IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

ANNA WHITE FERRARACCIO, PLAINTIFF,

v. CIVIL ACTION NO. 5:24-cv-00700

NEW PEOPLES BANK, DEFENDANT.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendant New Peoples Bank (NPB) submits this Memorandum in support of its Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6),

TRUTH IN LENDING ACT ALLEGATIONS

Plaintiff alleges NPB violated 15 U.S.C. §§1601-1667f, the Truth in Lending Act. (Act). However, 15 U.S.C. §1603(a) exempts loans primarily for business purposes from the Act's coverage:

> "This subchapter does not apply to the following:
> (1) Credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations." 15 U.S.C. Sec. 1603 Exempted transactions (United States Code (2024 Edition))

The loan in question was for business purposes for Pipestem Spa and Chalet Corporation, a corporation owned by the Plaintiff and which corporation is not a party here. Attached here is an Affidavit of L. Mori Williams, Senior Vice-President of NPB and the supervising loan officer of the loan in question identifying the nature of the loan. Plaintiff has no standing to bring a truth in lending claim because she has no injury since her corporation was the borrower and a separate legal entity under State law. Therefore, this

Court lacks subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Additionally, the loan in question is exempt from the Act by law and, therefore, fails to state a claim under Rule 12(b)(6). As a result, the Plaintiff has neither a procedural nor a substantive right to relief from the provisions of the Act.

ELECTION INTERFERENCE ALLEGATIONS

Plaintiff alleges NPB violated 18 U.S.C §245(b)(1) by, in some non specific ways, interfering with her campaign for public office. 18 U.S.C. §245 is a criminal statute delineating certain Federal Protected Rights and providing criminal penalties for the violation of the statute:

> (b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with-
>
> (1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from-
>
> (A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;
> ....
>
> shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under this title, or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any

> employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.
> 18 U.S.C. Sec. 245 Federally protected activities (United States Code (2024 Edition))

The United States Supreme Court of Appeals has ruled in Alexander v. Sandoval, 532 U.S. 275, 121 S.Ct. 1511 (2001) that absent Congressional action, there is no private right of action for violation of a Federal statute:

> Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. Touche Ross & Co. v. Redington, 442 U.S. 560, 578, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979)(remedies available are those "that Congress enacted into law"). The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979). Statutory intent on this latter point is determinative. See, e.g., Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 1102, 115 L. Ed. 2d 929, [121 S. Ct. 1520] 111 S. Ct. 2749 (1991); Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 812, n. 9, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986) (collecting cases). Without it, a cause of action does not exist and courts may not [532 U.S. 287] create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. See, e.g., Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145, 148, 87 L. Ed. 2d 96, 105 S. Ct. 3085 (1985); Transamerica Mortgage Advisors, Inc. v. Lewis, supra, at 23; Touche Ross & Co. v. Redington, supra, at 575-576. [149 L. Ed. 2d 529] "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991) (SCALIA, J., concurring in part and concurring in judgment).
> Alexander v Sandoval, 532 US 275, 121 S.Ct. 1511, 1520 (2001)

That section does not provide for a private right of action against a violator of the section; it only provides criminal penalties. As a result, no private right of action exists for the Plaintiff to assert against NPB.

EQUAL CREDIT OPPORTUNITY ACT ALLEGATIONS

Plaintiff alleges NPB violated 15 U.S.C. §§1691-1691f, the Equal Credit Opportunity Act (ECOA).

The ECOA defines an "adverse action" as an action denying credit:

> § 1691. Scope of prohibition
> (a) Activities constituting discrimination
> It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction-
> (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);
> (2) because all or part of the applicant's income derives from any public assistance program; or
> (3) because the applicant has in good faith exercised any right under this chapter.
> (b) Activities not constituting discrimination
> It shall not constitute discrimination for purposes of this subchapter for a creditor-
> (1) to make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;
> (2) to make an inquiry of the applicant's age or of whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided in regulations of the Bureau;
> (3) to use any empirically derived credit system which considers age if such system is demonstrably and statistically sound in accordance with regulations of the Bureau, except that in the operation of such system the age of an elderly applicant may not be assigned a negative factor or value;
> (4) to make an inquiry or to consider the age of an elderly applicant when the age of such applicant is to be used by the creditor in the extension of credit in favor of such applicant; or
> (5) to make an inquiry under section 1691c-2 of this title, in accordance with the requirements of that section.

(c) Additional activities not constituting discrimination
It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to-
(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;
(2) any credit assistance program administered by a nonprofit organization for its members or an economically disadvantaged class of persons; or
(3) any special purpose credit program offered by a profit-making organization to meet special social needs which meets standards prescribed in regulations by the Bureau;
if such refusal is required by or made pursuant to such program.
(d) Reason for adverse action; procedure applicable; "adverse action" defined
(1) Within thirty days (or such longer reasonable time as specified in regulations of the Bureau for any class of credit transaction) after receipt of a completed application for credit, a creditor shall notify the applicant of its action on the application.
(2) Each applicant against whom adverse action is taken shall be entitled to a statement of reasons for such action from the creditor. A creditor satisfies this obligation by-
(A) providing statements of reasons in writing as a matter of course to applicants against whom adverse action is taken; or
(B) giving written notification of adverse action which discloses (i) the applicant's right to a statement of reasons within thirty days after receipt by the creditor of a request made within sixty days after such notification, and (ii) the identity of the person or office from which such statement may be obtained. Such statement may be given orally if the written notification advises the applicant of his right to have the statement of reasons confirmed in writing on written request.
(3) A statement of reasons meets the requirements of this section only if it contains the specific reasons for the adverse action taken.
(4) Where a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by this subsection may be made directly by such creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed.
(5) The requirements of paragraph (2), (3), or (4) may be satisfied by verbal statements or notifications in the case of any creditor who did not act on more than one hundred and fifty applications during the calendar year preceding the calendar year in which the adverse action is taken, as determined under regulations of the Bureau.
(6) For purposes of this subsection, the term "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. Such term does not include a refusal to

> extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit.
> 15 U.S.C. Sec. 1691 Scope of prohibition (United States Code (2024 Edition))

NPB made the loan in question to Plaintiff's corporation on substantially the same terms as requested; Plaintiff was a guarantor of the loan but was not the recipient of the loan proceeds. The Affidavit of L. Mori Williams establishes that Plaintiff's corporation received a loan on substantially the same terms as in its application. Plaintiff's objection and complaint is not that the loan was not made; rather, the loan was not made based on her time line of expectation and that she changed her position anticipating when the loan would be approved, which loan was ultimately approved. Such complaint is not an adverse action under the ECOA, and Plaintiff was not the affected applicant to the loan. Accordingly, under Rule 12(b)(1) this Court lacks subject matter jurisdiction because of standing and under Rule 12(b)(6) there is no violation of the ECOA since the requested loan was made.

VIOLATION OF CIVIL RIGHTS UNDER 42 U.S.C. §1983

Plaintiff cites a violation of but makes no specific allegations of a cause of action against NPB under 42 U.S.C. §1983, which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of

> the District of Columbia.
> 42 U.S.C. Sec. 1983 Civil action for deprivation of rights (United States Code (2024 Edition))

§1983 requires action by an actor under "any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia...". NPB is not a state actor under a statute, ordinance, regulation, custom or usage of any State, Territory or the District of Columbia.

PENDANT STATE LAW CLAIMS OF DEFAMATION AND RETALIATION

Plaintiff's individual claims of Defamation and Retaliation are West Virginia common law claims. Such claims are before this Court as pendant to the Federal claims asserted in the Complaint.

If the Federal claims are dismissed, this Court under the doctrine of comity should not exercise jurisdiction. Either dismissal or remand to State would be appropriate. In Carnegie Mellon University v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988), the Supreme Court stated in the case Syllabus:

> Held: A federal district court has discretion under the doctrine of pendent jurisdiction to remand to state court a removed case upon a proper determination that retaining jurisdiction over the case would be inappropriate. Where, as here, all federal-law claims in the action have been eliminated and only pendent state-law claims remain, the district court has a powerful reason to choose not to continue to exercise jurisdiction.

This case is a case of original jurisdiction based on the asserted Federal claims above cited, but those claims are without merit.

For the reasons assigned herein, this case should be dismissed.

NEW PEOPLES BANK,

By Counsel.

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CERTIFICATE OF SERVICE

I, WILLIAM S. WINFREY, II, of counsel for Defendant, do hereby certify that a true and correct copy of the foregoing Memorandum in Support of Motion to Dismiss has this day been electronically filed with the Clerk of the Court via the CM/ECF filing system, as well as service upon the Plaintiff by United States Mail, postage prepaid, at her last-known address of:

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This the 11th day of December, 2024.

/s/ William S. Winfrey, II
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