER-L-20441-14 CIVIL ACTION **OPINION**

Argued: **May 29, 2015**
Decided: **May 29, 2015**

Honorable Robert C. Wilson, J.S.C.

Robert A. Solomon, Esq., appearing for the Plaintiff (Robert A. Solomon, P.C.).

Stephen G. Rinehart, Esq., admitted *pro hac vice*, appearing for the Defendants (Troutman Sanders, LLP; Amanda L. Genovese, Esq., on the brief).

INTRODUCTION

This matter arises from Defendants' allegedly improper printing of certain protected credit card information on sales receipts at some of its retail locations. Paris Baguette is a bakery chain with four stores operating in New Jersey, the first of which opened in 2007. The receipts in controversy were issued following sales at Paris Baguette's locations in Fort Lee, New Jersey; Palisades Park, New Jersey; and Manhattan, New York. Plaintiff claims that the receipts issued improperly contained the expiration date of the Plaintiff's credit card(s). Failure to omit this credit card information is claimed to be a violation of N.J.S.A. § 56:11-42, a section of the New Jersey

Fair Credit Reporting Act ("NJFCRA"), which prohibits the printing of certain card information on sales receipts. This statute provides:

> No retail sales establishment shall print electronically more than the last five digits of a customer's credit card account number or the expiration date of that credit card upon any sales receipt provided at the point of sale to the customer, except that the provisions of this section shall not apply to any sales receipt in which the sole means of recording the customer's credit card number is by handwriting or by an imprint or copy of the credit card.
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> N.J.S.A. § 56:11-42.

Plaintiff also alleges violations of the Truth-in-Consumer Contract, Warranty, and Notice Act ("TCCWNA"), which prohibits any retail seller from offering a customer or giving/displaying any "written … notice or sign … which includes any provision that violates any clearly established legal right of a consumer." N.J.S.A. § 56:12-15. These violations may entitle the Plaintiff, as well as any other members of the putative class, to statutory damages from $100 to $1,000, for each violation.

The facts of this matter are not in dispute by the Defendants at this time. Rather, Defendants move the Court for a dismissal pursuant to Rule 4:6-2(e), and argue that any remedies under the NJFCRA or the TCCWNA are not judiciable because they have been expressly preempted by an analogous federal statute. Specifically, Defendants argue that these claims are preempted by the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, et seq., as amended in 2003 by the Fair and Accurate Credit Transactions Act ("FACTA"). Accordingly, Defendants have moved this Court to dismiss the instant action for failure to state a claim upon which relief can be granted.

RULES OF LAW

I. Motions to Dismiss Pursuant to Rule 4:6-2(e).

On a motion to dismiss pursuant to R. 4:6-2(e), the Court must treat all factual allegations as true and must carefully examine those allegations "to ascertain whether the fundament of a

cause of action may be gleaned even from an obscure statement of claim. . . ." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). After a thorough examination, should the Court determine that such allegations fail to state a claim upon which relief can be granted, the Court must dismiss the claim. Id.

Under the New Jersey Court Rules, a Complaint may only be dismissed for failure to state a claim if, after an in-depth and liberal search of its allegations, a cause of action cannot be gleaned from even an obscure statement in the Complaint, particularly if additional discovery is permitted. R. 4:6-2(e); see Pressler, Current N.J. Court Rules, Comment 4.1.1. to Rule 4:6-2(e), at 1484 (2015) (citing Printing Mart, 116 N.J. at 746). Thus, a Court must give the non-moving party every inference in evaluating whether to dismiss a Complaint. See NCP Litigation Trust v. KPMG, LLP, 187 N.J. 353, 365 (2006); Banco Popular No. America v. Gandi, 184 N.J. 161, 165-66 (2005); Fazilat v. Feldstein, 180 N.J. 74, 78 (2004). The "test for determining the adequacy of a pleading [is] whether a cause of action is suggested by the facts." Printing Mart, 116 N.J. at 746. However, "a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Carbot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005).

II. Federal Preemption of New Jersey Law.

The power of the United States Congress to prohibit the governments of the States from regulating certain types of matters is a first principle of federalism, embodied in Article VI of the United States Constitution (the "Supremacy Clause"). The laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. "Thus, … [it is] settled that state law that conflicts with federal law is "without effect." Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992) (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)); see also

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819). A court's consideration of issues arising under the Supremacy Clause "starts with the assumption that the historic police powers of the States [are] not to be superseded by … Federal Act unless that [is] the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). "[T]he purpose of Congress is the ultimate touchstone" of preemption jurisprudence. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96 (1963)).

Federal law may preempt state laws in three ways: through either express preemption, implied conflict preemption, or field preemption. Hillsborough County, Fla., v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985). Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). "Express preemption applies where Congress, through a statute's express language, declares its intent to displace state law." Cosmas v. Am. Express Centurion Bank, 757 F. Supp. 2d 489, 495 (D.N.J. 2010) (citing Hillsborough County, Fla., supra, 471 U.S. 707)).

> "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation."
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> Cipollone, supra, 505 U.S. at 517 (citations and quotation marks removed.)

Alternatively, even in the absence of express congressional language preempting state regulation, courts may infer that Congress' intent was to preempt certain state laws by applying one of two rules of implied preemption.

> "[F]ield pre-emption [is] where the scheme of federal regulation 'is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict preemption [is] where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

> Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 362 (App. Div. 2004) (internal citations omitted).

In other words, state laws shall be preempted if those laws either actually conflict with the requirements of federal law, see Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 204 (1983), or also if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'"Burrell v. DFS Servs., LLC, Civ. No. 10-2076, 2011 U.S. Dist. LEXIS 21408 (D.N.J. Mar. 3, 2011) (citing Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153 (1982). However, these three categories of preemption are "anything but analytically air-tight." R.F. v. Abbott Labs., 162 N.J. 596, 618 (2000) (citations omitted). In adjudicating whether federal law has preempted state law, courts must engage in "a fact-sensitive endeavor, based on a court's review of 'fragments of statutory language, random statements in the legislative history, and the degree of detail of the federal regulation." Id. at 619.

"When construing an express preemption clause, a reviewing court must examine the "plain wording of the clause" to determine "Congress' pre-emptive intent." See Burrell, 2011 U.S. Dist. LEXIS 21408 at *16; see also Cipollone, 505 U.S. at 517. "A federal enactment expressly preempts state law if it contains language so requiring." See Burrell, supra, at *15.

Conflict preemption arises where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Gade v. Nat'l Solid Wastes Management Assoc., 505 U.S. 88, 98 (1992) (citations omitted). "Whether a state law stands as an obstacle to the accomplishment of a federal objective, requires a court to consider the relationship

between state and federal laws as they are interpreted and applied, not merely as they are written." Abbott Labs., 162 N.J. 596, 618 (2000) (internal citations omitted).

Field preemption applies where, "[a]bsent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[the] scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.' Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

Absent a federal enactment depriving this Court of jurisdiction to hear a claim arising under federal law, this "Court shall have original general jurisdiction throughout the State in all causes." N.J. Const. Art. VI, Section 3. Therefore, to the extent Plaintiff's state law claims are preempted by federal law, any related private cause of action arising under federal law may presumably still be brought before this Court. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other . . . ." Claflin v. Houseman, 93 U.S. 130, 136-137 (1876). The U.S. Supreme Court has adopted a presumption of concurrent jurisdiction, wherein they "have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." Tafflin v. Levitt, 493 U.S. 455, 458 (1990). "To give federal courts exclusive jurisdiction over a federal

cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction." Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990) (citing Tafflin, supra, 493 U.S. at 459-60). The Court in Yellow Freight also addressed the presumption that state courts had jurisdiction over federal claims unless expressly stated otherwise. "Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent." Yellow Freight, supra, 494 U.S. at 823. The Court provided a counter-example in a footnote:

> The Employee Retirement Income Security Act of 1974 — enacted just two years after the extensive amendments to the Civil Rights Act — illustrates this distinction in specifying that "[e]xcept for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter," but that "[s]tate courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section." 29 U. S. C. § 1132(e)(1); Act of Mar. 24, 1972, Pub. L. 92-261, § 4, 86 Stat. 104. See also statutes cited in Tafflin v. Levitt, 493 U.S. 455, 471 (1990) (SCALIA, J., concurring).
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> Yellow Freight, supra, 494 U.S. 820, at n. 3.

This State's concurrent jurisdiction is subject to the removal jurisdiction of the federal courts, insofar as "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Therefore, depending on the nature of Plaintiff's federal law claims, same may be brought before this Court following a dismissal of the state law claims, making a dismissal of the action with prejudice premature.

DECISION

The plain and unequivocal language of the FCRA, found at 15 U.S.C. § 1681t(b)(5)(a) indicates that Congress intended to expressly preempt state legislation regarding the truncation of credit card expiration dates printed on sales receipts. Indeed, section 1681t, entitled "Relation to State laws," provides:

> (a) In general. *Except as provided in subsections (b) and (c)*, this title [15 U.S.C.S. §§ 1681 et seq.] does not annul, alter, affect, or exempt any person subject to the provisions of this title [15 U.S.C.S. §§ 1681 et seq.] from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this title [15 U.S.C.S. §§ 1681 et seq.], and then only to the extent of the inconsistency.
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> 15 U.S.C. § 1681t(a) (emphasis added).

Thus, to the extent that Section 1681t allows for the States to regulate conduct with respect "to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft," that permission is limited only "to the extent that those laws are [consistent] with any provision of this title." Clearly, any conflict with the federal law requires the State law to yield. This permissive section notes that subsections (b) and (c) are exceptions to the general permissive rule. Accordingly, subsection (b) of section 1681t provides:

> (b) General exceptions. No requirement or prohibition may be imposed under the laws of any State—
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> …
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> - (5) with respect to the conduct required by the specific provisions of--
>   - (A) section 605(g) [15 U.S.C.S. § 1681c(g)] ….
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> 15 U.S.C. § 1681t(b)(5)(A). [1]

[1] Defendants also note for the Court that the legislative history of the FCRA indicates Congress' legislative intent to expressly preempt the particular regulations at issue in the NJFCRA and, perhaps, the TCCWNA. They cite the Fourth Circuit in Ross v. FDIC, 625 F.3d 808 (4th Cir. 2010):

The expressly preempted section, 15 U.S.C. § 1681c(g), provides:

> Truncation of credit card and debit card numbers.
>
> (1) In general. Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.
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> (2) Limitation. This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

As stated by the United States Supreme Court in Cipollone, 505 U.S. at 517, Congress' intent to preempt state regulation need not be inferred where the federal provision at issue has provided a "reliable indicium" of congressional intent. The preemption provision of Section 1681 provides that "No requirement or prohibition may be imposed under the laws of any State … with respect to the conduct required by the specific provisions of … 15 U.S.C. 1681c(g)." It is hard to imagine plainer language to evince Congress' intent to expressly preempt any state regulation of conduct required under 1681c(g). This codification specifically requires conduct regarding the redaction of expiration dates from credit card receipts. The mere fact that NJFCRA regulates the same conduct and requires substantively the same behaviors does not negate the plain fact that Congress has spoken clearly and prohibited the States from enacting the regulations at hand. Plaintiff argues that there is no conflict between the conduct required under NJFCRA and FACTA

> As originally enacted, the FCRA generally permitted state regulation of the consumer reporting industry. With but few exceptions, the original preemption provision, 15 U.S.C. § 1581t(a), preempted state laws only "to the extent that those laws are inconsistent with any provision of [the FCRA]." As part of the ongoing process of fine-tuning this statutory scheme, Congress amended the FCRA with the Consumer Credit Reporting Reform Act of 1996 ("CCRRA"). Pub. L. No. 104-208, 110 Stat. 3009, 3009-426 to -455. The CCRRA added a strong preemption provision, 15 U.S.C. § 1681t(b), to this comprehensive legislative framework. The purpose of this new subection was, in part, to avoid a "patchwork system of conflicting regulations."

Ross v. FDIC, 625 F.3d 80, 812-13 (4th Cir. 2010).

The Court further notes that Plaintiff does not attempt to rebut this legislative history.

– and while largely true, the plain language used by Congress indicates that no conflict is required in order to preempt state regulation.

Plaintiff further argues that 23 States have adopted their own laws which are analogous to FACTA, and cites each of them "[t]o further illustrate Congress' intent *not* to preempt state legislation of the "truncation of credit card and debt card numbers" under FACTA. This argument is misplaced. Congress' intent is best understood by reading the laws passed by Congress. If the provision was ambiguous or unclear, then this Court might consider the Congressional legislative history. The intent of Congress, however, should not be interpreted through the enactments or regulations of various independent State legislatures or regulatory bodies. Congress is distinct and wholly separate from those bodies, and has policies and preferences of its own that it may choose to enact in line with our constitutional scheme. The mere existence of competing, parallel, or complementary state laws or regulations has little relation to the intentions of Congress, where such intentions are made plain in the use of unambiguous language. That is the case before the Court here.

Moreover, Plaintiff's argument regarding the lack of authority for the instant application of the preemption doctrine is also unavailing. This Court notes that Section 1681t(b)(5)(a) has previously been found as preempting state regulation. In Ferron v. RadioShack Corp., 175 Ohio App. 3d 257, 264-67 (2008), the Court of Appeals of Ohio, Tenth Appellate District, Franklin County, overturned a trial court judgment in favor of a plaintiff against RadioShack for their displaying an expiration date for a debit card on a printed receipt. The reasoning of the appellate court therein is substantially similar to this Court's rationale. "The key phrase [of the preemption section, 1681c(g)] is "with respect to," and it has an ordinary meaning of "referring to" or "concerning." Ferron v. RadioShack Corp., 175 Ohio App. 3d at 264 (citing Random House

Unabridged Dictionary (2006)). "The language Congress employed in the exception evidences a broad preemptive purpose and expresses its intent that Section 1681c(g) preempt any state law imposing a requirement or prohibition concerning the conduct Section 1681c(g) requires: the truncation of credit and debit card information on electronically printed receipts provided to a cardholder." Id. This reasoning is plain and persuasive. Plaintiff has provided no authority holding to the contrary.

Lastly, Plaintiff by letter dated May 18, 2015, provided the Court with a recently published Appellate Division case, Daniels v. Hollister Co., A-3629-13T3, arguing that this case bolstered its opposition to the instant motion to dismiss. This case is inapplicable as it solely addresses a class action certification question of whether "ascertainability" should be considered. Plaintiff then argues that the above-cited case is a reminder of New Jersey's public policy of enabling access to the courthouse, particularly where individuals alone lack "either the incentive to sue for a small recovery or the strength to take on a corporate giant in litigation." This Court concurs with such a sentiment, however, such sentiment does not permit this Court to ignore the clear dictates of federal law.

The unambiguous language of 1681t(b)(5)(A) provides the reliable indicia contemplated by the Cipollone court, and as such, neither the NJFCRA nor TCCWNA is actionable in in this court for the failure to truncate credit card expiration dates from a consumer's sales receipt.

For the foregoing reasons, Defendant Paris Baguette's motion to dismiss the Complaint is **GRANTED**, and the Complaint is **DISMISSED WITHOUT PREJUDICE**.

It is so ordered.