



SO ORDERED.

SIGNED this 21 day of January, 2005.

Janice Miller Karlin

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)
SCOTT DAVID CUSHING and)
LISA DIANE CUSHING)
)
Debtors.)

Case No. 03-42373
Chapter 7

SCOTT DAVID CUSHING and)
LISA DIANE CUSHING)
)
Plaintiffs,)

v.)
)
HOUSEHOLD FINANCE)
CORPORATION III)
)
Defendant.)

Adversary No. 03-7120

**MEMORANDUM AND ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment on the issue of Plaintiff's right to extend the period to rescind a consumer credit transaction under the Truth in Lending Act. This matter constitutes a core proceeding,¹ and the Court has jurisdiction to decide it.²

I. FINDINGS OF FACT

The following facts are either uncontroverted or viewed in the light most favorable to Household Finance Corporation III, the non-moving party. On March 14, 2001, Plaintiffs, Scott David Cushing and Lisa Diane Cushing (the "Cushings"), entered into a consumer credit transaction with Fieldstone Mortgage Company for the purchase of their home located at 5300 SW 12th Street in Topeka, Kansas. The note and mortgage from that transaction were eventually assigned to Defendant, Household Finance Corporation III ("Household").

In March 2003, an employee of Household telephoned the Cushings and asked if they would like to refinance their current home mortgage at a lower interest rate and with lower monthly payments. On April 14, 2003, the Cushings entered into a consumer credit transaction with Household to refinance the mortgage. The Cushings apparently received some cash from the refinancing, as well as a three percent (3%) reduction in their interest rate.

There is no dispute that at the time the Cushings refinanced their mortgage with Household, the property was the principal dwelling for Mrs. Cushing. The parties disagree, however, whether Mr. Cushing lived there at that time. On their initial Statement of Financial Affairs filed in this bankruptcy proceeding, the Cushings indicated, under penalty of perjury, that he lived at 1107 SW Osborne, Topeka, Kansas from

¹28 U.S.C. § 157(b)(2)(B).

²28 U.S.C. § 1334.

“06-01 to Present,” and that he lived at 113 West Hall Avenue, Burlingame, Kansas from “02-03 to Present.” The 5300 SW 12th Street address was not mentioned. On November 4, 2004, the Cushings amended their Statement of Financial Affairs to claim that he instead lived at the residence from 1994 through May 26, 2003.³ They filed this amendment only after Household filed its response to Plaintiffs’ summary judgment motion, wherein it argued Cushing’s original Statement of Financial Affairs should be deemed an admission that he was not residing in the Topeka property at the time of the refinancing.

The parties also dispute the number of copies the parties received of certain disclosures at the closing on the refinancing transaction. At closing, the Cushings signed a statement indicating they each received two copies of the Notice of Right to Cancel, which is required by the Truth in Lending Act (TILA) to inform consumers of their right to rescind the transaction. The Cushings have now submitted sworn affidavits indicating that this prior statement is incorrect, and that in fact, they only received one copy each.

II. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the moving party demonstrates 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.”⁴ The rule provides that “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.”⁵ The substantive law identifies which facts are material.⁶ A dispute over a material

³Doc. 45.

⁴Fed. R. Civ. P. 56(c).

⁵*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

⁶*Id.* at 248.

fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant.⁷ “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”⁸

The movant has the initial burden of showing the absence of a genuine issue of material fact.⁹ The movant may discharge its burden “by ‘showing’ – that is, pointing out to the . . . court – that there is an absence of evidence to support the nonmoving party’s case.”¹⁰ The movant need not negate the nonmovant’s claim.¹¹ Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts.¹² The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial.¹³ Rule 7056(e) requires the Court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party’s case, and on which that party will bear the burden of proof.¹⁴

III. CONCLUSIONS OF LAW

⁷*Id.*

⁸*Id.*

⁹*Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993).

¹⁰*Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

¹¹*Id.* at 323.

¹²*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

¹³*Celotex*, 477 U.S. at 324.

¹⁴*Id.* at 322.

A. Background information on the TILA

Congress enacted the TILA to regulate the disclosure of the terms of consumer credit transactions in order “to aid unsophisticated consumers and to prevent creditors from misleading consumers as to the actual cost of financing.”¹⁵ Adequate disclosure allows consumers to compare different financing options and their costs.¹⁶ To encourage compliance, TILA violations are measured by a strict liability standard, so even minor or technical violations impose liability on the creditor.¹⁷ The consumer-borrower can prevail in a TILA suit without showing that he or she suffered any actual damage as a result of the creditor’s violation of the TILA.¹⁸

The Board of Governors of the Federal Reserve System (“the Fed”) is the agency charged with administering the TILA,¹⁹ and has adopted extensive regulations implementing the TILA,²⁰ referred to as “Regulation Z.”²¹ When the agency charged with enforcing a statute has promulgated a regulation that adopts a permissible construction of the statute, the courts must defer to that interpretation and not impose

¹⁵*Morris v. Lomas & Nettleton Co.*, 708 F. Supp. 1198, 1203 (D. Kan. 1989) (citing *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 363-69 (1973)).

¹⁶15 U.S.C. §1601(a).

¹⁷*See, e.g., Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983) (“To insure that the consumer is protected, as Congress envisioned, requires that the provisions of [the TILA and Regulation Z] be absolutely complied with and strictly enforced”); *Davison v. Bank One Home Loan Services*, 2003 WL 124542, *6 (D. Kan. 2003).

¹⁸*Herrera v. First Northern Savings & Loan Ass’n*, 805 F.2d 896, 900 (10th Cir. 1986).

¹⁹15 U.S.C. §§ 1602(a) and 1604(a).

²⁰12 C.F.R. Part 226 (2003).

²¹*See id.* § 226.1(a).

their own.²² Furthermore, the Supreme Court has indicated this requirement is especially strong in the context of the TILA and Regulation Z, where even official staff interpretations of the statute and regulation should control unless shown to be irrational.²³

B. The TILA right to rescind a home mortgage transaction

This proceeding involves a non-purchase-money loan secured by a consumer-borrower's home.²⁴

In such non-purchase-money transactions, the consumer-borrower has a right to rescind established by TILA § 1635. It provides:

(a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the

²²*Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

²³*Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-70 (1980); *see also Anderson Brothers Ford v. Valencia*, 452 U.S. 205, 219 (1981) (citing *Milhollin*, Court indicated that absent "obvious repugnance" to statute, Fed's regulation implementing TILA and interpretation of that regulation should be accepted by courts) and *Davison v. Bank One Home Loan Services*, 2003 WL 124542, at *5 (D. Kan. 2003) (holding there existed unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative).

²⁴*See* 15 U.S.C. §§1635(e)(1) and 1602(2) (excluding from rescission rights given by § 1635 liens against consumer-borrowers' homes that secure financing of acquisition or initial construction).

Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.²⁵

So long as the creditor has not given the obligor the items specified in this provision, the obligor's right to rescind will last three years from the consummation of the transaction, with certain exceptions that do not apply here.²⁶ The main part of Regulation Z that implements TILA § 1635 is 12 C.F.R. § 226.23. Relevant parts of that provision and other parts of Regulation Z will be discussed below.

The Cushings seek to exercise a right to rescind the transaction with Household well after the normal three-day rescission period expired. They contend that they are entitled to an extended rescission period because the errors committed by Household in providing the required TILA disclosures entitle them to a three-year rescission period provided by TILA § 1635(f).

C. The Notice of Right to Cancel supplied by Household to the Cushings complies with TILA requirements.

The Cushings first claim that they are entitled to an extended right to rescind the transaction because the Notice of Right to Cancel supplied by Household did not comply with TILA regulations. Specifically, the Cushings claim that Household's use of a "hybridized" Notice of Right to Cancel form (1) violated the TILA,²⁷ by rearranging the format of the disclosure, thereby adversely affecting the substance, clarity, or meaningful sequence of the disclosure; (2) violated Regulation Z,²⁸ by failing to provide the appropriate

²⁵15 U.S.C. § 1635(a).(Emphasis added).

²⁶See TILA §1635(f), 15 U.S.C. § 1635(f).

²⁷15 U.S.C. § 1604(b).

²⁸Regulation Z § 226.23(b)(2).

model form contained in the regulations, or a substantially similar notice; and (3) violated the requirements of the TILA,²⁹ and Regulation Z,³⁰ which require the disclosures to be made “clearly and conspicuously.”

Subsection (h) of TILA § 1635 provides:

(h) Limitation on rescission

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the *appropriate* form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was *properly* completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.³¹

Regulation Z § 226.23(b)(2) provides: “*Proper form of notice.* To satisfy the disclosure requirements of paragraph (b)(1) of this section, the creditor shall provide the appropriate model form in Appendix H of this part or a substantially similar notice.”

This regulation implements TILA § 1604(b), which directs the Fed to publish model forms and provides that creditors are deemed to have complied with non-numerical TILA disclosure requirements if they use the appropriate model form. Section 1604(b) also provides that a creditor shall be deemed to have complied if it: “(2) uses any such model form . . . and changes it by (A) deleting any information which is not required by this subchapter, or (B) rearranging the format, if in making such deletion or rearranging the format, the creditor . . . does not affect the substance, clarity, or meaningful sequence of the

²⁹15 U.S.C. § 1635(a).

³⁰Regulation Z § 226.23(b)(1)(I), (ii) and (iv).

³¹15 U.S.C. § 1635(h) (emphasis added).

disclosure.”³² Household could, therefore, have satisfied the requirement that it give the Cushings³³ proper notice of their right to rescind the transaction if it had simply used the correct model form, the New Loan Form (H-8) or the Refinancing Form (H-9).

Because Household chose not to use the model forms provided in Regulation Z, the Court must determine whether Household’s Notice constituted “a substantially similar notice,” as required by 12 C.F.R. § 226.23(b)(2). A careful reading of the Notice used by Household in this transaction reveals that it is substantially similar to the model form, the disclosures remain clear and conspicuous, and the changes did not affect the substance, clarity or meaningful sequence of the disclosure.

The only substantive change made by Household was the inclusion of the following sentence: “If this transaction is a refinance of a loan you have with us and you cancel, it will not affect any amount you presently owe.” The Court does not believe that this additional language makes the disclosure unclear or inconspicuous. In fact, the additional information provides the borrower with positive information that they will not be penalized on their existing loan if they choose to rescind the refinancing loan. The Court finds this information to be valuable to potential borrowers, because they then do not have to worry that their original mortgage will be jeopardized if they opt to rescind. This disclosure in no way takes away from the other disclosures contained in the form.

As for stylistic changes to the form, the creation of the hybrid form (providing the appropriate box is checked on the form to inform borrowers what paragraph applies to them, which it was here) and the

³²15 U.S.C. § 1604(b)(2)(A) and (B).

³³This finding assumes the property was, in fact, Mr. Cushing’s principal dwelling on the date the transaction closed, as discussed below.

rearrangement of the disclosures do not take away from the clarity, substance, or meaningful sequence of the disclosures. The Court finds the disclosures in the form used by Household to be as clear and conspicuous as the disclosures in the model form, and the substance has not been altered. Therefore, the Notice used by Household does not violate the TILA or Regulation Z.

The form used by Household clearly varies from the model forms in that it combines the two forms into one, rearranges certain information, and adds other information not contained in the model form. However, these changes simply make Household's form different, not improper. The Court finds that Household's use of the hybrid form they created, however litigation-inviting it might be, did not violate the TILA or Regulation Z. Therefore, the use of that form does not entitle the Cushings to an extended period wherein they could rescind the transaction.

D. Household was required to supply two copies of the notice of the right to rescind the transaction to each consumer entitled to rescind.

The Cushings next claim that they are entitled to an extended right of rescission because Household only provided each of them with one copy of the right to rescind. Although Household disputes the fact that it only provided each Plaintiff with one copy, which issue is addressed below, it alternatively asks the Court to rule that the failure to provide two copies of the notice does not result in the Cushings receiving an extended right of rescission.

Under TILA regulations, a creditor must “deliver two copies of the notice of the right to rescind to each consumer entitled to rescind.”³⁴ As noted above, the regulation is absolutely clear in requiring two copies for each consumer, and, absent a finding that the regulation is irrational, the Court must apply the

³⁴Regulation Z § 226.23(b)(1).

regulation promulgated by the Fed.³⁵ Household asks this Court to adopt Judge Pusateri's decisions in *Ramirez v. Household Finance Corporation III*,³⁶ and *Merriman v. Beneficial Mortgage Co. of Kansas, Inc.*,³⁷ wherein he found that Regulation Z was irrational to the extent it allowed a debtor to rescind a transaction for up to three years based upon the failure of the lender to provide two copies of the notice of right to cancel to each consumer. In that Order, Judge Pusateri held that although providing one copy of the Notice did constitute a violation of the TILA, the debtors were not entitled to an extended right of rescission based upon what he deemed a minuscule violation of the Act.

Although this Court tends to agree with Judge Pusateri's reasoning that the "punishment doesn't fit the crime," this Court declines to adopt his ruling on this issue, and finds that the clear TILA regulations, as they relate to this issue, are not demonstrably irrational.³⁸ As explained by Judge Vratil in *Davison v. Bank One Home Loan Services*,³⁹ the Fed included this provision in the regulation to make it easier for

³⁵See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-70 (1980).

³⁶Adversary Proceeding No. 01-7122 (Bankr. D. Kan. May 28, 2003).

³⁷Adversary Proceeding No. 01-7142 (Bankr. D. Kan. May 28, 2003).

³⁸In this day and age of inexpensive copy machines at most grocery stores, some gasoline stations, libraries and even within many home printers, and given that both Debtors are employed by employers who probably have copy machines accessible to them, this Court agrees the Regulations' two copy requirement seems unnecessary, especially if coupled with a potential windfall remedy. But it is not this Court's role to tell Congress and the Fed that they are being overly protective of consumers in today's technologically-advanced world. Enacting legislation, and promulgating the rule changes connected thereto, are not proper court functions.

³⁹2003 WL 124542 (D. Kan.) (holding "The regulations as to the required number of copies of the right to cancel and TILA disclosure forms are not demonstrably irrational"). See also *Stone v. Mehlberg*, 728 F. Supp. 1341, 1353 (W.D. Mich. 1989) (holding that the "TILA's requirement of two rescission notice copies to each obligor is not a mere technicality," because "[e]ffective exercise of the right to rescind obviously depends upon the delivery of one copy of the rescission form to the creditor

consumers to rescind the transaction. It allows the consumer to return one copy of the notice to the lender while retaining one copy.

The Court finds that the two-copy TILA regulation is not irrational. Household was required to give each of the Cushings two copies of the notice of their right to rescind this transaction, provided each of them was otherwise entitled to such disclosure. Similarly, the Court finds that the three year rescission period afforded by the TILA for a failure to comply with the noticing requirements, albeit harsh, is not irrational, as it clearly furthers the policy and goals of the TILA. Thus, if Household failed to give the required number of copies of the Notice, the right to rescind this transaction shall be extended to three years.

E. The issue of how many copies of the notice of the right to rescind the Cushings received cannot be decided on summary judgment.

One basis for the Cushings' claim that they are entitled to an extended right to rescind the transaction is that they did not each receive two copies of the notice informing them of their right to rescind. Household disputes the fact that the Cushings did not receive two copies of the notice.

At the closing of the transaction, the Cushings signed a Notice of Right to Cancel, which unequivocally stated "The undersigned each acknowledge receipt of two copies of the NOTICE OF RIGHT TO CANCEL." The Cushings' signatures on this Notice create a legal presumption that they received two copies of the Notice.⁴⁰ That presumption, however, is rebuttable, and the Cushings can present evidence to prove that, despite stating otherwise on the Notice, they only received one copy of the

and the retention by the obligor of the other copy.").

⁴⁰See 15 U.S.C. § 1635(c).

Notice.⁴¹ The Cushings have now submitted evidence, in the form of sworn affidavits, indicating that they did not receive two copies of the Notice.

The Court finds that a genuine question of fact exists on this issue, as both parties have presented conflicting evidence in support of their position. Therefore, summary judgment is not appropriate on this issue.⁴²

F. Whether Mr. Cushing has a right to rescind the transaction cannot be decided on summary judgment.

Household claims that it provided the parties with the appropriate number of disclosures based, in part, on the fact that Mr. Cushing was not entitled to receive separate copies of the TILA disclosures due to his non-resident status. Because the Cushings admit they jointly received one copy of the TILA disclosures, and each admit they received one copy of the notice of the right to rescind, Household claims that the documents received would be sufficient if Mrs. Cushing was the only consumer entitled to the notice.

⁴¹The Court realizes that, in document-intensive loan closings where many forms containing legal language are presented for quick signatures, the reality is that many borrowers typically sign whatever paper is put in front of them to obtain the requested financing. That is one of the reasons Congress has provided a rescission period.

⁴²Because Household's loan closer has indicated, by affidavit, that she has no independent memory of this transaction, the Court could theoretically have found that there is no genuine issue of fact if this was the only issue remaining for trial. Because there must be a trial, anyway, caused by a second instance where Debtors must try to explain away their inconsistent statements, the Court declines to find summary judgment for Plaintiffs on this issue, under the precise facts of this case. Household will be given the opportunity to cross-examine Debtors on these inconsistencies.

In support of its contention, Household points to Regulation Z § 226.17, which sets out some general disclosure requirements. Subsection (d) addresses transactions involving multiple creditors or multiple consumers, and provides:

(d) *Multiple creditors, multiple consumers.* If a transaction involves more than one creditor, only one set of disclosures shall be given and the creditors shall agree among themselves which creditor must comply with the requirements that this regulation imposes on any or all of them. If there is more than one consumer, the disclosures may be made to any consumer who is primarily liable on the obligation. If the transaction is rescindable under § 226.23, however, the disclosures shall be made to each consumer who has the right to rescind.⁴³

Household then points to § 226.23(a)(1), which provides:

(a) *Consumer's right to rescind.* (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction [with exceptions not applicable here].⁴⁴

Household suggests that Mr. Cushing had no right to rescind because the property being mortgaged was not his principal dwelling.

The Cushings claim that the property was the principal dwelling of Mr. Cushing and, even if it was not his principal dwelling, he was still entitled to the notice because he was a consumer whose ownership interest was subject to the security interest. Household does not dispute that Mr. Cushing is a title owner of the subject real estate.

⁴³Regulation Z § 226.17(d).

⁴⁴Regulation Z § 226.23(a)(1).

In 1981, the Fed extensively revised Regulation Z, and adopted §§ 226.2(a)(11) and 226.23(a)(1) in their present forms.⁴⁵ The Fed included this comment about § 226.23:

Under paragraph (a)(1), a consumer has the right to rescind only if the transaction involves the consumer's principal dwelling and the consumer's ownership interest in that dwelling is or will be subject to a security interest. A number of commenters contended that the language in the December proposal could be interpreted to provide the right to rescind to a nonresident co-owner of a dwelling. To avoid such interpretations, the definition of "consumer" in § 226.2 has been expanded to clarify that, for purposes of rescission, a consumer is any natural person who is both an owner and a resident of a dwelling that is or will be subject to a security interest as part of the credit transaction. The definition therefore encompasses persons who are not parties to the credit agreement but who have signed the security agreement. As a signatory to the security agreement, that person is a party to the credit transaction and is obligated to the extent that his or her ownership interest is encumbered by the creditor's security interest. Accordingly, joint owners in this situation must be given the right of rescission, so long as the property represents the joint owners' principal dwelling.⁴⁶

Thus, in response to comments it had received about an earlier draft of the regulation, the Fed revised § 226.2 to make clear that "a nonresident co-owner of a dwelling" would not have a right to rescind a transaction creating a mortgage on property, even though the resident co-owner would have the right. Therefore, if the home was not Mr. Cushing's principal residence at the time the loan documents were signed, then he was not entitled to rescind the transaction. Obviously, if that is the case, he was not entitled to receive a second set of disclosures.

The Court finds that summary judgment is not appropriate on this issue, because the location of Mr. Cushing's principal residence during the relevant time period is a genuine issue of material fact about which there is dispute. The Cushings' original response to Question No. 15 of the sworn Statement of Financial

⁴⁵See Truth in Lending; Revised Regulation Z, 46 Fed. Reg. 20848, 20893 and 20904 (Apr. 7, 1981).

⁴⁶Truth in Lending; Revised Regulation Z, 46 Fed. Reg. 20848, 20884 (Apr. 7, 1981) (emphasis added).

Affairs, signed August 21, 2003, which asks debtors to disclose where they were residing during the two years prior to filing, indicates that he lived at 1107 SW Osborne, Topeka, Kansas from “6-01 to Present,” and 113 West Hall Avenue, Burlingame, Kansas from “02-03 to Present.” Neither of these addresses match the address of the real property that Household refinanced (5300 SW 12th).

Because the location of Mr. Cushing’s “principal residence” is critical to whether he was entitled to certain disclosures, Household has understandably seized on the Cushings’ original sworn statement to conclude that Mr. Cushing was not residing with Ms. Cushing in the 12th Street property when the refinancing closed. Debtors responded to this inconsistency by amending their Statement of Financial Affairs, on November 4, 2004, to indicate that Mr. Cushing moved out of the 12th Street property on May 26, 2003, and into the Osborne property the next day. This would mean that the refinanced property was his principal dwelling on the date of the refinancing transaction with Household. Debtors’ brief suggests this was merely a petition drafting error of no consequence, and because Household has no information to refute the Cushings’ sworn affidavits, which say Mr. Cushing moved from the residence May 26, 2003, a month after the transaction was closed with Household, there is no genuine issue.

It is certainly possible that the Cushings’ affidavits on the issue of Mr. Cushing’s principal residence are true, and their original Statement of Financial Affairs was a mere scrivener’s error, given their divorce date of September 18, 2003. The Court can take judicial notice that it is common for divorcing spouses to physically separate residences pending a divorce, although no party has provided this Court the date the divorce was filed, only a case number with an “03” prefix. Further, the evidence reflects that the Cushings paid their monthly mortgage payments to Household with a joint checking account, which included both

their names, until the payment of June 10, 2003. That check, paid less than two weeks after both Cushings now swear Mr. Cushing moved away, was paid from an account in Lisa Cushing's name only.

Debtors also argue, in their responsive brief, that "06-01" actually meant June 1 of 2003—the year of the bankruptcy petition, presumably the closest month to the date he left the home. This is also believable, because the question specifically asks about addresses where Debtors resided within two years of the date of filing. June 2001 is more than two years after the date of filing, and Debtors would not have even been required to disclose that address in their Statement of Financial Affairs.

But the Court is speculating in suggesting that one of the Cushings' sworn statements is more believable than another, contradictory, sworn statement. Further, the Cushings didn't even try to explain away the sworn statement saying Mr. Cushing was living in a Burlingame, Kansas address from "02-03 to Present," and that is important, because the Household transaction occurred during that time period. Accordingly, the Court finds that there is a genuine issue of material fact as to the location of Mr. Cushing's principal residence on the date this transaction was closed, and that Household should be entitled to cross-examine Debtors about their conflicting sworn testimony.

IV. CONCLUSION

For the reasons set forth above, the Court finds that Plaintiffs' Motion for Partial Summary Judgment on the issue of whether they have an extended right to rescind must be denied. The Court finds that the TILA disclosures made by Household satisfy the requirements of the TILA and Regulation Z, despite their variance from the model forms authorized by the Fed. Factual issues remain, however, as to whether Mr. Cushing was entitled to rescind the transaction, and thus whether he was entitled to receive a copy of the TILA disclosures and two copies of the notice of his right to rescind, and whether the

Cushings actually received the appropriate number of copies of the notice of the right to rescind the transaction. These factual issues preclude summary judgment.

IT IS, THEREFORE, BY THIS COURT ORDERED that Plaintiffs' Motion for Partial Summary Judgment (Extended Right to Rescind) is denied. Furthermore, the Court does not accept Household's invitation to decide, at this juncture, what rights and obligations Plaintiffs may have if they ultimately prevail in their TILA action. That issue is expressly not the subject of Plaintiff's partial summary judgment motion. In addition, that issue is presently being litigated in two appeals in two District Courts, and the parties to those proceedings claim they will appeal any adverse ruling to the Tenth Circuit Court of Appeals. This Court has stayed the resolution of the "remedy" issue in several cases, pending guidance from the Circuit. Accordingly, this issue is not today addressed or resolved.

IT IS FURTHER ORDERED that the trial of the liability issues in this case is set to a two-day stacked docket beginning **March 15, 2005**. The Court will contact counsel for the parties to set the exact date and time for trial.

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