IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY STUMP, KIMBERLY STUMP, Plaintiffs, v. WMC MORTGAGE CORP., JAVELIN, INC. d/b/a COMMERCE FINANCIAL, FAIRBANKS CAPITAL CORP., and BANK SUISSE FIRST BOSTON, Defendants.	: : : : : : : : : : : : :	CIVIL ACTION 02-326

MEMORANDUM AND ORDER

JOYNER, J. **March 16, 2005**

Presently before the Court are the Motions for Summary Judgment of Defendants WMC Mortgage Corporation, Credit Suisse First Boston, and Fairbanks Capital Corporation. For the reasons that follow, we will grant Defendant Fairbanks Capital's Motion for Summary Judgment as to Count II of the Amended Complaint, and we will grant in part and deny in part Defendant WMC Mortgage's Motion for Summary Judgment with respect to Plaintiffs' allegations of Truth in Lending Act violations.

Facts and Procedural History

Plaintiffs purchased their home, at 1127 Keystone Drive in Sellersville, in November 2000. In early 2001, Plaintiffs engaged Commerce Financial to broker a loan to refinance their original mortgage as well as a second mortgage on the home. At the July 24, 2001 closing of the refinancing transaction,

Plaintiffs received, among other documents, a Department of Housing and Urban Development Settlement Statement ("HUD Settlement Statement,"), two copies each of a Notice of Right to Cancel, and a Federal Truth In Lending Disclosure Statement ("Disclosure Statement").

The first page of the Disclosure Statement established that the Amount Financed would be $209,811.92, the Annual Percentage Rate ("APR") would be 11.3115%, and the Finance Charge would be $528,813.99. The second page of the Disclosure Statement included the following information:

LOAN AMOUNT:		220,000.00
ITEMIZATION OF PREPAID FINANCE CHARGES:		
ORIGINATION FEE TO BROKER	8,800.00	
Premium Yield To Broker to BROKER 0.5% (P.O.C.) $1,100 Pd by LENDER		
*TAX CONTRACT FEES TO FIRST AMERICAN	68.00	
*DOCUMENT PREPARATION TO WMC	250.00	
*FLOOD DETERMINATION TO FIRST AMERICAN FLOOD DATA SERVICES	19.00	
*ADMINISTRATION FEE TO WMC	597.00	
Prepaid Interest for (07/30/2001 - 08/01/2001)	128.08	
Settlement or Closing Fee to ESCROW/ TITLE COMPANY	326.00	
TOTAL PREPAID FINANCE CHARGE		10,188.08
AMOUNT FINANCED		209,811.92
OTHER SETTLEMENT CHARGES:		
AMOUNTS PAID TO OTHERS ON YOUR BEHALF BY CREDITOR -		
Document Preparation Fee to CLOSING PROTECTION	35.00	
Notary Fee to NOTARY	25.00	
Title Insurance to TITLE INSURANCE CO	1383.76	
Recording Fee	100.00	

TOTAL OTHER SETTLEMENT CHARGES	1,543.76
LOAN PROCEEDS	208,268.16

Plaintiffs contend that, on July 27, 2001, they executed a copy of the Notice of Right to Cancel form and faxed it to WMC Mortgage Corporation. Plaintiffs further contend that they attempted to rescind the loan twice thereafter, on November 5, 2001, and November 12, 2003.

Plaintiffs now bring this action alleging violations of the Truth in Lending Act, the Equal Credit Opportunity Act, the Real Estate Settlement Practices Act, the Pennsylvania Credit Services Act, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and seek rescission of the July 24, 2001 loan transaction. Specifically, Plaintiffs allege that Defendants violated the Truth in Lending Act by failing to disclose or inaccurately disclosing the following charges as itemized finance charges on the Disclosure Statement: a yield spread premium of $1100 paid to Commerce Financial; a hazard insurance premium of $568 paid to Allstate; an excessive notary fee of $25 paid to Scott Firman, employed by Capital Assurance Group; excessive title insurance charges of $1428.75, plus $200 in endorsements, paid to Capital Assurance Group; a $225 settlement and closing fee paid to Kotsopoulos & Bennett, P.C.; a $15 courier fee paid to Capital Assurance Group; administration and document fees totaling $847 paid to WMC Mortgage Corporation; a $4987.50 charge

paid to Domestic Relations; and a $35 closing service letter fee paid to Lawyers Title Insurance Corporation.[1] The above charges were all fully disclosed on the HUD Settlement Statement.

Standard of Review

A motion for summary judgment shall be granted if the admissible evidence before the Court demonstrates that "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3rd Cir. 1995). A genuine issue of fact exists "when a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in favor of the non-moving party. See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the party opposing the motion may not rest upon the bare allegations of the pleadings, but must, through affidavits, admissions, depositions, or other evidence, set forth "specific facts" showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477

---

[1] This Court addressed many of these claims in its Order dated September 29, 2003, denying Defendant WMC Mortgage Corporation's Motion for Summary Judgment on Plaintiffs' original Complaint.

U.S. 317, 324 (1986).

Discussion

The Truth in Lending Act (TILA) establishes a three-day right of rescission for borrowers in some real estate credit transactions, such as the mortgage refinancing at issue in this action. 15 U.S.C. § 1635(a). However, where a lender fails to comply with TILA's disclosure or notice requirements, the borrower's right of rescission is expanded to three years from the date of closing. 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(3); see In re Porter, 961 F.2d 1066, 1073 (3rd Cir. 1992).

Defendant WMC Mortgage, joined by Defendants Credit Suisse First Boston and Fairbanks Capital, has moved for summary judgment on the grounds that Plaintiffs received all TILA-mandated notices and disclosures, but failed to rescind their loan within the three-day rescission period. Defendants further contend that Plaintiffs are estopped from asserting their right to rescind, because they ratified the loan transaction on August 15, 2001. Independently, Defendant Fairbanks Capital moves for summary judgment on Count II only, on the grounds that TILA imposes no liability on loan servicers.

I. Accuracy of Material Disclosures

This Court will first address the issue of whether the

Disclosure Statement Plaintiffs received at closing, particularly the calculation of itemized prepaid finance charges on the second page, complied with TILA disclosure requirements. Upon extremely careful review of each allegedly misleading disclosure or wrongly-excluded charge, this Court finds that there are genuine issues of material fact only with respect to the $25 notary fee and the $15 courier fee. As these potentially excessive fees fall within the tolerance threshold of 15 U.S.C. § 1605(f), the Disclosure Statement was materially accurate as a matter of law and Defendants are entitled to summary judgment with respect to Count I of the Amended Complaint.

A. WMC Mortgage Charges, Settlement Charge, and Closing Services Letter Charge

Initially, this Court finds that Defendants are entitled to judgment as a matter of law on Plaintiffs' claims concerning the charges paid to WMC Mortgage Corporation for administration and document preparation, Kotsopolous & Bennett, P.C. for settlement, and Lawyers Title Insurance Corporation for document preparation.

Plaintiffs' Amended Complaint alleges that WMC's fees of $847 "were not [] included in the finance charges." We direct Plaintiffs' attention to the Itemization of Prepaid Finance Charges on the second page of the Disclosure Statement, which includes both the $597 administration fee and the $250 document preparation fee imposed by WMC.

Plaintiffs also object to the exclusion of a $225 "settlement or closing fee" paid to Kotsopolous & Bennett, P.C. However, as this Court pointed out in its previous Order, the $225 fee was included as part of a $326 "Settlement or Closing Fee to Escrow/Title Company," itemized on the Disclosure Statement as a Prepaid Finance Charge.

Finally, the $35 "closing services letter" fee paid to Lawyers Title Insurance Corporation, which was itemized on the Disclosure Statement as a Settlement Charge, was properly excluded from the finance charge calculation. 15 U.S.C. § 1605(e)(1) permits exclusion from the finance charge of "fees or premiums for title examination, title insurance, or similar purposes." Defendants have called this Court's attention to section 7.5 of the Manual of the Title Insurance Rating Bureau of Pennsylvania ("Rating Manual"), which establishes that a title insurance company may charge $35 to issue a closing services letter to a creditor. Plaintiffs, in opposing the instant motions, have presented no evidence suggesting that the closing services letter fee was anything but a bona fide and reasonable charge.

B. Yield Spread Premium

The Disclosure Statement's Itemization of Prepaid Finance Charges includes a notation for a $1,100 yield spread premium paid by the lender to the broker, Commerce Financial. However,

this $1,100 fee is not included in the calculation of the Total Prepaid Finance Charge of $10,188.08. Plaintiffs contend that the yield spread premium is a finance charge within the definition of TILA, and should have been added to the calculation of Prepaid Finance Charges to arrive at a Total of $11,288.08. It is a matter of first impression before this Court whether a yield spread premium must, as a matter of law, be included in the calculation of itemized finance charges on a TILA Disclosure Statement.

Before addressing the substance of Plaintiffs' argument, a few clarifications are in order. TILA regulations define the finance charge as "the cost of consumer credit as a dollar amount." 12 C.F.R. § 226.4(a). The finance charge includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to the extension of credit. 12 C.F.R. § 226.4(a); 15 U.S.C. § 1605(a). The TILA Disclosure Statement at issue in this action, however, uses the term "finance charge" in two different contexts. The first page of the Disclosure Statement indicates a $528,813.99 Finance Charge, defined as "[t]he dollar amount the credit will cost you," which comports with the TILA definition. The second page of the Disclosure Statement, however, refers to Prepaid Finance Charges ($10,188.08) and Other Settlement Charges ($1,543.76), which are itemized and subtracted from the Loan

Amount to arrive at the Amount Financed. When Plaintiffs refer to the wrongful exclusion of the yield spread premium from the finance charge, it appears they are referring to the Itemized Prepaid Finance Charges on the second page.

A yield spread premium is a bonus paid by a lender to a mortgage broker when the broker originates a loan at an interest rate higher than the lender's approved minimum rate. Bell v. Parkway Mortg., Inc., 309 B.R. 139, 153 n.9 (Bankr. E.D. Pa. 2004) (citing Noel v. Fleet Finance, Inc., 971 F. Supp. 1102, 1106-07 (E.D. Mich. 1997)). The lender then rewards the broker by paying it a percentage of the difference between the lender's approved rate and the actual interest rate set by the broker, multiplied by the amount of the loan. Id. Under TILA, borrower-paid mortgage broker fees qualify as finance charges, whether those fees are paid directly to the broker, or paid directly to the lender for delivery to the broker. 12 C.F.R. § 226.4(a)(3); 15 U.S.C. § 1605(a)(6). However, the Federal Reserve Board has clarified that fees paid "to a broker as a 'yield spread premium' that are already included in the finance charge, either as interest or as points, should not be double counted" on the TILA Disclosure Statement. 61 F.R. 26126, 26127 (1996); 61 F.R. 49237, 49238-49239 (1996); 12 C.F.R. § 226, Supplement I, sec. 4(a)(3)-3.

Our reading of the TILA regulations and the Federal Reserve

Board's official staff commentary suggests that the $1,100 yield spread premium paid to Commerce Financial was properly excluded from the Itemized Prepaid Finance Charges on the TILA Disclosure Statement. The yield spread premium certainly qualifies as a "finance charge" under the TILA definition, which expressly includes mortgage broker fees paid to the lender for delivery to the broker. 12 C.F.R. § 226.4(a)(3); 15 U.S.C. § 1605(a)(6). However, the yield spread premium may be included in the total TILA finance charge in one of two ways – either as a part of the annual percentage rate (APR), or as part of the prepaid finance charges which serve to lessen the total amount financed. In this case, the lender, WMC Mortgage, paid the broker, Commerce Financial, a $1,100 fee for having originated the Plaintiffs' refinancing at an APR of 11.3115%, which was higher than WMC Mortgage's approved minimum rate. This fee was not paid out of Plaintiffs' funds at settlement, but rather was paid by WMC Mortgage outside of closing. Thus, the cost to the Plaintiffs of the $1,100 yield spread premium is not imposed at settlement, but is instead paid out as interest over the course of the 11.3115% APR mortgage. Because the yield spread premium is already included in the total Finance Charge of $528,813.99 as a higher interest rate, it should not be "double-counted" by being added to the Itemized Prepaid Finance Charges. See Noel, 34 F. Supp. 2d at 457 (under TILA, a lender is not required to break down the

components of the finance charge to disclose the separate existence of a yield spread premium).[2] Thus, Defendants are entitled to judgment as a matter of law on the issue of whether the yield spread premium was properly excluded.

C. Title Insurance and Endorsement Charges

Plaintiffs in this action object to being charged the basic rate of $1428.75 for their title insurance policy, plus $200 for endorsements. Plaintiffs contend that they should have been charged the refinance rate of $1032.30 rather than the full basic rate, because their refinancing loan was made within three years of their previous mortgage transaction. However, as Plaintiffs have failed to present evidence suggesting there is a genuine issue for trial, Defendants are entitled to judgment as a matter of law with respect to the title insurance charges.

Reasonable fees paid for title insurance are properly excluded from the computation of a TILA finance charge. 15

---

[2] We note that many courts which have addressed this issue in the context of HOEPA claims have found that yield spread premiums are "finance charges," but need not be disclosed as "points and fees" because they are paid by the borrower outside of closing. See, e.g., Bell v. Parkway Mortg., Inc., 309 B.R. 139, 153 (Bankr. E.D. Pa. 2004); Wingert v. Credit Based Asset Servicing & Securitization, LLC, No. 02-1973, 2004 U.S. Dist. LEXIS 25186, 18-19 (E.D. Pa. 2004); Mourer v. Equicredit Corp. of America, 309 B.R. 502, 505 (W.D. Mich. 2004). While the instant action is admittedly outside the scope of HOEPA, the above cases are instructive inasmuch as they highlight a distinction between the total TILA finance charge payable over the course of the loan, and the itemized prepaid finance charges which have been paid at or before closing.

U.S.C. § 1605(e)(1); 12 C.F.R. § 226.4(c)(7)(i). However, any fee charged for title insurance which exceeds the fee authorized by the Manual of the Title Insurance Rating Bureau of Pennsylvania is unreasonable and must be disclosed as a finance charge. Johnson v. Banc One Acceptance Corp., 278 F. Supp. 2d 450, 456 (E.D. Pa. 2003).

Section 5.6 of the Rating Manual provides that the refinance rate, rather than the higher basic rate, shall be applied "[w]hen a refinance or substitution loan is made within 3 years from the date of closing of a previously insured mortgage or fee interest and the premises to be insured are identical to or part of the real property previously insured and there has been no change in the fee simple ownership." Defendants concede that the refinance transaction in question is within three years of the Plaintiffs' previous mortgage, that the property in question is identical, and that the ownership has not changed. However, Defendants contend that Plaintiffs were not entitled to the refinance rate because they never demonstrated that their prior mortgage was insured. In responding to this challenge, Plaintiffs rest on their pleadings and offer no additional facts or evidence, such as a copy of a previously-issued title insurance policy, which would show that a genuine issue exists for trial. Because the record before this Court is devoid of any indication that Plaintiffs' previous mortgage was insured by a title insurance

policy, we find that, as a matter of law, Plaintiffs were not entitled to the Refinance Rate. See Ricciardi v. Ameriquest Mortg. Co., No. 03-299, 2005 U.S. Dist. LEXIS 310 (E.D. Pa. 2005) (plaintiff in a TILA action not entitled to the reissue or refinance rate because he provided no evidence of a prior title policy). Thus, it was reasonable for Plaintiffs to be charged the basic rate of $1428.75, and the title insurance fee was properly excluded from the Itemized Prepaid Finance Charges.

Defendants further contend that the $200 endorsement fee was proper, because four endorsements were attached to Plaintiffs' title insurance policy. Pursuant to the Rate Manual, each of the four endorsements (Endorsement PA 100, Endorsement PA 300, Endorsement PA 900, and Endorsement 6.1 for adjustable rate mortgages) carries a charge of $50. Plaintiffs, in their response to the instant motion, do not seem to dispute this matter, and have identified no facts suggesting that there is a genuine issue for trial.

D. Hazard Insurance Premium

TILA provides that property insurance premiums must be included in the finance charge "unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the

person through which the insurance is to be obtained." 15 U.S.C. § 1605(c). Plaintiffs object to the exclusion of a $568 hazard insurance premium from the Itemized Prepaid Finance Charges on the Disclosure Statement, on the grounds that they never received notice of the cost of insurance if obtained through the creditor. Upon careful review of the TILA Disclosure Statement and the applicable regulations, this Court finds, as a matter of law, that the $568 insurance charge was properly excluded.

The requirements of § 1605(c) are better understood when read in conjunction with TILA Regulation Z, which establishes that property insurance premiums may be excluded from the finance charge "if the following conditions are met: (i) The insurance coverage may be obtained from a person of the consumer's choice, and this fact is disclosed; (ii) If the coverage is obtained from or through the creditor, the premium for the initial term of insurance coverage shall be disclosed." 12 C.F.R. § 226.4(d)(2). Indeed, the Federal Reserve Board, in its official staff commentary, has noted that the choice of insurance disclosure must be made whether or not coverage is obtained through the creditor, but that the "premium or charge must be disclosed only if the consumer elects to purchase the insurance from the creditor." 12 C.F.R. § 226, Supplement I, sec. 4(d)-8; see also In re Moore, 117 B.R. 135, 140 (Bankr. E.D. Pa. 1990) (the cost of insurance must be disclosed if and only if the insurance is

purchased from or through the creditor).

Plaintiffs in this action received and signed a TILA Disclosure Statement which stated, on the first page:

> INSURANCE: The following insurance is required to obtain credit: *Property
> You may obtain the insurance from anyone that is acceptable to the creditor.

This disclosure was sufficient to place Plaintiffs on notice that they had the option of obtaining insurance from an insurer of their choice. See Clark v. U.S. Bank Nat'l Ass'n, No. 03-5452, 2004 U.S. Dist. LEXIS 11264, 12-13 (E.D. Pa. 2004) (exclusion of property insurance premium was proper where the Disclosure Statement stated, "you may obtain property insurance from anyone you want that is acceptable to Ameriquest Mortgage Company"). Indeed, it appears that the hazard insurance Plaintiffs ultimately purchased was the same policy they obtained from their own carrier during their prior mortgage financing transaction. Because Plaintiffs did not obtain property insurance through their creditor, the creditor was not required to disclose the cost of insurance, and it was proper to exclude the $568 insurance charge from the Disclosure Statement's Itemized Prepaid Finance Charges.

E. Domestic Relations Charge

This Court further finds that the $4,987.50 Domestic Relations fee identified on the HUD Settlement Statement as payable in connection with the loan was properly excluded from

the Disclosure Statement's Itemization of Prepaid Finance Charges. The Third Circuit has held that pre-existing liens and debts, such as prior mortgages and accrued taxes, are not within the definition of finance charge as that phrase was used by Congress. Smith v. Fidelity Consumer Discount Co., 898 F.2d 896, 906 (3rd Cir. 1990); see also 12 C.F.R. § 226.4(e)(1) (excluding from the finance charge fees paid to public officials for perfecting, releasing, or satisfying a security interest). Furthermore, Pennsylvania law establishes that overdue child support obligations shall constitute a lien against the obligor's real property, as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act. 23 Pa.C.S.A. § 4352(d).

Plaintiff Jeffrey Stump has testified that he has "no idea" what the $4987.50 Domestic Relations charge listed on the HUD Settlement Statement was used for, and denies having any outstanding child support obligations in July of 2001. Jeffrey Stump Deposition, pp. 115-117. However, Plaintiff Kimberley Stump has testified that she knew the $4987.50 charge was for child support owed by Plaintiff Jeffrey Stump. Kimberley Stump Deposition, p. 68, pp. 174-179. Defendants have introduced a document printed from the Pennsylvania Child Support Enforcement System for the account of Plaintiff Jeffrey Stump which indicates arrears in the amount of $4987.50 as of July 5, 2001. The document indicates that on August 2, 2001, a distribution of

$4987.50 and a disbursement of the same amount were made. While Plaintiff Kimberley Stump does not recall having ever received a $4,987.50 child support payment, when and how these funds were ultimately paid out is not relevant for the purpose of TILA disclosure. The $4,987.50 Domestic Relations fee paid out of Plaintiffs' loan proceeds was a pre-existing child support obligation owed by Plaintiff Jeffrey Stump, which, by law, constitutes a lien on Plaintiff's real property. As such, the fee was properly excluded from the Disclosure Statement's Itemized Prepaid Finance Charges. See Smith, 898 F.2d at 906.

F. Genuine Issues of Fact Relating to Notary Charge and Courier Charge

This Court finds that summary judgment is inappropriate with respect to the $25 notary fee and the $15 courier fee, as these charges raise genuine issues of material fact which, if resolved in Plaintiffs' favor by the trier of fact, could result in a verdict for Plaintiffs.

First, there is a genuine issue of whether the $25 notary fee listed on the HUD Settlement statement was "reasonable in amount" and thus properly excluded. See 12 C.F.R. § 226.4(7)(iii). While the maximum fee that a notary may charge under 57 P.S. § 157 is two dollars, the record before this Court does not indicate whether the $25 fee was for a single notarization or for multiple notarizations. See Johnson, 278 F.

Supp. 2d at 457.

The HUD Settlement Statement also discloses a $15 courier fee paid to title company Capital Assurance Group. A settlement agent's charge for courier service qualifies as a finance charge only if the creditor has required the use of the courier or otherwise retained the charge. 12 C.F.R. § 226, Supplement I, sec. 4(a)(2)-1; 60 F.R. 16771, 16777 (1995); See Cowen v. Bank United, FSB, 70 F.3d 937, 943 (7th Cir. 1995). Because it is unclear whether the courier fee was included in the "Settlement or Closing Fee to Escrow/Title Company" listed as a Prepaid Finance Charge on the Disclosure Statement, and because there is a genuine question as to whether WMC Mortgage required the use of a courier in this transaction, this issue cannot be resolved as a matter of law.

F. TILA Tolerance Threshold

Where the overcharges on a TILA Disclosure Statement are the result of small errors of judgment and fall within TILA's allowable tolerance for discrepancies, the disclosed finance charge is considered accurate as a matter of law. 15 U.S.C. § 1605(f); Johnson v. The Know Fin. Group, L.L.C., No. 03-378, 2004 U.S. Dist. LEXIS 9916 at 34 (E.D. Pa., 2004). For the purposes of rescission, the Disclosure Statement is considered accurate if the disclosed finance charge is understated by no more than one-half of one percent of the face amount of the note, which in this

case is $1,100. 15 U.S.C. § 1605(f)(2); 12 C.F.R. § 226.23(g)(i). However, for the purposes of TILA Disclosure violations generally, the allowable tolerance is $100. 15 U.S.C. § 1605(f)(1).[3]

The total dollar amount of contested charges in this action is $40, well within both the general $100 limit for disclosure violations and the $1,100 limit for the purposes of rescission. Thus, Defendants are entitled to the protection of the tolerance doctrine, and this Court will treat Defendants' disclosures under TILA as materially accurate.

II. Plaintiffs' Alleged Rescission and Ratification

As the TILA Disclosure Statement was materially accurate, the period during which Plaintiffs could validly rescind the loan transaction was limited as a matter of law to three days from the date of closing, rather than three years. However, because a reasonable juror, viewing the record in the light most favorable to Plaintiffs, could find that Plaintiffs exercised their right of rescission on July 27, 2001, we must deny Defendant's Motion

[3] Where foreclosure has been initiated against the property secured by the loan, the allowable tolerance is limited to $35. 12 C.F.R. 226.23(h)(i). However, this provision is inapplicable in this action, as Defendants deny having initiated a foreclosure action against Plaintiffs, and the Order obtained in Plaintiff Kimberley Stump's bankruptcy proceeding expressly prohibits the servicer from initiating foreclosure without first obtaining relief from the automatic stay.

for Summary Judgment with respect to Count II of the Amended Complaint.

A. The July 27, 2001 Rescission Attempt

Plaintiffs have both testified that, at approximately five or six P.M. on July 27, 2001, Jeffrey Stump faxed an executed Notice of Right to Cancel form to WMC Mortgage from a fax machine located at the Heritage Village office of his former employer, Montrose Realty. In opposing the instant motion, Plaintiffs have presented an affidavit of Jeffrey Stump, in which he reaffirms that he knew July 27, 2001 was the last day to send in the rescission notice, that he faxed the notice from the Hamilton Village fax machine on that date, and that the fax machine he used only prints a notice if an item sent does not go through. Plaintiff Jeffrey Stump's testimony on this issue has been unwavering.

Defendants have presented telephone records from the Montrose Realty offices which do not indicate that any calls were made to the California office of WMC Mortgage on July 27, 2001. The telephone records are prefaced by a letter from Marie Mulgrew, of Montrose Realty, indicating that the records reflect three Heritage Village office phone numbers, including 215-855-9466, which "is the only fax line." At deposition, Ms. Mulgrew testified that the fax line referenced in the letter is the only fax line at the Heritage Village office where Plaintiff Jeffrey

Stump worked, but that another fax machine was available at the West Reading office of Montrose Realty, where Plaintiff occasionally visited. Mulgrew Deposition, pp. 11-13. Ms. Mulgrew also testified that the records she provided were the only records she had for the Heritage Village office fax line. Mulgrew Deposition, pp. 17-18.

The record before this Court indicates that there may be issues of credibility or possible bias surrounding Ms. Mulgrew's testimony. Plaintiff Jeffrey Stump has testified that Ms. Mulgrew, his former supervisor, had a pattern of untruthful and potentially illegal behavior, including stealing from tenants, harassing Plaintiff at his home, sexual harassing Plaintiff at his workplace, permitting drug use on Montrose Realty property, directing Plaintiff to perform personal work for Ms. Mulgrew and her husband on company time, and falsifying worker's compensation records. Jeffrey Stump Deposition, pp. 132-153. For her part, Ms. Mulgrew refused to answer any questions regarding her relationship with Plaintiff Jeffrey Stump or the circumstances of Plaintiff's termination from Montrose Realty. Mulgrew Deposition, pp. 26-29.

Because the instant Motion for Summary Judgment has been brought by Defendants, the burden is upon them to show that they are entitled to judgment as a matter of law as to the issue of Plaintiffs' alleged rescission. This situation presents a

classic difficulty. In practical terms, it is nearly impossible for Defendants to "prove a negative" – namely, that Plaintiff did not fax a notice of rescission on July 27, 2004. See Medico v. Time, Inc., 509 F.Supp. 268, 271 (E.D. Pa. 1980) (proving a negative for the purposes of summary judgment is "a challenging task indeed"). Of course, the telephone records provided by Ms. Mulgrew do not indicate that any faxes were sent to the California offices of WMC Mortgage. However, considering the issues of credibility surrounding the testimony of Ms. Mulgrew, the possibility remains that the records provided are incomplete or do not accurately reflect all faxes sent from the Heritage Village office. Furthermore, issues of credibility and bias are typically reserved for the jury. See United States v. Abel, 469 U.S. 45, 52 (U.S. 1984). Viewing the record in the light most favorable to Plaintiff, a reasonable juror could find that Jeffrey Stump faxed a notice of rescission to WMC Mortgage on July 27, 2001.

B. Ratification by Acceptance of Loan Proceeds

Defendants further contend that, even if Plaintiffs validly rescinded the loan transaction on July 27, 2001, they are estopped from enforcing the rescission because they ratified or re-awakened the loan on August 15, 2001 by accepting a $8,809.67 check representing the proceeds of settlement. Defendants cite case law in support of the proposition that a party can lose the

right to rescind a contract if he engages in acts inconsistent with disaffirmance, such as acceptance of benefits under the contract. See, e.g., Banque Arabe Et Internationale D'Investissement v. Maryland Nat'l Bank, 850 F. Supp. 1199, 1212 (S.D. N.Y., 1994). However, the cases cited by Defendants address only equitable rescission in cases of fraud, mistake, or misrepresentation, none of which are applicable here. In this action, Plaintiffs have a statutory right of rescission under TILA which, if exercised, voids the contract and makes later ratification legally impossible.

TILA regulations provide that when a consumer validly rescinds a loan transaction, "the security interest giving rise to the right of rescission becomes void." 12 C.F.R. § 226.15(d)(1). After rescission, the creditor is responsible for returning all monies paid to third parties in connection with the transaction and taking any action necessary to reflect termination of the security interest. 12 C.F.R. § 226.15(d)(2). Furthermore, the borrower is entitled to retain possession of any money or property received in connection with the transaction until the creditor satisfies the above obligation, and is entitled to retain permanent possession if the creditor fails to take action within 20 days of rescission. 12 C.F.R. § 226.15(d)(3). In effect, the statutory right of rescission established by TILA renders a loan transaction voidable, vesting

the borrower with the power to either disaffirm the contract by submitting a timely notice of rescission, or to ratify the contract by failing to submit the notice within the prescribed limitations period. Bertram v. Ben. Consumer Disc. Co., 286 F. Supp. 2d 453, 459 (W.D. Pa. 2003). If a borrower validly rescinds the loan, the loan agreement becomes null and void pursuant to 12 C.F.R. § 226.15(d)(1), and can no longer be validated by ratification at a later date. Bertram, 286 F. Supp. 2d at 459; 17A Am. Jur. 2d Contracts § 10.

If Plaintiffs validly rescinded their loan on July 27, 2001, their loan agreement became void, and their later acceptance and retention of the loan proceeds would have no impact whatsoever on their right to enforce the rescission in court. Particularly as there is no evidence to suggest that WMC Mortgage took action to terminate the security interest within 20 days of the alleged rescission, a reasonably jury could find that Plaintiffs' loan was validly rescinded on July 27, 2001 and that Plaintiffs were statutorily entitled to retain the $8,809.67 loan proceeds.

III. Liability of Loan Servicers Under TILA

As TILA imposes liability only on purchasers and assignees of mortgages, loan servicers cannot be liable under TILA. 15 U.S.C. §1641(f); Wile v. Green Tree Servicing, LLC, No. 04-2866, 2004 U.S. Dist. LEXIS 23709 at 5-6 (E.D. Pa. 2004); Clark v.

Fairbanks Capital Corp., No. 00-7778, 2003 U.S. Dist. LEXIS 9204 at 8-9 (N.D. Ill. 2003). As it is undisputed that Fairbanks Capital Corporation is merely the servicer of the Stumps' loan, Defendant Fairbanks Capital Corporation's Motion for Summary Judgment shall be granted with respect to Count II.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY STUMP, KIMBERLY STUMP, Plaintiffs, v. WMC MORTGAGE CORP., JAVELIN, INC. d/b/a COMMERCE FINANCIAL, FAIRBANKS CAPITAL CORP., and BANK SUISSE FIRST BOSTON, Defendants.	: : : : : : : : : : : : :	CIVIL ACTION 02-326

ORDER

AND NOW, this 16th day of March, 2005, upon consideration of Defendant WMC Mortgage Corporation's Motion for Summary Judgment (Doc. No. 46), Defendants Credit Suisse First Boston and Fairbanks Capital Corporation's Motion for Partial Summary Judgment (Doc. No. 45, 47), and all responses thereto (Doc. No. 49, 54, 55), it is hereby ORDERED, for the reasons stated in the accompanying Memorandum, as follows:

1) Defendant WMC Mortgage Corporation's Motion for Summary Judgment is GRANTED with respect to Count I of Plaintiffs' Amended Complaint, alleging TILA disclosure violations;

2) Defendant WMC Mortgage Corporation's Motion for Summary Judgment is DENIED with respect to the remaining counts of Plaintiffs' Amended Complaint;

3) Defendants Credit Suisse First Boston and Fairbanks Capital Corporation's Motion for Partial Summary Judgment as to Count II of Plaintiffs' Amended Complaint is GRANTED with respect

to Defendant Fairbanks Capital Corporation only.

BY THE COURT:

s/J. Curtis Joyner

J. CURTIS JOYNER, J.