

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

NORWEST BANK MINNESOTA, N.A., Etc.,

Plaintiffs,
vs.

GENERAL JURISDICTION DIVISION
CASE NO.: 00-14254 CA-01 SECT. 03

QUEEN DOYLE MARTIN, et. al.,

Defendants.

MARTIN'S TRIAL MEMORANDUM

NOW INTO COURT, through undersigned counsel, **QUEEN DOYLE MARTIN** (Ms. Martin), the Defendant herein, and files this her Trial Memorandum regarding the Complaint filed against her by Plaintiff **NORWEST BANK MINNESOTA, N.A.** (NBM), alleging as follows:

STATEMENT OF FACTS

Ms. Martin lives in this property as her home and has owned it ever since she inherited the home from her mother. [Martin Depo. p. 16 l. 7-14.]. Ms. Martin's home had no mortgages when she inherited. [Martin Depo. p. 16 l. 7-14.].¹

The mortgage in this suit arose when 2 [two] men, one named either Mr. Herman or Mr. Sherman [Martin Depo. p. 72 l. 18-25], were canvassing to repair roofs in Martin's neighborhood. [Martin Depo. p. 82 l. 15-18]. These were the only 2 [two] men that Ms. Martin dealt with during her loan application process. [Martin Depo. p. 82 l. 17-24]. Ms. Martin was not home, but Ms. Martin's niece took their card and gave the 2 [two] men Ms. Martin's telephone number to arrange a loan to fix the roof. [Martin Depo. p.83 l. 3-12].

¹ Ms Martin attaches hereto as Exhibit "A" excerpts from Ms. Martin's testimony. Ms Martin attaches hereto as Exhibit "B" excerpts from Ms. Malgarejo's deposition.

Ms. Martin wanted the loan because she needed her roof repaired [Martin Depo. p. 64 l. 10-16.]. Ms. Martin described the roof leak problem to the 2 [two] men from the mortgage company, describing one as African-American while the other was White. The men went to Ms. Martin's home and took a loan application from Ms. Martin. [Martin Depo. p. 81 l. 10 to p. 82 l. 6.]. They also came to Ms. Martin's home to bring her to the mortgage closing. [Martin Depo. p. 65 l. 13 p. 66 l. 18.]. One of the men who brokered the loan was present at the closing. [Martin Depo. p. 29 l. 6-8].

At the August 9, 1999 closing, the closing agent, Ava Malgarejo, presented documents for Ms. Martin to sign without any explanation nor an opportunity to read or review the documents [Martin Depo. p. 29 l. 12 - l. 16, p. 30 l. 9-14]. Ms. Martin adamantly maintained that although she may have **signed** a few papers at the closing, she was never **given** any of the closing documents at the closing. The closing agent told Ms. Martin she would mail Ms. Martin the closing documents with her anticipated check from the net closing proceeds.

NBM may urge at trial, as it did in its summary judgment p. 8 that Ms. Martin testified "I do not know" and "I do not remember" about documents she received. Ms. Martin's deposition testimony left no doubt that Ms. Martin never received any closing documents in general and the Truth in Lending Disclosure Statement and Truth in Lending Notice of Right to Cancel form in particular. Ms Martin's Exhibit "A" Depo excerpts refute NBM's attack on Ms. Martin's deposition.

The only evidence that Ms. Martin received a TIL Disclosure Statement and 2 copies of a TIL Notice of Right to Cancel² at closing, independent of her acknowledgment, will come from Ms.

² Ms. Martin will refer to 15 U.S.C. §1601, et. seq., the Federal Truth In Lending Act, as "TIL"; Pre-1980 15 U.S.C. §1601, et seq. as "Old TIL" before the TIL Simplification and Reform Act of 1980; § ____ as the specific section of TIL §15 U.S.C. 1601; The Federal Reserve Board, as the "FRB"; 12 C.F.R. 226.1, et seq. as "Reg. Z 226.1"; and the Official Staff Comments to 12 C.F.R. 226.1, et. seq. issued by the Federal Reserve Board as "OSC 226.1."

Malgarejo, the closing agent. While Ms. Malgarejo testified in her Feb. 1, 2003, deposition that she remembered Ms. Martin's signature because of the unique "Q." (Malg. Depo p. 20 l. 24- p. 21 l. 8), Ms. Malgarejo had very little recollection of many specific closing facts and had to rely on her "regular business practice" procedures to testify how she closed Ms. Martin's loan.³

Ms. Malgarejo testified that she received the Notice of Right to Cancel form from BNC, the original creditor, with the dates left blank: Malgarejo Depo p. 9 l. 21 - l. 24: Q. "I show you Exhibit No. 5. Can you identify that document? A.: "This is the rescission document. As I go through the rescission document, this lender actually leaves the dates blank." Ms. Malgarejo testified that she filled in the dates in the Notice of Right to Cancel form, at the closing with the borrower and explains this to the borrower: Malgarejo Depo p. 9 l. 24 p. 10 l. 13: "So, at the closing, while I'm sitting with the borrower, I fill in the date of the closing, which is the date of the transaction. Then after the three business days elapse, the rescission date is August 12, 1999. It says no later than midnight. That's the third business day after it had elapsed. Q. Is that your handwriting? A. Yes. That's my handwriting. Q. What exactly did you write there? A. The date of the transaction, August 9, 1999; and then the third business day that you have to notify if you wish to cancel. And my handwriting says August 12, 1999."

Ms. Malgarejo also testified that when she received the closing package, which includes the lender's Notice of Right to Cancel form, she makes a copy of the documents before the closing for

³ While Fla. Stat. §90.406 allows evidence of "routine business practice" to prove an action in conformity with that practice, this does not apply to an individual, and even if admitted, raises only an inference that the routine practice was followed on the occasion in question. See: McKeithan v. HCA Health Services, 879 So.2d 47, p. 49 (Fla. 4th DCA 2004) ("Although section 90.406, Florida Statutes (2003), does not apply to the routine practice of an individual, it is "left to the court to determine as a matter of circumstantial evidence whether there was sufficient probative value to allow the admission of the habit evidence.").

the borrower to take from the closing as the borrower's copies: Malgarejo Depo p. 23 l. 17 - p. 24 l. 7: "Q. Do you remember making a copy package for her? A. Not specifically. But it's a standard. Every single closing that I do, I make a copy package. I always provide copies to the borrower at the time of closing, always. There are no exceptions. I always do. The only time that I would not provide it is if somebody doesn't want it, they're in a rush to leave, I already have the copies here, they say they'll pick them up another time. But they're always made and ready to be provided to the borrower. **I always copy the package prior to going into the closing.** Sometimes people request a copy package signed. I run another through on the copier and give them a signed copy if they prefer one with their signature."

Ms. Malgarejo's testimony continued at p. 48 l. 15 - l. 24: "Q. Now, do you make a set of copies in your closing package before or after the consumer signs the documents received in your closing package? A. **Prior to the closing.** Q. So you make a set of copies for the consumer before the closing? A. Correct."

Ms. Malgarejo then testified that she does not make a copy of signed document unless the consumer asks for a signed set. She stated the only signed document that she gives the consumer is the signed HUD-1 settlement statement, and she is certain that she followed this practice for Ms. Martin's closing: Malgarejo Depo p. 49 l. 2 p. 50 l. 19: "Q. Do you give the consumer any copies of any documents that are executed – A. The settlement statement. Q. Any other documents? A. Not unless they're requested, I believe. Q. So you sit there with the consumer, with the package of documents. You already have a set of copies made. Correct? A. Correct. Q. And you go through the package of documents and have the consumer sign. Correct? A. Correct. Q. And at the conclusion of signing the documents, there are no documents that are signed other than the HUD-1 settlement

statement that you give to the consumer before they leave. Correct? [cell phone rings] Q. There are no copies of documents that are signed that you give to the consumer before they leave except for the HUD-1 settlement statement. Correct? MR. HELLER: Object to the form. THE WITNESS: I believe that's the only one that is signed that I put in the closing package. BY MR. BONFIGLIO: Q. And then the consumer leaves with that closing package that you already prepared before the closing. Correct? A. Correct. Q. There is no doubt about that in your mind, at least in this particular case, that Ms. Doyle left the closing with that packet of documents that were copied before the closing and not signed. Correct? A. Correct. Q. As we stand here, you don't have any question in your mind about that particular practice in your office. Correct? A. I don't believe so, no.”

Finally, Ms. Malgarejo testified that she does not recall whether Ms. Martin left the closing with a Notice of Right to Cancel with the dates filled in or left blank: Malgarejo Depo p. 59 l. 1 - l. 24: “Q. If I understand your testimony, you're not sure as to whether you put the dates in before you ran it through the photocopier. You're not sure whether you did; you're not sure whether you didn't. A. Correct. Q. The copies that Ms. Martin took with her in that package that you testified you gave her, do you know whether the copies in that package had the dates on them or not? A. I do not recall.” Malgarejo Depo p. 66 l. 6 - l. 16: “Q. As I understand your testimony, it is entirely possible that Ms. Martin left the closing with an unsigned and undated copy of the Notice of Right to Cancel. Correct? MR. HELLER: Object to the form. THE WITNESS: I'm not 100 percent sure. I can't state whether or not the dates were on there prior to me copying the form. But she did leave with an unsigned copy. I can't recall whether or not the dates were on there prior to me copying it. That, I cannot recall.”

Therefore Ms. Malgarejo's testimony establishes that the closing package Ms. Malgarejo

gave to Ms. Martin on Aug. 9, 1999, only contained the blank TIL Notice of Right to Cancel form, without the dates filled in, and unsigned. In fact, this record has 2 TIL rescission forms: one which refers to Ms. Martin's loan but is otherwise blank, and a second form which is filled out, provides a post office box for delivery of the notice of intent to cancel and contains Ms. Martin's signature. Attached hereto is Exhibit "C" the Blank notice, and Exhibit "D", the filled in Notice.

The TIL Disclosure Statement that NBM contends Ms. Martin received on Aug. 9, 1999, is attached hereto as Exhibit "E". The Disclosure contains the following "material information":⁴

Annual Percentage Rate	Finance Charge	Amount Financed	Total of Payments
11.227%	\$176,073.12	\$70,708.16	\$246,781.28

PAYMENTS: Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due	
359	685.52	<u>Monthly beginning</u> 10/01/99	
1	679.60	09/01/29	

At the bottom of the TIL Disclosure Statement, and just inside the bottom part of the federal box, BNC placed an "X" next to: "'e' means an estimate;" and a second "X" next to: "all dates and numerical disclosures except the late payment disclosures are estimates."

Since BNC did not provide a Reg Z 226.18(c) required Itemization of Amount Financed, one "work backwards" to determine how BNC arrived at the TIL disclosures. First, one must deduct the

⁴ The disclosures are interrelated. If one multiplies the monthly payment amounts by the number of payments, and adds the sums, this equals the total of payments. Adding the finance charge to the amount financed equals the total of payments. The annual percentage rate is the percent of these figures, based on 360 monthly payments, using either the American or actuarial method.

\$70,708.16 “amount financed” from the face amount of Ms. Martin’s \$76,500.00 loan to find that BNC used \$5,791.84 as the total of “prepaid finance charges.” Then one must examine the HUD-1 charges to find the charges that equal the \$5,791.84 “prepaid finance charges” to determine the items from the HUD-1 that BNC included in the \$5,791.84 prepaid finance charges to determine if \$5,791.84 correct reflects all the prepaid finance charges. See: §1638(a)(2)(A); Reg Z 226.18(b): “The amount financed is calculated by: (1) Determining the principal loan amount or the cash price (subtracting any downpayment); (2) Adding any other amounts that are financed by the creditor and are not part of the finance charge (not applicable); and, (3) Subtracting any prepaid finance charge.”

Ms. Martin’s August 9, 1999, HUD-1, attached hereto as Exhibit “F” shows that BNC treated the following fees as finance charges incident to or as a condition of Ms. Martin’s loan, in order to arrive at \$70,708.16 as the amount financed, based on Ms. Martin’s \$76,500.00 loan: HUD-1 line 808 \$2,295.00 Mortgage Broker Fee to JP Mortgage [§1605(a)(6), Reg Z 226.4(a)(3), Reg Z 226.4(b)(2), (3)]; Line 809 \$200.00 Processing Fee to JP Mortgage [§1605(a)(2), (6), Reg Z 226.4(a)(3), Reg Z 226.4(b)(2), (3)]; Line 810 \$1,695.00 Administrative Fee to JP Mortgage [§1605(a)(2), (6), Reg Z 226.4(a)(3), Reg Z 226.4(b)(2), (3)]; Line 811 \$983.00 from Addendum⁵; Line 901 \$413.82 Prepaid Interest [§1605(a)(1), Reg Z 226.4(b)(1)]; Line 1101 \$150.00 settlement or closing fee to Burt Eisenberg, split with the closing agent 60/40 Malgarejo Depo. p. 41 l. 1-25, p. 42 l. 13 - p. 44 l. 21, §1605(a) [not excluded by §1605(e)], Reg Z 226.4(a)(1), O.S.C.

⁵ The \$983.00 in the HUD-1 Addendum consisted of: Line 812 \$40.00 courier fee; Line 813 \$495.00 Underwriting Fee to BNC Mortgage [§1605(a)(1), (2), Reg Z 226.4(b)(2), (3)]; Line 814 \$175.00 Appraisal Review Fee; Line 815 \$175.00 Funding Fee BNC Mortgage [§1605(a) (1), (2), (3), Reg Z 226.4(b)(1)]; Line 816 \$81.00 Tax Service Fee BNC Mortgage [§1605(a)(1), (2), (3), Reg Z 226.4(b)(1), (2), (3)]; Line 817 \$17.00 Flood Certification Fee BNC Mortgage [§1605(a) (1), (2), (3), Reg Z 226.4(b)(1), (2), (3)].

226.4(a)(1),(2) 1, 2. [The settlement agent already charged \$100.00 over the risk premium rate for title insurance on the HUD-1 line 1108, & 1109. Therefor a separate fee for a settlement charge is neither bona fide nor reasonable]; Line 1303 \$55.00 courier fee to Burt Eisenberg. These HUD-1 fees total \$5,791.82, and as shown above, BNC used \$5,791.84 as the "prepaid finance charges", a \$.02 (2 cents) difference.

The HUD-1 p. 2 line 810 \$1,695.00 charge to Ms. Martin for JP Mortgage's administrative fee and HUD-1 p. 1 line 206 \$1,695.00 "broker credit" to Ms. Martin forms the claim that the TIL Amount Financed is **understated** by \$1,695.00 and the Finance Charge (dollar amount) and Annual Percentage Rate (percentage equivalent) are **overstated** by \$1,695.00, assuming the Court rejects Ms. Martin's argument on the HUD-1 p. 1 line 303 \$9,732.50 cash to borrower.

Ms Martin contends that the HUD-1 p. 1 line 303 \$9,732.50 "cash to borrower" that should have been paid to Ms. Martin is a prepaid finance charge because Ms. Martin did not receive the \$9,732.50, or the benefits of the \$9,732.50, and the record contains no evidence that the funds were paid to anyone that Ms. Martin authorized to receive the funds. Ms. Martin claims she wanted the \$9,732.50 to pay for roof repairs, but the roofers never repaired the roof.

Ms. Martin p. 71 l. 15 - p. 73. l. 3 testified that she wanted to cancel this loan within the 3 day rescission period after August 9, 1999, when one of the roofers returned and told Ms. Martin that they were \$200.00 short, paying the taxes. The roofer asked for \$200.00 and he would pay the taxes. Ms. Martin refused and instead wrote a \$200.00 check directly to the Dade tax office. Ms. Martin told the roofer she wanted to cancel, but the roofer refused because they had too hard a time getting the loan. Ms. Martin later found out that the roofers had improperly submitted Ms. Martin's application by listing jobs for Ms. Martin that she did not have nor knew anything about.

Ms. Martin's Deposition p. 74 l. 12 - p. 75 l. 1, said she called the closing agent right after the roofers came to her house, to cancel. Ava said: "Your package is coming out." Then about three days later, she called Ava again. This time, Ava was on vacation and stayed on vacation from that day on. Ms. Martin never got her closing package. Martin Depo, p. 75 l. 7 - l. 13.

Ms. Martin stopped paying the loan when she did not get her money from the closing and realized nobody would repair her roof. Martin Depo. p. 24 l. 15-23. This lawsuit ensued. On January 11, 2001, shortly after NBM filed suit, Ms. Martin through counsel sent a Notice of Intent to Rescind via mail and facsimile to Ms Tracy Preston Preece, Esq., Butler & Hosch P.A., 3185 South Conway Road, Suite E, Orlando, Florida 32812, fax 407-381-5577, and simultaneously served her TIL rescission pleadings, all within 3 years from closing.⁶

On May 5, 2005, Ms. Martin filed a Ch. 13 petition under the Bankruptcy Code. On October 20, 2005, Ms. Martin filed an adversary against NBM, seeking to assert her TIL right to rescind. NBM asked the Bankruptcy Court to abstain from the adversary, and urged the Court to allow the case to proceed in state court through final judgment, despite Ms. Martin's inquiry about the interplay between §1635(b), Reg Z 226.23(d) and Bankruptcy. At NBM's insistence, the Bankruptcy Court declined to take the case back after the court made findings of fact and conclusions of law and ordered the case to go to final judgment. See: Transcript of Jan. 12, 2006, Bankruptcy hearing. On Feb. 2, 2006, Ms. Martin converted to a Ch. 7. On 03/15/06, bankruptcy issued a discharge.

STATEMENT OF THE CASE

NBM brought a 2 count complaint against Ms. Martin. The first count asked to foreclose a mortgage and note against Ms. Martin's home. The second count ¶17 asked to re-establish the lost

⁶ TIL allows service on the creditor's attorney. See O.S.C. 226.2(a)(22)-2.

mortgage and note NBM sought to foreclose in the first count. Ms. Martin first retained Mr. Many Singh, Esq., then retained James A. Bonfiglio, Esq. To represent her.

Ms. Martin filed a Counterclaim and several affirmative defenses seeking TIL damages and rescission, and raising state law defenses, including claims that NBM was not the proper party to foreclose and that NBM had not properly accelerated the mortgage and note. NBM filed and served a Motion for Summary Judgment with 2 supporting affidavits on January 2, 2001. The Court granted NBM's first Summary Judgment, then set aside the summary judgment on rehearing.

NBM filed a second Summary Judgment motion supported with the affidavit of Diane DeLoney, who claims to be the Assistant Manager in Countrywide Foreclosure Dept. [Aff't ¶ 1]. She claims Countrywide services the loan for NBM and claims Countrywide is authorized to submit the affidavit for NBM. [Aff't ¶ 3]. Ms. DeLoney states NBM owns and holds the mortgage and note, which NBM purchased on the secondary market. [Aff't ¶ 4]. Ms. DeLoney claims she reviewed Countrywide's file for Ms. Martin, [Aff't ¶ 5] the Countrywide computer system, [Aff't ¶ 6], and identifies the computer system as recording a letter of default for Ms. Martin [Aff't ¶ 7]. Ms. DeLoney does not include a copy of the alleged notice of default.

The parties stipulated that Ms. Martin could file a 2nd Amended Affirmative Defense and Counterclaim. Material to the trial are Ms. Martin's 2nd Amended Counterclaim and 2nd Amended Affirmative Defenses pleading: 1) TIL violations leading to actual and statutory damages and rescission (Count I and 1st Aff. Def); 2) TIL violations based on the application of TIL §1639 and Reg Z 226.32 to this loan (Count 2 and 2nd Aff. Def); and, 3) Failure to Comply With Conditions

Precedent (5th Aff. Def.).⁷ NBM Replied to the 2nd Amended Affirmative Defenses, Answered and filed Affirmative Defenses to the 2nd Amended Counterclaim, essentially claiming: 1) TIL's Bona Fide Error defense; 2) TIL immunity under §1641; 3) §1639 does not apply; 4) TIL rescission is inequitable; and, 5) NBM is a holder in due course. (This no longer applies based on NBM's May, 2006 assignment and Motion to Substitute, served on Ms. Martin's counsel May 9, 2006.).

LEGAL ANALYSIS

TRUTH IN LENDING DEFENSES AND CLAIMS

I TRUTH IN LENDING

Congress passed TIL to remedy fraudulent practices in the disclosure of the cost of consumer credit, assure meaningful disclosure of credit terms, ease credit shopping, and balance the lending scales weighted in favor of lenders. See: §1601(a); Beach v. Ocwen, 118 S.Ct.1408 (1998), aff'g Beach v. Great Western Bank, 692 So.2d 146,148-149 (Fla.1997), aff'g Beach v. Great Western, 670 So.2d 986 (Fla. 4th DCA 1996), Dove v. McCormick, 698 So.2d 585, 586 (Fla. 5th DCA 1997), Pignato v. Great Western Bank, 664 So.2d 1011, 1013 (Fla. 4th DCA 1996), Rodash v. AIB Mortgage, 16 F.3d 1142 (11th Cir.1994).⁸

Pignato p. 1013 further instructs the Court: "Creditors must strictly comply with TILA. Rodash, 16 F.3d at1144; In re Porter, 961 F.2d 1066, 1078 (3d Cir. 1992). A single violation of

⁷ Upon NBM filing the original note with proper endorsements and either the original mortgage and assignments, properly executed, or certified copies thereof, Ms. Martin will not argue the raised affirmative defenses that NBM neither owns, nor has the right to re-establish the lost note.

⁸ All 11th Circuit TIL decisions and pre- 11th Circuit 5th Circuit cases are binding in Florida. Kasket v. Chase Manhattan Mtge. Corp., 759 So.2d 726 (Fla. 4th DCA 2000) (This is Kasket's 2nd reported opinion, the first is reported at Kasket v. Chase Manhattan Mtge. Corp., 695 So.2d 431 (Fla. 4th DCA 1997). Ms. Martin will refer to Kasket, 695 So.2d as Kasket I, and Kasket, 759 So.2d as Kasket, II).

TILA gives rise to full liability for statutory damages, which include actual damages incurred by the debtor plus a civil penalty. 15 U.S.C.A. §§ 1640(a)(1)(2)(A)(i). Moreover, a violation may permit a borrower to rescind a loan transaction, including a rescission of the security interest the creditor has in the borrower's principal dwelling. 15 U.S.C.A. §§ 1635(a).” See also the Beach line of cases.

W.S. Badcock Corporation v. Myers, 696 So.2d 776, p. 779 (Fla. 1st DCA 1996) informs the Court: “Violations of the TILA are determined on an objective standard, based on the representations in the relevant disclosure documents, with no necessity to establish the subjective misunderstanding or reliance of particular customers.” W.S. Badcock p. 783 also holds that: “The TILA is remedial legislation. As such, its language must be liberally construed in favor of the consumer. Rodash v. AIB Mortgage Co., 16 F.3d at 1144; Schroder v. Suburban Coastal Corp., 729 F.2d 1371, 1380 (11th Cir. 1984). Zamarippa v. Cy's Car Sales, 674 F.2d 877, 879 (11th Cir. 1982), binding here under, Kasket II, agrees: “An objective standard is used to determine violations of TILA, based on the representations contained in the relevant disclosure, documents; it is unnecessary to inquire as to the subjective deception or misunderstanding of particular consumers.”

II MS. MARTIN'S RIGHTS UNDER TIL

TIL creates several substantive rights. §1640(a)(1) gives Ms. Martin actual damages for any TIL errors. §1640(a)(2)(A)(iii) gives Ms. Martin statutory damages of twice the finance charge, up to \$2,000.00, for errors in connection with §1635 violations, or §1638(a)(2) through (6), or (9) violations, and the numerical disclosures, outside various error tolerances.⁹ (§1640's last paragraph has the §1640(a)(2) damage limit).

⁹ Pre-1995 TIL had a limited number of error tolerances. See, for example: Steele v Ford Motor Credit, 783 F.2d 1016, p. 1018, fn. 3 (11th Cir. 1986). The 1995 TIL amendments created a myriad of error tolerances, which can confuse even the most experienced TIL practitioners.

§1635(a) allows Ms. Martin to rescind this loan because it is home secured non-purchase credit. Ms. Martin can rescind for any reason within 3 business days from the August 9, 1999, loan consummation. If the Court concludes BNC did not give Ms. Martin either or both of the TIL Disclosure or Notice of Right to Cancel, or gave Ms. Martin inaccurate material TIL disclosures, or an inaccurate Notice of Right to Cancel, TIL extends Ms. Martin's rescission right for 3 days from the date BNC, or its assignee delivers the accurate TIL disclosures and an accurate rescission notice, for up to three years from closing. Pignato, p.1013 (Fla. 4th DCA 1995) ("TILA permits the borrower to rescind a loan transaction until midnight of the third business day following delivery of all of the disclosure materials or the completion of the transaction, whichever occurs last."). See: §1635(a); Reg. Z 226.23(a); Beach, cases; Rodash; Steele, p. 1017; Semar v. Platte Valley Federal S & L Ass'n, 791 F.2d 699 p. 699, 701-702. ¹⁰ (9th Cir. 1986).

TIL requires additional disclosures and imposes more controls on loans that meet either the "T-Bill Trigger" or "Points and Fees Trigger" found at §1602(aa). §1639, Reg Z 226.31 & Reg Z 226.32, require the creditor for this loan, commonly called a HOEPA loan, a §1639 loan or Section 32 loan, to give additional disclosures 3 days before closing and prohibits loans from containing certain terms; i.e., a prohibition on certain balloon payments. HOEPA also has a special actual damage provision at §1640(a)(4).

In 1995, Congress created an additional right to rescind when a lender sues to foreclose. See: §1635(i); Reg. Z 226.23(h). If the creditor overstates the amount financed by more than \$35.00, or errs in the Notice of Right to Cancel form, the consumer can rescind as a defense to the foreclosure,

¹⁰ Ms. Martin exercised her right to rescind by delivering her January 11, 2001, Notice of Intent to Rescind, and by filing her pleadings enforcing her right to rescind, since she served NBM within 3 years from August 9, 1999. See: Taylor v. Domestic Remodeling, 97 F.3d 96 (5th Cir. 1996).

in addition to the other rights to rescind he may have. An understated or overstated annual percentage rate or finance charge outside of TIL's error tolerance ranges trigger Ms. Martin's extended right to rescind. See: TIL §1605(f); Reg Z 226.22(d); Williams v. Chartwell Financial Services, Ltd., 204 F.3d 748 (7th Cir. 2000); England v. MG Investments, Inc., 93 F. Supp.2d 718 (S.D.W.Va. 2000).

III. **NBM CARRIES THE BURDEN TO PROVE TIL COMPLIANCE**

As with all consumer protective statutes, the burden of proving TIL compliance lies with the creditor when challenged by the consumer. In Wright v. Tower Loan of Mississippi, Inc., 679 F.2d 436, p. 444 (5th Cir. 1982), 2 consumers sued Tower alleging similar TIL disclosure errors. The lower court affirmed a magistrate's finding that upheld all of the alleged TIL errors. While the 5th Circuit reversed on one TIL violation, the 5th affirmed the finding that Tower violated TIL, holding: "The lender, however, bears the burden of proving [TIL] compliance."

Louisiana agreed with Wright, in a consumer's TIL suit against his creditor, Rainey v. Credithrift of America #5, 441 So.2d 278, p. 280 (La. App. 4th Cir. 1983). This Court held: "When challenged, the creditor assumes the burden to prove compliance with TILA, and even slight deviations from the disclosure requirements are remediable by the consumer."

Florida adopted the "creditor must prove TIL compliance" burden when it passed Fla. Stat. § 520.07(2), a TIL disclosure statute required in connection with auto financing loans: Cannon v. Metro Ford, Inc., 242 F. Supp.2d 1322, p. 1333 (S. D. Fla. 2002): "Under Florida law, the burden of proving compliance with the TILA is on the party claiming compliance. Fla. Stat. § 520.07(2)"

IV. **BNC FAILED TO PROVIDE MS. MARTIN WITH A CLEAR CONSPICUOUS NOTICE OF HER RIGHT TO RESCIND**

A. **BNC FAILED TO PROVIDE ANY DISCLOSURE OR RIGHT TO RESCIND**

The principal that each consumer with the right to rescind must receive 2 copies each of the

TIL notice of right to cancel and 1 copy each of the TIL disclosure statement is enunciated in Cintron v. Bankers Trust Company, 682 So.2d 616 (Fla. 2nd DCA 1996), at p. 616, citing Yslas v. D.K. Guenther Builders, Inc., 342 So.2d 859 (Fla. 2d DCA 1977) (holding that right to receive 2 copies each of the rescission notice applies separately to each person obligated under transaction). The Right is created at §1635(a) and Reg Z 226.23(b)(1), which states:

“Notice of right to rescind. In a transaction subject to rescission, **a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind.**”

Ms. Martin's testimony excerpts, Exh. “A” to this Memo, establishes that Ms. Martin did not receive any copy of BNC's Notice of Right to Cancel form or Disclosure Statement, as pled in her 2nd Amended Aff. Def. ¶8 a.-g. and 2nd Amended Counterclaim ¶9 a.-g. ¹¹ Ms. Martin clearly articulated her position that she left the August 9, 1999, closing without any “closing package” and without the TIL disclosure statement and notice of right to cancel. Just 2 excerpts from Ms. Martin's deposition show: P. 75 L. 25 - P. 76 L. 3: “Q.: Do you remember getting this document [Exhibit #14 Truth in Lending Notice of Right to Cancel Form]?” **A.: “I saw it, but like I said before, I didn't get anything.** They were supposed to send me the whole package to me.” And, at P. 77 L. 1 - L. 16: “Q.: “Keeping in mind that you are under oath today for this deposition, can you say that you're positive that you weren't given that document, Exhibit No. 14, Notice of Right to Cancel, at the closing? Are you positive?” A.: “I'm more than sure they didn't give it to me, along with the papers that they shuffled in front of me. And then I saw that. And I said: “Oh, I have time to think.” That's when I said I had time to think.”

B. MS. MARTIN'S TESTIMONY REBUTS §1635(c)'s PRESUMPTION OF

¹¹ Ms. Martin will use “rescind” and “cancel” interchangeably. She also claims that she did not receive a TIL disclosure statement and combines that argument in this part of her Memo.

RECEIPT

While Ms. Martin signed the acknowledgment of receipt in BNC's Disclosure Statement and Notice of Right to Cancel form, §1635(c) provides that Ms. Martin's acknowledgment only creates a rebuttable presumption of receipt. ¹² §1635(c) states that:

“Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.”

Cintron, interpreted §1635(c) and held:

“The [TIL] provides that ‘written acknowledgment’ of receipt of any disclosures required under this subchapter . . . does no more than create a rebuttable presumption of delivery thereof 15 U.S.C. §§1635(c). In their filed affidavits, the Cintrons sufficiently rebutted this presumption. Because this created a disputed issue of material fact, the trial court erred in granting summary judgment. See, e.g., Stone v. Mehlberg, 728 F. Supp. 1341 (W. D. Mich. 1989); Award Lumber & Constr. Co., Inc. v. Humphries, 110 Ill. App.3d 119, 65 Ill. Dec. 676, 441 N.E.2d 1190 (1982). Accordingly, we reverse the summary judgment granted on the issue of rescission notices.”

This court is bound to follow Cintron, and Yale, which Cintron, p. 616-617 cites, and the “presumption of receipt” analysis Cintron adopted from Stone v. Mehlberg, 728 F. Supp. 1341, 1353-1354 (W.D.Mich. 1989). ¹³ In Stone, the Court granted the Stones summary judgment on the

¹² The §1635(c) presumption trumps the §1641(b) assignee “conclusive presumption” of receipt. See: §1641(b), “**Except as provided in section 1635(c) of this title**, in any action or proceeding by or against any subsequent assignee without knowledge to the contrary by the assignee when he acquires the obligation, written acknowledgment of receipt shall be conclusive proof of the delivery thereof ...” (emphasis added); Bryant v. Mortgage Capital Resource Corp., 197 F. Supp.2d 1357 (N.D.Ga. 2002); In Re Bumpers, WL 22119929, N.D.Ill., Sep 11, 2003; In re Williams 291 B.R. 636 (Bkrtcy. E.D.Pa., 2003);

¹³ All Florida trial courts are bound to follow 2nd DCA opinions, absent a controlling case from their District Court. Angrand v. Key, 657 So.2d 1146, p. 1148 (Fla. 1995). Absent a controlling case from any District Court on the subject, the trial court is bound to follow 11th Circuit cases on TIL. Kasket v. Chase Manhattan Mtg., 759 So.2d 726 (Fla. 4th DCA 2000).

issue of whether the consumer received the required notices of right to cancel and held:

“The ‘Notice of Right to Cancel’ unearthed by the Mehlbergs contains, directly above the Stones' signatures, the statement ‘. . . we received from the creditor two copies of the above notice. . . .’ [This language does not present probative evidence that each received 2 copies of the form].... Moreover, even if the “Notice of Right to Cancel” did refer to receipt of two copies by both Kenneth and Delores Stone, the document does not suffice to raise a jury question whether the Stones in fact received the required papers. Under 15 U.S.C. §§ 1635 (c), the Stones’ signatures after the acknowledgment of receipt **merely created a rebuttable presumption of delivery to them of two copies of the “Notice of Right to Cancel.” The Stones' affidavit testimony rebutted this presumption.** [emphasis added] Powers v. Sims and Levin Realtors, 396 F.Supp. 12, 22-23 (E.D.Va. 1975), aff'd in part and rev'd in part, 542 F.2d 1216 (4th Cir. 1976). **Following this rebuttal, it is incumbent upon the Mehlbergs, who stand in the creditor's shoes, to produce some positive evidence that delivery of the “Notice of Right to Cancel” copies to the Stones actually did occur.** [emphasis added]. In re Pinder, 83 B.R. 905, 912-14 (Bankr. E. D. Pa. 1988). The Mehlbergs have not produced any delivery evidence. Consequently, the Stones have established the absence of a genuine factual issue and are entitled to judgment as a matter of law.” Stone, p. 1353-1354, (emphasis added.).

The §1635(c) “rebuttable presumption” standard announced in Stone and adopted in Cintron is sometimes called the “bursting bubble” presumption. While NBM may cite Williams v. First Government Mortg. & Invest., 225 F.3d 738 (D.C. Cir. 2000), this non-binding decision actually supports Ms. Martin because it rejects the notion that Ms. Martin’s testimony does not rebut the §1635(c) presumption. See: Williams, p. 751: “Although we disagree with the district court on the proper legal standard for evaluating the sufficiency of Williams’ testimony, the presumption of delivery imposed on Williams ‘the burden of going forward with evidence to rebut or meet the presumption, but [did] not shift to [him] the burden of proof,’ Fed. R. Evid. 301; see Legille v. Dann, 544 F.2d 1, 6 (D.C. Cir. 1976) we agree with the court's ultimate conclusion.”¹⁴

¹⁴ Some commentators inform the court that to rebut a presumption, a party must provide evidence that “would support a jury finding of the nonexistence of the presumed fact.” 21 Wright & Graham, Federal Practice and Procedure: Evidence §5122 (1977). [emphasis added]. Legille p. 6 informs the Court that: “A presumption merely invokes a rule of law compelling the [trier of fact] to reach a conclusion in the absence of evidence to the contrary from the opponent. If the opponent

Davison v. Bank One Home Loan Services, LEXIS 514 at 15-16 (D. Kan. 2003) surveyed the TIL presumption cases, and held:

“To rebut this presumption, borrowers must present evidence to the contrary. See [Williams] (presumption of delivery requires borrower to come forward with evidence to meet presumption, but does not shift burden of proof to borrower).” See also: Cooper v. First Gov't Mortgage & Investors Corp., 238 F. Supp 2nd 50, p. 63-65 (D.D.C. Nov. 4, 2002) (presumption rebutted by borrower's testimony that she did not read documents at closing, but placed them in ‘lockbox’ shortly thereafter, and when she later reviewed them, required number of copies were not present); Hanlin v. Ohio Builders & Remodelers, Inc., 212 F. Supp.2d 752, 762 (plaintiffs’ testimony that they did not receive disclosures sufficient to rebut presumption); Stone, 728 F. Supp. at 1353-54 (same); In re Rodrigues, 278 B.R. at 687 (same); In re Williams, 232 B.R. at 641 (same), aff'd in relevant part, 237 B.R. 590, 594-95 (E.D.Pa. 1999); Cooper, 2002 WL 31520158, at *11-13 (TILA plaintiff attempting to overcome presumption faces low burden).

In other words, Cintron, by adopting Stone, only requires Ms. Martin to present “some evidence” of non-receipt to rebut the §1635(c) presumption, similar to the summary judgment standard. Ms. Martin’s testimony is sufficient to support a finding by the trier of fact that Ms. Malgarejo did not give Ms. Martin copies of BNC’s TIL Disclosure and Notice of Right to Cancel form on Aug. 9, 1999, and is “some evidence” of non-receipt. Thus, Ms. Martin met the §1635(c) “some” evidence standard to rebut the presumption of receipt. Ms. Martin’s deposition bursts the presumption bubble, which compels NBM, under Cintron, adopting Stone, to present some other independent evidence that BNC delivered 1 copy of BNC’s TIL Disclosure Statement and 2 copies of the Notice of Right to Cancel to Ms. Martin.¹⁵ Once Ms. Martin presented “some evidence” of non-receipt, the §1635(c) presumption vanished. NBM must now present evidence independent of

offers ‘some evidence’ to the contrary, the presumption disappears as a rule of law, and the case is in the [factfinder's] hands free from any rule. The presumption thus ‘bursts’ in the face of some evidence in opposition to the presumed fact.”

¹⁵ Proof of a negative independent of Ms. Martin’s testimony that she did not receive the TIL documents would be virtually impossible.

the acknowledgment that BNC delivered the disclosure statement and notices of right to cancel to Ms. Martin. Absent that, the Court must find that Ms. Martin did not receive a TIL Disclosure Statement nor 2 copies of a Notice of Right to Cancel, thus extending Ms. Martin's §1635 and Reg Z 226.23 Right to rescind, and the Court must order a TIL rescission. See: Pignato, p.1013; Beach, cases; Rodash; Steele, p. 1017; Semar, p. 699, 701-702.

C. MALGAREJO DOES NOT PROVE DELIVERY OF CORRECT TIL FORMS

NBM will offer Ms. Malgarejo's testimony to try and overcome Ms. Martin's testimony that she did not leave the closing with a TIL Disclosure Statement or Notice of Right to Cancel form. However, according to Ms. Malgarejo's deposition, the Disclosure Form that she gave Ms. Martin could not have had the date of the transaction nor the date rescission expired as pled in her 2nd Amended Aff. Def. ¶8 h. and 2nd Amended Counterclaim ¶9 h. As shown infra, the disclosure statement and notice of right to cancel forms BNC prepared violate TIL.

Ms. Malgarejo testified that she received the closing package from BNC with BNC's Notice of Right to Cancel form blank: Malgarejo Depo p. 9 l. 21 - l. 24. She copied BNC's closing package documents before the closing to make a package for the borrower to take home from closing. Malgarejo Depo p. 23 l. 17 - p. 24 l. 7; Malgarejo Depo p. 48 l. 15 - l. 24. Ms. Malgarejo does not fill in the dates in the Notice of Right to Cancel form until the closing with the borrower. She fills in the dates in the form with the borrower present and explains the form to the borrower: Malgarejo Depo p. 9 l. 24 p. 10 l. 13. Therefore, the closing package that Ms. Malgarejo copied for Ms. Martin to take away from the closing could only contain a copy of BNC's blank Notice of Right to Cancel form, and not the form with the handwritten dates, Exhs. "C" and "D."

Ms. Malgarejo testified that she does not make a copy of the signed documents unless the

consumer asks for a signed set. The only signed document she gives the consumer is the signed HUD-1. She is certain that she followed this practice for Ms. Martin's closing: *Malgarejo Depo* p. 491. 2 p. 50 l. 19. A fortiori, the BNC Notice of Right to Cancel form in the closing package that Ms. Malgarejo contends she gave to Ms. Martin on August 9, 1999, to take home after closing contained only BNC's blank form because Ms. Malgarejo did not give Ms. Martin copies of signed documents to take, except the HUD-1. While Ms. Malgarejo did not recall whether Ms. Martin left the closing with a completed Notice of Right to Cancel (*Malgarejo Depo* p. 59 l. 1 - l. 24.), she agreed it was possible Ms. Martin left the closing with a blank rescission form. *Malgarejo Depo* p. 66 l. 6 - l. 16.

Thus, even if the Court accepts Ms. Malgarejo's testimony over Ms. Martin's testimony, the Court must conclude that NBM did not meet its burden to prove TIL compliance because the closing package Ms. Malgarejo gave to Ms. Martin only contained the TIL Notice of Right to Cancel form with the dates blank, and establishes that Ms. Martin has the extended right to rescind. See: Semar, p. 704, "This failure to fill in the expiration date on the rescission form violated the TILA and Regulation Z."; Williamson v. Lafferty, 698 F.2d 767, 768-69 (5th Cir. 1983); "Such a violation entitles the borrower to rescind the loan agreement for up to three years, whether or not the violation was material."; New Maine Nat. Bank v. Gendron, 780 F. Supp. 52, 57 (D. Me. 1991) (where a creditor fails to take the necessary actions to start the mandatory three-day rescission period, the period extends to three years from the consummation of the transaction); Mayfield v. Vanguard Savings & Loan Ass'n, 710 F. Supp. 143, 145-46 (ED. Pa. 1989).

While NBM makes much of Ms. Martin's testimony that she knew her TIL right to rescind, NBM acknowledges that regardless of what Ms. Martin may have known about her right to rescind, TIL still requires BNC to deliver both copies of the Notice of Right to Cancel at closing. See Rodash.

Moreover, the consumer may sue for enforcement even if she is not actually deceived or harmed.

Zamarippa, p. 879.”

Jenkins v. Landmark Mortg. Corp. Of Va., 696 F. Supp. 1089 (W.D.Va. 1988) presents facts very similar to these facts, and informs the Court that Ms. Martin has the extended right to rescind. Here, Ms. Jenkins sued for rescission and damages after she defaulted, in response to a foreclosure sale. The facts show Ms. Jenkins and her son went to the closing agent's law office to close, where they signed the TIL Disclosure "Acknowledgment of Receipt." Ms. Jenkins while agreeing they received a Notice of Right to Cancel, testified that the attorney gave neither her nor her son a copy of the disclosure form, instead, saying that he would mail a copy. The attorney testified that he could not recall the details, but it was his usual practice to ask the consumer if they wished to take a copy of the TILA disclosure form with them or to have it mailed along with the other loan documents. Jenkins ruled that Ms. Jenkin's testimony rebutted the §1635(c) presumption, in the face of "regular practice" testimony, resoundingly rejecting the attorney's "regular business practice" testimony in the face of direct contrary testimony on this TIL issue: "Regardless of the apparent conflict in the testimony between the attorney and plaintiff, it is clear that plaintiff and her son left the office without the TILA disclosure form in their possession." Id., p. 1091. Even though the Jenkins, consumer saw the disclosure and signed the acknowledgment, the failure to give Ms. Jenkins or her son the forms violated TIL and extended the right to rescind.

- D. **BNC'S NOTICE OF RIGHT TO CANCEL DOES NOT PROVIDE A CLEAR CONSPICUOUS NOTICE OF MARTIN'S RIGHT TO CANCEL BECAUSE IT USES A POST OFFICE BOX TO DESIGNATE THE ADDRESS OF BNC'S PLACE OF BUSINESS, AND IS CONFUSING AND MISLEADING IN ITS DISCLOSURE OF THE MANNER AND LENGTH OF TIME THAT MS. MARTIN CAN EXERCISE HER RIGHT TO RESCIND**

The Notice of Right to Cancel form that NBM claims was given to Ms. Martin violates

§1635(a), Reg Z 226.23(b)(1)(iii), Reg Z 226.23(a)(2), and O.S.C. 226.23(a)(2) - 1, raised in her 2nd Amended Aff. Def. ¶8 i. and 2nd Amended Counterclaim ¶9 i., because BNC's Notice only provided a post office box as the address of BNC's place of business for Ms. Martin to deliver her Notice of Intent to Cancel. A post office box address is not a "clear and conspicuous" disclosure of the address of BNC's place of business, and is confusing and misleading because a Post Office Box address limits the manner in which Ms. Martin can rescind the loan to US Postal Service mail only, and during postal business hours, when Reg Z 226.23(a) allows Ms. Martin to deliver the notice by several methods, including telegraphic transmission, hand delivery, courier, or non-postal express delivery (UPS, Federal Express), up to midnight of the 3rd business day, which is after normal post office hours, as set forth in BNC's Notice of Right to Cancel. See: In re Porter.

1. **BNC's Notice of Right to Cancel Disclosure Obligation**

Reg Z. 226.23(b)(1) imposed on BNC the obligation to give Ms. Martin a Notice of Right to Cancel that clearly and conspicuously disclosed 2 important items of information, among several others: 1) How Ms. Martin can exercise the right to rescind (by delivery of a written notice to BNC); and, 2) The address of BNC's place of business to deliver her written notice of intent to rescind:

"(1) In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind **The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:**

(iii) **How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.** (Emphasis added).

Reg. Z 226.23(a)(2) describes how the consumer can exercise the right to rescind:

"(2) To exercise the right to rescind, the consumer **shall notify the creditor of the rescission by mail, telegram or other means of written communication.** Notice is considered given when mailed, when filed for **telegraphic transmission** or, if **sent by other means**, when delivered to the **creditor's designated place of business.**" (Emphasis added).

The Staff Comments at O.S.C. 226.23(a)(2) - 1 state:

“1. Consumer’s exercise of right. The consumer must exercise the right of rescission in writing but not necessarily on the notice supplied under section 226.23(b). Whatever the means of sending the notification of rescission — mail, telegram or other written means — the time period for the creditor’s performance under section 226.23(d)(2) does not begin to run until the notification has been received.” (Emphasis added).

2. **BNC’s P.O. Box Address Cannot be the “Address of BNC’s Place of Business” and Does Not Meet Its Reg Z 226.23(b)(1)(iii) Obligation to Clearly and Conspicuously disclose the “Address of BNC’s Place of Business”**

The Notice with only a post office box as BNC’s place of business does not comply with Reg Z 226.23(b)(1)(iii), nor Reg Z 226.23(a)(2) because a post office box address is not BNC’s “place of business.” The Court must use rules of statutory construction to define “place of business” because neither §1602 nor Reg Z 226.2 define “place of business.” Those rules include: construing the phrase “in accordance with its ordinary or natural meaning,” a meaning which may be supplied by a dictionary. FDIC v. Meyer, 510 U.S. 471, 476 (1994); giving nontechnical words their “ordinary and natural meaning,” Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979); considering “not only the bare meaning of the word but also its placement and purpose in the statutory scheme,” Bailey v. United States, 516 U.S. 137, 116 S.Ct. 501, 507, 133 L.Ed.2d 472 (1995); and interpreting a single statutory word or provision in “a context that makes its meaning clear,” United Savings Assoc. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988).

Looking first to the dictionary definition, Black’s Law Dictionary 6th Ed. (1990) (and 8th Ed. 2004), agree that a post office box cannot be BNC’s “place of business” regardless of whether the Court uses the phrase “place of business” or separately examines “place” and “business.” *Black’s* defines “place of business” as: “The location at which one carries on his business or employment.”

Black's Law Dictionary 6th Ed., p. 1149. It is obvious that BNC's post office box cannot be the location at which BNC carries on its business under *Black's* definition of "place of business."

The result is the same for each word separately. *Black's* defines "Place" as: "This word is a very indefinite term. It is applied to any locality limited by boundaries, however large or however small. The extent of the locality by it must generally be determined by the connection in which it is used..." *Black's* defines "Business" as: 1. A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain."

Giving each of the 2 words "place" and "business" or the phrase "place of business" their "ordinary and natural meaning," considering its placement and purpose in TIL's statutory scheme, in "a context that makes its meaning clear," the Reg. Z 226.23(a)(2) and Reg Z 226.23(b)(1)(iii) "address of the creditor's place of business" means the locality where BNC carries on its commercial enterprise or its particular occupation. BNC's post office box cannot be the locality where BNC carries on its commercial enterprise or its particular occupation, and so fails to comply with BNC's obligation to clearly and conspicuously disclose BNC's address of BNC's place of business as required by Reg. Z 226.23(a)(2) and Reg Z 226.23(b)(1) (iii).

This conclusion is further buttressed by examining The Postal Service's Domestic Mail Manual ("DMM").¹⁶ Ms. Martin attaches hereto as Exhibit "G" the applicable DMM rules. DMM §4.2.1. informs the Court that the Postal Service owns and BNC rents BNC's Notice of Right to Cancel "business address," P. O. Box 19656, Irvine, Cal., 92623-9656. ("Post office box service is

¹⁶ U.S. v. American Target Advertising, 257 F.3d 348, p. 352 (4th Cir. 2001) informs the Court that 39 C.F.R. §111.1 incorporates the Postal Service's Domestic Mail Manual into the Postal Service agency's regulations. See also: City of Pompano Beach v. Haggerty, 530 So.2d 1023, p. 1024 (Fla. 4th DCA 1988).

provided only through receptacles owned or operated by the USPS or its agents.”). DMM §4.3. requires BNC, as an applicant to rent a Box, to “provide a permanent physical address **where he/she conducts business.**”

4.3.1 Application Procedures for applying for post office box service are as follows:

- a. The applicant must complete all required items on Form 1093, Application for Post Office Box or Caller Service, and submit it to any postal facility that provides window service to the public.”

4.3.2 Verification **An application for post office box service may not be approved until the applicant's identity and current permanent physical address where he or she resides or conducts business is verified.**

Since the Postal Service owns BNC's post office box, and the Postal Service requires BNC to have a physical address where BNC conducts business to rent a Box, BNC's P.O. Box address cannot be the place where BNC “conducts business.” A fortiori, if BNC conducts business at a physical location different from the P.O. Box address in Ms. Martin Notice of Right to Cancel, placing BNC's P.O. Box address in the Notice cannot comply with BNC's Reg. Z 226.23(a)(2) and Reg Z 226.23(b)(1) (iii) obligation to designate the address of BNC's “place of business.”

3. **BNC's Use of a P.O. Box as its “Designated Address” Has the Capacity to Confuse and Mislead Ms. Martin on the Manner and Time TIL allows Ms. Martin to deliver her Notice of Intent to Cancel to BNC**

BNC's use of its P.O. Box as its “designated address” has the capacity to confuse and mislead Ms. Martin on the manner TIL allows her to deliver her Notice of Intent to Cancel to BNC, and infringes on Ms. Martin's right to rescind by limiting that right both in the means and the time to deliver the notice, which is yet another basis to find that BNC's notice violates TIL, extending Ms. Martin's Right to Rescind. See: In re Porter, supra; Wright, supra, p. 444; Mackey v. Household Bank, F.S.B., 677 So.2d 1295 (Fla. 4th DCA 1996); Weaver v. General Finance Corp., 528 F.2d 589,

fn 6 (5th Cir. 1976) (binding here under Kasket II).

As shown above, Reg Z 226.23(a)(2) and O.S.C. 226.23(a)(2) allowed Ms. Martin to deliver her notice of intent to cancel by mail, telegram or other written communication. BNC's Notice of Right to Cancel, just below BNC's post office address, explains that these are Ms. Martin's options. However, DMM §4.2.1 prohibits use of the post office box for other means of delivery intended to replace carrier delivery (such as telegram, hand delivery, courier, or non-postal express delivery UPS, Federal Express, etc.), and DMM §4.4.2 only allows one to place US mail and official USPS notices in the Post Office box.¹⁷ Therefore, BNC's post office address in the notice, prevents Ms. Martin from using other means to deliver her Notice of Intent to Rescind if she wanted to use an alternative to the US Postal Service, such as telegram, hand delivery, courier, or Federal Express.

Telling Ms. Martin in the Notice of Right to Cancel that she can rescind by mail or telegram or other written means, and at the same time limiting the manner Ms. Martin can deliver the notice to only US Post Service mail has the capacity to confuse or mislead Ms. Martin. For example, if Ms. Martin decided to rescind timely at 11:00 pm, August 12, 1999, and read BNC's notice, it tells Ms. Martin she can rescind by mail or telegram, or other means. Since it is 11:00 pm, no US post offices are open, so she cannot get US postal personnel to help her mail the notice if she wants proof of delivery (i.e. certified mail return receipt requested, or overnight mail). She also cannot buy stamps or envelopes at the desk. Ms. Martin therefor decides to go to the nearest 24-hour Western Union telegram office to send BNC her telegram rescinding the loan, as BNC's notice tells her she can. When she arrives at Western Union, just in time to defeat the midnight deadline, Western Union

¹⁷ DMM §4.2.1: "Post office box service does not include alternate means of delivery established to replace, simplify, or extend carrier delivery service..." and DMM §4.4.2: "Only mail and official USPS notices may be placed into a post office box."

cannot send the telegram to BNC because DMM §4.2.1. and DMM §4.4.2. prohibit Western Union from delivering Ms. Martin's telegram notice to rescind at BNC's post office box. It is now past midnight of the 3rd business day and Ms. Martin has been prevented from timely rescinding because she could not deliver her Notice of Intent to rescind to BNC at the post office address in BNC's Notice of Right to Cancel in a manner allowed by TIL as set forth in her Notice, even though she read and precisely followed the instructions in BNC's Notice.¹⁸

Ms. Martin now realizes that the 3 hour time difference with California means she may have 3 more hours to find another means to deliver her notice to BNC's post office box. She returns home, calls Irvin, Cal., directory assistance for local courier services that may be open after 9:00 pm. While Ms. Martin might be able to fax a signed written notice to the courier, then have the courier hand deliver the faxed notice timely to BNC, no courier service can hand deliver to BNC's post office box because DMM §4.4.2 prohibits all but official US mail in BNC's post office box. Once again, even though Ms. Martin followed the instructions in BNC's Notice, she could not deliver her Notice of Intent to rescind to BNC at the post office address in BNC's Notice of Right to Cancel in the manner allowed by TIL as set forth in the notice.

As the Court can see, BNC's PO Box address in the Notice has the capacity to confuse or mislead Ms. Martin because it limits the manner she can rescind, (by US Mail only vs. telegram or other means) and limits the time she can rescind (from midnight of the 3rd business day to US Postal

¹⁸ While Ms. Martin does not know delivery is complete on mailing (i.e. dropping in the mail box), or when filed for telegraphic transmission under Reg. Z 226.23(a)(2), this information is not in BNC's Notice of Right to Cancel form, creating more confusion in Ms. Martin about her TIL rights. Regardless, even if Ms. Martin knew, without envelopes or stamps, and with Western Union's refusal to accept her telegram, she cannot use the US mail or telegram. And, any cautious consumer would want proof of mailing or telegraphic receipt.

service business hours), compared to the rights BNC described in her Notice. BNC's Notice of Right to Cancel post office box address fails to clearly and conspicuously disclosure the address of BNC's place of business, and is confusing and misleading, violating §1635(a), Reg Z 226.23(b)(1) (iii), Reg Z 226.23(a)(2), and O.S.C. 226.23(a)(2) - 1, thus extending Ms. Martin's right to rescind. Wright, supra, p. 444; Rodash, supra., In re Porter, supra.

E. **ORAL STATEMENTS CONTRARY TO THE WRITTEN NOTICE OF RIGHT TO CANCEL EXTEND MS. MARTIN'S RIGHT TO RESCIND**

Ms. Martin wanted to cancel this loan within the 3 day rescission period after August 9, 1999, when one of the roofers who helped her close returned and told Ms. Martin that they were \$200.00 short, paying the taxes. Martin Depo p. 71 l. 15 - p. 73. l. 3. Ms. Martin said she wanted to cancel, but the roofer refused because they had too hard a time getting the loan. Ms. Martin's Deposition p. 74 l. 12 - p. 75 l. 1, said she called Ava (the closing agent) right after the roofer came to her house, to cancel. Ava refused, saying: "Your package is coming out." About three days later, she called Ava again. This time, Ava was on vacation and stayed on vacation from that day on. Ms. Martin never got her closing package and could never rescind. Martin Depo, p. 75 l. 7 - 1. 13.

Jenkins, again informs the Court that oral statements that discourage Ms. Martin from exercising her right to rescind have the capacity to confuse or mislead about her TIL rights and so violate TIL, extending her right to rescind.

V. **BNC FAILED TO ACCURATELY DISCLOSE THE FINANCE CHARGES AND ANNUAL PERCENTAGE RATE**

A. **BNC OVERSTATED THE ANNUAL PERCENTAGE RATE AND FINANCE CHARGE, OUTSIDE TIL'S ERROR TOLERANCE, THUS EXTENDING MS. MARTIN'S RIGHT TO RESCIND**

As pointed out earlier, the 1995 TIL amendments created a confusing maze of error tolerance

levels, applicable in different situations to different required disclosures, which can confound even the most experienced TIL practitioners. NBM's Summary Judgment Motion P. 12 - 14 claimed BNC properly disclosed the finance charge because the dispute over the HUD-1 p. 1 line 303 \$9,732.50 "cash to borrower" that should have been paid to Ms. Martin is at best a dispute over the mortgage broker fee and potential fraud claim against the broker. NBM then argued that BNC properly disclosed the finance charge because the Amount Financed was over disclosed by \$1,695, which does not harm the consumer and does not violate TIL. Ms. Martin pled that BNC overstated the amount financed and APR in her 2nd Amended Aff. Def. ¶9 i.-j. and 2nd Amended Counterclaim ¶10 i.-j. She withdraws her claims of other disclosure errors, except only: 1) the claim that the HUD-1 p. 1 line 303 \$9,732.50 "cash to borrower" is a "finance charge" as alleged in her 2nd Amended Aff. Def. ¶9 g. and 2nd Amended Counterclaim ¶10 g.; and, 2) the claim that "estimated disclosures" violate TIL as alleged in her 2nd Amended Aff. Def. ¶9 k. and 2nd Amended Counterclaim ¶10 k.

APR over-disclosure can easily harm a consumer because it can result in a conscientious credit-shopping consumer accepting a loan that is more expensive than another loan. Assume creditor "A" over-discloses his APR as 10% when the correct APR is 5%. Creditor "B" accurately discloses his APR as 7%. The "credit-shopping consumer" will chose the accurately disclosed but more expensive "B" 7% loan over the over-disclosed but cheaper 5% "A" loan, and thus suffer harm by paying Creditor "B" a 2% higher APR than that which Creditor "A" would actually charge. The same applies to over-disclosed finance charges. APR and finance charge over-disclosure is just as abusive to the consumer and as much a TIL violation as under-disclosure.

BNC understated Ms. Martin's amount financed by \$1,695.00 because BNC had to include the HUD-1 line 810 \$1,695.00 charge to Ms. Martin in the "prepaid finance charges" to arrive at the

\$70,708.16 disclosed amount financed under the §1638(a)(2)(A) and Reg Z 226.18(b) formula. Since the HUD-1 p. 1 line 206 \$1,695.00 “broker credit” gave Ms. Martin use of the \$1,695.00 credit by decreasing the closing costs accordingly, BNC should have added the HUD-1 p. 1 line 206 \$1,695.00 broker credit to the amount financed, but did not. See: §1638(a)(2)(A): “The ‘amount financed’ ..., which shall be the amount of credit of which the consumer has actual use.” See also: Reg Z 226.18(b).¹⁹ A fortiori, excluding the HUD-1 p. 1 line 206 \$1,695.00 from the “amount financed” and including this \$1,695.00 in the finance charge understated the amount financed and over-stated the finance charge and the annual percentage rate by the HUD-1 \$1,695.00 broker credit, violating TIL and extending Ms. Martin’s right to rescind.

Ms. Martin filed a TIL rescission and damages counterclaim, which has a different error tolerance under §1605(f)(2)(A) than the §1635(i) “defensive” TIL rescission. Regardless, §1635(i)(1) clearly states that this special “defensive” right to rescind is in addition to Ms. Martin’s other rights to rescind. (“... in addition to any other right of rescission available under this section for a transaction...”). Therefore, the court must look to all of the applicable error tolerances to determine whether Ms. Martin has the right to rescind, whether by counterclaim or affirmative defense.

1. **§1605(f)(2)(A) Creates a Range for “Finance Charge” Error Tolerances**

Contrary to NBM’s claim of unlimited error tolerances for finance charge over-disclosure, TIL creates an upper and lower range for finance charge error tolerances.

¹⁹ The Reg Z 226.18(c) “Itemization of amount financed” clearly informs the Court that BNC had to add the \$1,695.00 back into the amount financed: “For each transaction, the creditor shall disclose the following information as applicable: (1) A separate written itemization of the amount financed, including: (i) The amount of any proceeds distributed directly to the consumer. (ii) **The amount credited to the consumer’s account with the creditor.** (iii) Any amounts paid to other persons by the creditor on the consumer’s behalf.”

15 U.S.C. §1605(f)(2)(A) states:

“In connection with credit transactions not under an open end credit plan that are secured by real property or a dwelling, the disclosure of the **finance charge** and other disclosures affected by any finance charge— (2) shall be treated as being accurate for purposes of section 1635 of this title if—(A) except as provided in subparagraph (B),²⁰ the amount disclosed as the finance charge does not vary from the actual finance charge by more than an amount equal to one-half of one percent of the total amount of credit extended. [emphasis added].

\$176,073.12 is the “amount disclosed” as the finance charge. \$176,073.12 varies from the “actual finance charge” by the HUD-1 line 206 \$1,695.00 Broker Credit. The total credit extended to Ms. Martin was \$76,500.00. ½ of 1 percent of \$76,500.00 equals \$382.50. The \$1,695.00 finance change variance exceeds the §1605(f)(2)(A) \$382.50 error tolerance, making the \$176,073.12 disclosed finance charge misstated outside of §1605(f)(2)(A)’s error tolerance, extending Ms. Martin’s right to rescind.

Guise v. BWM Mortg., 377 F.3d 795, p. 798-799 (7th Cir. 2004) agrees that the error tolerance of §1605(f)(2)(A) for home secured loans subject to §1635 does not create an unlimited error tolerance for finance charge over-disclosure. Even though Guise, rejected rescission, finding that the creditor had not understated the finance charge, the court interpreted §1605(f)(2)(A)’s error tolerances and held Congress created an error tolerance **range** for the finance charge disclosures in connection with §1635 loans. Guise, then held if the Creditor exceeded the **range**, either by over-disclosure or under-disclosure, this would extend the consumer’s right to rescind:

“In credit transactions secured by real property, a finance charge ‘shall be treated as being accurate . . . [if] the amount disclosed as the finance charge . . . does not vary from the actual finance charge by more than an amount equal to one-half of one percent of the total amount of credit extended.’ 15 U.S.C. § 1605(f)(2)(A). The regulation implementing this provision,

²⁰ Subparagraph (B) does not apply because this loan is not a refinance of a §1602(w) mortgage (Ms. Martin inherited the property free of liens) and the loan provided a new consolidation and a new advance of \$9,732.50.

known as Regulation Z, follows this language: 'the finance charge . . . shall be considered accurate for purposes of this section if the disclosed finance charge . . . is understated by no more than ½ of 1 percent of the face amount of the note or \$100, whichever is greater.' 12 C.F.R. § 226.23(g). In this case, the plaintiffs borrowed \$180,000. Therefore, any finance charge disclosed by The Loan Arranger is accurate for purposes of TILA and Regulation Z if it is within 0.5% of \$180,000, or \$900, of the actual finance charge incurred." *Guise*, p. 798-799. (emphasis added).

BNC overstated Ms. Martin's finance charge by \$1,695.00 which exceeds the upper limit of §1605(f)(2)(A)'s \$382.50 error tolerance over-disclosure range, extending Ms. Martin's right to rescind. *Guise*, p. 798-799.

2. **§1606(c) Creates a Range for APR Error Tolerances**

Contrary to NBM's claim of unlimited error tolerances for APR over-disclosure, TIL creates an upper and lower range for APR error tolerances. §1606(c) states:

"The disclosure of an annual percentage rate is accurate for the purpose of this subchapter if the rate disclosed is within a tolerance not greater than one-eighth of 1 per centum more or less than the actual rate or rounded to the nearest one-fourth of 1 per centum. The Board may allow a greater tolerance to simplify compliance where irregular payments are involved."

The APRWIN 5.0 program APR calculation, entering the disclosed \$70,708.16 as the amount financed, \$176,073.12 as the finance charge, and 359 monthly payments of \$685.52 beginning on 10/01/99 and 1 of \$679.60 on 09/01/29 with a transaction date of 08/09/99, shows that the APR is 11.1365% compared to the disclosed 11.227% APR, and within the TIL error tolerance. The APRWIN 6.0 program APR calculation is identical.²¹ Ms. Martin attaches hereto as Exhibit "H" the APRWIN 5.0 and 6.0 printouts for this calculation.

²¹ See Ms. Martin's Request for Judicial Notice. The Office of the Comptroller of the Currency bulletin OCC 98-39 shows that the OCC released APRWIN 5.0 in 1998. APRWIN 6.0 came out in 2004. The APR result is identical for either program, and is virtually the same using the FRB APR tables authorized at §1606(d), and implemented by the FRB at 12 C.F.R. 226.22(b)(1), with the formulas published as Appendix J to 12 C.F.R. 226.

Using APRWIN 5.0.0 and using $\$176,073.12 - \$1,695.00 = \$174,378.12$ as the finance charge, $\$70,708.16 + \$1,695.00 = \$72,403.16$ as the amount financed, the disclosed 359 monthly payments of \$685.52 beginning 10/01/99 and 1 of \$679.60 on 09/01/29, and an 08/09/99 transaction date, the APR is 10.8405% compared to the 11.227% disclosed APR. This results in an overstated APR by .3865%, which is outside the error tolerance and a TIL violation, extending Ms. Martin's right to rescind. Ms. Martin attaches hereto as Exhibit "I" the APRWIN 5.0 and 6.0 printouts for this calculation.

Williams v. Chartwell Financial Services, Ltd., 204 F.3d 748 (7th Cir. 2000) rejects NBM's argument that TIL allows unlimited APR over-disclosure. Williams, examines this precise issue, and at p. 756 holds:

"[t]he disclosure of an amount or percentage which is greater than the amount or percentage required to be disclosed . . . does not in itself constitute a violation of [TILA]." 15 U.S.C. §§ 1602(z). However, TILA also states that a disclosed APR is considered accurate only "if it is not more than 1/8 of one percentage point above or below the [actual APR]." 12 CFR §§ 226.22(a)(2). **This provision indicates that in some circumstances, over disclosure of the APR can constitute a violation of TILA.** Williams, p. 756. (Emphasis added)

Williams p. 756-757 cited to Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 557 (1980) (stating courts should give "a high degree of deference" to the Federal Reserve Board's interpretation of TILA), and cited to note 45d to 12 CFR §§ 226.22 which states:

"An error in disclosure of the annual percentage rate or finance charge shall not, in itself, be considered a violation of this regulation if: (1) The error resulted from a corresponding error in a calculation tool used in good faith by the creditor; and (2) upon discovery of the error, the creditor promptly discontinues use of that calculation tool for disclosure purposes and notifies the Board in writing of the error in the calculation tool. 12 CFR §§ 226.22 n. 45d."

Williams p. 757 rejects NBM's claim of unlimited over disclosure tolerance for APR errors:

"It is our understanding that this note clearly illustrates the circumstances in which over disclosure of the applicable interest rate is not a violation of TILA. See In re Cox, 114 B.R. 165, 168 (Bankr.C.D.Ill. 1990). Except in circumstances where the error arises from the good

faith use of a calculation tool, and where that error is promptly remedied upon discovery, an over disclosure of more than 1/8 of one percent constitutes a violation of TILA. See id.” Williams p. 757. (emphasis added).

The 3rd Circuit agreed with the 7th Circuit's APR “range” analysis in In Re Community Bank of Northern Virginia, 418 F.3d 277 (3rd Cir. 2005). The Community Bank, Court wrote at fn 18: “15 U.S.C. § 1606(c) provides a safe harbor for APR overstatements of .125%.” The 3rd Circuit thus agreed with the 7th Circuit, recognizing that the §1606(c) “safe harbor” for APR overstatements ends at the §1606(c) .125% error tolerance upper limit, for regular transactions (irregular transactions have a .25% error tolerance).

The FRB agrees that TIL creates an upper and lower range for APR error tolerance at Reg Z 226.22(a)(5). While Reg Z 226.22(a)(4) may arguably create an APR “safe harbour” for over-disclosure, Reg Z 226.22(a)(5) carves out an exception to any Reg Z 226.22(a)(4) “arguable APR safe harbor.” First, applying the Reg Z 226.22(a)(4) formula to Ms. Martin's Disclosures shows:

<u>Reg Z 226.22(a)(4)</u>	<u>Ms. Martin's Disclosures</u>
If the annual percentage rate disclosed in a transaction secured by real property or a dwelling varies from the actual rate determined in accordance with paragraph (a)(1) of this section in addition to the tolerances applicable under paragraphs (a)(2) and (3) of this section, the disclosed annual percentage rate shall also be considered accurate if:	11.227% disclosed APR Ms. Martin's home secures the loan 10.8405% Actual Rate APRWIN 5&6
(i) The disclosed rate results from the disclosed finance charge; and	Reg Z 226.22(a)(4) error tolerance 11.227% is the disclosed “rate” (APR) assuming results from \$176,073.12 as the disclosed finance charge
(ii)(A) The disclosed finance charge would be considered accurate under §226.18(d)(1)	§226.18(d)(1)(i) f/c is understated by no more than \$100; or (ii) is greater than amount required to be disclosed.

While Reg Z 226.22(a)(4) may arguably create APR safe harbor for over-disclosure, Reg Z 226.22(a)(5) carves out an exception from any Reg Z 226.22(a)(4) APR safe harbor, whether real or arguable:

<u>Reg Z 226.22(a)(5)</u>	<u>Ms. Martin's Disclosures</u>
“Additional tolerance for mortgage loans”	
In a transaction secured by real property or a dwelling, in addition to the tolerances applicable under paragraphs (a)(2) and (3) of this section, if the disclosed finance charge is calculated incorrectly but is considered accurate under §226.18(d)(1) or § 226.23(g) or (h) the disclosed annual percentage rate shall be considered accurate:	This creates an additional tolerance. The f/c is incorrect and is considered accurate under §226.18(d)(1) or §226.23(g) or (h), rescission creating a §226.22(a)(4) exception, otherwise, the §226.22(a)(5) phrase “the disclosed annual percentage rate shall be considered accurate” has no meaning, this regulation would be superfluous.
(i) If the disclosed finance charge is understated, and the disclosed annual percentage rate is also understated but it is closer to the actual annual percentage rate than the rate that would be considered accurate under paragraph (a)(4) of this section.	f/c overstated so (i) does not apply.
(ii) If the disclosed finance charge is overstated, and the disclosed annual percentage rate is also overstated but it is closer to the actual annual percentage rate than the rate that would be considered accurate under paragraph (a)(4) of this section.	both are overstated so (ii) applies emphasizes §226.22(a)(4) exception.

Ms. Martin's disclosed finance charge and APR are over-stated and meet §226.22(a)(5)(ii)'s criteria for application of this APR error tolerance. Her disclosed 11.227% APR is overstated by .3865% compared to 10.8405% actual APR as shown by APRWIN and the FRB Tables, and is overstated by .2715%, compared to 10.9655%, which is the .125% upper limit for APR error tolerance under §226.22(a)(4). The overstated 11.227% APR is not closer to the actual 10.845% APR than it is to the 10.9655% upper limit APR, and therefor violates TIL by exceeding the Reg Z 226.22(a)(5)(ii) error tolerance for an APR over-disclosure, applicable to Martin's loan.

The Official Staff Comments establish that Ms. Martin uses the correct formula in its O.S.C. 226.22(a)(4) and (a)(5) examples. The OSC 226.22(a)(5) example uses an irregular loan, subject to a 1/4 of 1 percentage point tolerance range. Ms. Martin's loan is a regular transaction so the 1/8 percent error tolerance applies. Illustrating this exception, the comment states if the actual APR is 9.00% and a \$75 omission from the finance charge corresponds to a correct APR of 8.50%, which is considered accurate under section 226.22(a)(4), a disclosed APR of 8.65% is within the Reg Z 226.22(a)(5) tolerance. The Comment then states: "In this example of an understated finance charge, a disclosed annual percentage rate **below 8.50 or above 9.25 percent will not be considered accurate.**" It is clear that TIL created a range of upper and lower APR error tolerances which, if exceeded, extend Ms. Martin's Right to Rescind.

B. **BNC UNDERSTATED THE ANNUAL PERCENTAGE RATE AND FINANCE CHARGE, OUTSIDE TIL'S ERROR TOLERANCE, THUS EXTENDING MS. MARTIN'S RIGHT TO RESCIND**

Ms. Martin alleged in her 2nd Amended Aff. Def. ¶9 g. and 2nd Amended Counterclaim ¶10 g. and testified she did not get the HUD-1 line 303 \$9,732.50 funds. See Martin Depo. P. 34 L. 4-24: Q.: "But these are documents that you took home after your loan closed, after you got this loan in the BNC transaction" A.: "They promised to mail me my package and the check. I never received it." Martin Depo P. 75 L. 7 - L. 13: "A.: "No. This was this before the three days was up? I don't remember. But after, I never got my package like they said and the check. I just figured something was wrong. It might have been a little too late, but then I..."

Ms. Malgarejo did not bring a copy of the \$9,732.50 check to her deposition, nor did she account for the funds. She agreed she did not mail the check to Ms. Martin. She agreed she never heard of a roofer in connection with the loan. She agreed she had no evidence Ms. Martin picked

up the check in person, and she agreed that she may have sent the check to the mortgage broker because it had occurred on several other closings with this broker. Ms. Martin. at P. 32 L. 15 - P. 33 L. 10 P. 35 L. 22 - P. 36 L. 11: 51 L. 15 - 53 L.14.

TIL cases are legion finding a creditor liable for TIL errors when the creditor misrepresents to the consumer that the creditor will disburse the consumer's funds for charges excluded from the finance charge, but does not. Jones v. Bill Heard Chevrolet, 212 F.3d 1356, p. 1360-1361, 1363 (11th Cir. 2000), an 11th Circuit case on this TIL issue, binding here under Kasket II, held: "After review, we find that Heard Chevrolet's disclosure - that it paid \$2,495 to General Motors when it paid only \$290 - was inaccurate and violated both TILA and Reg. Z." There is no difference in the creditor disclosing to the consumer that the creditor will pay a 3rd party \$2,495.00 from the consumer's loan, which is excluded from the finance charge, and actually paying only \$290.00, and here, BNC disclosing to Ms. Martin that BNC will pay Ms. Martin \$9,732.50 from her loan amount, which BNC excluded from the finance charge, and paying Ms. Martin \$00.00.

Gibson v. Bob Watson Chevrolet-Geo, Inc., 112 F.3d 283 (7th Cir. 1997) agrees. The Gibson, creditor violated TIL by disclosing it charged the consumer \$800.00 for an extended warranty when it actually kept a substantial but unknown amount from the \$800 charge. The 5th Circuit also agreed in Green v. Levis Motors, Inc., 179 F.3d 286 (5th Cir. 1999). Here, the Court imposed TIL liability on a car dealer for disclosing that it paid a \$40.00 state license fee, when it only payed \$22.00 and pocketed the \$18.00 difference.

Since Ms. Martin testified she never received either the HUD-1 line 303 \$9,732.50 funds, nor the benefit of roof repairs, the Court cannot treat the \$9,732.50 as part of the amount financed. In order for the Court to find that NBM properly included the \$9,732.50 in the amount financed,

NBM must prove Ms. Martin had the actual use of the \$9,732.50 because: 1) BNC included the HUD-1 line 303 \$9,732.50 in the disclosed \$70,708.16 amount financed; 2) §1638(a)(2)(A) states: "The 'amount financed' ... shall be the amount of credit of which the consumer has actual use." See also: Reg Z 226.18(b); 3) Ms. Martin challenged the validity of this part of the BNC disclosed amount financed because she pled it and testified she did not receive it; and, 4) NBM has the burden to prove BNC complied with TIL, so it must prove BNC properly excluded the \$9,732.50 from BNC's disclosed finance charge. See: Wright, p. 444; Rainey, p. 280; Cannon, p. 1333. Furthermore, the copy of the closing agents check #0966 for \$9,732.50, upon which NBM relies, is not even probative on this issue because it has no bank marks showing the check was presented or honored. In fact, the top "check" part is still attached to the bottom "stub" part, showing it has never been issued, much less delivered, endorsed, presented, or honored.

If the Court treats the \$9,732.50 as a finance charge under 15 U.S.C. §1605(a)(6), this would make the finance charge understated by \$9,732.50 (or \$8,057.50 based on the \$1,695.00 broker fee credit) and the amount financed overstated by \$9,732.50 (or \$8,057.50.). Regardless, even an \$8,057.50 over stated amount financed and understated finance charge far exceeds the \$35.00 error tolerance for a §1635(i) defensive rescission, and the ½ of 1% error tolerance for an offensive rescission under 15 U.S.C. §1605(f)(2)(A).

Likewise, if the Court treats the \$9,732.50 as a finance charge under 15 U.S.C. §1605(a)(6), this would trigger the additional high end home equity disclosures under 15 U.S.C. §1639 and Reg Z 226.32 under the points and fees test. Reg Z. 226.32(a)(1)(ii) states: "This section apply to a consumer credit transaction that is secured by the consumer's principal dwelling, and in which either: (i) [the loan meets the Treasury Bills test]; or (ii) The total points and fees payable by the consumer

at or before loan closing will exceed the greater of 8 percent of the total loan amount, or \$400.”

Ms. Martin's total loan amount is \$76,500.00, times 8%, equals the points and fees trigger, which is \$6,120.00. Even the best case for NBM is that the total points and fees are \$8,057.50 if one accepts NBM's \$1,695.00 broker fee credit argument. Since the \$8,057.50 “points and fees” exceed the \$6,120.00, 8% tolerance, §1639 and Reg Z 226.32 apply.

It is undisputed that BNC did not provide the §1639 and Reg Z 226.32 early disclosures. This is an additional TIL violation, and considered “material” for rescission, thereby: extending Ms. Martin's right to rescind under Reg Z 226.23 fn 48; enhancing actual damages under §1640(a)(4); and, stripping NBM of assignee immunity under §1641(d).

C. **BNC MIS-DISCLOSED THE ANNUAL PERCENTAGE RATED, FINANCE CHARGE, AMOUNT FINANCED, TOTAL OF PAYMENTS AND PAYMENT SCHEDULE BY “ESTIMATING” ALL TIL INFORMATION, EXTENDING MS. MARTIN'S RIGHT TO RESCIND**

BNC estimated all of the disclosures as alleged in the 2nd Amended Aff. Def. ¶9 k. and 2nd Amended Counterclaim ¶10 k. At the bottom of the Federal Box, BNC placed an “X” in the line next to “‘e’ means an estimate” and an “X” in the line next to “all dates and numerical disclosures except the late payment disclosures are estimates.” TIL prohibits BNC from disclosing the annual percentage rate, finance charge, amount financed, total of payment, and payment schedule figures as estimates when it knows, or should know, the actual figures at closing. Smith v. No. 2 Galesburg Crown Finance Corp., 615 F.2d 407, 417-418 (7th Cir. 1980), In Re Mitchell, 75 B.R. 593 (Bkr. E. D. Pa. 1987).

In No. 2 Galesburg Crown Fin., the consumer claimed that the creditor violated TIL because the creditor used the additional word “ESTIMATED” in conjunction with the required disclosure of the “finance charge” and “total of payments”. The No. 2 Galesburg, court interpreted Reg Z

226.6(f), which has been renumbered at Reg Z 226.17(c), entitled "Basis of disclosure and use of estimates." This states: (1) The disclosures shall reflect the terms of the legal obligation between the parties. (2)(i) If any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided to the consumer, and shall state clearly that the disclosure is an estimate."

No. 2 Galesburg, held that using "estimated" with "finance charge" and "total of payments" was improper, and that the figures should simply have been disclosed as "finance charge" and "total of payments" based on the assumption that the payments would be made when due. The Court reasoned:

"It is apparent from the restrictive requirements imposed on the use of estimated figures under Regulation Z that estimated figures are to be used only when absolutely necessary. This is entirely consistent with the standardization and comparison shopping goals of the Act discussed above. If, in the process of comparing terms, a consumer finds some simple interest loan disclosures given only in estimated figures, confusion is bound to result. Yet, under the interpretation offered by the creditor, all simple interest loans could be disclosed in this manner. This would undermine the purposes of the statute. Since the figures, when based on the assumption of payments being made when due, are readily available from charts and tables, the provisions of 12 C.F.R. §§ 226.6(f) are not applicable, and we find it improper to disclose these figures as "estimated."

Since BNC disclosed all dates and numerical disclosures as estimates, including the annual percentage rate, amount financed, finance charge, total of payments and payment schedule, BNC misstated the annual percentage rate, finance charge, amount financed and total of payments. These are all material disclosures under Reg z 226.23, fn 48: "The term "material disclosures" means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, giving Ms. Martin the continuing right to rescind, and statutory damages under 15 U.S.C. 1640(a). No. 2 Galesburg Crown Fin., 407, 417-418, 419-420.

VI. N.M.'S LIABILITY AS AN ASSIGNEE OF A NON-PERFORMING LOAN

N.M. is the admitted voluntary assignee of Ms. Martin's non-performing loan. Even if N.M. is not an assignee of a non-performing loan, the new May, 2006, substituted Plaintiff assignee surely is. All assignees are liable for §1635 rescission under §1641(c). §1641(a)(1) and §1641(e)(1)-(2) impose §1640 damage liability on voluntary assignees for errors that are apparent on the face of the disclosure statement and other documents assigned. §1641(e)(2) designated the TIL disclosure statement, the notice of right to cancel, and any summary of the closing costs as documents assigned.

§1641(e) also requires the assignee to compare the documents assigned at: "if the disclosure can be determined to be incomplete or inaccurate by a comparison among the disclosure statement, any itemization of the amount financed, the note, or any other disclosure of disbursement."

If the Court agrees that BNC over disclosed the Finance Charge and under disclosed the Amount Financed by the HUD-1 p. 1 line 206 \$1,695.00 broker credit, §1641 provides no safe harbor against §1640 damages because N.M. can determine that the disclosure was incomplete or inaccurate by a comparison among the disclosure statement, any itemization of the amount financed, the note, or any other disclosure of disbursement. If the Court agrees BNC under disclosed the finance charge and over disclosed the amount financed by the HUD-1 line 303 \$9,732.50 cash to borrower, §1641 again provides no safe harbor for N.M. under §1641(d).

Furthermore, N.M.'s May, 2006, assignee and the substituted plaintiff cannot claim safe harbor for any TIL claim interposed by Ms. Martin, irrespective of §1641 because the new assignee actual knowledge of all of Ms. Martin's TIL claims.

Regardless, as assignee of a non-performing loan, N.M., or its May, 2006, assignee and the substituted plaintiff, loses the holder defense. They are liable to Ms Martin in the same capacity as BNC because assignee liability under §1641 is not the exclusive method to hold an assignee liable.

TIL does not preempt state law on assignee liability. See: §1610(b) "Except as provided in section 1639 of this title, this subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State...;" and, §1610(d) "Except as specified in sections 1635, 1640, and 1666e of this title, this subchapter and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law."

VII. TRUTH IN LENDING REMEDIES

If the Court finds N.M. committed even 1 TIL violation as set forth above, the Court has no discretion but to order: 1) a §1635(b) and Reg Z 226.23(d)(1-4) rescission; and, §1640 damages. If the Court finds N.M. violated §1639 because of the HUD-1 line 303 \$9,732.50, Ms. Martin gets the §1640(a)(4) enhanced actual damages, which equals the sum of all the finance charges paid by Ms. Martin.

Semar, p. 707, is the leading case used by virtually all courts to impose TIL's §1635(b) and Reg Z 226.23(d)(1-4) rescission remedy in a non-§1639, non-vesting case. Semar, accepted the consumer's rescission formula, which added all the "finance charges" listed on the HUD-1, plus the 2 \$1,000.00 maximum statutory damage awards (\$1,000.00 for the initial error and \$1,000.00 for the improper response to rescission, increased to \$2,000.00 in 1995), plus all the mortgage payments made, then deducted this sum from the face amount of the Semar, note to arrive at the net debt owed the creditor.

Ms. Martin's returnable closing costs shown on the HUD-1 total \$7,469.93, and would be the finance charges and part of the actual damages under §1639. If the court finds that the \$9,732.50 is a prepaid finance charge, the returnable HUD-1 fees would equal \$17,202.43. According to the N.M.'s complaint, Ms. Martin defaulted on Jan. 1, 2000. According to the TIL Disclosure payment

schedule, Ms. Martin paid \$685.52 from 10/01/99 to 12/01/99 for a total of 3 payments. Ms. Martin would get all 3 of her payments, for a total of \$2,056.56. The court must award \$4,000.00 in total statutory damages under §1640(a) & (e), \$2,000.00 for the initial errors and \$2,000.00 for the improper response to rescission.

If the Court ordered equitable modification of TIL rescission and applied the Semar formula, Ms. Martin would get \$4,000.00 statutory damages, plus \$17,202.43 from the closing, and return of the \$2,056.56 mortgage payments for a total of \$23,258.99 under §1635 for her rescission remedy. She would get \$17,202.43 as actual damages under §1640(a)(4). The total is \$42,720.41. Ordinarily, if N.M. can show it is entitled to equitably modify TIL, Ms. Martin would have to return the \$76,500.00 original principal she borrowed, for a net debt of \$33,779.59 owed to Norwest.

Florida rejects the notion that Ms. Martin has the burden to establish that she can tender first as a condition to exercise her right to rescind. Williams v. Homestake Mortg. Co., 968 F.2d 1137 (11th Cir. 1992), binding here under Kasket, and adopted by Dotter v. Texas Com. Bank, 679 So. 2d 1215 (Fla. 4th DCA 1996) informs the Court that: “the courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required by the act.”

In both Williams and Dotter, the creditor tendered his TIL obligation to the consumer, then asked the Court to equitably modify rescission. Williams, and Dotter require the Court to make detailed findings of fact which prevents an equitable modification of rescission by summary judgment: “In deciding whether or not to impose conditions upon Williams, the district court should consider traditional equitable notions, including such factors as the severity of Homestake's TILA violations and whether Williams has the ability to repay the principal amount. While the goal should

always be to "restor[e] the parties to the status quo ante," *Harris*, 609 F.2d at 123; *Gerasta*, 575 F.2d at 584, rescission must also maintain its vitality as an enforcement tool."

Williams at fn 9 also noted that TIL empowered the Court fashion its own remedy, based on the evidence presented, which again precludes an equitable modification of TIL: "The amended statute gives the courts the authority to restructure these loans. This could range from ordering the immediate return of the full principal amount to leaving the creditor to whatever other legal procedures might be available under state law. District courts might consider the requiring of the execution of substitute security instruments depending upon the circumstances and the changed status of the parties, i.e., has the bathroom remodeling been completed, etc." (The Court must recall that Ms. Martin's roof has still not been repaired, which was the entire purpose of the loan.).

N.M. has put TIL's equitable modification cart before its TIL horse - NBM's concession that a TIL violation exists and NBM's offer to rescind must come before equitable modification, as occurred in Williams, and Dotter. An additional impediment to any equitable modification is Ms. Martin's bankruptcy and discharge because under §1635(b) and Reg Z 226.23(d)(1), NBM's mortgage is void, making N.M. unsecured. Therefor this Court cannot equitably modify rescission.

Since N.M. still refuses to rescind, the Court is bound to follow Yslas v. D.K Guenther Builders, Inc., 342 So.2d 859, fn 2 (Fla. 2nd DCA 1977), which holds:

"The statutory scheme to effect restoration to the status quo provides that within ten days of receipt of the notice of rescission the creditor return any property of the debtor and void the security interest in the debtor's property. The debtor is not obligated to tender any property of the creditor in the debtor's possession until the creditor has performed his obligations. If the creditor does not perform within ten days of the notice or does not take possession of his property within ten days of the tender, ownership of the creditor's property vests in the debtor without further obligation." [emphasis added].

The 2nd District recently reaffirmed Yslas in Associates First Capital v. Booze, 912 So.2d 696

(Fla. 2nd DCA 2005). Associates, involved a partial §1635(b) and Reg Z 226.23(d)(1-4) rescission because the consumer refinanced with the same creditor, and the refinance included an additional advance of credit. In the Associates, circumstance, the consumer can rescind only the additional advance. Important here, the Associates, consumer argued, and the Court agreed that the lender failed to perform a condition precedent to an equitable modification of TIL by failing to respond to his rescission notice within 20 days, as required by §1635(b) and Reg Z 226.23(d)(2):

“If a lender fails to respond within twenty days to the notice of rescission, the ownership of the property vests in the borrowers and they are no longer required to pay the loan. See § 1635(b); Staley v. Americorp Credit Corp., 164 F. Supp. 2d 578, 584 (D. Md. 2001); Gill v. Mid-Penn Consumer Disc. Co., 671 F.Supp. 1021 (E.D.Pa. 1987). However, because 12 C.F.R. § 226.23(f)(2) provides only a partial right of rescission where there is a refinancing, when the Lender failed to respond to the notice of rescission within twenty days, ownership of only the property subject to the right of rescission — the \$994.01 loaned for property taxes — vested in the Borrowers without further obligation.” Associates, p. 698.

Ms. Martin respectfully submits that the Court cannot “equitably modify” TIL’s §1635(b) and Reg Z 226.23(d)(1-4) rescission remedy.

CONTRACTUAL DEFENSES

VIII. FAILURE TO COMPLY WITH CONDITIONS PRECEDENT

As alleged in Ms. Martin’s 2nd Amended Aff. Def. ¶48-50, BNC’s Mortgage ¶21 requires, as a condition precedent, a 30 day notice to accelerate the full principal balance, specifying the default, the action required to cure the default, the date not less than 30 days from the date of the notice to cure the default, and that failure to cure the default may result in foreclosure. The Mortgage ¶21 notice must also inform the borrower of his right to reinstate and to defend the foreclosure. The note ¶10 incorporates the mortgage default provisions.

It is elementary that there must be at least a substantial performance of conditions precedent in order to authorize a recovery under a contract. Cohen v. Rothman, 127 So.2d 143, p. 147 (Fla. 3rd

DCA 1961); Dauer v. General Health Services, Inc., 317 So.2d 456, p. 457 (Fla. 3rd DCA 1975).

Furthermore, N.M. has the burden to prove the condition precedent of proper acceleration under ¶21 of its mortgage: See: State Street Bank v. Badra, 765 So.2d 251, p. 253 (Fla. 4th DCA 2000)

“Because of State Street Bank’s failure to meet its burden of proof with regard to the conditions precedent under the mortgage, the trial court granted the Badras’ motion for judgment on the pleadings.”

N.M. has not produced a copy of any acceleration notice despite Ms. Martin’s Request to Produce. At summary judgment, N.M. relied on a hearsay statement in ¶6 of Ms. Delaney’s affidavit. Ms. Delaney did not attach a copy of a written notice. She simply refers to a computer printout which she claims proves N.M. delivered the notice required by the mortgage ¶21 and note ¶10. The computer printout only says: “Breach 35 day notice sent out.” The record does not contain a copy of the notice nor the content of the notice to establish that NBM’s notice contained the information required by the mortgage ¶21 and the note ¶10. Without a properly authenticated copy of the “breach letter” the Court cannot find that N.M. complied with its condition precedent obligation to accelerate the mortgage.

Sun Bank of St. Lucie County v. Oliver, 403 So.2d 583, 584 (Fla. 4th DCA 1981), and Fla. Stat. §90.952, the best evidence rule, prevent Ms. Delaney from testifying about the contents of what the computer record may or may not show was sent. Here, the “Breach Letter” must be admitted over substituted testimony because evidence which indicates the existence of a more original source of the information, here the computer printout, disqualifies Ms. Delaney’s oral testimony. The best evidence of compliance with the Mortgage ¶21 is the notice admitted after proper authentication. Without the notice in evidence on proper foundation, oral testimony by an assignee’s servicing agent is hearsay and must be excluded under Sun Bank, and Fla. Stat. §90.952, the best evidence rule.

Insurance Company of North America v. Cooke, 624 So.2d 252 (Fla. 1993) is directly on point. Under Cooke, without a properly authenticated copy of the required mortgage ¶21 “breach letter,” NBM’s computer printout log, standing alone, is insufficient to meet NBM’s burden to prove both content and delivery of the notice. The 2nd DCA at Cooke v. Ins. Co. of North America, 603 So.2d 520 (Fla. 2nd DCA 1992) held that the trial court correctly struck a similar summary judgment affidavit, but certified conflict noting at Cooke, p. 522:

“Other than the affidavit testimony of Robert Ballon, INAC's vice president of operations, no documentation of either the contents of the notice or proof of its mailing exists. INAC did, however, introduce into evidence a computer printout entitled “Notices of Intent to Cancel.” INAC claims that this printout “confirms” that the notice of intent to cancel was mailed on October 19, 1988. INAC could not produce a copy of the notice of intent. In an odd commercial practice, INAC does not maintain any return receipts or a U.S. postal service certificate of mailing to prove mailing of this notice.”

The Supreme Court in Cooke, 624 So.2d p. 255 agreed that giving a notice in conformity with the statute was a “condition precedent” to cancellation. While holding that the 2nd DCA wrongly struck the affidavit, Cooke 603 So.2d at p. 256 also held:

“The fact that the computer printout standing alone may not have been sufficient at the summary judgment stage of the proceedings to prove that INAC mailed a notice of intent to Cooke does not serve as a basis for its exclusion. Such is a consideration that goes to the weight to be given the evidence, not to its admissibility.”

Cooke, 603 So.2d p. 256 informs the Court that the computer log, while probative of mailing, is insufficient to prove content, unless N.M. can prove one of the §90.954 exceptions:

“Likewise, the best evidence rule, sections 90.952, .953, .954, Florida Statutes (1991), does not require exclusion. **The best evidence rule only governs the admissibility of the computer printout if offered to prove the contents of the notice. See §90.952. It appears the printout was relied upon as evidence that the notice was mailed, which clearly is not a prohibited use of secondary evidence under Florida's best evidence rule. Moreover, even if the printout were offered to prove the contents of the notice, secondary evidence is admissible for such purpose if one of the exceptions set forth in section 90.954 is established.** [emphasis added].

CONCLUSION

Ms. Martin respectfully submits that this record establishes each and every TIL error as alleged in her 2nd Amended Affirmative Defenses and Counterclaim. She is entitled to rescind under §1635(b) and Reg Z 226.23(d), and N.M. is not entitled to equitable modification because it has failed to perform and Ms. Martin's Bankruptcy. Likewise, N.M. has failed to prove either TIL compliance nor compliance with the mortgage ¶21 condition precedent. Ms. Martin requests that this Honorable Court dismiss NBM's complaint in toto with prejudice, and grant her the relief prayed for in her 2nd Amended Affirmative Defenses and Counterclaim.

I HEREBY CERTIFY that a true and accurate copy of the above has been furnished by U.S. Mail and facsimile this 12th day of May, 2006, to: William P. Heller, Esq., Akerman, Senterfitt & Eidson, P.A., 350 East Las Olas Blvd., Suite 1600, Fort Lauderdale, Florida 33301.

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