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)

REPLY BRIEF FOR APPELLANTS YER SONG AND MANISY MOUA

KATHLEEN KEEST
MELISSA BRIGGS
DANIEL MOSTELLER
CENTER FOR RESPONSIBLE LENDING
910 17th Street, NW, Suite 500
Washington, DC 20006
202-349-1872

NINA SIMON
JEAN CONSTANTINE-DAVIS
AARP FOUNDATION LITIGATION
601 E Street, NW
Washington, DC 20049
202-434-2060

JOHN MICHAEL TANCABEL
Tancabel Law Office
895 Osceola Avenue
St. Paul, MN 55105
651-224-1244

Counsel for Appellants Yer Song and Manisy Moua

October 15, 2007

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Rand's brief argues Truth in Lending law as Rand would like it to be—not the law as it is. Rand cherry-picks sections of the applicable law, misrepresents other sections, and completely ignores dispositive statutory provisions and case law that clearly, if inconveniently, establish its liability. Specifically, Rand ignores: (1) controlling precedent from the U.S. Supreme Court holding that the Federal Reserve Board's Commentary interpreting the Truth in Lending Act ("TILA") and Regulation Z is binding authority; (2) the specific provisions of TILA and Regulation Z that define "material disclosures" justifying rescission as including the failure to comply with the Home Ownership and Equity Protection Act's ("HOEPA") early warning notice requirements and its prohibitions on prepayment penalties; and (3) relevant case law explaining that requiring a borrower to sign a Confirmation that three days have passed at closing makes the Notice of Right to Cancel not "clear and conspicuous." Finally, after challenging the Federal Reserve Board's interpretations throughout its brief, Rand reverses course. Rand seeks the Board's model forms "safe harbor" protection for Rand's Notice of Right to Cancel form that is itself conspicuously *out of compliance* with the Board's model form. We now turn to each of Rand's spurious arguments and explain why the district court's conclusion that the

Mouas did not have the right to rescind their Rand mortgage must be reversed.

I. THE OFFICAL STAFF COMMENTARY'S INTERPRETATION OF HOEPA IS BINDING AUTHORITY.

Our opening brief discusses extensively Rand's numerous failures to comply with HOEPA provisions as explained in the Federal Reserve's Official Staff Commentary on Regulation Z. In the face of its blatant noncompliance with the Commentary's dictates, Rand claims that, while the Commentary may provide "some insight," Rand Br. 10 n.7, it is legally inconsequential. Rand Br. 9, 10 n.7, 15, 18 & n.8.[1] This is plain error that ignores the settled authority of the Supreme Court and this Circuit.

The law of this Circuit is clear: "*Unless demonstrably irrational*" the Commentary's interpretation of TILA is "dispositive." *Sentinel Fed. Sav. & Loan Assn. of Kan. City v. Office of Thrift Supervision*, 946 F.2d 85, 89 (8th Cir. 1991) (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980)). It is not a novel rule; instead, it is taken directly from the Supreme Court's holding in *Ford Motor Credit Co. v. Milhollin*. *Id.*; *accord Walker v. Wallace Auto Sales, Inc.*, 155 F.3d 927, 931 n.5 (7th Cir. 1998) (labeling

[1] Citations to the Mouas' Opening Brief are cited as Moua Br. __. Citations to Rand's Brief are cited as Rand Br. __. Citations to documents in the Joint Appendix are cited as JA __. Documents in the Addendum to the Mouas' Opening Brief, other than the district court's opinion, are designated with an asterisk(*).

the Commentary's provisions as "binding on this court unless they are demonstrably irrational" (internal quotation marks omitted)). The passage of time has not diminished the force of the rule, as the Supreme Court has recently reiterated the deference owed to the Federal Reserve's interpretations of TILA. *Household Credit Servs. Inc. v. Pfennig*, 541 U.S. 232, 238 (2004).

In light of such clear authority, Rand's challenge to this settled rule is baffling. *See First Nat'l Bank of Council Bluffs v. Office of the Comptroller of the Currency*, 956 F.2d 1456, 1460 (8th Cir. 1992) (noting *Sentinel* "forecloses" the contention that following the Commentary was not required). Yet its legal errors do not stop there. Rand also relies on the patently false assertion that the Board's Commentary *does not* go through notice and public comment procedures. Rand's Br. 10 n.7. This is simply wrong. The Commentary—indeed the particular Commentary to HOEPA upon which the Mouas rely—was adopted only after a complete public notice and comment period. *See* 61 Fed. Reg. 14,952 (Apr. 4, 1996) (adopting the Official Staff Commentary applicable to the regulations implementing HOEPA and noting that the Federal Reserve had received "about 120" comments in response to the publication of the proposed

version of this Commentary in the Federal Register at 60 Fed. Reg. 62,764 (Dec. 7, 1995)).

Rand has not and cannot suggest that the Commentary relevant to this case is irrational. The Commentary is therefore binding and requires this Court to find the district court erred in: (1) excusing Rand's failure to provide required disclosures at least three days before consummation; and (2) excusing multiple substantive errors in the HOEPA disclosure form that was eventually provided.[2] Accordingly, this Court should reverse the grant of summary judgment and remand those claims to the district court to evaluate in light of the Commentary's requirements.

[2] As more fully described in the Mouas' opening brief, Rand failed to comply with multiple, conjunctive requirements of the Commentary. Specifically:

- The requirement that a *bona fide* financial emergency is a necessary prerequisite to waive HOEPA's advance notice requirement. Official Staff Commentary on Regulation Z § 226.31(c)(1)(iii)-1; Moua Br. 35-36.
- The requirement that HOEPA disclosures must be delivered to each consumer before they can waive the advance notice requirement. Official Staff Commentary on Regulation Z § 226.31(c)(1)(iii)-1; Moua Br. 38.
- The requirement that the HOEPA disclosure include all scheduled future changes in regular loan payments, in addition to disclosing a final balloon payment. Official Staff Commentary on Regulation Z § 226.32(c)(3)-1; Moua Br. 45-47.

II. RAND'S MULTIPLE FAILURES TO ACT GAVE THE MOUAS THE RIGHT TO RESCIND.

As we explained in our opening brief, in enacting HOEPA, Congress created new obligations for high-cost creditors and also expanded the remedy of rescission to encompass violations of those new requirements. Moua Br. 18 n.6, 24-25. Violations of HOEPA's obligations give rise to the right to rescind; these HOEPA bases for rescission are in addition to any right to rescind originally afforded under TILA.[3] 15 U.S.C. §§ 1602(u), 1635(a), 1639(j); 12 C.F.R. § 226.23(a)(3) n.48.

Rand asserts that the Mouas are seeking to "revive any right of rescission" and that the Mouas "leap to the conclusion that because the Mouas did not receive this pre-closing waiting period, their post-closing rescission rights were extended to three years rather than three days." Rand Br. 6, 8. Here, too, Rand's mischaracterization reflects its basic misapprehension of the rescission remedy. It is indeed the case that there is an unqualified three-day post-closing right to cancel a home-secured transaction. 15 U.S.C. § 1635(a). However, conceptually and legally, that is distinct from the rescission remedy. As a *remedy* for specified TILA violations, rescission does not operate as an extension of, or revival of that

[3] Rand's focus on the sufficient accuracy of its interest rate calculation is a red herring. Rand Br. 12-15. Our opening brief did not challenge that portion of the district court's opinion.

unqualified right to cancel. Rather, when a creditor violates the law in one of the ways Congress deemed "material," the clock never starts to run on the three-day right to cancel in the first place. That "unclocked" period during which a consumer entitled to the remedy may opt to cancel remains open until the three-year statute of repose established in 15 U.S.C. § 1635(f) has passed.[4] Never having begun because of Rand's multiple material violations, the Mouas' three-day right to cancel never expired.

This is clearly expressed in § 1635(a), which provides that "the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction *or the delivery of the information and the rescission forms required under this section together with a statement containing the material disclosures required under this subchapter,* ***whichever is later***." 15 U.S.C. § 1635(a) (emphases added); *see, e.g., Ljepava v. M.L.S.C. Props., Inc.*, 511 F.2d 935,

[4] Rand's inexplicable challenge to the Mouas' right to rescind on the theory that rescission is only available under § 1635(f) and the Mouas have "fail[ed] to produce any facts or legal arguments to invoke section 1635(f)" again reflects its misunderstanding of TILA rescission. Rand Br. 11. Section 1635(f) does not define rescission, but simply reflects Congress' decision that the right should be subject to repose after three years, even when material disclosures have never been provided. 15 U.S.C. § 1635(f); *see Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417-19 (1998); Act of Oct. 28, 1974, Pub L. No. 93-495, § 405, 88 Stat 1500 (adding subsection (f) to create a three-year outside limit to the right of rescission; prior to that time, there was no time limit on the exercise of the extended right to rescind).

944 (9th Cir. 1975); *Sosa v. Fite*, 498 F.2d 114, 117-18 (5th Cir. 1974) (early cases that describe this continuing right to rescind). The Official Staff Commentary elaborates: "The period within which the consumer may exercise the right to rescind *runs for 3 business days from the last of 3 events:*

- Consummation of the transaction.
- Delivery of all material disclosures.
- Delivery to the consumer of the required rescission notice."

Official Staff Commentary on Regulation Z § 226.23(a)(3)-1 (emphasis added). As the Commentary further explains, "[f]ootnote 48 [which includes the advance HOEPA disclosures and HOEPA's limitations on loan terms] sets forth the material disclosures that must be provided *before the rescission period can begin to run.*" *Id*. § 226.23(a)(3)-2 (emphasis added); *see also* 12 C.F.R. § 226.23(a)(3) n.48 (specifying "material disclosures" include the advance HOEPA disclosures detailed in 12 C.F.R. § 226.32(c)). Thus, the Mouas were free to exercise their right to rescind in April 2006. Their rescission was timely because Rand's failure to deliver the material disclosures mandated by HOEPA prevented the three-day rescission period from commencing.

A. Multiple HOEPA Disclosure Violations Each Left Open the Mouas' Right To Rescind.

1. Rand's Decision To Eliminate the Three-Day Waiting Period Following Its HOEPA Disclosures Entitles the Mouas To Rescind.

As discussed in detail in our opening brief, Congress established a three-day, early warning notice as a core of its efforts in HOEPA to protect consumers against predatory, high-cost loans. Moua Br. 22-23, 31-32. Congress' mandate of an accurate and *timely* disclosure for high-cost loans is not a mere technical requirement but has real practical benefit for homeowners; it is designed to ensure, to the greatest extent, that homeowners have the opportunity to consider the high cost and other terms of their mortgage transactions in advance and to assess the risks associated with them.

The early warning offers homeowners their first opportunity to see the actual terms of the proposed loan and a cushion of time in which to evaluate whether they wish to enter into or reject it.[5] *See* Ralph J. Rohner & Fred H. Miller, *Truth in Lending* ¶ 6.09 [3][d], at 458 (2000) ("The three-day period between the delivery of the disclosures and the time of consummation is a cooling-off period during which the consumer may reject the transaction.").

[5] This is especially important for borrowers with high-cost loans who are more vulnerable to bait and switch in the terms and conditions of the loans between application and closing. *See* Moua Br. 23.

This "cooling off" period is especially important for homeowners, like the Mouas, who must rely on others to read and explain English language loan documents. Moreover, the decision whether to proceed with the loan is not academic, even for borrowers who face the loss of their home if they do not refinance. The very real question the Mouas could have addressed—if they had been provided the mandated time and information—was whether, in light of the high payment obligations under the Rand loan, they wished to risk losing the additional $50,000 obtained from the sale of their business that they were required to tender at closing. *See* JA 209 ¶ 20*; JA 23; JA 109.

In creating this new advance waiting period, Congress established two "cooling off" periods to bookend a mortgage transaction for borrowers with high-cost loans. The waiting period created by the three-day advance notice offers the prospective borrower the opportunity to walk away prior to signing; the post-closing right to cancel offers the borrower the right to cancel, for any reason or no reason, for three days after consummation. *Compare* 15 U.S.C. § 1635(a), *and* 12 C.F.R. § 226.23(a)(3), (c) (providing borrowers with three days to review the material documents received at consummation for all loans covered by TILA), *with* 15 U.S.C. § 1639(b)(1) (requiring creditors to provide HOEPA disclosures three days before

consummation); *see also* 59 Fed. Reg. 61,832, 61,833 (Dec. 2, 1994) (noting HOEPA's timing "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"). These two separate three-day mandates, with their corresponding disclosure requirements, give homeowners the *information* Congress deemed essential for evaluating the advisability of entering into a high-cost transaction and the *time* and *privacy* in which to consider this decision.

As we have also previously explained, HOEPA's three-day advance waiting period is an added opportunity—not to be conflated with the three-day post-closing opportunity—for a borrowers to review, reflect, and, if so inclined, decline to be bound to the proposed loan. Moua Br. 31-32; *see also* Rohner & Miller, *supra,* ¶ 6.09[3][d], at 458 ("The right to reject the transaction during this period is in addition to the post-consummation right of rescission. . . ."). In describing the cooling off period as "additional," Congress made clear its decision to create a *further* pre-closing "cooling off" period parallel to the already existing three-day right to rescind *following closing* that was already available to borrowers with refinance loans. S. Rep. No. 103-169, at 2 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1881, 1886 ("The disclosure must be provided at least 3 days before settlement, creating an

additional 'cooling off' period." (emphasis added)); *see also* 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(a)(3).[6] By also designating the advance notice requirement that creates this three-day waiting period as "material," 15 U.S.C. § 1602(u), Congress also made abundantly clear that its violation was equally as important as the post-closing period: violations of either trigger the key rescission remedy.

Rand seeks to excuse its failure to make the HOEPA disclosures *before* closing by claiming the documents that the Mouas received *at* closing were sufficient to meet its obligations under both TILA and HOEPA. Rand Br. 10-11. In so doing, Rand ignores the fundamental Congressional decision to stop borrowers from hastily entering into an expensive loan, forcing the high-cost lender to give them a three-day period to consider the advisability of proceeding with the transaction.[7] Rand was not free to substitute its disclosures under TILA, which serve to *inform* borrowers about

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[6] The Federal Reserve Board also treated the two cooling off periods as imposing similar legal duties by using provisions applicable to waiving the three-day post-consummation rescission right as its model for regulations concerning a borrower's waiver of the HOEPA pre-consummation waiting period. *See* 60 Fed. Reg. 15,463, 15,464-65 (Mar. 24, 1995) (explaining the adoption of 12 C.F.R. § 226.31(c)(1)(iii)).

[7] Congress did not prohibit these high-cost loans outright, but did express its clear disapproval of them through the explicit warning required in the advance disclosure, the prohibition of certain terms, and its decision to hold borrowers back from hotly entering into these loans without the time and information necessary to consider them. Moua Br. 21-25, 29.

the terms of their loan, for its disclosures under HOEPA, which serve both to *inform* and *warn* them. *See* 15 U.S.C. § 1639 (a)(1)(B) (requiring HOEPA disclosure warn to borrowers that "[y]ou could lose your home, and any money you have put into it, if you do not meet your obligations under the loan"). Moreover the statute forecloses Rand's argument that it caused the three-day rescission period to begin to run by providing the content of the HOEPA disclosures at closing, because it explicitly requires that HOEPA's special disclosures "shall be given not less than 3 business days prior to consummation." 15 U.S.C. § 1639(b)(1); *see also supra* pp. 5-6 discussion. The Mouas, therefore, were never given the required HOEPA disclosures in a legally effective manner. Because TILA specifies that the HOEPA disclosures are "material disclosures," 15 U.S.C. § 1602(u), the failure to provide them in a legally effective manner left open the Mouas' right to

rescind, 15 U.S.C. § 1635(a); *see also* Moua Br. 32-33 (citing legislative history and cases so holding).[8]

2. Rand's January 2005 Disclosure Did Not Fulfill Its Advance Warning Obligation Under HOEPA.

Again ignoring HOEPA's plain language and relying on an inapposite case, Rand alternatively claims that its January 5, 2005 disclosures to the Mouas satisfied HOEPA's advance disclosure requirement. Moua Br. 2, 10.

Three business days is the minimum advance notice required by HOEPA. Thus, Rand could have met HOEPA's advance disclosure requirement if it had provided an *accurate* and *complete* disclosure of the Mouas' *final loan terms* three months in advance of the Mouas' April loan closing. It did not.

[8] Rand's assertion that the Mouas should have responded to their unaffordable and HOEPA-violative loan by commencing an action for damages again exposes Rand's lack of familiarity both with TILA and this Court's precedent. Rand Br. 11. TILA explicitly affords borrowers the right to bring an action for statutory damages or rescission or both: "In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under [the damages section] of this title for violations of this subchapter not relating to the right to rescind." 15 U.S.C. § 1635(g); *see also Dryden v. Lou Budke's Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980) ("[R]ecovery of statutory damages by a successful TILA plaintiff is not inconsistent with other remedies the plaintiff may have in connection with the same transaction, such as rescission of the loan contract or even forfeiture to the plaintiff, under state usury laws, of the unpaid balance of the loan." (citations omitted)).

As Rand acknowledges, the January 5 disclosure failed to account for a nearly twenty-five percent increase in the loan amount—a jump of more than $47,000—before the loan was consummated on April 22. Rand's Br. 2 n.2. Because the change in the amount of the loan caused the Mouas' monthly payments to increase significantly, HOEPA explicitly required Rand to provide the Mouas with new disclosures reflecting the altered terms of the loan. *See* 15 U.S.C. § 1639(b)(2)(A) ("After providing the disclosures required by this section, a creditor may not change the terms of the extension of credit if such changes make the disclosures inaccurate, unless new disclosures are provided that meet the requirements of this section."). Based on the loan the Mouas actually signed, the January 5 disclosure understated the consummated loan's initial monthly payment by over $500. *Compare* JA 41, *with* JA 35-38. In addition, the January 5 disclosure failed to include the monthly payment obligation for the majority of the loan term—an increase of $932 over the disclosed payment. *Id.*; *see also infra* pp. 17-18 discussion.

Rand argues that its failure to correct the HOEPA disclosure with updated payment figures is somehow excused because the Mouas decided to increase the loan amount. Rand Br. 10 n.6. This claim is totally unsupported by HOEPA or its implementing regulations which, without

reference to who initiated the increase, place the burden of redisclosue squarely on the creditor. *See* Official Staff Commentary on Regulation Z § 226.31(c)(1)(i)-1 ("Creditors must provide new disclosures when a *change* in terms *makes* disclosures previously provided . . . inaccurate . . . ." (emphases added)); S. Rep. No. 103-169, at 64, 1994 U.S.C.C.A.N. at 1948 ("The section prohibits *subsequent changes* in the loan terms that *affect* the APR or monthly payment unless new disclosures are provided." (emphases added)); *accord* Rohner & Miller, *supra*, ¶ 6.09 [3][d], at 459.

Finally, Rand's reliance on *Ramsey v. Vista Mortgage Corp.* (*In re Ramsey*), 176 B.R. 183 (9th Cir. BAP 1994), to justify its failure to provide new HOEPA disclosures misreads that case on multiple levels. First, *Ramsey* not only did not involve HOEPA, Rand Br. 10 n.6, but was decided prior to HOEPA's effective date. Moreover, *Ramsey* is clearly distinguishable. The *Ramsey* borrower sought to change the loan terms *after* signing the promissory note. *See* 176 B.R. at 187.

Rand has presented no evidence that it provided an accurate HOEPA disclosure at any point prior to the Mouas' closing. Because failing to provide the disclosure three days in advance of closing leaves open a right to rescind, this Court should reverse the district court's summary judgment

ruling and remand to the district court to reconsider the record based on the correct interpretation of HOEPA.

3. Rand's Failure To Provide Each of the Mouas a Separate and Accurate Copy of the Material Disclosures Left Open the Right To Rescind.

Rand's assertion that "[e]ven the Commentary unduly relied upon by the Mouas does not clearly require that multiple photocopies be made and separately provided to joint borrowers" is simply wrong. Rand Br. 15-16. The Commentary clearly requires that "[e]ach consumer entitled to rescind must be given:

- Two copies of the rescission notice.
- The material disclosures."

Official Staff Commentary on Regulation Z § 226.23(b)-1. Anticipating this very issue, the Commentary gives explicit direction to lenders entering into a transaction with joint owners who are spouses: "For example, if both spouses are entitled to rescind a transaction, each must receive 2 copies of the rescission notice and one copy of the disclosures." *Id.* This binding interpretation settles the question: Rand's failure to disclose the information in the manner prescribed by the Board was a failure to provide a "material disclosure." *See* 15 U.S.C. §§ 1602(u), 1635(a) (designating HOEPA disclosures as "material disclosures" that must be accurately and properly

given to start the three-day right to rescind). Given the deference owed the Commentary, there can be no question that the district court erred when it concluded that spouses may share a single HOEPA disclosure document.

4. Rand's Failure To List Scheduled Future Payment Increases on the HOEPA Disclosure Was a Failure To Provide a Material Disclosure and Left Open the Mouas' Right to Rescind.

Our opening brief addressed, at length, the Commentary's explicit requirement that each payment level owing under a HOEPA loan must be disclosed on the advance HOEPA disclosure. Moua Br. 44-48. As we explained, this requirement is anything but technical. Congress understood that, without a complete advance warning about all monthly payments that would be owing throughout the loan term, homeowners would be unable to assess the loan's long-term affordability and whether they wished to place their home at risk by entering into it. Thus, the statutory mandate for lenders making HOEPA loans is clear: HOEPA loans whose interest rates are not fixed must disclose "the amount of the maximum monthly payment, *based on the maximum interest rate*." 15 U.S.C. § 1639(a)(2)(B) (emphasis added).

This mandate makes particular sense in the context of the Mouas' loan transaction: Their monthly payment was scheduled to increase by $400 after only twelve months and to remain at that increased level for the next forty-

nine months of the loan. JA 35-38. Even if the Mouas could have lived with the disclosed payment of $2,883, they might easily have concluded that the $400 increase was just too much. *See* JA 22*. Had they received this essential information in advance, as required, they could have taken the opportunity Congress intended and avoided the loan altogether.[9]

5. Rand Provides No Reason To Excuse the Patently Illegal Prepayment Penalty.

As detailed in our opening brief, HOEPA bans prepayment penalties in high-cost loans subject to narrow exceptions. 15 U.S.C. § 1639(c). Consumers have a three-year right to rescind their loan when such penalties are included. 15 U.S.C. §§ 1639(j), 1635(a); *see also* Moua Br. 50-53.

Rand incorrectly asserts that this court should ignore the illegal prepayment penalty in this loan because it claims the Mouas waived appellate review of the issue. Rand Br. 19-20. But the Mouas did not waive the issue; instead, they affirmatively pled a HOEPA violation based on the

[9] Rand now raises an irrelevant argument that it complied with the variable rate disclosures required by 12 C.F.R. § 226.32(c)(4). Rand Br. 19. Its alleged compliance with that provision has no bearing on the clear obligation we have demonstrated it had under § 226.32(c)(3) and the accompanying Commentary provisions to disclose the regular payment's future increases.

prepayment penalty as a counterclaim. JA 152, ¶ 94.[10] That counterclaim was then adjudicated as part of the summary judgment proceedings. *See* Dist. Ct. Docket #21 ¶2 (Rand's motion requesting the dismissal of the Mouas' counterclaims with prejudice); JA 250 (order granting the motion).

Appellate review of a dispute raised in a counterclaim is proper even though the failure to brief the issue in opposing summary judgment would otherwise constitute waiver. *Cf. Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 980 (10th Cir. 2005) (determining that defendants had waived an issue not raised below after undertaking "particular" review of their third-party complaint). Appellate courts deem issues not raised below as waived so as not to surprise parties unfairly who had no opportunity to develop the relevant evidentiary and legal record in the district court. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976). But by pleading a counterclaim based on the illegal prepayment penalty, the Mouas put Rand on notice that the penalty was at issue. Moreover, Rand acknowledged the notice by seeking to dismiss the Mouas' counterclaims. The Mouas therefore did not deny Rand an opportunity to justify the penalty before the district court. Rand's failure to take this opportunity—causing the district court to overlook the

[10] The Mouas again raised the prepayment penalty with the district court in a timely motion for reconsideration. This Court previously has reviewed such a motion for reconsideration in determining whether an issue was raised below. *See Vaughn v. Sexton*, 975 F.2d 498, 503 (8th Cir. 1992).

prepayment penalty in its summary judgment ruling—does not allow it now to claim surprise.

Moreover, Rand's effort to justify the prepayment penalty to this Court does not wash. Rand seeks to use documents outside the record to support its claim that the Mouas' loan qualifies for the exception to HOEPA's prepayment penalty ban, but the exception's terms are not met even accepting Rand's representation of relevant events. Although the statute allows prepayment penalties when a borrower's indebtedness payments are under fifty percent of her monthly gross income, this exception applies only when the lender has verified the income and expenses of an employed consumer through three means: a signed financial statement by the consumer; a credit report; *and* a document verifying employment income. 15 U.S.C. § 1639(c)(2)(A)(ii); 12 C.F.R. § 226.32(d)(7)(iii). The statute and regulation both use conjunctive language when listing the means of verification, requiring *all* of the methods to be used for each consumer. *See Erdahl v. Comm'r*, 930 F.2d 585, 591 n.8 (8th Cir. 1991) ("Because [the statute] is written in the conjunctive, all of its requirements must be met . . . .").

Rand argues that it satisfied the exception's requirement by relying merely upon the Mouas' income representation in their loan application.

Rand Br. 20-21. It does not claim that it verified these income figures using a credit report and employment documents. Importantly, none of these documents—not even the loan application on which Rand relies—are part of the record. In contrast, Manisy Moua's testimony that she and her husband provided pay-stub information, that Mr. Miller, the president of Rand, advised them to sign an incomplete loan application, and that the completed application sent to them by mail inflated their income, is part of the record and directly contradicts Rand's assertions. JA 207-11*.

It is undisputed that the Mouas' loan included a prepayment penalty. Rand presented no record evidence that it met HOEPA's verification requirements for including that penalty. Accordingly, summary judgment should be reversed and the issue should be remanded to the district court for factual determination.

B. Rand Materially Violated TILA by Failing To Provide Clear and Conspicuous Notice of the Three-Day Right To Cancel.

As we showed in our opening brief, requiring the Mouas to sign the Confirmation that their three-day right to rescind had expired at closing vitiated the disclosure of that right. Moua Br. 53-58.

As Rand itself states, Rand Br. 23, it is clear that an objective standard should be applied to determine whether or not the Notice of Right to Cancel

is clear and conspicuous—yet the district court in its decision relied heavily on the subjective characteristics of the Mouas in making its determination. *See* JA 246 ("[T]his was not the Mouas first real estate transaction in this country."). We did not in our opening brief, nor do we now assert, that the Mouas should be held to a different standard than the reasonable borrower standard—however, the fact that the Mouas are not English-literate is relevant to understand how the transaction occurred and amplifies the effect of denying the post-transaction right to cancel. *Cf. Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877, 879 (11th Cir. 1982) (explaining that disclosures must be assessed against a reasonable borrower standard and that non-English speaking consumers could "have the documents translated or explained to them").

Rand *never* squarely deals with the cases we cite in our opening brief (*Wiggins v. AVCO Fin. Servs.*, 62 F. Supp. 2d 90, 96 (D.D.C. 1999); *Rodrigues v. Members Mortgage Co.*, 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)) that make clear that requiring a borrower on the day of closing to sign a statement that three days have passed vitiates the Notice of Right to Cancel. Moua Br. 55-56; *see also Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir. 2006) ("Where more than one reading of

a rescission form is 'plausible,' the form does not provide the borrower with a clear notice of what her right to rescind entails." (internal quotation marks and brackets omitted)). Indeed, completely ignoring those courts' reasoning, Rand states that it is "impossible for a 'reasonable borrower'" to be confused by such a circumstance. Rand Br. 24. Nor does Rand confront the extensive authority holding that TILA's protections must be broadly construed in favor of consumers. *See* Moua Br. 57. Instead, Rand misstates the facts, relies on a single distinguishable case, and attempts to rely on the irrelevant fact that the funds did not actually disburse until after the closing.[11]

First, Rand's assertion that "the form use[d] by Rand, however, is the model form promulgated by the Federal Reserve Board" patently misstates the record. Rand Br. 7. In fact, the document signed by the Mouas is not the Notice of Right to Cancel model form promulgated by the Board. *Compare*

[11] Because Rand itself admits that "[t]he district court already addressed the 'clear and conspicuous' argument and ruled against the Mouas," Rand Br. 22, we do not address its contrary argument that the Mouas did not raise the issue of whether the notice was clear and conspicuous below, *see id*. at 21.

infra Appendix (model form), *with* JA 225*.[12] Accordingly, Rand most assuredly is *not* entitled "to the protections of the safe-harbor provisions under federal law." Rand Br. 9; *see* 15 U.S.C. § 1635(h).

On its face the model form does not include the Confirmation section stating that three days have passed on the same page as the Notice. Nor has the Federal Reserve identified a Confirmation as a permissible addition to the form.[13] Clearly then, the model form does not contemplate requiring the

[12] Inexplicably, Rand apparently required the Mouas to sign four Notice of Right to Cancel forms at the time of closing but provided the Mouas copies only of the form with the Confirmation section. Rand initially submitted to the district court only the two copies that lacked the Confirmation section. JA 51-54. Rand acknowledged the existence of the forms with the Confirmation section only after the Mouas brought the discrepancy to the district court's attention. JA 221-26.

[13] The Official Staff Commentary specifically identifies information that may be added to the model form—"description of the property," information about the rescission rights of joint owners "and that a rescission by one is effective for all," and "name and address of an agent of the creditor to receive notice of rescission." Official Staff Commentary on Regulation Z § 226.23(b)-3. A Confirmation section is not identified as a permissible addition to the form. *See id.*

borrower to sign a Confirmation on the date of the closing.[14]

Second, as we showed in our opening brief, *Smith v. Highland Bank*, 108 F.3d 1325 (11th Cir. 1997), the sole case that Rand relies upon, distinguishes between a Confirmation form given at closing but not required to be signed at closing—the facts in *Smith*—from one in which the borrower was required to sign that Confirmation at closing—the facts here. *Id*. at 1326-27.

Third, Rand argues that its disbursement of the Mouas' settlement funds more than three days after the closing is determinative. Yet, the timing of the *disbursement* of funds is simply not relevant to whether Rand clearly and conspicuously *disclosed* the right to cancel to the Mouas. A reasonable borrower would have no idea what significance to draw from the lender's speed in cutting checks. Not surprisingly, Rand does not and cannot provide *any* authority that considers the date of the disbursement of

[14] Rand's attempt to avoid responsibility for instructions delivered by its closing agent—"Rand was not present at the closing of the transaction and did not direct the Mouas to sign the second signature line"—is misplaced. Rand Br. 8. Rand and Rand alone, as creditor, had the obligation to deliver all mandated disclosures to the Mouas. *See* 15 U.S.C. § 1631(b) ("If a transaction involves one creditor . . . such creditor . . . shall make the disclosures."). Rand cannot, then, have it both ways: Either Rand delivered no disclosures at all—because these admittedly were delivered by Excel Title—or Rand delivered disclosures through Excel as its agent and is bound by Excel's actions. *See also* Moua Br. 54 n.28.

funds as relevant in determining whether the right to cancel was clearly and conspicuously disclosed to a consumer.

CONCLUSION

For the reasons explained in our opening brief and reiterated above, this Court should reverse the district court's grant of summary judgment and remand to the district court for any necessary fact finding.

CERIFICATE OF COMPLIANCE

I hereby certify that this brief contains 5,752 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.

_____

Melissa Briggs

H-8—Rescission Model Form (General)

NOTICE OF RIGHT TO CANCEL

Your Right to Cancel

You are entering into a transaction that will result in a [mortgage/lien/ security interest] [on/in] your home. You have a legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last:

(1) the date of the transaction, which is

_____; or

(2) the date you received your Truth in Lending disclosures; or

(3) the date you received this notice of your right to cancel.

If you cancel the transaction, the [mortgage/lien/security interest] is also cancelled. Within 20 calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the [mortgage/lien/security interest] [on/in] your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this transaction, you may do so by notifying us in writing, at

(creditor's name and business address).

You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no

later than midnight of (date)

(or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

_____ _____

Consumer's Signature Date

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October 2007, I served a total of two paper copies and one digital copy of the foregoing Reply Brief for Appellants Yer Song and Manisy Moua via Federal Express, postage prepaid, on all parties herein to the following address:

Eric D. Cook
Christina M. Weber
Wilford & Geske
760 Currell Boulevard, Suite 300
Woodbury, MN 55125

Counsel for Appellee

_____

Melissa Briggs