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

CATHERINE A. OSCAR and ALVIN D. OSCAR	:	CIVIL ACTION
v.	:	
BANK ONE, N.A.	:	NO. 05-5928

MEMORANDUM

Padova, J. **February 17, 2006**

Plaintiffs, Catherine and Alvin Oscar, have brought this action seeking rescission of their home mortgage on the grounds that the loan violates the Truth in Lending Act ("TILA"). Before the Court is Defendant's Motion for Summary Judgment. A Hearing was held on the Motion on January 12, 2006.[1] For the reasons which follow, Defendant's Motion is granted.

I. BACKGROUND

The Oscars refinanced their home mortgage with WMC Mortgage Corporation ("WMC") on February 8, 2002. (Compl. Ex. B.) Defendant Bank One is the current holder of the mortgage. The February 8, 2002 mortgage was in the total amount of $450,000, of which $22,339.75 was taken out in settlement charges, $379,018.10 was disbursed to others, and $48,642.15 was disbursed to the Oscars. (Def. Ex. F.) The Complaint alleges that Plaintiffs did not receive required disclosures for variable rate loans prior to consummation of the loan or within three business days from the date of their application for the loan in violation of the Truth in Lending Act ("TILA") .[2] (Compl. ¶ 17.)

[1]This case was originally filed as an adversary proceeding in Catherine Oscar's Chapter 13 bankruptcy proceeding in the United States Bankruptcy Court for the Eastern District of Pennsylvania on August 30, 2004. The underlying bankruptcy case was dismissed on September 28, 2005, and this action was referred to this Court pursuant to 28 U.S.C. § 1631 on November 8, 2005.

[2]Counsel for Plaintiffs sought, during the Hearing on the instant Motion, to amend the Complaint to add a claim that the loan violated the TILA because Plaintiffs were not notified of the

The Complaint also alleges that the pre-paid Finance Charge disclosed in the HUD 1 Settlement Statement omits a charge and contains excessive charges. (Compl. ¶¶ 9, 17.) The Complaint further alleges that the failure of WMC to properly disclose these terms of the transaction, particularly the finance charges, constitutes a "material" disclosure violation of the TILA which entitles Plaintiffs to rescission of the loan. (Compl. ¶ 18.) The Complaint also alleges that Plaintiffs validly exercised their right to rescind on April 8, 2004, but Bank One refused to rescind the loan, thereby entitling Plaintiffs to statutory damages. (Compl. ¶¶ 12, 19.) Count I of the Complaint asserts a claim for

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interest rate on the loan until closing. Plaintiffs' counsel told the Court that this new claim is supported by paragraph eight of the Affidavit of Dr. Alvin D. Oscar. Alvin Oscar's Affidavit does not, however, state that Plaintiffs were not notified of the interest rate on the loan until closing. Paragraph eight of the Affidavit states as follows:

> What in fact happened is that we learned about many of the terms of the Instant Loan for the first time at settlement and I was furious at Ms. Fisher for not properly informing us of the terms, particularly her own compensation of (so we thought) $15,750.00. At that, we failed to notice that she also received an additional $1100 in miscellaneous fees and what I now know was a "yield spread premium" of yet another $4500.

(Alvin Oscar Aff. ¶ 8.) Although Plaintiffs filed a Supplemental Memorandum of Law in opposition to the Motion for Summary Judgment on January 13, 2006, they have failed to submit any other evidence to the Court in support of their new claim that they were not notified of the interest rate on their loan before closing.

Federal Rule of Civil Procedure 15(a) provides that a party may amend its pleading after a responsive pleading is served only by leave of the court, which "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The United States Court of Appeals for the Third Circuit has held that "a District Court may deny leave to amend on the grounds that amendment would cause undue delay or prejudice, or that amendment would be futile." In re Alpharma Inc. Sec. Litig., 372 F.3d 137, 153 (3d Cir. 2004) (quoting Oran v. Stafford, 226 F.3d 275, 291 (3d Cir.2000)). The decision whether to grant or deny a motion for leave to amend a complaint is committed to the sound discretion of the district court. Cureton v. Nat'l Collegiate Athletic Ass'n., 252 F.3d 267, 272 (3d Cir.2001). The Court finds that amendment of the Complaint would be futile because Plaintiffs have no evidentiary support for their new allegation that they were not informed of the interest rate on their loan prior to closing and because allowing Plaintiffs to amend their Complaint after Defendant's Motion for Summary Judgment has been fully briefed and argued would cause undue delay and prejudice to Defendant. Plaintiffs' oral request to amend the Complaint to add this claim is, therefore, denied.

rescission and for statutory damages against Bank One pursuant to 15 U.S.C. §§ 1635(b), 1640(a)(2)(A)(iii), and 1640(a)(3) on the grounds that Plaintiffs did not receive the requisite disclosures for variable rate loans at any time and did not receive accurate disclosure of the Finance Charge in violation of 15 U.S.C. § 1638(a).

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] . . . which it believes demonstrate an absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248. An issue is "material" if it may affect the outcome of the matter pursuant to the underlying law. Id. An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

III. DISCUSSION

Defendant has moved for summary judgment on the grounds that there is no evidence that Plaintiffs did not receive the requisite material variable rate loan disclosures or that the Finance Charges which were charged to Plaintiffs at closing violated the TILA. Defendant also maintains

that, because Plaintiffs were not entitled to rescission of their loan, they are also not entitled to statutory damages for Defendant's failure to honor their request for rescission.

A. Variable Rate Loan Disclosures

Defendant argues that it is entitled to summary judgment on Plaintiffs' claim that they are entitled to rescission because they did not receive material variable rate disclosures because the evidence establishes that they did receive such disclosures. The TILA, and its implementing regulation, Regulation Z, provide that a lender is required to accurately disclose the following material disclosure items: "the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule, and the disclosures and limitations referred to in § 226.32(c) and (d)." 12 C.F.R. § 226.28, n.48. If a lender in a consumer credit transaction "in which a security interest is or will be retained or acquired in a consumer's principal dwelling" does not deliver these material disclosures, the consumer has a right to rescind the transaction. 12 C.F.R. § 226.28(a). If a loan contains a variable rate, the borrower is also entitled to additional variable rate disclosures, including the specific program disclosure and the HUD variable rate consumer handbook. 12 C.F.R. § 226.19(b).

The consumer may rescind the transaction:

> until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first.

12 C.F.R § 226.23(a)(3) (footnote omitted). In its commentary to this section of Regulation Z, the Federal Reserve Board explains that the failure to give material disclosures which extends the

rescission period for three years includes "failure to inform the consumer of the existence of a variable rate feature." 12 C.F.R. Pt. 226 Supp. I. FRB Commentary to 12 C.F.R. § 226.23(a)(3), ¶ 2 (Material Disclosures). However, "[f]ailure to give the other required [variable interest rate] disclosures does not prevent the running of the rescission period, although that failure may result in civil liability or administrative sanctions." Id. The Courts are required to defer to the Federal Reserve Board's interpretation of Regulation Z:

> Congress included in the Act a provision expressly authorizing the Federal Reserve Board to "prescribe regulations to carry out the purposes of" the TILA. 15 U.S.C. § 1604. The Board promulgated "Regulation Z," 12 C.F.R. § 226, for this purpose. It also published extensive "Official Staff Interpretations." 12 C.F.R. Pt. 226 Supp. I. "The Supreme Court has emphasized the broad powers that Congress delegated to the Board to fill gaps in the statute" with these two devices. Ortiz v. Rental Mgmt., Inc., 65 F.3d 335, 339 (3d Cir. 1995). "Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive . . . ." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980).

Rossman v. Fleet Bank Nat'l Ass'n, 280 F.3d 384, 389-390 (3d Cir. 2002).

Defendant argues that the record before the Court establishes that Plaintiffs received all of the material disclosures required by Regulation Z as well as all variable interest rate disclosures required by Regulation Z. The record before the Court includes a letter from WMC to Alvin Oscar dated January 22, 2002, prior to closing, which enclosed disclosures, including "Federal Truth in Lending Disclosure[,] . . . The Consumer Handbook on Adjustable Rate Mortgages[,] . . . Prepayment Mortgage Loan Disclosure - Adjustable Rate First Mortgage Loans[,] . . . Prevailing Interest Rate Notice." (Def. Ex. C.) In addition, the Federal Truth In Lending Disclosure Statement signed by Alvin D. Oscar and Catherine A. Oscar on February 8, 2002 states as follows:

"VARIABLE RATE: Your loan contains a variable-rate feature. Disclosures about the variable-rate feature have been provided to you earlier." (Def. Ex. D.)

Plaintiffs maintain, despite this evidence, that they did not receive any disclosures related to the variable interest rate feature of the mortgage prior to closing. (Alvin Oscar Aff. ¶¶ 6, 8.) However, Plaintiffs' execution of the Federal Truth In Lending Disclosure Statement creates a presumption that those disclosures were, in fact received and Alvin Oscar's statement to the contrary is not, by itself, sufficient to rebut that presumption. See Strang v. Wells Fargo, Civ.A.No. 04-2865, 2005 WL 1655886, at *3 (E.D. Pa. July 13, 2005) (finding that borrowers' testimony that they did not receive variable rate disclosures is not sufficient to rebut the presumption that the disclosures were received where the borrowers had signed a written acknowledgment of receipt of those disclosures) (citing McCarthy v. Option One Mortgage Corp., 362 F.3d 1008, 1011 (7th Cir. 2004); Gaona v. Town & Country Credit, 324 F.3d 1050, 1054 (8th Cir. 2003)). The Court finds, therefore, that Alvin Oscar's statement is not sufficient to overcome the presumption that Plaintiffs did, indeed, receive the variable rate disclosures sent by WMC.

Moreover, even if Plaintiffs did not receive any variable interest rate disclosures prior to closing, Regulation Z provides that the three-day rescission period is triggered by the consummation of the loan, delivery of the notice, or delivery of the material disclosures, whichever occurs last. 12 C.F.R § 226.23(a)(3) (footnote omitted). Consequently, the three-day period was triggered by the closing, when Plaintiffs acknowledge they received notification of the variable interest rate feature of their loan. (Alvin Oscar Aff. ¶¶ 6, 8.) Plaintiffs also contend, however, that the disclosure that their loan had a variable interest rate feature was not sufficient to satisfy the material disclosure requirement of TILA and Regulation Z and, therefore, the time to rescind their loan should be

extended to three years. See 12 C.F.R. § 226.23(a)(3). However, as discussed above, the Federal Reserve Board's Commentary has made it perfectly clear that, while "failure to inform the consumer of the existence of a variable rate feature," is a material non-disclosure which extends the rescission period, "[f]ailure to give the other required disclosures does not prevent the running of the rescission period . . . ." 12 C.F.R. Pt. 226 Supp. I. FRB Commentary to 12 C.F.R. § 226.23(a)(3), ¶ 2 (Material Disclosures); see also Pulphus v. Sullivan, No. 02-C-5794, 2003 WL 1964333, at *14 (D. Ill. Apr. 28, 2003) ("There is nothing irrational about the Board's desire to extend the period to rescind a loan, a rather Draconian remedy, only for those consumers who were completely unaware that their loan had a variable rate. Accordingly, we will adhere to the plain language of its interpretation and hold that the only variable rate disclosure that is material within the meaning of 12 C.F.R. § 226.23(a)(3) is the disclosure that a loan has a variable interest rate feature.").

The Court finds, accordingly, that there are no genuine issues of material fact regarding Plaintiffs' receipt of the required material disclosure that their loan had a variable interest rate at closing. The Court further finds, as a matter of law, that Plaintiffs received that material disclosure at closing and, therefore, were not entitled to rescind their loan on April 8, 2004, since the three-day rescission period had elapsed. Defendant's Motion for Summary Judgment is, therefore, granted with respect to Plaintiffs' claim for rescission based upon the alleged nondisclosure of the variable interest rate feature of their loan.

B. Failure to Accurately Disclose the Finance Charge

Defendant argues that it is entitled to summary judgment on Plaintiffs' claim that they are entitled to rescission because the Finance Charge was not accurately disclosed because the evidence establishes that the disclosed Finance Charge is accurate for purposes of the TILA. The TILA

requires lenders to accurately disclose the finance charge on the loan. 15 U.S.C. § 1638(a)(3). "TILA regulations define the finance charge as 'the cost of consumer credit as a dollar amount.'" Stump v. WMC Mortgage Corp , Civ.A.No. 02-326, 2005 WL 645238, at *4 (E.D. Pa. Mar. 16, 2005) (citing 12 C.F.R. § 226.4(a)). It 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." Id. (citing 12 C.F.R. § 226.4(a); 15 U.S.C. § 1605(a).) The finance charge is one of the "material disclosure" items under Regulation Z and, if it is materially inaccurate, the rescission period is extended until three years after consummation. 12 C.F.R. § 226.23 n. 48. Regulation Z provides that the finance charge is considered to be accurate "if the disclosed finance charge: (i) is understated by no more than 1/2 of 1 percent of the face amount of the note or $ 100, whichever is greater; or (ii) is greater than the amount required to be disclosed." 12 C.F.R. § 226.23(g). If the mortgage loan on the consumer's principal dwelling is in foreclosure, as is the loan in this case, the finance charge will not be considered to be accurate unless it: "(i) is understated by no more than $ 35; or (ii) is greater than the amount required to be disclosed." 12 C.F.R. § 226.23(h).

Defendant argues that it is entitled to summary judgment because the Finance Charge disclosed to Plaintiffs by WMC in the TILA Disclosure Statement given to Plaintiffs at closing was greater than the amount required to be disclosed and, therefore, accurate for the purposes of the TILA and Regulation Z. Defendant has calculated the disclosed pre-paid Finance Charge as $24,217.37, which is the principal amount of the loan ($450,000), less the amount financed, which is stated on the TILA Disclosure form to be $425,782.63. (Def. Ex. D.) Defendant contends that the total actual pre-paid Finance Charge is, therefore, accurate for purposes of the TILA and Regulation Z if it is not more than $24,217.37 plus $35. According to the HUD 1 Settlement Statement (the "HUD 1")

executed by Plaintiffs at closing, the actual pre-paid Finance Charge was $19,687.37 and included the following charges:

Line #	Description	Amount
801	loan origination fee to broker	$15,750.00
803	tax contract	68.00
804	processing fee	450.00
805	document prep fee	360.00
806	flood fee	19.00
807	admin fee	597.00
808	underwriting fee	300.00
901	prepaid interest	1,773.37
1104	closing letter	35.00
1105	wire fee	60.00
1107	attorney's fees	275.00
TOTAL		$19,687.37

(Def. Ex. F.)

Plaintiffs give two reasons for their contention that the disclosed pre-paid Finance Charge is materially inaccurate. First, they claim that the Finance Charge is materially inaccurate because it does not include the Yield Spread Premium ("YSP") of $4500 paid to the mortgage broker. This charge was disclosed on the H-1 on line 809 as "BKR COMP BY LENDER TO HLF POC $4,500.00" but not included in the pre-paid finance charge. (Def. Ex. F.) A YSP is:

> a bonus paid to a broker when it originates a loan at an interest rate higher than the minimum interest rate approved by the lender for a particular loan. The lender then rewards the broker by paying it a percentage of the "yield spread" (i.e., the difference between the interest rate specified by the lender and the actual interest rate set by the broker at the time of origination) multiplied by the amount of the loan.

In re Bell, 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)). Plaintiffs insist that the YSP falls within the definition of finance charge and, therefore, should have been included in the disclosed pre-paid Finance

Charge. While the YSP is a finance charge, the Federal Reserve Board has concluded that it should not be disclosed as a pre-paid finance charge pursuant to 15 U.S.C. § 1605(a)(6) because it is already included in the interest rate: "Fees paid by the funding party 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." 61 F.R. 26126, 26127 (1996); see also 61 F.R. 49237, 49238-49239 (1996); 12 C.F.R. § 226, Supplement I, sec. 4(a)(3)-3; Stump, 2005 WL 645238, at *4 (finding that a $1,100 YSP was properly excluded from the itemized pre-paid finance charge on the TILA Disclosure Statement even though a YSP is a finance charge because "the cost to the Plaintiffs is not imposed at settlement, but is instead paid out as interest over the course of the . . . mortgage"); Strang, 2005 WL 1655886, at *5 ("[C]ourts in the Eastern District of Pennsylvania have held that the yield spread premium is properly excluded . . . . Specifically, courts have found that the yield spread premium is already incorporated into the total finance charge as a higher interest rate and therefore should not be double-counted.") (citing Stump, 2005 WL 645238, at *4); In re Bell, 309 B.R. at 153. The Court finds, accordingly, that the YSP was properly excluded from the pre-paid Finance Charge disclosed to Plaintiffs in the TILA disclosure statement.

Second, Plaintiffs claim that the charges imposed by the Bank for title insurance and notary fees are excessive and make the disclosed Finance Charge materially inaccurate. Title insurance and notary fees are excluded from the pre-paid Finance Charge unless the borrower can prove that they are unreasonable or not bona fide. See 12 C.F.R. § 226.4(7)(i), (iii) (stating that fees for title insurance and notary fees are not finance charges "if the fees are bona fide and reasonable in amount"). Only the excess over the reasonable or bona fide amount for these fees is treated as a finance charge. See Guise v. BWM Mortgage, L.L.C., 377 F.3d 795, 800 (7th Cir. 2004) ("An

allegedly partial overcharge does not convert the entire title insurance transaction into a finance charge, it only demonstrates that some amount of the fee was not eligible from exclusion from the finance charge computation."); Walker v. Gateway Fin. Corp., 286 F. Supp. 2d 965, 966-67 (N.D. Ill. 2003) (noting that the "excess over what is treated for present purposes as the 'bona fide and reasonable amount' chargeable for title insurance is treated as an undisclosed finance charge for TILA purposes"); Quinn v. Ameriquest Mortgage Co., No. 03-CV-5059, 2004 WL 316408, at *4 (N.D. Ill. Jan. 26, 2004) ("[W]e must discern how much of the total cost of the title insurance was made up of a finance charge. In order to do so, we must subtract from the amount charged a reasonable rate for title insurance. To do otherwise would be to penalize the defendants for the portion of the entire title insurance cost that actually went to providing the plaintiffs with title insurance."); In re Strong, Civ.A.No. 04-4699, 2005 WL 1463245, at *4 (E.D. Pa. June 20, 2005) (finding that the bankruptcy court properly included only the unreasonable portion of a title insurance premium as a finance charge); Johnson v. Know Financial Group L.L.C., Civ.A.No. 03-378, 2004 WL 1179335, at *8 (E.D. Pa. May 26, 2004) ("Several courts have held, . . . that only the unreasonable portion of a charge deemed not to be 'reasonable in amount,' 12 C.F.R. § 226.4(c)(7), should be included as a finance charge.") (listing cases).

Line 1108 of the HUD-1 shows that Plaintiffs were charged $2,372.38 for Title Insurance. (Def. Ex. F.) Plaintiffs claim that a reasonable charge for title insurance would have been only $1,878.30 because they were entitled to a "refinance rate" pursuant to the Manual of Title Insurance Rating Bureau of Pennsylvania. (Pl. Ex. D ¶ 5.6, Addendum page 6.) The resulting overcharge would be $494.08. Plaintiffs also contend that the $35 for notary fees listed on line 1106 of the Settlement Statement is an overcharge. Plaintiffs claim that, under state law, a notary can only

charge $2.00 per notarization. See 57 Pa. Stat. § 167 (stating that, as of 2003, notary fees were limited to $2.00). Even if the Court were to find that the title insurance charge was in excess of a reasonable charge by the $494.08 and that the notary fee was $33 in excess of a reasonable fee, and those amounts were added to the $19,687.37 in pre-paid finance charges which were disclosed in the HUD-1, the total pre-paid finance charge would still be less than the $24,217.37 Finance Charge included in the TILA Disclosure form. Consequently, the Court finds that there are no genuine issues of material fact regarding the accuracy of the disclosed Finance Charge in this case. The Court further finds, as a matter of law, that the Finance Charge was not materially inaccurate for the purposes of the TILA and Regulation Z and that the rescission period in this case is not extended to three years on that basis. Defendant's Motion for Summary Judgment is, therefore, granted with respect to Plaintiffs' claim for rescission based upon the alleged failure to include the YSP and excessive fees charged at closing for title insurance and notary services in the disclosed pre-paid Finance Charge.

C. Statutory Damages

15 U.S.C. § 1640 provides for the imposition of statutory damages for certain violations of the TILA, including failure to honor the right to rescind. Plaintiffs seek statutory damages pursuant to 15 U.S.C. §§ 1640(a)(2)(A)(iii) and 1640(a)(3) for Defendant's alleged failure to recognize Plaintiff's right to rescind and to perform any of its duties related to rescission set forth in 15 U.S.C. § 1635(b). 15 U.S.C. § 1640(a)(2)(A)(iii) provides for statutory damages for violations of the TILA "in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, [in an amount] not less than $200 or greater than $2,000 . . . ." 15 U.S.C. § 1640(a)(3) permits recovery "in the case of any successful action to

enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, [of] the costs of the action, together with a reasonable attorney's fee as determined by the court . . . ." Defendant seeks summary judgment on Plaintiffs' claim for statutory damages pursuant to these sections on the grounds that Plaintiffs were not entitled to rescind at the time they sent their rescission notice to Defendant on April 8, 2004. As the Court has found, as a matter of law, that Plaintiffs were not entitled to rescind their mortgage loan on April 8, 2004, the Court finds that Plaintiffs are not entitled to statutory damages pursuant to 15 U.S.C. §§ 1640(a)(2)(A)(iii) and 1640(a)(3). Defendant's Motion for Summary Judgment is, therefore, granted as to Plaintiffs' claim for statutory damages.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
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CATHERINE A. OSCAR and ALVIN D. OSCAR	:	CIVIL ACTION
v.	:	
BANK ONE, N.A.	:	NO. 05-5928

O R D E R

AND NOW, this 17th day of February, 2006, upon consideration of Defendant's Motion for Summary Judgment, Plaintiffs' response thereto, the Hearing held on January 12, 2006, and the supplemental memoranda and exhibits filed by the parties, **IT IS HEREBY ORDERED THAT** said Motion is **GRANTED**. **JUDGEMENT** is hereby entered in favor of Defendant and against Plaintiffs.

BY THE COURT:

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John R. Padova, J.