UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x

BRENDA EDWARDS, on Behalf of Herself and All Others Similarly Situated,

Plaintiff,

-against-

MACY'S INC. and DEPARTMENT STORES NATIONAL BANK,

Defendants.

x

No. 14 Civ. 8616 (CM)

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

McMahon, J.:

Plaintiff Brenda Edwards ("Plaintiff") asserts various claims against Defendants arising from her enrollment in a debt cancellation program, which is one of the "Payment Protection" plans offered by Department Stores National Bank ("DSNB") in conjunction with its credit cards. Plaintiff alleges that she was enrolled in and charged for the Payment Protection program after opening her DSNB credit card, though she neither asked nor agreed to do so. She also alleges that Defendants misled her – and many other DSNB cardholders – regarding the nature of the Payment Protection program; as a result, she enrolled in a program that was essentially worthless.

Plaintiff claims that Defendants failed to provide adequate disclosures about the program's limitations and costs, the program provides little or no value to persons who are not eligible for all of its benefits, and cardholders are overcharged for the program. Based on these

allegations, the Complaint asserts violations of South Dakota's consumer protection laws, as well as claims for unjust enrichment, declaratory relief and rescission.

Pending before the Court is Defendants' motion to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons discussed below, the motion is granted.

BACKGROUND

The Parties

DSNB, a subsidiary of Citibank, N.A., is a national bank located in Sioux Falls, South Dakota. It issues Macy's branded credit cards. (Compl. ¶ 10.) Macy's is a Delaware corporation with a principal place of business in New York and Ohio. (*Id.* ¶ 9.) Plaintiff is a citizen of Massachusetts and the holder of a Macy's-branded credit card issued by DSNB. (*Id.* ¶¶ 8, 20.)

DSNB's Payment Protection Programs

DSNB offers a variety of Payment Protection programs. (Compl. ¶¶ 1-2; Def. Br. Ex. 2 at 2.) Specific programs named in the Complaint include: "Credit Pro," "Credit Card Protection," "Debt Suspension," "Debt Cancellation," "Accountguard," and "Major Ins(urance)." (Compl. ¶¶ 1, 15.) The Complaint does not specify what services each individual program provides; instead, Plaintiff alleges that all the Payment Protection programs "temporarily suspend[] or cover[] consumers' minimum monthly credit card payments or permanently cancel[] up to a certain dollar amount in the event of job loss, disability, or leave of absence." (*Id.* ¶ 15.) Plaintiff further alleges that, "Defendants charge monthly fees for Payment Protection from 99 cents to $1.89 per $100 of customers' ending monthly balance." (*Id.*)

One of the Payment Protection programs – the one in which Plaintiff was enrolled – is known as "Credit Protection." (Compl. ¶¶ 1-2; Def. Br. Ex. 2 at 2.) As set forth in the Credit

Protection Amendment (an amendment to a customer's DSNB Credit Card Agreement), the Credit Protection program offers debt cancellation of up to $10,000 upon the occurrence of certain qualifying events, which include: involuntary unemployment, leave of absence, disability, hospitalization, nursing home care, loss of life, terminal medical condition, or critical injury. (Def. Br. Ex. 2 at 1; *see also id.* §§ 1.1-8.4.)

The fee charged to the customer for Credit Protection is "based on the rate of $1.89 per $100 of your New Balance at the end of a billing period." (*Id.* at 2, General Terms and Conditions, eighth paragraph; *see also id.* at 1.) Customers who enroll in Credit Protection may cancel at any time. If they cancel within thirty days after the mailing of the program terms and conditions, they will receive a full refund of any fees billed to their account. (*Id.* at 2, General Terms and Conditions, eleventh paragraph; *see also id.* at 1.)

Plaintiff alleges that Defendants engage in a variety of deceptive and unfair business practices in connection with the Payment Protection programs.

First, Plaintiff alleges that Defendants enroll and charge consumers for Payment Protection services without first obtaining their affirmation. (Compl. ¶ 16.)

Second, Plaintiff claims that Defendants fail to provide consumers with sufficient disclosures about the terms and conditions – including the cost – of Payment Protection. (*Id.*)

Third, Plaintiff alleges that Payment Protection offers little to no value to consumers, and that some consumers enrolled are not even eligible for the program's purported benefits. For example, Plaintiff alleges that part-time or self-employed employees are not eligible for Payment Protection's services, but that Defendants have failed to fully reimburse ineligible individuals who were nonetheless enrolled in a program. (Compl. ¶ 17.)

Fourth, Plaintiff claims that Defendants overcharge for Payment Protection programs. Charges for these programs are calculated based on the credit card balance on the closing date of the billing cycle, regardless of when charges to the account were incurred. For example, if a Macy's credit card customer has a $500 ending balance with Payment Protection rate of 99 cents per $100 dollars, that customer is charged $4.95 for that month's Payment Protection coverage – whether the charges were incurred on the first day or last of the billing cycle. (*Id.* ¶ 18.) In other words, a consumer with a month of coverage would be charged the same as a consumer with only one day of coverage, as long as their ending balances were the same. (*Id.* ¶ 19.) Plaintiff contends that this is an unfair payment practice.

Plaintiff Edwards' Credit Protection Plan

Plaintiff Brenda Edwards obtained a Macy's credit card some "years ago." She alleges that sometime in or before January 2011, Defendants enrolled her in a Payment Protection plan without her consent. (*Id.* ¶ 20). Edwards has been self-employed for the last 30 years and claims that she was ineligible for benefits under the program in which she was enrolled. (*Id.*)

Around April 2014, Edwards noticed charges for "Credit Pro" on her Macy's credit card while reviewing old statements. She called Macy's customer service, and was informed that she had enrolled in a payment protection plan, which would supposedly help her if she found herself out of work. Edwards denied having enrolled in any Payment Protection plan and said that she had not authorized any such charges. She demanded cancellation of the program and a refund of all associated charges.

On May 19, 2014, Edwards received a credit of $17.12 on her Macy's credit card for the period ending June 17, 2014. Edwards contends that this credit constitutes a refund of three months' worth of Credit Pro fees. She has received no other refund. (*Id.* ¶¶ 21-23.)

Plaintiff alleges that she has been charged $1.89 per $100 of her monthly ending balance for Credit Pro since January 2011. In total, she paid more than $250 for enrollment in a program she claims she never requested, and for which she was, in any event, ineligible. Edwards alleges that she was also charged interest at a rate of 24.5% on balances that included the premiums paid for Payment Protection.

Based on the foregoing, Plaintiff asserts claims for violation of the South Dakota Consumer Deceptive Trade Practices Act, unjust enrichment, rescission, and declaratory relief. (Compl. ¶¶ 37-77.)[1]

DISCUSSION

I. Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The court in *Iqbal* suggested a "two-pronged approach" for evaluating the sufficiency of a complaint. Under the first prong, a court should "choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. Under the second prong, "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Id.* A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550

[1] Plaintiff also asserted a claim for breach of the covenant of good faith and fair dealing, but withdrew that claim in her brief in opposition to this motion. (Pl. Opp. at n.1.)

U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

II. Plaintiff's State Law Claims are Preempted

Defendants argue that all of Plaintiff's claims against DSNB and Macy's are preempted by the National Bank Act ("NBA") and regulations promulgated by the Office of the Comptroller of the Currency (the "OCC"). Specifically, they argue that OCC regulations governing "Debt Cancellation Products" and "Debt Suspension Agreements," set forth in 12 C.F.R. § 37 ("Part 37") preempt Plaintiff's claims. Defendants are correct.

"The federal preemption doctrine derives from the Supremacy Clause of the United States Constitution, which provides that 'the Laws of the United States which shall be made in Pursuance' of the Constitution 'shall be the supreme Law of the Land.'" *Madden v. Midland Funding, LLC*, 786 F.3d 246, 249 (2d Cir. 2015) (quoting U.S. Const. art. VI, cl. 2).

"Business activities of national banks are controlled by the National Bank Act ... and regulations promulgated thereunder by the Office of the Comptroller of the Currency... As the agency charged by Congress with supervision of the NBA, OCC oversees the operations of national banks and their interactions with customers." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 6 (2007).

Preemption under the National Bank Act may be either "express" or "implied." *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 31 (1996). State law is expressly preempted when Congress or a federal agency explicitly states its "intent to pre-empt state law." *Id.* at 31. State law is implicitly preempted when the application of state law would "prevent or significantly interfere with [a] national bank's exercise of its powers." *Id.* at 33. Implied preemption takes two forms: (1) field preemption – where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or (2) conflict preemption

– where federal law conflicts with state law. *See Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2d Cir.2005).

Although there is a presumption against preemption in areas of regulation allocated to states and of local concern, that "presumption against federal preemption disappears … in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (citations omitted). Indeed, the Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters,* 550 U.S. at 11.

However, not every state law that could conceivably apply to a national bank is preempted by the NBA and corresponding OCC regulations. Rather, "Federally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." *Id.* (citations omitted).

Here, Defendants argue that 12 C.F.R. § 37 preempts Plaintiff's claims. Part 37 governs loan terms or contractual arrangements that cancel or suspend (as the case may be) a customer's obligation to repay credit extended by a bank upon the occurrence of a specified event. 12 C.F.R. § 37.2 (f) and (g). DSNB's Payment Protection products – which, as discussed above, offer debt cancellation or suspension upon certain qualifying events – are governed by this regulation.

Plaintiff's claims are expressly preempted by Part 37. 12 C.F.R. § 37.1 states that "This part applies to debt cancellation contracts and debt suspension agreements entered into by national banks in connection with extensions of credit they make. *National banks' debt cancellation contracts and debt suspension agreements are governed by this part and applicable Federal law and regulations, and not by. . . State law*." *Id.* (emphasis added). The OCC's

regulations "constitute the entire framework for uniform national standards for [debt cancellation contracts] and [debt suspension agreements] offered by national banks." OCC, Debt Cancellation Contracts and Debt Suspension Agreements, 67 Fed. Reg. 58,962, 58,964 (Sept. 19, 2002). There can be no question that § 37.1 expressly preempts the application of state law to debt cancellation and debt suspension products.

Plaintiff argues that there is no express preemption because, under Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") (Pub. L. 111-203, H.R. 4173), state laws that "directly and specifically" regulate financial transactions are not expressly preempted or subject to field preemption. (Def. Opp. at 15-16 (citing § 1044(b)(1) of the Dodd-Frank Act).) But it is not clear that Dodd-Frank even applies to Plaintiff's claims, because Dodd-Frank's preemption amendments regarding national banks did not go into effect until July 21, 2011, months after Plaintiff enrolled in Payment Protection. *See* Dodd-Frank § 1048 ("This subtitle shall become effective on the designated transfer date."); Bureau of Consumer Financial Protection, Designated Transfer Date, 75 Fed. Reg. 57,252 (Sept. 20, 2010) ("[T]he Secretary of the Treasury designates July 21, 2011, as . . . [the] 'designated transfer date.'"). Furthermore, the OCC has made clear that the preemption rule in Part 37 was unchanged by Dodd-Frank, so the application of that Act makes no difference to the preemption analysis here. 76 Fed. Reg. 43,549, 43,558. *See also New Mexico ex rel. King v. Capital One Bank (USA) N.A.,* 980 F. Supp. 2d 1314, 1324-26 (D.N.M. 2013).

Plaintiff's claims are also barred by implied preemption. Defendants frame their argument as one of conflict preemption, but field preemption – in which federal regulations are so comprehensive in a particular field as to leave no room for state law – is more apt. But regardless of which particular theory of implied preemption is more appropriate, the bottom line

is that Plaintiff's state law claims are preempted – even absent Part 37's express declaration of preemption. Regulations in the field of debt cancellation and suspension products entered into by national banks are sufficiently comprehensive as to crowd out state law. *See King,* 980 F. Supp. 2d at 1330; *Spinelli v. Capital One Bank*, 265 F.R.D. 598, 605 (M.D. Fla. 2009).

As discussed above, Plaintiff's allegations relate to Defendants' (1) enrollment practices, (2) failure to inquire as to enrollees' eligibility and disclosures about the programs' terms, and (3) calculation of Payment Protection fees. (*See* Compl. ¶ 2). OCC Regulations govern each of these allegedly deceptive practices. To require Defendants also to comply with state law that reaches the same subject matter would impermissibly "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33.

1. Enrollment Practices

Section 37.7(a) provides the standards for affirmative consent to enter into a debt cancellation contract, 12 C.F.R. § 37.7(a). Specifically, 12 C.F.R. § 37.7(a) provides:

> (a) **Affirmative election and acknowledgment of receipt of disclosures.** Before entering into a contract the bank must obtain a customer's written affirmative election to purchase a contract and written acknowledgment of receipt of the disclosures required by § 37.6(b). The election and acknowledgment information must be conspicuous, simple, direct, readily understandable, and designed to call attention to their significance. The election and acknowledgment satisfy these standards if they conform with the requirements in § 37.6(d) of this part.

Whether DSNB obtained "affirmative consent" from Plaintiff must be judged by these federal standards, not by the standards set forth in South Dakota law.

2. Enrollee Eligibility

The OCC regulates how national banks will screen for the eligibility of program enrollees – namely, by disclosing all relevant eligibility requirements to prospective program participants. Section 37.6 requires disclosure to customers regarding "eligibility requirements, conditions, and

exclusions that could prevent [the customer] from receiving benefits under [the relevant program]." 12 C.F.R. § 37.6; 12 C.F.R. § 37 App. A, App. B.

3. Fees for Payment Protection

Part 37 expressly allows a national bank to charge for debt cancellation contracts and debt suspension agreements. *See* 12 C.F.R. § 37.1(a). As for the precise *amount* that a national bank can charge a customer, the OCC made a conscious decision not to adopt price controls as part of its debt cancellation and debt suspension regulations. During notice-and comment proceedings held in connection with the adoption of Part 37, the OCC received comments urging it to "regulate the amount of fees banks can charge" for payment protection plans by "impos[ing] the same type of regulation … on the sale of [payment protection plans] as is commonly required . . . with respect to the sale of credit insurance." 67 Fed. Reg. at 58,964. The OCC declined to do so, concluding that "[a] regulatory approach that includes price controls as a primary component is not warranted." *Id.* Thus, "To the extent that the [OCC] has determined not to specify the fees banks may set, its determination has preemptive effect." *Thomas v. Bank of Am. Corp.*, 309 Ga. App. 778, 783 (2011) (holding that Part 37 preempts state-law challenges to payment protection fees).

Other courts that have addressed this issue uniformly hold that Part 37 preempts the application of state law to debt cancellation or suspension products.

In *Spinelli v. Capital One Bank*, 265 F.R.D. 598 (M.D. Fla. 2009), the plaintiff asserted claims under the Florida Deceptive and Unfair Trade Practices Act on behalf of a statewide class, alleging that Capital One's payment protection product was "virtually worthless because of the numerous restrictions that are imposed after the consumer accepts or receives the product, and because of the administrative and bureaucratic hurdles that are placed in the way of the Florida

consumer who attempts to secure payments." *Id.* at 600. The court held that plaintiff's consumer-protection claims were preempted, concluding that "The National Bank Act and the OCC's implementing regulations provide that state law on the subject of Debt Agreements is subject to express preemption: such agreements are governed by 12 C.F.R. Part 37 and 'applicable Federal law and regulations, and not . . . by State law.'" *Id.* at 605. The court further found that "the OCC's comprehensive scheme of regulation leaves no room for state law when it comes to Debt Agreements." *Id.*

Similarly, in *Rose v. Bank of Am. Corp.*, No. CV 10-5067-VBF JCX, 2010 WL 8435397, at *1 (C.D. Cal. Nov. 5, 2010) adopted, No. CV 10-5067-VBF JCX, 2010 WL 8435398 (C.D. Cal. Nov. 8, 2010), the plaintiff asserted claims under California's Unfair Competition Law and Consumers Legal Remedies Act and for unjust enrichment, alleging that defendants failed to disclose that credit card customers did not qualify for all of the benefits offered by defendants' debt cancellation product. *Id.* at *1. The court granted defendants' motion to dismiss, concluding that "Part 37 was intended to provide 'the entire framework for uniform national standards for [debt cancellation contracts] . . . offered by national banks," and that plaintiff's claims based on nondisclosure were preempted. *See id.* at *4 (quoting 67 Fed. Reg. 58,962, 58,964).

And in *Denton v. Dep't Stores Nat. Bank*, No. C10-5830RBL, 2011 WL 3298890 (W.D. Wash. Aug. 1, 2011), the plaintiff alleged that DSNB violated Washington's Consumer Protection Act because its Payment Protection disclosures to "virtually ineligible" enrollees were "belated" and "inadequate." This court, too, held that plaintiff's claim was preempted by Part 37. *Id.* at *1-5.

Finally, in *Thomas v. Bank of Am. Corp.*, 309 Ga. App. 778 (2011), the plaintiff contended that the defendant bank had engaged in deceptive business practices by enrolling her

in its "Credit Protection Plus" program because she was not eligible for the program's benefits. The plaintiff also alleged that defendants improperly charged the same price for the product to customers who were and were not eligible. The Georgia Court of Appeals affirmed the trial court's dismissal of plaintiff's claims, holding that Part 37 preempted plaintiff's state law claims. *Id.* at 784.

Plaintiff cites *Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027 (9th Cir. 2014) and *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78 (5th Cir. 2013) and their progeny, but neither case compels a contrary result. Plaintiffs in those cases challenged payment protection plans similar to Defendants' on state law grounds. But in both *Louie* and *Hood*, the question before the court was whether §§ 85 and 86 of the NBA – which govern the rate of interest a national bank may charge – "completely preempted" plaintiffs' state law claims so as to give rise to federal jurisdiction of those claims. Neither court addressed whether Part 37 expressly or impliedly preempts state law claims.

The Court can find only one case holding that state law challenges to a national bank's debt cancellation and suspension products are not preempted by Part 37. It is cited by neither party, likely because its reasoning is not persuasive. In *Arevalo v. Bank of Am. Corp.*, 850 F. Supp. 2d 1008 (N.D. Cal. 2011), the courts found that express preemption was lacking because the defendant failed to show that the OCC followed proper procedures in issuing the preemption regulation. *Id.* at 1026-27. However, as noted in *Denton*, 2011 WL 3298890, at *5, the *Arevalo* court failed to address 12 U.S.C. § 43(c), which provides that the notice and comment requirements "shall not apply with respect to any … interpretive rule that … raises issues of Federal preemption of State law that are essentially identical to those previously resolved by the courts." When issuing Part 37, the OCC explained that the Eighth Circuit had held more than a

decade earlier that national banks were authorized to offer debt cancellation contracts and that the NBA therefore preempted contrary state law. 67 Fed.Reg. 58,962, 58,963 (citing *First Nat. Bank of E. Arkansas v. Taylor*, 907 F.2d 775, 778 (8th Cir. 1990)).

Because I hold that Plaintiff's state law claims are preempted by Part 37, I need not reach Defendants' additional argument that Plaintiff has failed to state a claim for rescission.

III. Preemption Applies to Defendant Macy's as well as to Defendant DSNB

Plaintiff argues (in a footnote) that even if her claims against DSNB are preempted, her claims against Macy's are not, because, "Macy's has not exercised any national bank powers nor has it acted on behalf of a national bank in carrying out a national bank's powers." (Pl. Opp. at 8 n.8 (citing *Madden v. Midland Funding, LLC*, 786 F.3d 246, 251 (2d Cir. 2015)).) Unfortunately for Plaintiff, her Complaint says otherwise.

The Second Circuit has indeed held that OCC preemption extends to an entity that is not a national bank only where that entity is an agent or subsidiary of a national bank or is otherwise acting on behalf of the national bank in carrying out the bank's business. *Madden*, 786 F.3d at 249. Macy's is not a national bank and it is not a subsidiary of a national bank. However, the fair import of plaintiff's allegations is that Macy's was acting on behalf of DSNB in carrying out DSNB's business. The Complaint alleges that under the Credit Card Agreement between Macy's and DSNB's parent corporation, Citibank, Macy's provides "marketing services, credit processing, collections, and customer service related to credit card accounts and ancillary products, including Payment Protection, and receives compensation for these services." (Compl. ¶13.) The language could not be clearer: Macy's was to provide marketing, credit processing, collections and customer service related to the Payment Protection program, and it was compensated for so doing. Macy's was, therefore, conducting those activities on DSNB's behalf.

Plaintiff cannot escape the consequences of her own pleading. The federal preemption that cloaks DSNB extends to Macy's in connection with the activities in suit.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Complaint is granted. The Clerk of the Court is directed to remove Docket No. 55 from the Court's list of pending motions and to close the file.

Dated: March 9, 2016

U.S.D.J.

BY ECF TO ALL COUNSEL