IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Civil No. 07-2544

YER SONG MOUA, MANISY MOUA,
Defendants-Appellants,

v.

RAND CORPORATION,
Plaintiff-Appellee.

On Appeal from the United States District Court
for the District of Minnesota, No. 07-510 (ADM)

BRIEF FOR APPELLANTS YER SONG AND MANISY MOUA

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SUMMARY OF THE CASE

Appellants Yer Song and Manisy Moua (the "Mouas"), homeowners who obtained a high-cost mortgage from Appellee Rand Corporation ("Rand"), appeal from the district court's grant of summary judgment in favor of Rand. The Mouas asserted an extended right to rescind their Rand mortgage due to Rand's failure to comply with the clear mandates of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, including the Home Ownership and Equity Protection Act ("HOEPA"), §§ 1602(aa), 1639, *inter alia*: (1) Rand's failure to comply with the time, content, and method requirements of the HOEPA "early warning" notice; (2) Rand's inclusion of a prepayment penalty that HOEPA expressly prohibits; and (3) Rand's failure to give clear and conspicuous notice of the TILA's three-day post-transaction right to cancel. The Mouas assert on appeal that the district court ignored TILA's strict liability regime and objective standards, as well as its implementing regulations and Commentary, both making errors of law and overlooking issues of material fact.

Appellants believe that oral argument will be beneficial to the Court, particularly as to issues of first impression in this Circuit regarding TILA, and respectfully request 15 minutes for each side for oral argument.

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JURISDICTIONAL STATEMENT

Rand's compliance with the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, as it relates to the Mouas' mortgage is at issue in this case. The district court's jurisdiction was based on 28 U.S.C. § 1331, as the TILA-related claims arise under the laws of the United States. The district court entered judgment in favor of Rand on May 31, 2007. The Mouas timely filed this appeal on June 26, 2007. This Court's jurisdiction arises out of 28 U.S.C. § 1291, which provides this Court jurisdiction over a final judgment of a United States District Court.

STATEMENT OF ISSUES

1. Whether the district court erred in denying the Mouas a three-year extended right to rescind their mortgage pursuant to 15 U.S.C. §§ 1635(a) & (f) despite Rand's non-compliance with material timing, method, and content requirements of the TILA early warning for high-cost home loans (15 U.S.C. § 1639(a)).

Apposite statutes and cases: 15 U.S.C. § 1602(u); 15 U.S.C. §§ 1635(a) & (f); 15 U.S.C. §§ 1639(a) & (b); *In re Community Bank*, 418 F.3d 277 (3d Cir. 2005); *Sentinel Fed. Sav. & Loan v. Office of Thrift Supervision*, 946 F.2d 85 (8th Cir. 1991); *Household Credit Servicing, Inc. v. Pfennig*, 541 U.S. 232 (2004).

2. Whether the district court erred in summarily dismissing the Mouas' claim that Rand's inclusion of a prepayment penalty in violation of TILA's HOEPA protections (15 U.S.C. § 1639(c)) created a three-year extended right to rescind their mortgage pursuant to 15 U.S.C. §§ 1635(a) & (f); 15 U.S.C.§ 1639(j). **Apposite statutes and cases:** 15 U.S.C. §§ 1639(c) & (j); 15 U.S.C. §§ 1635 (a) & (f); *In re Community Bank*, 418 F.3d 277 (3d Cir. 2005); *Sentinel Fed. Sav. & Loan v. Office of Thrift Supervision*, 946 F.2d 85 (8th Cir. 1991); 15 U.S.C. § 1601(a); *Household Credit Servicing, Inc. v. Pfennig*, 541 U.S. 232 (2004).

3. Whether the district court erred in concluding that Rand did not violate the requirement to clearly and conspicuously provide the Mouas with Notice of their Right to Cancel by instructing the Mouas to sign a statement at closing that three days had passed since closing and that they had elected not to exercise their right to cancel, and by doing so, created a three-year extended right to rescind pursuant to 15 U.S.C. §§ 1635(a) & (f).

Apposite statutes and cases: 15 U.S.C. § 1635(a) & (f); *Smith v. Cash Store Mgmt., Inc.*, 195 F.3d325, 327-328 (7th Cir. 1999); *Wiggins v. AVCO Fin. Servs.*, 62 F. Supp. 2d 90, 96 (D.D.C. 1999); *Rodrigues v. Members Mortgage Co., Inc.*, 323 F. Supp. 2d 202, 209 (D. Mass. 2004); *Adams v. Nationscredit Fin. Servs. Corp.*, 351 F. Supp. 2d 829, 834 (N.D. Ill. 2004).

STATEMENT OF THE CASE

This appeal is filed from the district court's grant of summary judgment in favor of Rand Corporation against Yer Song and Manisy Moua, homeowners who refinanced their mortgage with Rand.

Under TILA, consumers have an unqualified right to rescind[1] any home equity loan secured by a primary residence within three days of consummation, a right which is extended for three years in the event the creditor violated TILA or HOEPA by failing to provide material disclosures. Here, the Mouas asserted their extended right to rescind their Rand mortgage due to Rand's material violations of TILA (including HOEPA), specifically: (1) Rand's failure to comply with the time, content, and method requirements of the HOEPA "early warning" notice; (2) Rand's inclusion of a prepayment penalty in contravention of HOEPA's express prohibition; and (3) Rand's failure to give clear and conspicuous notice of the TILA three-day post-closing right to cancel.

The district court, however, ignored the text of TILA, its implementing regulations, and Commentary in finding that Rand did not commit violations of material requirements of TILA or HOEPA that would

[1] Because TILA and the case law use the term "cancel" as the equivalent of "rescind," we also use both terms. *Compare, e.g.*, 15 U.S.C, § 1635 to Regulation Z, App. G-6 (model form for "Notice of Right to Cancel").

have triggered the three-year extended rescission right. Specifically, the district court held that:

1. The failure of the Rand Corporation to deliver in a timely and accurate fashion the "early warning" notice required in advance of closing for "high-cost" loans by 15 U.S.C. § 1639(a) & (b) did not constitute a material violation triggering the extended rescission right. JA 239-40. The district court ruled, as a matter of law, that failure to provide a TILA-compliant early warning notice three days in advance of the closing did not give rise to the extended right to rescind. JA 240.[2]
2. Rand's instruction that the Mouas sign at closing s a confirmation that three days had passed since the transaction and they chose not to rescind did not vitiate TILA's Notice of the three-day post-closing right to cancel—despite the fact that pursuant to 15 U.S.C. § 1635, the notice of right to cancel must be given clearly and conspicuously. JA 244-46.
3. Rand was entitled to a summary dismissal of the Mouas' claim that the loan's prepayment penalty violated HOEPA and gave rise to an extended right to rescind despite the fact that Rand had provided no

[2] Citations to documents in the Joint Appendix are cited as JA__. Documents in the Addendum, other than the district court's opinion, are designated with an asterisk(*).

evidence that it qualified for an exception to HOEPA's prohibition on prepayment penalties. JA 283.

The district court's decision flatly ignores the Supreme Court's pronouncements that TILA must be interpreted in favor of the consumer and that courts must faithfully adhere to and enforce TILA's implementing regulations and Commentary. Moreover, the district court's blessing of Rand's extensive noncompliance undermines the very purpose for which Congress enacted TILA and HOEPA—to provide homeowners with both the information and the time necessary to evaluate whether or not they should enter into a mortgage transaction.

The Mouas, with the assistance of counsel, timely exercised their extended three-year right of rescission based on Rand's violations of material TILA and HOEPA requirements via a letter to Rand on April 11, 2006. JA 55. Rand responded to the Mouas' rescission letter by claiming that the Mouas' rescission rights had already expired. JA 71. Despite the notice of rescission, Rand foreclosed on the Mouas' home and purchased it at a sheriff's sale on May 4, 2006. JA 62.

On January 29, 2007, Rand filed a declaratory judgment action in the U.S. District Court of Minnesota seeking a determination that the Mouas did not have a right to rescind their mortgage based on Rand's alleged violations

of TILA and HOEPA—essentially asking the district court to bless the transaction and Rand's interest in the Mouas' home. JA 1. Rand filed a motion for summary judgment nine days later, before the Mouas' period to answer expired. After Rand's motion was dismissed as premature, the Mouas filed their answer, along with specific counterclaims against Rand—including a challenge to the legality of a prepayment penalty in their HOEPA loan and failure to provide clear and conspicuous notice of their right to rescind—on February 22, 2007. JA 126. Rand followed with a second motion for summary judgment on March 16, 2007. On May 30, 2007, the district court granted Rand's Motion for Summary Judgment and entered judgment on May 31, 2007. JA 231. The Mouas timely filed this appeal on June 26, 2007.

STATEMENT OF FACTS

Rand Corporation is in the business of purchasing and reselling foreclosed homes and lending to homeowners in foreclosure. JA 217*. In January 2005, Patrick Aylward, a real estate broker who solicits customers for Rand, solicited Yer Song and Mainsy Moua at their home. JA 208 ¶¶ 8-11*. The Mouas were going through foreclosure proceedings and the redemption period during which they could redeem their home from foreclosure was set to expire on June 2, 2005.[3] JA 75 ¶ 4. Aylward told the Mouas that he could refinance their existing mortgage and bring their payments "way down." JA 208 ¶ 10*.

The Mouas subsequently met with Aylward and Albert Miller of Rand. *Id.* ¶¶ 11-12*. They were instructed to sign an incomplete loan application by Miller, who assured them that Rand would complete the application for them.[4] *Id.* ¶¶ 12-13*. To verify his income, Mr. Moua gave Aylward his pay-stubs, showing his income as a laborer was $13 per hour,

[3] Minnesota law provides for non-judicial foreclosures, which is what occurred here. Once a mortgage becomes delinquent, the mortgagee publishes and furnishes notice of a pending sheriff's sale. A six-month redemption period follows the sheriff's sale, during which time the mortgagor retains the right to occupy the house; the mortgagor must pay off the entire mortgage within the six-month period or else vacate. Minn. Stat. § 580.23.

[4] The Mouas, Hmong immigrants, have limited English abilities. JA 207-08 ¶¶ 2-3*. Both Mouas can speak, but neither is literate in, English. *Id.*

while Mrs. Moua's self-employment income from tending a family-owned grocery in St. Paul was $1,000 to $1,200 per month. JA 208-09 ¶¶ 11, 15*.

Rand scheduled the closing of the loan on April 22, 2005. JA 209 ¶ 16*. At that point in time the Mouas had more than 40 days to redeem their home. *See* JA 75 ¶ 4.

The $245,311.95 loan arranged by Rand carried an Annual Percentage Rate ("APR") of 16.775%, qualifying it as a high-cost mortgage under HOEPA. It included a prepayment penalty, in effect for two years, which would have required that the Mouas pay the lesser of 2.000% of unpaid principal or 60 days interest on unpaid principal. JA 20, 22*. The Mouas brought $50,000 to closing obtained from the sale of a family-owned grocery store. JA 209 ¶ 20*; JA 23; *see also* JA 109.

Rand, however, did not provide the Mouas with a HOEPA advance warning notice three days before closing. JA 209 ¶ 17*. Rather, Rand's agent insisted that the Mouas sign the closing documents on the same day that they received the HOEPA disclosure. *See* JA 115-16*; *see also* JA 209 ¶ 23*. Rand asserts that it rushed the Mouas because of issues with getting timely information from the County about the payoff amount, despite the fact that Rand had received payoff information from the County as early as

April 14, 2005—13 days earlier than the April 27, 2005 funding date. JA 48-49, 115*, 203-06.

At closing, Rand's closing agent gave Mrs. Moua a prepared statement and told her to copy it in her own handwriting. JA 209 ¶ 23*; *see also* JA 115-16*. Rand's instructions to its agent regarding the statement read:

> KAREN
> PRIOR TO STARTING THIS CLOSING THE CUSTOMER NEEDS TO MAKE A STATEMENT SIMILAR TO THE FOLLOWING IN THEIR OWN HANDWRITING, SIGN AND DATE:
>
> WE ARE AWARE THAT WE ARE ENTITLED TO A 3 DAY REVIEW OF THE DISCLOSURES PRIOR TO CLOSING OF THIS TRANSACTION. BECAUSE WE ARE AWARE THAT THE COUNTY HAS NOT BEEN TIMELY IN RETURNING THE PAYOFF STATEMENT ON OUR MORTGAGE AND THE CURRENT FORECLOSURE PROCEEDINGS WE REQUEST THAT THIS 3 DAY REVIEW PERIOD BE WAIVED.
> WE ARE FURTHER AWARE THAT WE HAVE A 3 DAY RECESSION [sic] AFTER SIGNING THE CLOSING DOCS TO REVIEW ALL THE FINAL DOCUMENTS. WE FEEL THAT THIS WILL ALLOW US TIME TO ADDRESS ANY CONCERNS OR QUESTIONS.
> PLEASE ACCEPT OUR REEQUEST [sic] TO WAIVE THE 3 DAY REVIEW PERIOD.

JA 115*. Mrs. Moua copied the statement including the misspellings. *Compare* JA 115* *with* JA 116*.

The HOEPA advance warning notice Rand provided at closing was also incomplete. JA 22*. The notice, in fact, failed to disclose the nearly $400 per month increase in the regular monthly payment that was scheduled to occur after the first twelve months of the loan. *Compare* JA 22* *with* JA 37. Further, Rand provided only one copy of the notice to the Mouas, rather than one to each borrower as required. JA 242.

Also among the flurry of papers that Rand had the Mouas sign that day was a Notice of Right to Cancel. JA 210 ¶ 25*. That Notice explained that, under federal law, borrowers are entitled to cancel the transaction for up to three days after closing. JA 225*. However, Rand also had the Mouas sign a Confirmation at closing—on the bottom of the same page as the Notice—stating that "more than 3 business days have elapsed since the date of the new transaction and . . . we certify that the new transaction has not been rescinded." *Id.**.

When the Mouas returned home from signing the papers, their son Vong Moua read the copies of what they had signed and broke the news to his parents that their mortgage payments had not been lowered. JA 210 ¶¶ 26-27*. Rather, their monthly payment had risen to much higher than their prior loan payment—despite the Mouas' contributing $50,000 to Rand's refinancing. *Id.**; JA 209 ¶ 20*; *see also* JA 109.

The Mouas' son also read the Notice of Right to Cancel with the Confirmation that Rand's agent had had the Mouas sign at closing. JA 209 ¶¶ 27-28*; *see also* JA 225*. Based on reading the signed Confirmation, which certified "that the new transaction has not been rescinded," the Mouas' son told his parents that the three-day, post-closing rescission period had ended and they could not rescind the loan—even though the Mouas had just closed the loan that day. JA 225*, 210 ¶ 28*.

The Rand mortgage carried an initial payment of $2,883 a month, which would increase to $3,272 after the first year. JA 37. Despite the fact that their mortgage payments had increased dramatically, the Mouas nevertheless attempted to make the payments of $2,883 each month. *See* JA 210 ¶ 27, 30*. The Mouas continued making the monthly payment to Rand until they defaulted in December 2005 following Mr. Moua's heart attack and stroke JA 78 ¶17, 210 ¶ 31*. Rand began foreclosure on the loan, notifying the Mouas of a sheriff's sale scheduled on May 4, 2006. JA 78-79 ¶¶ 18-19, 23. As explained in the Statement of the Case, the Mouas' rescission letter, dated April 11, 2006 (JA 55), and this case followed.

SUMMARY OF THE ARGUMENT

The Truth in Lending Act seeks to ensure that consumers receive meaningful disclosure of credit terms. The 1994 HOEPA Amendments added additional protections to TILA for borrowers in high-cost loans. While TILA gives all home-secured borrowers a three-day period after closing during which they may rescind the transaction, HOEPA also gives borrowers in high-cost loans a three-day period in *advance of closing* to consider the transaction. In addition, HOEPA prohibits certain loan terms that are especially subject to abuse in high-cost loans, including prepayment penalties. The Federal Reserve Board ("Board") has broad authority to issue regulations interpreting TILA, which the Supreme Court has repeatedly reiterated that courts are bound to enforce.

TILA, including HOEPA, imposes strict liability for creditor violations. More specifically relevant here, TILA gives homeowners an extended, three-year right to rescind a refinanced mortgage if the creditor materially violates the statutes terms by failing to provide accurate and timely "material disclosures" to each borrower or by including prohibited terms in a high-cost, HOEPA loan. Here, Rand committed multiple, material violations of the plain language of TILA, all of which were either

excused by the district court or found not to give rise to the three-year extended right to rescind.

As a threshold matter, it is undisputed that the loan Rand made to the Mouas was a high-cost loan covered by HOEPA. However, Rand failed to comply with HOEPA's most basic requirement: that the creditor provide the homeowners with an early warning notice three days in advance of closing warning the borrowers of the risks of the loan and disclosing specified terms of the mortgage. Indeed, Rand failed to comply with the timing, method, and content requirements for the early warning disclosures, each of which is a material violation creating the extended right to rescind.

First, Rand did not provide the early warning notice three days in advance of closing. Although the Mouas executed an alleged waiver of the three-day waiting period, the statement of waiver and the circumstances surrounding the waiver were insufficient as a matter of law. Material disputed issues of fact also surround the alleged waiver. Second, the HOEPA disclosure Rand did provide was legally flawed in that it failed to disclose the fact that the Mouas' regular monthly payment would increase by nearly $400 a month just one year into the loan—a second material violation. Third, Mr. and Mrs. Moua received only one copy of the advance warning disclosure, when HOEPA mandates that each borrower must

receive a copy. In sum, Rand committed three separate violations of HOEPA's advance warning requirements, each of which independently gave the Mouas the three-year extended right to rescind. Because the district court denied that any of these violations justified rescission, its grant of summary judgment must be reversed.

Next, Rand's inclusion of a HOEPA-prohibited term—a pre-payment penalty—provides an additional, independent material violation that gave the Mouas an extended right to cancel. HOEPA creates one exception to this prohibition. However, the creditor must establish various facts to demonstrate that the exception applies, and Rand presented no such evidence. In the absence of such evidence, the district court should not have summarily dismissed the Mouas' counterclaim challenging the inclusion of a prepayment penalty.

Finally, Rand materially violated TILA because the Notice of Right to Cancel it provided to the Mouas was not clear and conspicuous. The Notice included a Confirmation, which the Mouas were instructed to sign at closing, that three days had passed since the closing and that the Mouas had chosen *not* to exercise their rescission rights. Such a Confirmation creates confusion in the mind of a reasonable borrower about whether the three-day right to rescind has expired, violating TILA's requirement that material

disclosures, including the Notice of Right to Cancel, be made "clearly and conspicuously." The district court's determination that the Confirmation did not vitiate the Notice of Right to Cancel undermines the very purpose of TILA—informing borrowers in a timely and accurate manner about the terms of their credit so that they can make informed judgments.

TILA and HOEPA demonstrate the value Congress places on Americans' homes, the caution required when those homes are put at risk, and the extra precautions required when a home is at risk to high-cost lenders. The TILA requirements Rand violated here are far from *pro forma* or "hypertechnical." Rather, the violations undermine the specific purpose of Congressionally-mandated notice requirements and prohibitions and effectively deprived the Mouas of the opportunity to consider in advance of signing and to reconsider after signing the risks they were undertaking by entering into a high-cost loan.

In sum, Rand's multiple material violations of TILA, including HOEPA, gave the Mouas the extended right to rescind their mortgage.

STANDARD OF REVIEW

Grants of summary judgment are reviewed de novo. *Stutzka v. McCarville*, 420 F.3d 757, 762 (8th Cir. 2005). Summary judgment is proper only where no disputed issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* Summary dismissals of claims are also reviewed de novo. *See Rucci v. City of Pacific*, 327 F.3d 651, 652 (8th Cir. 2003).

ARGUMENT

The core issue in this case is whether the Mouas had the extended right to rescind their Rand mortgage based on violations of certain material requirements of the Truth in Lending Act. The district court failed to adhere to TILA's mandate of specific compliance with its objective disclosure requirements and limitations on loan terms in granting summary judgment in favor of Rand.

I. THE TRUTH IN LENDING ACT IMPOSES STRICT LIABILITY FOR VIOLATIONS OF ITS MANDATES.

A. TILA and Its Rescission Remedy Are Strictly Enforced to Protect Borrowers.

The purpose of TILA—of which HOEPA and the rescission remedy are critical parts—is to create a regime that "promote[s] the informed use of credit by assuring meaningful disclosure of credit terms" through strict compliance with its mandates. *Sentinel Fed. Sav. & Loan v. Office of Thrift Supervision*, 946 F.2d 85, 87 (8th Cir. 1991); *see also* 15 U.S.C. § 1601(a); *Household Credit Servicing, Inc. v. Pfennig*, 541 U.S. 232, 235 (2004); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980).

TILA is a remedial statute, which must be liberally construed in favor of borrowers. *See, e.g.*, *Murphy v. Ford Motor Credit*, 629 F.2d 556, 569

(8th Cir. 1980) (reversed on other grounds).[5] Congress has carefully designated those portions of TILA whose violation is deemed of such significance to its disclosure regime to be "material" violations.[6] 15 U.S.C. § 1602(u).

TILA grants borrowers the absolute right to rescind a transaction within three business days following consummation. 15 U.S.C. § 1635(a). The right is reserved only for non-purchase loans secured by a consumer's primary residence. 15 U.S.C. §§ 1602(w) & 1635(a); *see also Belini v. Wash. Mut. Bank, FA*, 412 F.3d 17, 20 (1st Cir. 2005). When a creditor fails

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[5] TILA is intended to protect the marketplace itself, as well as consumers, by protecting the competitive positions of "ethical and efficient lenders." *See, e.g.*, 109 Cong. Rec. 2027 (1963) (remarks of Sen. Douglas). Congress created liability in TILA to deter violations by providing economic incentives to creditors to desist from widespread TILA disclosure violations. *See Dryden v. Lou Budke's Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980); *In re Perkins*, 106 B.R. 863, 864 (Bankr. E.D. PA. 1989); *see also* 145 Cong. Rec. E569, E570 (1999) (statement of Rep. LaFalce). Congress designed TILA's protections to apply not only to "model" borrowers but to ". . . all consumers, who are inherently at a disadvantage in loan and credit transactions." *Semar v. Platte Valley Fed. Sav. & Loan*, 791 F.2d 699, 705 (9th Cir. 1986).

[6] Prior to HOEPA, the right of rescission was only available for failure to accurately disclose the APR, finance charge, amount financed, total of payments, schedule of payments, and for failure to properly provide the three day post-closing right to rescind the loan. 15 U.S.C. § 1602(u) (1993); 15 U.S.C. § 1635. HOEPA added to this list of "material disclosures"—those which trigger the extended right to rescind —the HOEPA early warning disclosures required by §1639(a), *see* 15 U.S.C. § 1602(u) ("disclosures required by section 1639(a) are "material"), and the inclusion of prohibited terms in high-cost loans, 15 U.S.C. § 1639(j); *see also* Reg. Z, 12 C.F.R. § 226.23 n. 48.

to comply with any *material* disclosure requirement, TILA's three-day right to rescind is extended to three years. 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3); *see In re Community Bank*, 418 F.3d 277, 304 (3d Cir. 2005) ("If 'material disclosures' are not provided, the creditor is *strictly liable* and a borrower has the right to rescind the loan up to 3 years after consummation . . ."). (emphasis added). The three "material" violations relevant here are: (1) Rand's failure to comply with the time, content, and method requirements of the HOEPA early warning notice; (2) Rand's inclusion of a prepayment penalty in contravention of HOEPA's express prohibition; and (3) Rand's failure to give clear and conspicuous notice of the three-day post-closing right to cancel.

Through rescission, borrowers are restored to the position they would have been in if they had never undertaken the mortgage: rescission mandates a release of the security interest in the property and return of any money the consumer has paid as finance charges or other fees, while returning the remaining principal to the creditor. 15 U.S.C. § 1635(b); 12 C.F.R.§ 226.23(d); *see also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 411 (1998); *Barrett v. J.P. Morgan Chase, N.A.*, 445 F.3d 874, 875-76 (6th Cir. 2006); 17 Am. Jur. 2d Consumer Protection § 135. Thus, where the creditor fails to comply with the law, rescission allows homeowners who have placed

the title and equity in their homes at risk by entering into a home equity transaction a chance to undo the transaction and be returned to the status quo.

All material TILA disclosures, including the special disclosures required for high-cost loans by HOEPA, are subject to the basic requirement that they must be made "clearly and conspicuously." 15 U.S.C. § 1632(a); 12 C.F.R.§ 226.17(a)(1); 12 C.F.R. § 226.31(b)(1). TILA and its implementing Regulation Z further specify timing requirements for each mandated notice. 15 U.S.C. § 1639(b)(1); 12 C.F.R. § 226.31(c) (early HOEPA disclosure); 15 U.S.C. § 1635(a); 12 C.F.R. §226.17(d), § 226.23(a)(3) & (b) (all disclosures given prior to consummation; the three-day post-closing cancellation right does not begin until the latest of three events, one of which is the delivery of a compliant notice of the right to cancel.). It is incumbent upon a creditor to provide all notices in compliance with TILA's requirements: timing, method, and clear and conspicuous disclosure are as integral to TILA compliance as is content. *See, e.g.*, 15 U.S.C. § 1602(u); *Sentinel,* 946 F.2d at 87; *Household Credit,* 541 U.S. at 235. Moreover, determining whether a material disclosure complies with TILA is an objective test. Thus, it is "unnecessary to inquire into the subjective deception or misunderstanding of particular consumers."

Zamarippa v. Cy's Car Sales Inc., 674 F.2d 877, 879 (11th Cir. 1982)[7]; *see also Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325, 327-328 (7th Cir. 1999).

B. TILA's HOEPA Amendments Reflect Congress' Heightened Concerns About High-Cost Mortgages.

In 1994 Congress amended TILA by enacting the Home Ownership and Equity Protection Act, establishing special additional protections for borrowers with high-cost loans. 15 U.S.C. §§ 1602(aa); 1639. Congress enacted HOEPA in response to widespread reports of high-cost and abusive mortgage lending practices.[8] Despite TILA's disclosure regime, predatory lenders were able to conceal the high costs and many pitfalls of their abusive

[7] While it is irrelevant to a creditor's disclosure obligations whether a particular consumer can read, speak, or understand English, the loss of a waiting period can be particularly significant to non-English readers like the Mouas. *See Zamarippa*, 674 F.2d at 879. ("Appellees have not suggested that adequate disclosure in English would never be of benefit to Spanish-speaking consumers who could, for example, have the documents translated or explained to them. We cannot allow the appellees to evade the requirements of the TILA and Regulation Z on the fortuity that some consumers are better able to evaluate the information than others.").

[8] *See generally Problems in Community Development Banking, Mortgage Lending Discrimination, Reverse Redlining, and Home Equity Lending: Hearings Before the S. Comm. On Banking, Housing, and Urban Affairs*, 103d Cong. 137 (1993); *The Home Ownership and Equity Protection Act of 1993: Hearings on S. 924 Before the S. Comm. on Banking, Housing, and Urban Affairs*, 103d Cong. 245 (1993); *Community Development Institutions: Hearing Before the H. Subcomm. On Financial Institutions Supervision, Regulation and Deposit Insurance*, 103d Cong. 2 (1993); *The Home Equity Protection Act of 1993: Hearings on H.R. 3153 Before the H. Subcomm. on Consumer Credit and Insurance of the H. Comm. on Banking, Finance, and Urban Affairs*, 103d Cong. 127 (1994).

loans from the low-income, elderly, and ethnic and racial minority borrowers who were their target population. *See, e.g.*, 139 Cong. Rec. S5709, 5711 (1993) (statement of Sen. D'Amato). Thus, HOEPA was enacted because "the type of disclosures required under TILA were insufficient to ensure adequate notification to the consumer of the financial ramifications of high-cost, nonpurchase money mortgages." *Newton v. United Cos. Fin. Corp.*, 24 F. Supp. 2d. 444, 450 (E.D.Pa. 1998).

HOEPA curtails abusive practices in two ways. First, it requires that borrowers in high cost mortgages[9] be provided a disclosure of specific terms including the amount borrowed, the annual percentage rate, and each level of potential monthly payments–*three days in advance of* consummation of the loan (hereinafter referred to as the "early warning notice").[10] The HOEPA early warning notice states:

> You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application. If you obtain this loan, the lender will have a mortgage on your home.

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[9] HOEPA includes in its coverage two classes of mortgages that are deemed "high cost" by virtue of either the APR or their points and fees. 15 U.S.C. § 1602(aa). If either of these triggers is met, the loan is covered by HOEPA. Since there is no dispute that the Mouas' mortgage was high cost and covered by HOEPA, the details of HOEPA coverage are not discussed herein.

[10] The HOEPA early warning has been called "a three-day advance Miranda-like disclosure." Elizabeth Renuart & Kathleen Keest, *Truth In Lending*, § 9.1 (5th ed.) (2003)

> You could lose your home and any money you have put into it, if you do not meet your obligations under the loan.

15 U.S.C. § 1639(a)(1). Second, HOEPA prohibits creditors making high-cost loans from "piling on" even more costs through other abusive terms such as prepayment penalties and negative amortization. 15 U.S.C. § 1639(c)-(g). The specific prohibition against prepayment penalties, at issue here, reflected Congressional recognition that the imposition of a back-end penalty fee as a condition to early repayment or refinancing of the loan effectively trapped borrowers in such loans. H.R. Conf. Rep. No. 652, 103d Cong., 2d Sess. 147, at 160 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1977, 1990-91; S. Rep. No. 103-169, at 25-26 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 1881, 1909-10.

Through HOEPA's two-pronged approach, TILA for the first time stepped beyond its pure "disclosure" function by affirmatively prohibiting certain abusive practices from being imposed in tandem with high-cost mortgages. Thus, while HOEPA "does not create a usury limit or prohibit loans with high rates or high fees," Congress instituted a regime with "a heightened degree of consumer protection in order to ensure that borrowers are not victimized by abusive lending practices." H.R. Conf. Rep. No. 652,

103d Cong., 2d Sess. 147, at 158 (1994), as *reprinted in* 1994 U.S.C.C.A.N. 1977, 1988.

Congress determined that TILA's strongest remedy—the extended three-year right to rescind—would be available for a lender's failure to provide an accurate, three-day advance warning notice and for inclusion of any of the prohibited terms in a loan covered by HOEPA. *See* note 6, *supra; see also* 12 C.F.R. § 226.23; § 226.31(c). ("If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation. . .") 12 C.F.R. § 226.23(a)(3), n. 48 (defining "material disclosures"; 59 Fed. Reg. 61832 (Dec. 2, 1994) (to be codified at 12 C.F.R. pt. 226) ("the provision is intended to protect consumers from high-pressure sales tactics and to ensure that consumers understand the terms of loans with high interest rates or up-front fees.")

The decision to make rescission available for material violations of HOEPA demonstrates both the magnitude of these violations and Congress' determination to deter the origination of HOEPA loans. *See* S. Rep. No. 103-169, at 23 (1993); as reprinted in 1994 U.S.C.C.A.N. 1881, 1907 ("The only loans that the Act would deter are those that charge excessive interest or upfront fees, and have repayment terms that the borrower cannot possibly meet. Consequently, I do not believe the remedies contained in the Act

would impose unreasonable compliance costs or interfere with *legitimate* financial transactions.") (emphasis added) (remarks of Eugene Ludwig, Comptroller of the Currency); *Sellers v. Wollman,* 510 F.2d 119, 123 (5th Cir. 1975) (citing remarks of Cong. Cahill, 114 Cong. Rec. 1611 (1968)) ("The purpose of according borrowers a right of rescission is broader; not only is it designed to compel disclosure, but it also serves to blunt unscrupulous sales tactics by giving homeowners a means to unburden themselves of security interests exacted by such tactics.").

The extended rescission right thus serves dual purposes. It serves as sufficiently powerful remedy to deter high-cost lenders from seeking to deprive homeowners of the mandated information and time to carefully evaluate the offered loan terms and the attendant risks of the loan in the first place, or from including terms prohibited by HOEPA. When a lender ignores HOEPA's mandates, it also assures that homeowners have a practical and meaningful way to vindicate the rights the non-compliant lender sought to deny them.

C. Unless Demonstrably Irrational, Regulation Z and Its Commentary Are Binding On Courts.

To effectuate TILA and HOEPA, and assure compliance with their mandates, Congress delegated "expansive authority" to the Federal Reserve Board to enact appropriate regulations. *Household Credit,* 541 U.S. at 235.

TILA's primary implementing regulation, 12 C.F.R. § 226, known as "Regulation Z", and its Commentary expand upon the text of the statute, imposing specific requirements, definitions, and explanations of the statutory terms. As the Supreme Court has repeatedly recognized, Regulation Z and its Official Staff Commentary ("Commentary") are binding authority on courts interpreting TILA. *Household Credit*, 541 U.S. at 238 (quoting *Ford Motor Credit*, 444 U.S. at 566.) ("Congress has specifically designated the [Board] and staff as the primary source for the interpretation and application of truth-in-lending law."). Thus, "[a]bsent 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." *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981). The Commentary interpreting TILA or Regulation Z is similarly dispositive. *Sentinel*, 946 F.2d at 89. Indeed, the Supreme Court has repeatedly warned lower courts "that judges ought to refrain from substituting their own interstitial lawmaking for that of the Board." *Household Credit*, 541 U.S. at 244, (quoting *Ford Motor Credit*, 444 U.S. at 568).

Material violations of TILA and HOEPA are not merely technical compliance standards but are disclosure requirements designed to ensure that

homeowners understand the terms of the mortgage transactions they are entering into and have the opportunity to assess the risks associated with them. The district court's analysis ignored the strict timing, method, and content requirements of TILA, Regulation Z, and the Commentary and substituted subjective standards for TILA's objective ones. In doing so, the district court substituted its own judgment for that of Congress and the Board and deprived the Mouas of the important benefits of TILA and HOEPA's disclosures, the pre-closing waiting period and post-closing cooling-off period and, ultimately, of their right to rescind.

II. RAND'S MATERIAL VIOLATIONS OF TILA GAVE THE MOUAS FIVE INDEPENDENT BASES FOR RESCISSION.

A. Rand's Early Warning Notice Failed to Comply With HOEPA as to Timing, Method, and Content, Triggering the Extended Rescission Right.

The district court ruled that facts establishing that Rand violated HOEPA's early warning notice requirements as to timing, method, and content were "irrelevant" because the sole material violation creating a rescission right is the complete failure to give *any* notice at *any* time. *See* JA 240 (extended rescission right "arises only if the lender fails to provide material disclosures at all") and JA 242 ("Even if the disclosures were inaccurate, they could not be the basis for finding a three year rescission right, since the statute and regulations provide a three year right to rescind only if the lender *fails to provide* the material disclosures.") (emphasis in original). The district court cited no authority for this remarkable proposition, nor could it. Indeed, the district court ignored Supreme Court precedent and impermissibly substituted its judgment for that of Congress and the Board. *See Beach*, 523 U.S. at 411 ("[w]hen the lender 'fails to deliver certain forms *or to disclose important terms accurately*' to the borrower, the Act extends the borrower's right to rescind the transaction to three years"); *Household Credit*, 541 U.S. at 244; *Ford Motor Credit*, 444 U.S. at 568.

Congress expressed its serious reservations about the propriety of high-cost HOEPA loans by erecting significant compliance hurdles. Congress directed that the HOEPA three-day advance notice take the form of a warning to the borrower that "you are not required to complete this agreement" and "you could lose your home and any money you have put into it" because of the loan. After these sobering words, the HOEPA early warning lays out the terms of the loan for the consumer—the APR, monthly payments for *each* payment level, any balloon payment, and the amount borrowed. 12 C.F.R. § 226.32(c); Official Staff Commentary on Regulation Z, § 226.32(c). A copy of the early warning notice must be given to *each* borrower liable on the loan. 12 C.F.R. § 226.31(e). Indeed, the timing, method, and content of the HOEPA early warning notices are deemed by Congress to be of such importance that, if the terms of the loan change after this disclosure is furnished, the creditor must re-disclose and is required to wait another three days before closing the loan. 12 C.F.R. § 226.31(c)(1).

Here, there is no dispute that: (1) the Mouas' mortgage was subject to HOEPA; (2) the Mouas did not receive a HOEPA early warning notice until the date of consummation;[11] and (3) the HOEPA early warning notice the

[11] The HOEPA disclosure provided to the Mouas in January 2006 described a radically different loan than the one that was consummated in April, requiring Rand to re-disclose and wait three days before closing.

Mouas received did not comply with the statute or Regulation Z because it did not disclose the significantly higher monthly payment level that would take effect just twelve months into the loan term.[12] Despite these clear, undisputed, and multiple violations of HOEPA, the district court concluded that the Mouas did not have a three-year extended right to rescind. Practically, the district court's failure to enforce the three-day advance notice requirements deprives homeowners of the time and opportunity to consider the terms of the proposed loan and gives unscrupulous lenders a free hand in the high-cost, high-risk marketplace.[13]

The failure to provide the HOEPA early warning notice in the time, manner, and with the content prescribed by the statute, Regulation Z, and the Commentary gives borrowers the right to rescind for up to three years. Accordingly, the district court's grant of summary judgment on the claim that Rand failed to comply with HOEPA's three-day advance early warning notices must be reversed.

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[12] This was no mere technicality as the payment information excluded from the early warning would have revealed the higher payment that was owing for the majority of the 62-month loan term—$3272, as compared to the $2,883 payment owing for only the first 12 months of the loan.

[13] Here, Rand deprived the Mouas of HOEPA's mandated three days to review the 16.775% percent interest rate and the payments of $2,883 a month (resetting to $3,272 a month after a year), decide whether or not they should enter the transaction, including contributing $50,000 from the sale of their store, and determine whether they could afford the monthly payments.

1. Timing: Rand's Failure to Provide the HOEPA Early Warning Notice Three Days in Advance Materially Violated TILA.

Congress determined that the three-day, early warning notice was necessary in addition to TILA's post-transaction three-day right to rescind because of the high risks and high stakes in HOEPA lending. *See* 139 Cong. Rec. at S5710. "To ensure that consumers understand the terms of such loans and are protected from high-pressure sales tactics, the legislation requires creditors making High Cost Mortgages to provide a special, streamlined High Cost Mortgage disclosure three days before consummation of the transaction." S. Rep. No. at 103-169, at 21(1993), as reprinted in 1994 U.S.C.C.A.N. 1881, 1906. Congress intended this three-day waiting period *before* closing a high-cost loan be added to, not run concurrently with, TILA's three-day *post*-closing absolute right to cancel a home-secured loan.[14] Thus, the HOEPA three-day early warning notice offers homeowners the information Congress deemed essential to evaluate the advisability of entering into a high-cost transaction and the time and privacy

[14] As the Federal Reserve Board has explained, the combined effect of the two separate three-day periods is to "afford[] consumers a minimum of six business days to consider accepting key loan terms before receiving the loan proceeds" in a high-cost HOEPA loan. 66 Fed. Reg. 65604 (Dec. 20, 2001) (to be codified at 12 C.F.R. pt. 226). *See also* S. Rep. No.103-169, at 2 (1993) ("[t]he disclosure must be provided at least 3 days before settlement, creating an *additional* 'cooling off' period.") (emphasis added.)

in which to consider the decision prior to entering the loan. *See* S. Rep. No. 103-109.[15]

The importance of timely delivery of the HOEPA early warning notice is reinforced by the compliance details in the Commentary. It is not enough for the creditor to mail the HOEPA disclosure within the three-day period, the consumer must *receive* it three business days in advance. Official Staff Commentary to Regulation Z, § 226.31(c)(1). ("Disclosures are considered furnished when received by the consumer.")

Moreover, as we have discussed, Congress made the failure to provide the HOEPA early warning notice three days in advance of closing a material disclosure violation giving rise to a three-year extended right to rescind. S. Rep. No. 103-169, at 28 (1993), *as represented in* 1994 U.S.C.C.A.N. 1881, 1912 ("Failure to provide the High Cost Mortgage disclosure three days before consummation . . . [is a] material disclosure violation[] of the Subtitle B of Title I."); § 15 U.S.C. § 1602(u); *see also Newton,* 24 F. Supp. 2d 444 (concluding that the homeowners had the right to rescind their mortgages because their HOEPA notices were not timely received); *Jackson v. U.S. Bank, N.A.*, 245 B.R. 23, 32 (Bankr. E.D. Pa. 2000) (finding that the HOEPA notice, the receipt of which the borrower had acknowledged with

[15] *See* footnote 7, *supra*.

her signature, was not provided until the closing and the borrower was entitled to rescind the transaction).

Here, because the district court ignored the statutory requirement that the disclosures be given three days in advance, it did not consider the legality of the Mouas' waiver of the three-day waiting period.

Because the validity of the waiver is essential in determining whether or not a material violation of HOEPA occurred as to timing, we now highlight issues of law and material issues of fact surrounding the alleged waiver.

a. The Legality of the Mouas' Purported Waiver of the Three-Day Advance Waiting Period Involved Issues of Fact and Law.

A consumer is not free simply to waive the advance waiting period, nor is a creditor free to compel such a waiver. *See* 12 C.F.R. § 226.31 (c)(1)(iii); *Mills v. Home Equity Group, Inc.*, 871 F. Supp. 1482, 1486 (D.D.C. 1994) (right to rescind cannot be released or waived absent the narrowly drawn circumstances found in TILA for such a waiver).

There are three prerequisites to a waiver, each of which must be fulfilled for the waiver to be effective. First, the homeowners must be facing a financial emergency that is so pressing that it cannot be averted without waiving or modifying the advance cooling off period. Official Staff

Commentary on Regulation Z, § 226.31(c)(1)(iii)-1(bona fide personal emergency rules in § 226.23(e) on waiver of notice of right to cancel apply to waiver of HOEPA notice); Official Staff Commentary on Regulation Z, § 226.23(e) -1 (bona fide personal emergency is one that must be met before the end of the rescission period); *see also Ljepava v. M.L.S.C. Properties, Inc.*, 511 F.2d 935 (9th Cir. 1975) (no bona fide personal emergency where foreclosure is two months hence). Second, waiver can be effectuated only *after* each consumer with a right to rescind has been provided a copy of the HOEPA disclosure. 12 C.F.R. § 226.31(c)(1)(iii). Third, the waiver must be in the homeowners' own words and signed by each homeowner entitled to rescind; it may not be accomplished through the use of a printed form. 12 C.F.R. § 226.31(c)(1)(iii); *Wiggins v. AVCO Fin. Servs.*, 62 F. Supp. 2d 90, 97 (D.D.C. 1999) (pre-printed waiver of three-day notice of right to cancel was ineffective waiver).

Here, disputed issues of fact and law exist as to all three prerequisites: (1) whether in fact a bona fide emergency existed; (2) whether the Mouas received the early warning prior to copying the waiver statement; and (3) whether requiring a consumer to copy a statement is the equivalent of a pre-printed form. While the district court did not reach these issues because of its erroneous conclusion that the timing of the early warning was irrelevant

to the Mouas' right to rescind, each of these issues independently made summary judgment inappropriate.

i. Disputed issues of fact exist as to whether a *bona fide* emergency existed.

First, the existence of a *bona fide* financial emergency is a necessary prerequisite to a homeowner's waiver of HOEPA's advance waiting period. 12 C.F.R., § 226.31(c)(iii); *see* Official Staff Commentary on Regulation Z, 12 C.F.R. § 226.31(c). Whether such an emergency existed at the time of the Mouas' loan closing justifying shortening or waiving the three-day advance waiting period is a question of fact as is clearly explained in the Commentary:

> *Paragraph 31(c)(1)(iii) Consumer's waiver of waiting period before consummation.* 1. *Modification or waiver.* A consumer may modify or waive the right to the three-day waiting period only *after* receiving the disclosures required by section 226.32 and *only if the circumstances meet the criteria for establishing a bona fide personal financial emergency under section 226.23(e).* Whether these criteria are met is determined by the facts surrounding individual situations. The imminent sale of the consumer's home at foreclosure *during* the three-day period is one example of a bona fide personal financial emergency. Each consumer entitled to the three-day waiting period must sign the handwritten statement for the waiver to be effective." (emphasis added).

Official Staff Commentary to Regulation Z, 12 C.F.R § 226.31(c)(1)(iii); *see also* Official Staff Commentary to Regulation Z, § 226.23(e) -1 (bona fide

personal emergency is one that must be met before the end of the rescission period); *see also Ljepava*, 511 F.2d at 935. A critical analysis of the factual basis for waiver is essential to preserving TILA and HOEPA's statutory scheme and ensures that lenders are not permitted to "game" the system to deprive homeowners of their pre-closing waiting period or their post-closing right to rescind.

Because the district court erroneously concluded that no waiver was necessary because Rand's failure to deliver the early warning notice did not trigger the extended rescission right in any event, it therefore failed to consider the numerous disputed material facts surrounding whether a *bona fide* emergency existed. The words dictated by the lender describing the emergency attributed it to the county's untimely responses to requests for pay-off statements (JA 115*), yet numerous disputed facts exist as to whether a *bona fide* emergency existed or whether it was a mere pretext for

depriving the Mouas of the pre-closing waiting period.[16] Indeed, the facts surrounding the waiver—particularly the fact that forty-one days remained in the redemption period and Manisy Moua was unable to read and understand the statement she copied (complete with misspellings)—raise serious questions about whether there genuinely was a *bona fide* emergency. *See* note 16 *supra*; JA 115*; 116*; 208* ¶3. Accordingly, the disputed material facts surrounding whether a *bona fide* emergency existed require a remand to the district court for fact-finding.

[16] For example, the Sheriff's pay-off statement, JA 48, is dated April 14 and 15, 2005, a full week before the Mouas' closing. It provides a pay off through April 22 of $220,414. JA 49. It provides no pay off amount through April 27, the funding date for the Mouas' loan, yet the HUD-1 reveals that Rand proceeded to fund the loan, paying the Sheriff's office $221, 964. *See* JA 56, 206. Thus, it appears that, contrary to Judi Lawrence's affidavit, Rand was able to contact the Sheriff and receive a quick updated pay-off figure in a few days, raising the question as to why it could not have provided the HOEPA advance warning notice and simply moved the closing ahead by three or more days. Similarly, the documents in the record reveal that the Sheriff's office provided a pay-off within two weeks of Rand's request; even with an additional delay of two weeks, the loan could have been funded and the Mouas could have been afforded advance and post-closing cooling off periods well within the remaining 41 day redemption period. These documents suggest that had the facts underlying Rand's description of the "emergency" been properly scrutinized by the district court, the waiver would have been found invalid. In any event, material issues of fact remain regarding whether a *bona fide* emergency existed.

ii. Issues of fact exist as to whether the Mouas received the HOEPA disclosure prior to executing the waiver.

Second, HOEPA specifically requires that "[a] consumer may modify or waive the right to the three-day waiting period *only after receiving* the [advance warning] disclosures required by Section 226.32." Official Staff Commentary of Regulation Z, 12 C.F.R. § 226.31(c)(iii)(emphasis added). The Board mandates that homeowners at least be informed of the essential loan terms—material HOEPA disclosures—*before* they waive their rights. Therefore, in order for the Mouas' waiver to be valid, Rand would have had to provide the early warning HOEPA notice to the Mouas *prior to their waiver* of their advance waiting period.[17]

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[17] The rules for delivering disclosures and conducting closings electronically provide insight into the importance of strict lender compliance with the requirements for timing and order of disclosure during the course of a loan transaction. Thus, it is instructive to consider how the process would be required to unfold if Rand and the Mouas had elected to conduct the closing electronically. First, Rand would have had to provide each of the Mouas—through separate email accounts—a non-bypass-able disclosure of each of the terms of the advance HOEPA disclosure. *See* 12 C.F.R. §§ 226.31(c)(iii); 226.36; Official Staff Commentary on Regulation Z, §226.23(b)-1 ; 66 Fed. Reg. 17329 (March 30, 2001) (to be codified at 12 C.F.R. pt. 226). Next, Rand would have had to allow each of the Mouas to compose and transmit in their own words, an explanation of their emergency and a request that the closing occur immediately. This could likely be implemented using a blank box typically utilized in online forms for seeking comments. At that point, Rand would have been required to transmit the final TILA disclosures, the Notice of Right to Cancel; only then could signing of loan documents take place.

Here, there is a material issue of fact as to whether or not the Mouas received the early warning HOEPA disclosures prior to copying and signing the waiver statement. Indeed, the *only* documentation in the record suggests that the Mouas were instructed to execute their waiver first, prior to receiving any closing documents. A closing instruction provided by Rand states:

> KAREN
> *PRIOR TO STARTING THIS CLOSING* THE CUSTOMER NEEDS TO MAKE A STATEMENT SIMILAR TO THE FOLLOWING IN THEIR OWN HANDWRITING, SIGN AND DATE.

JA 115* (emphasis added). The closing instruction continues with the text that Mrs. Moua was directed to copy and the instruction that both Mouas were to sign to effectuate the waiver.

Accordingly, whether the closing proceeded as instructed by Rand, and thus contrary to Regulation's Z prescription, also presented an issue of material fact that precludes summary judgment.

iii. As a matter of law, the copied handwritten statement was ineffective to waive the three-day advance waiting period.

Third, Regulation Z explicitly prohibits the use of a printed form to waive the advance waiting period mandated by HOEPA. *See* 12 C.F.R. § 226.31(c)(iii). This parallels the prohibition on using a printed form to

waive the post-closing rescission period. *Id.;* 12 C.F.R. § 226.23(e). Thus, a borrower's signature on a printed form cannot waive either the advance waiting period or the post-closing right to rescind. *See* 12 C.F.R. § § 226.31(c)(iii), 226.23(e);[18] *Wiggins*, 62 F. Supp. 2d at 97. ("By having Plaintiff waive her right to rescission on a pre-printed form . . . Defendant violated the dictates of TILA.").

To be sure, requiring a borrower to copy a pre-printed waiver word-for-word in her own handwriting plainly subverts both the letter and spirit of TILA and Regulation Z's prohibition on pre-printed forms. Accordingly, the Mouas' waiver should also be invalidated as a matter of law.[19]

* * *

Thus, issues of both law and fact must be resolved surrounding the Mouas' alleged waiver of the three-day early warning period. Because the district court's decision ignored the requirement of TILA, Regulation Z, and the Commentary that the HOEPA early warning notice be delivered three days prior to closing, the district court failed to consider the whether the

[18] There are narrow exceptions, not relevant here, limited to post-disaster situations as declared by the Board. *See* 12 C.F.R. §§ 226.23(e)(2) – (4).

[19] Even assuming *arguendo* that this Court does not invalidate the waiver as a matter of law as a violation of the pre-printed form rule, remand would still be required on this issue for the district court to determine whether the instructions here, which required an illiterate person to copy letter-by-letter the waiver language, violated the pre-printed form rule.

alleged waiver was valid. Accordingly, this Court should correct the district court's legal errors and remand for any necessary factual determinations.

2. Method of Delivery: Failure to Provide Each Borrower A Copy of the HOEPA Early Warning Notice Materially Violates TILA.

Material issues of fact also exist as to whether Manisy and Yer Song Moua each received a separate copy of the HOEPA early warning disclosure, a failure that provides another basis for their right to rescind under TILA.

Regulation Z § 226.31(e), addressing HOEPA loans, states that "[i]f the transaction is rescindable under . . . section 226.23 . . . the disclosures shall be made to each consumer who has the right to rescind." [20] Indeed, Regulation Z expressly singles out home-secured credit for special treatment in requiring that a separate set of all disclosures be given to *each consumer* with a right to cancel; for other forms of consumer credit involving multiple obligors, the disclosures may be given to only one borrower. 12 C.F.R. § 226.17(d). In the HOEPA context, providing each borrower with a copy of the advance warning notice effectuates TILA's goal "of making sure that each borrower with the right to rescind has personally received all the

[20] Each "consumer" with an ownership interest in the property which serves as collateral has an independent right to rescind, *see* 12 C.F.R. §§ 226.2(a)(11), 226.23(a); Official Staff Commentary on Regulation Z § 226.23(a)(4)-1.

information necessary" to evaluate the transaction. *In re Jones*, 298 B.R. 451, 458-460 (Bankr. D.Kan. 2003).

The importance of ensuring that each borrower actually receives a copy of the material disclosures, as opposed to simply being shown the disclosures, is reinforced by the Commentary.[21] For disclosures on closed-end loans like Rand's:

> "Creditors must give the required disclosures to the consumer in writing, in a form that the consumer may keep. . . . The disclosure requirement is satisfied if the creditor gives a copy of the . . . disclosures to the consumer to read and sign; and the consumer receives a copy to keep at the time the consumer becomes obligated. It is not sufficient for the creditor merely to show the consumer the document containing the disclosures."

Official Staff Commentary on Regulation Z, § 226.17(b)-3; 67 Fed. Reg. 16980, 16982-83 (April 9, 2002) (to be codified at 12 C.F.R. pt. 226). Thus, it was not sufficient for Rand to merely show Yer Song Moua the disclosures while giving his wife a copy, or to merely show Manisy Moua the disclosures while giving her husband a copy. TILA required that Rand

[21] The importance of providing a copy of each disclosure to each borrower is also illustrated by the Commentary on Regulation Z in the context of electronic disclosures. For disclosures on closed-end loans like Rand's, "if e-mail is used, *the creditor complies with section 226.23(b)(1) if one notice is sent to each co-owner*." (emphasis added). Official Staff Commentary on Regulation Z, 226.23(b)-1; 66 Fed. Reg. 17329, 17340 (March 30, 2001) (to be codified at 12 C.F.R. pt. 226) (emphasis added). Furthermore, "each [co-owner] must designate an electronic address for receiving the disclosure." *Id.*

give Yer Song and Manisy Moua a copy each, so that they could each make an independent decision whether or not to complete this high-cost mortgage.

Nevertheless, the district court held that "it was reasonable for Rand to give the [Mouas] one copy of the disclosures." JA 242. In so ruling—directly contrary to the express requirement of Regulation Z that Rand was required to give one copy to Yer Song Moua and one copy to Manisy Moua—the district court's decision runs afoul of the Supreme Court's oft-repeated warning that courts are bound to follow Regulation Z's mandates. [22] 12 C.F.R., §226.31(e); *see Household Credit*, 541 U.S. at 244; *Ford Motor Credit*, 444 U.S. at 568. The district court was not free to substitute its judgment for that of the Board in concluding that one copy would suffice to meet Rand's obligations.

[22] Nor can the district court's decision allowing a single disclosure rest on the fact that Yer Song and Manisy Moua are spouses who live together. *See In re Williams*, 291 B.R. 636, 645 (Bankr. E.D.Pa. 2003); *Stone v. Mehlberg*, 728 F.Supp. 1341, 1353 (W.D. Mich. 1989). While Regulation Z took pains to require separate disclosures only for home-secured credit, it clearly did not further exclude married co-borrowers from the separate disclosure requirement. *See In re Jones*, 298 B.R. at 458-60. Given the limitation of the separate disclosure rule to home secured credit and that the most likely scenario for co-borrowers is that of a married couple, it is inconceivable that Congress and the Board overlooked this situation when they specified that each borrower with the right to rescind must be given his or her own set of the documents containing all the required information. *Id*.

Because the district court's legal analysis disregarded Regulation Z's requirement that a separate copy of the early warning be given to each borrower, the issue must be remanded to the district court for factual determinations as to whether or not each of the Mouas received a copy of the early warning.

3. Content: Rand's Disclosure Excluded the Scheduled Payment Increase, Materially Violating TILA.

The material omission of a scheduled payment increase from the HOEPA early warning notice provides another independent basis for the Mouas' right to rescind. Here, the district court ruled that Rand's obligation to disclose the highest monthly payment on the early warning notice was satisfied by: (1) its disclosure of the final balloon payment owing on the mortgage—"[t]he one time balloon payment of $245,331.95 is the maximum monthly payment, and so Rand's disclosure appears to properly comply with the requirements of the statute" and (2) Rand's disclosure of the maximum monthly payment on other documents, separate from the HOEPA early warning notice. JA 242. The district court ultimately concluded that, "[e]ven if the disclosures were inaccurate, they could not be the basis for finding a three-year rescission right, since the statute and regulations provide

a three-year right to rescind only if the lender *fails to provide* the material disclosures." *Id.*

As an initial matter, the district court's ultimate conclusion expressly ignores Supreme Court precedent which specifically holds that "[w]hen the lender 'fails to deliver certain forms *or to disclose important terms accurately*' to the borrower, the Act extends the borrower's right to rescind the transaction to three years." *Beach*, 523 U.S. at 411.

As to the first basis of the district court's holding, as we have discussed, the Supreme Court has repeatedly reiterated that courts are bound to Regulation Z and the Commentary's interpretation of TILA. *See Household Credit*, 541 U.S. at 238, 244; *Anderson Bros. Ford*, 452 U.S. 219. Here the district court ignored the language of the statute and Regulation Z, and its clear application in the Commentary, which explain that the HOEPA disclosure itself must disclose *each regular* payment level, and that a balloon payment disclosure can never substitute for disclosure of any regular payment level.

Regulation Z spells out the disclosures required in the HOEPA three-day advance warning notice, specifically requiring disclosure of the amount of each regular monthly payment and any balloon payment. 12 C.F.R., §§ 226.32(c) & (d). As the Commentary makes clear, where the payment level

changes over the course of the loan term, "*the regular payment for each level must be disclosed*." Official Staff Commentary on Regulation Z, § 226.32(c)(3)(i) (emphasis added). [23]

The Commentary also specifically distinguishes between the definitions of the regular payment and balloon payment:

> *Paragraph 32(c)(3) Regular payment; balloon payment.*
>
> 1. *General.* The regular payment is the amount due from the borrower at regular intervals, such as monthly, bimonthly, quarterly, or annually. *There must be at least two payments*, and the payments must be in an amount and at such intervals that they fully amortize the amount owed.
> * * *
> *Paragraph 32(d)(1)(i) Balloon payment.*
> 1. *Regular periodic payments.* The repayment schedule for a section 226.32 [HOEPA] mortgage loan with a term of less than five years must fully amortize the outstanding principal balance through "regular periodic payments." A payment is a "regular periodic payment" if it is not more than twice the amount of other payments.

Official Staff Commentary on Regulation Z, §§ 226.32(c)(3)-1, 226.32(d)(1)(i)-1. As these definitions make clear, disclosure of a final "balloon payment" can never substitute for disclosure of the highest level of regular payment, as by definition, a regular payment can never be more than

[23] The Commentary provides the following example: "In a 30-year graduated payment mortgage where there will be payments of $300 for the first 120 months, $400 for the next 120 months, and $500 for the last 120 months, each payment amount must be disclosed, along with the length of time that the payment will be in effect."

twice the amount of other payments and must be payable at regular intervals. Here there is no question that the balloon payment disclosed by Rand—$245,331.95—could not qualify, as the district court concluded, as disclosure of the highest monthly payment.[24]

Despite the precise requirements set out by the Commentary to high-cost creditors such as Rand, the district court inexplicably conflated the requirement to disclose a final balloon payment with disclosure of the highest regular monthly payment.

The district court's second basis for its decision excused Rand's failure to include the higher regular payment amount of $3272 on the HOEPA disclosure because "it was revealed on other . . . [documents]". JA 241. TILA does not permit information just to be disclosed somewhere among the multitude of closing documents—it specifically requires clear and conspicuous disclosure at the prescribed time and in the prescribed manner. *See Vallies v. Sky Bank*, 432 F.3d 493, 497 (3d Cir. 2006), ("Nowhere in the TILA statute or its implementing regulations does it declare that a creditor may avoid the requirements as long as the consumer somehow gets the information."); *Rossman v. Fleet Bank Nat'l Ass'n*, 280 F.3d 384, 390 (3d

[24] The Rand balloon was more than 100 times greater than $3272, the highest regular monthly payment and was not payable at least two times or at a regular interval. *See* Official Staff Commentary on Regulation Z, §§ 226.32(c)(3)-1; 226.32(d)(1)(i)-1.

Cir. 2002) ("TILA mandates the required terms be 'clearly and conspicuously' disclosed. The mere inclusion of the terms in the agreement is ordinarily insufficient to meet the disclosure requirements. The purpose of the disclosures is to present the significant terms of the agreement to the consumer in a consistent manner that is readily seen and easily understood . . ."); *Smith,* 195 F.3d at, 327-28 (finding that obscuring part of a disclosure with a receipt and using terms on the receipt that did not match those in the disclosure box stated a claim under TILA); *Van Jackson v. Check 'N Go of Ill., Inc*., 193 F.R.D. 544, 548-549 (D. Ill. 2000) (a creditor may not satisfy its requirement to disclose inside a disclosure box by disclosing elsewhere in the documents; this would "give lenders a virtually free pass to violate the disclosure requirements.").

Therefore, Rand's failure to accurately disclose the $3,272.04 increased, regular monthly payment amount on the HOEPA notice itself—an increase of $400 a month—per the express language of Regulation Z, extended the Mouas' right to rescind for three years. 12 C.F.R. § 226.23(e); *see Beach*, 532 U.S. at 411; *see also Jeanty v. Wash. Mut. Bank*, 305 F. Supp. 3d 962, 964 (E.D. Wis. 2004) (finding lender violated HOEPA requirements by failing to disclose the regular monthly payment on the HOEPA early warning).

* * *

In sum, the district court's conclusion—that the failure to provide a compliant HOEPA early warning notice is irrelevant because rescission is available only "for failures to disclose" —regardless of whether the disclosures comply with TILA—ignores the plain language of the statute, regulations, Commentary, and Supreme Court precedent.

TILA and HOEPA disclosure requirements "do not exist to elevate form over function. Rather, they exist in their form to best protect consumers." *Vallies,* 432 F.3d 493, at . As such, the practical effect of the district court's decision to give Rand a pass on its multiple violations of HOEPA's three-day advance warning notice expressly frustrates Congress' intent. Rand's failure to give the Mouas each an advance warning notice that accurately stated all the essential terms three days prior to closing precluded the Mouas from determining if the loan was suitable for them. HOEPA was passed to protect borrowers exactly like the Mouas, whose personal and financial vulnerabilities expose them to the abuses of the high-cost lending market. Because the district court misapplied HOEPA as a matter of law and, thus, ignored key material facts, summary judgment on the HOEPA early warning claim should be reversed.

B. Inclusion of a Prepayment Penalty in a HOEPA Loan Creates the Extended Right to Rescind.

As discussed above, HOEPA seeks to combat some of the most egregious practices in the high-cost mortgage market. Among the practices expressly prohibited by HOEPA is the inclusion of prepayment penalties—fees that are charged if a loan is repaid early—which are designed to prevent the refinancing of a mortgage. *Banned at* 15 U.S.C. § 1639(c). The prohibition stemmed from extensive Congressional testimony that the prepayment penalties "trapped" consumers in abusive mortgages through "outrageous terms that made it prohibitively expensive to prepay their loans." H.R. Conf. Rep. No. 103-652, (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1997, 1990-91. Congress weighed these concerns against the theoretical market benefits that might come from prepayment penalties and decided that an explicit prohibition best served the "broader public interest." S. Rep. No. 103-169, at 26 (1993), *as reprinted in* 1994 U.S.C.C.A.N.1881,1910.

The inclusion of a prepayment penalty in a HOEPA loan is a material violation that allows a borrower to rescind the mortgage within three years.

15 U.S.C. § 1639(j).[25] HOEPA creates a single exception to this prohibition and places the burden on the creditor to come forward with affirmative proof that all four prongs of the exception outlined in 15 U.S.C. § 1639(c)(2) are satisfied. Thus, once a borrower comes forward to challenge the inclusion of a prepayment penalty in a HOEPA mortgage, the borrower has established a *prima facie* case, and the statute places the burden on the lender to present evidence that will prove that the prepayment penalty meets the exception.[26]

In order to meet the exception, a lender must prove that at the time the mortgage was consummated: (1) the consumer was not liable for an amount of monthly indebtedness payments (including the mortgage amount) that was greater than 50 percent of the monthly gross income of the consumer; (2) the income and expenses of the consumer were verified by a financial

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[25] 15 U.S.C. § 1639(j) states that "Any mortgage that contains a provision prohibited by this section shall be deemed a failure to deliver the material disclosures . . . for the purpose of" 15 U.S.C. § 1635, entitling the borrower to a three-year right of rescission under § 1635(f).

[26] The burdens of proof and of production fall on the lender in actions under TILA generally, *see, e.g.*, *Wright v. Tower Loan of Mississippi, Inc.*, 679 F.2d 436, 444 (5th Cir. 1982); *In re Maxwell*, 281 B.R. 101, 126 (Bankr. D. Mass. 2002), and in actions under HOEPA specifically, *see In re Rodrigues*, 278 B.R. 683, 690 (Bankr. D.R.I. 2002). This placement of the burden on the lender is in accord with the general interpretation of TILA's legislative intent. *See Mourning v. Family Publ'ns Serv.*, 411 U.S. 356, 377 (1973) ("The Truth in Lending Act reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.'").

statement signed by the consumer; (3) the penalty applied only to a prepayment made with amounts obtained by the consumer by means other than a refinancing by the creditor under the mortgage, or an affiliate of that creditor; AND (4) the penalty did not apply after the end of the five-year period beginning on the date on which the mortgage is consummated. 15 U.S.C. § 1639(c)(2).

Here, it is undisputed that the Mouas' loan fits HOEPA's definition of a high-cost mortgage, that it contains a prepayment penalty, and that the Mouas have challenged the prepayment penalty as violating HOEPA. JA 1, 152, ¶94. Nevertheless, the record is devoid of *any* evidence from Rand proving that its prepayment penalty meets the exception outlined in 15 U.S.C. § 1639(c)(2).[27] Because the Mouas alleged a claim upon which relief could be granted, and because Rand failed to meet its burdens of proof and of production, the trial court should not have summarily dismissed the Mouas' claim.

[27] Indeed, Rand did not even address the Mouas' prepayment penalty violation counterclaim in seeking summary judgment. *See* Rand Motion, Memorandum and Reply. The district court did not rule on the validity of this claim, but summarily dismissed it in entering judgment for Rand. *See* JA 231. Nor did the court correct its error after receiving a Letter from Manisy Moua seeking clarification that the prepayment penalty violation continued to present a live controversy between the parties. *See* JA 283.

Accordingly, this Court should reverse the district court's judgment and remand the claim based on Rand's inclusion of a prepayment penalty to the district court.

C. Failure to Deliver the Notice of Right to Cancel Clearly and Conspicuously in Accord With TILA's Mandate Triggers the Extended Right to Rescind.

In addition to the HOEPA-specific violations, TILA's general disclosure requirements provide yet another basis for the Mouas' right to rescind the Rand mortgage.

As discussed earlier, TILA gives all borrowers whose loans are secured by their principal dwelling the right to rescind for three days after the transaction. *See* 15 U.S.C. § 1635. Lenders must provide borrowers with "clear and conspicuous" notice of the three-day post-closing right to rescind. *Id*. Failure to provide that clear and conspicuous notice is a material violation of TILA that triggers the three-year extended right to rescind the loan. 12 C.F.R. § 226.23(a)(3) ("If the required notice or material disclosures are not delivered, the right to rescind shall expire three years after consummation.").

Here, disputed issues of fact and questions of law exist as to whether the Mouas received "clear and conspicuous" notice of their three-day *post*-closing cooling off period. The Mouas do not dispute that they signed two

pre-printed signature lines included on the Notice of Right to Cancel—an Acknowledgement of receipt of the Notice of Right to Cancel and a Confirmation that they had not rescinded. JA 52. The problems arise both from the document itself and from the fact that the Mouas were told to sign prematurely—on the day of the closing—the Confirmation that stated that "three days had passed since the closing and that they chose NOT to exercise their rescission rights." *Id.*[28]

An objective standard is applied to determine whether a disclosure is clear and conspicuous for purposes of TILA. *See Smith* 195 F.3d at 327-28; *Zamarippa*, 674 F.2d at, 879. The relative experience or inexperience of the actual borrower is irrelevant—the legal inquiry is based only on what a

[28] Rand claimed in the district court that if the form was signed prematurely it was not at its authorization. However, TILA makes clear that the title agent's actions are imputed to Rand. Rand is the creditor and the creditor has the duty under TILA to make the disclosures. To the extent the creditor delegates this duty to someone else, it cannot then turn around and complain that it is not responsible for errors. *See Vallies*, 432 F.3d at 495; *Wright*, 679 F.2d at 444; *In re Williams*, 232 B.R. 629, 641 (Bankr. E.D. Pa. 1999). Even if it were relevant, whether the closing agent is an agent of Rand is a mixed question of law and fact, and not appropriate for summary judgment adjudication where it is disputed.

reasonable borrower perceives.[29] Having a borrower sign a Confirmation that she has elected not to rescind at closing tells the average borrower that her cooling off period has expired and that she can no longer rescind—an understanding which is "clearly contradictory to the rights guaranteed by TILA" and the Notice of Right to Cancel. *Wiggins*, 62 F. Supp. 2d at 96. Thus, the confusion created by having the borrower sign the Confirmation renders the Notice of the Right to Cancel no longer clear and conspicuous.

Utilizing the reasonable borrower standard, district courts have repeatedly recognized that requiring a borrower prematurely to sign a Confirmation that three days had passed since the transaction and that the borrower does not desire to cancel necessarily creates confusion as to whether the right to cancel described in the Notice of Right to Cancel still exists. *See, e.g.*, *Wiggins*, 62 F.Supp. 2d at 96; *Rodrigues v. Members Mortgage Co., Inc.*, 323 F. Supp. 2d 202, 209 (D. Mass. 2004) ("Not only might a reasonable borrower believe it was necessary to sign both forms at the time of closing but the practice is particularly confusing because a

[29] The district court improperly applied a subjective standard (JA 246) to determine whether the disclosure of the right to rescind was clear, relying on the fact that it was not the first loan the Mouas had received in this country. The district court also relied heavily on the date the funds actually disbursed. *Id.* However, that is a red herring—what matters is not what actions the creditor took but what a reasonable borrower would believe based on the information presented.

reasonable borrower might not understand that despite signing the confirmation he still had the right to rescind in the three day cooling off period."); *Adams v. Nationscredit Fin. Servs. Corp.*, 351 F. Supp. 2d 829, 834 (N.D. Ill. 2004) ("The average borrower who was asked to sign such a statement at the closing would be confused about whether he was still entitled to a three-day "cooling off" period. He likely would assume, with good reason, that by signing the Confirmation, he had given up his right to rescind the deal.");[30] *see also Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir. 2006); *Porter v. Mid-Penn Consumer Discount Co.*, 961 F.2d 1066, 1077 (3d Cir. 1992) (both holding that where more than one reading of a rescission notice is plausible, the notice does not provide the borrower with clear notice of the right to rescind).

[30] The district court relies on *Smith v. Highland Bank*, 108 F.3d 1325, 1326-28 (11th Cir. 1997) in support of its decision, though the facts render that case inapposite. Indeed, the *Smith* court itself distinguishes between a confirmation form given at closing, but to be signed *after* three days had passed, from the situation where a lender requires the borrower to sign a certificate of non-rescission *at closing*. *Id.* at 1326-27. *Smith's* "certificate of confirmation" indicates it is not to be signed until the three-day right to cancel expired, unlike *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1146 (11th Cir. 1994) in which lender had the consumer sign the "Election Not to Cancel" prematurely at closing. The latter circumstance was also present in *Wiggins, Rodrigues, and Adam*s. In the instant case, the district court acknowledges (JA 245-46) that the dates on the forms support the Mouas' contention that they signed the forms on the day of closing. Thus *Smith* itself supports the proposition that whether Rand's agent instructed the Mouas to sign is at least a material issue of fact that precluded summary judgment on this issue.

Here, the district court relies heavily on the fact that the Mouas signed the form stating that more than three business days elapsed. That analysis fails to focus on TILA's primary purpose of protecting consumers, who are "inherently at a disadvantage in loan and credit transactions," through clear, conspicuous and accurate disclosures. *See Semar*, 791 F. 2d at 705; *see also*, *e.g.*, *Sentinel*, 946 F.2d at 87; *Household Credit*, 541 U.S. at 235; 12 C.F.R. § 226.17. Moreover, the district court's analysis fails to "broadly construe" TILA in "favor of the consumer" as Congress intended (s*ee*, *e.g.*, *Murphy* 629 F.2d at 559 and allows unscrupulous lenders to avoid all of TILA's mandates by requiring consumers to sign away their rescission rights—something TILA expressly prohibits unless specific requirements for a valid waiver are met. *See* 12 C.F.R. § 226.23(e)(1); 15 U.S.C. § 1635(d).

In sum, requiring the Mouas to sign the Confirmation that their three-day-right to rescind had expired at closing vitiated the disclosure of that right in the notice as a matter of law. To the extent that any factual issues surrounding the signing of the Confirmation preclude a determination that the premature Confirmation rendered the Notice not clear and conspicuous as a matter of law, the claim should be remanded for factual determinations. Accordingly, this Court should remand the TILA Notice claim to the district

court with instructions to apply the correct legal standards and, utilizing those standards, determine any issues of material fact.

CONCLUSION

For all of the above reasons, the judgment of the district court should be reversed and the case remanded to the district court for further proceedings.

CERIFICATE OF COMPLIANCE

I hereby certify that this brief contains 13,256 words and thus complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

In compliance with Eighth Circuit Rule 28A(c) I certify that his document was prepared using Microsoft Word XP.

I also certify that a digital, .pdf version of this brief was furnished to the Court on CD-ROM pursuant to Eighth Circuit Rule 28A(d). The .pdf file copied to the CD-ROM has been scanned for viruses and it is virus-free.

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Melissa Briggs

DISTRICT COURT OPINION

ADDENDUM

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August 2007, I served a total of two paper copies and one digital copy of the foregoing Brief for Appellants Yer Song and Manisy Moua via Federal Express, postage prepaid, on all parties herein to the following address:

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