UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIAN and HOLLY SILCOX,

Plaintiffs,

File No. 5:04-CV-37

v.

HON. ROBERT HOLMES BELL

COUNTRYWIDE HOME LOANS, INC.,

Defendant.
_____/

O P I N I O N

Plaintiffs Brian and Holly Silcox (collectively "Plaintiffs") seek recision of two mortgage loan transactions they entered into with Defendant Countrywide Home Loans, Inc. ("Defendant"), a declaration that Defendant's security interest in their home is void, and other monetary damages based upon numerous alleged violations of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.* Before the Court are the parties' cross-motions for summary judgment. Plaintiffs' seek summary judgment on the issue of Defendant's liability for the alleged TILA violations. Defendant seeks dismissal of Plaintiffs' claims in their entirety. For the reasons set forth more fully below, the Court will deny Plaintiffs' motion for summary judgment and grant in part and deny in part Defendant's motion for summary judgment.

I.

This dispute arises out of two mortgage loans entered into between Plaintiffs and Defendant. The first loan was a home equity line of credit entered into in April 2002. After refinancing their home with Defendant in January 2002 (a loan not at issue in this case), Plaintiffs again approached Defendant for a home equity credit line in April 2002 (the "April 2002 home equity loan"). As is customary at a real estate closing, Plaintiffs signed numerous forms in order to complete the loan transaction. Among the documents signed was a Notice of Right to Cancel informing the borrowers of their right to cancel the transaction. The Notice of Right to Cancel also contained an acknowledgment by the borrowers that they each received two copies of the Notice of Right to Cancel and one copy of the Truth in Lending Disclosure Statement. Also included in the loan documents were two Housing & Urban Development Settlement Statements ("HUD-1 Settlement Statements") detailing the settlement costs of the home equity loan. One HUD-1 Settlement Statement stated that the Plaintiffs received $10,415 cash from the transaction, the other provided that they received $3,415. At the end of the closing Plaintiffs received a folder from the closing agent, Michigan Mortgage Services Inc. ("Michigan Mortgage"), containing their copies of the loan documents. According to Mrs. Silcox, she brought the file folder home and placed it in a file drawer without looking at the contents of the folder. Thereafter, the folder was moved to Plaintiffs' basement for storage where it remained until they consulted an attorney regarding their financial difficulties.

The second loan at issue in this case was a mortgage refinancing entered into on March 26, 2003 (the "March 2003 refinancing loan"). As part of this transaction a HUD-1 Settlement Statement was prepared which stated that the settlement charges included a $250 closing fee and a $50 overnight & copy fee. In the Truth in Lending Disclosure Statement, however, the Itemization of Amount Financed stated that the closing fee was $500 and the copy fee was $30. The amounts stated in the HUD-1 Settlement Statement were the correct charges. The incorrect closing and copy fees were used to calculate the finance charge, amount financed, and annual percentage rate ("APR"). This misstatement on the Itemization of Amount Financed resulted in an overstated finance charge as well as an understated amount financed and APR. As in the previous transaction, Plaintiffs signed a Notice of Right to Cancel acknowledging that they each received two copies of the Notice of Right to Cancel and one copy of the Truth in Lending Disclosure Statement. Again at the end of the closing, Plaintiffs received a file folder of the loan documents which they brought home, placed in their file cabinet, and eventually moved to their basement for storage.

According to Plaintiffs, no one accessed the file folders after they received them at each closing until they brought the folders to their attorney's office. Plaintiffs made payments on the two loans until early 2004. On February 25, 2004 Plaintiffs attempted to rescind both loans by sending Defendant a notice of rescission. Defendant did not take any action in response to the notice and this litigation followed.

Plaintiffs allege a variety of Truth in Lending Act violations resulting from both the April 2002 home equity loan and the March 2003 refinancing loan. Common to both loans is the allegation that, despite their acknowledgment in the Notice of Right to Cancel, they did not receive the proper amount of copies of the Notice of Right to Cancel and the Truth in Lending Disclosure Statement. They also contend that the Notice of Right to Cancel for both loans is defective because it does not clearly state that Mr. Silcox has a right to rescind. Specifically regarding the April 2002 loan, Plaintiffs assert that the two inconsistent HUD-1 Settlement Statements are a violation of the TILA. As for the March 2003 refinancing loan, Plaintiffs contend that Defendant violated the TILA by providing inconsistent figures in the HUD-1 Settlement Statement and Itemization of Amount Financed and by providing incorrect figures for the APR, amount financed, and finance charge in the Truth in Lending Disclosure Statement. Before the Court are the parties cross-motions for summary judgment.

II.

The standards upon which the Court evaluates a motion for summary judgment do not change simply because the parties present cross-motions. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). "The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts." *Id.* (quoting *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987).

Summary judgment is appropriate where "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). An issue concerning a material fact is genuine if the record as a whole could lead a reasonable trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"On summary judgment, all reasonable inferences drawn from the evidence must be viewed in the light most favorable to the parties opposing the motion." *Hanover Ins. Co. v. American Engineering Co.*, 33 F.3d 727, 730 (6th Cir. 1994) (citing *Matsushita*, 475 U.S. at 586-88). Nevertheless, the mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id. See generally, Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989).

III.

The TILA, 15 U.S.C. § 1601, *et. seq.*, was enacted to promote the informed use of credit by assuring meaningful disclosure of credit terms to consumers. *See generally,* 15 U.S.C. § 1601(a); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559 (1980); *Baker v. Sunny Chevrolet, Inc.*, 349 F.3d 862, 864 (6th Cir. 2003). The TILA is a remedial statute that must be given a broad, liberal construction in favor of the consumer. *Begala v. PNC Bank,*

163 F.3d 948, 950 (6th Cir. 1998); *Jones v. TransOhio Sav. Ass'n*, 747 F.2d 1037, 1040 (6th Cir. 1984). Creditors must strictly comply with the TILA requirements. *Begala*, 163 F.3d at 950 (citing *Purtle v. Eldridge Auto Sales*, 91 F.3d 797, 801 (6th Cir. 1996)). Also relevant to this case are certain provisions of Regulation Z, the implementing regulation of the TILA promulgated by the Federal Reserve Board. *See* 12 C.F.R. § 226.1; *Milhollin*, 444 U.S. at 560-61. Because this case involves numerous alleged TILA violations in two different loan transactions, the Court will consider each loan separately.

A. The April 2002 Home Equity Line of Credit

Plaintiffs allege three violations of the TILA stemming from the April 2002 home equity loan. They contend the receipt of two inconsistent HUD-1 Settlement Statements is a TILA violation, the Notice of Right to Cancel was defective because it did not state that Mr. Silcox had a right to cancel the loan, and that they did not each receive the required number of copies of the Notice of Right to Cancel.

1. Inconsistent HUD-1 Settlement Statements

The Court turns first to Plaintiffs' allegation that the receipt of two inconsistent HUD-1 Settlement Statements is a TILA violation. Defendant contends that this claim is not actionable because HUD-1 Settlement Statements are governed by the Real Estate Settlement Procedures Act ("RESPA"), which does not provide for a private right of action. Therefore, Defendant argues that Plaintiffs are attempting to "bootstrap an arguable violation of

Regulation X . . . into a TILA violation." *Brannam v. Huntington Mortgage Co.*, 287 F.3d 601, 604 (6th Cir. 2002).

Defendant's argument appears well taken. RESPA was enacted to provide effective advance disclosure of settlement costs to home buyers and sellers, as well as to eliminate the costs of settlement services and reduce the amounts required to be placed in escrow accounts for the payment of real estate taxes. *See* 12 U.S.C. § 2601(b). To effectuate these purposes, Congress mandated that the Secretary of Housing and Urban Development develop a standard form for the statement of settlement costs which was to be used in all real estate transactions involving federally related mortgage loans. 12 U.S.C. § 2603(a). The HUD-1 Settlement Statement was created as the required standard form for settlement of federally related mortgage loans. 24 C.F.R. § 3500.8.

Although Plaintiffs contend that the inconsistencies in the two HUD-1 Settlement Statements constitute violations of the TILA, they have not pointed to any statute, regulation, or case supporting their position. The HUD-1 Settlement Statement was created and is governed by the provisions of RESPA and Regulation X, not the TILA. Although inconsistencies in the HUD-1 Settlement Statement may arguably be a violation of Regulation X, there is no private right of action upon which Plaintiffs can seek relief. *See Brannam*, 287 F.3d at 604. Accordingly, the Court grants Defendant's motion for summary

judgment on Plaintiffs' claim that the two inconsistent HUD-1 Settlement Statements violated the TILA.[1]

2. The "Defective" Notice of Right to Cancel

The Court now turns to Plaintiffs' second ground for relief, the allegation that the Notice of Right to Cancel was defective because it did not expressly provide that Mr. Silcox had a right to rescind the loan. The TILA and Regulation Z require that certain disclosures must be made to the borrowers. These disclosures include that the borrower has the right to rescind, how to exercise that right, the date the recission period expires, and the effect of rescission. *See* 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(b)(1). Regulation Z also provides "each consumer whose ownership interest is subject to a security interest shall have the right to rescind the transaction." 12 C.F.R. § 226.23(b)(1). The creditor must also provide a form for exercising the right to rescind. *Id*. In order to satisfy these disclosure requirements the creditor should use one of the model forms provided by the Federal Reserve Board. 12 C.F.R. § 226.23(b)(2). Neither party disputes that Mr. Silcox has an ownership interest in the home subject to the April 2002 home equity loan, and therefore had a right to rescind the

[1]Plaintiffs appear to rely on *In re Ralls*, 230 B.R. 508 (Bankr. E.D. Pa. 1999) to argue that inconsistent HUD-1 Settlement Statements are a TILA violation. *In re Ralls* does not assist Plaintiffs' position. *In re Ralls* confronted the issue of whether the disclosures in the Truth in Lending Disclosure Statement sufficiently provided the disclosures required by the TILA. 230 B.R. at 514-15. That is not the issue in this case. Plaintiffs do not allege that the Truth in Lending Disclosure Statement violated the TILA. Rather, they argue that inconsistencies in two documents not governed by the TILA, constitute a TILA violation.

transaction. The parties dispute whether the Notice of Right to Cancel provided to Plaintiffs adequately informed Mr. Silcox of his rescission rights.

Both sides have provided the Court with a copy of the Notice of Right to Cancel used in the April 23, 2002 loan transaction. *See* Exhibit D attached to Defendant's Motion for Summary Judgment and Exhibit 2 attached to Plaintiffs' Response and Cross Motion for Summary Judgment. The Court notes that Defendant used the model Notice of Right to Cancel form provided in 12 C.F.R. § 226, Appendix H-8, with only a few modifications. In the upper left corner of the form under the borrower heading it states "Holly Silcox." In the middle of the form there is a box providing directions for how to cancel the loan and a single signature line below the phrase "I WISH TO CANCEL," in bold type. Finally, at the bottom of the form there are signature lines for up to four "Borrower/Owners." Below the first signature line, where Mrs. Silcox's signature appears, in computer type is "HOLLY A. SILCOX." Below Mr. Silcox's signature there is only "Borrower/Owner." Directly above the signature block Defendant inserted the following two sentences: "Each borrower/owner in this transaction has the right to cancel. The exercise of this right by one borrower/owner shall be effective to all borrowers/owners." *See* Exhibit D and Exhibit 2.

Plaintiffs argue that the Notice of Right to Cancel does not indicate that Mr. Silcox has the right to rescind. They rely on the two sections of the form where Holly Silcox's name is printed as well as the fact that the box containing the directions for cancellation has only one signature line below the words "*I* WISH TO CANCEL." Exhibit D (emphasis added).

Plaintiffs reason that because Mr. Silcox's name does not appear on the form, it is defective. Arguably, when viewed in isolation, these aspects of the form appear to only provide Mrs. Silcox with the right to cancel. She is the only person listed as a borrower, her name is the only name printed in the signature block at the end of the document, and there is only one signature line in the area used to cancel the loan.

Plaintiffs contend *In re Apgar*, 291 B.R. 665 (Bankr. E.D. Pa. 2003), is instructive on the disposition of this case. In *In re Apgar*, a husband and wife both signed a Notice of Right to Cancel when entering into a mortgage loan, even though the husband was the borrower in the transaction. 291 B.R. at 672-73. Similar to this case, the creditor in *In re Apgar* used the model form provided in Appendix H-8. The creditor, however, made two alterations to the form, typing the husband's name below the signature line in the box used to exercise the right to cancel and adding an acknowledgment of receipt of the requisite number of copies of the right to cancel. *Id*. The bankruptcy court held that the placement of the husband's name below the signature line used to exercise the right to cancel rendered the notice unclear and thus a TILA violation. *Id*. at 673-74. The Silcoxs' contend that the form they received was similarly ambiguous and therefore constitutes a TILA violation.

Plaintiffs reliance upon *In re Apgar* is misplaced. The form used in that case was rendered ambiguous because the creditor only typed the husband's name below the signature line specifying that "I WISH TO CANCEL." Such a modification does render the form unclear because it indicates that only that person may exercise the right to cancel. In this

case, however, Defendant did not modify that area of the model form. Further, *In re Apgar* is not applicable because Defendant made an additional modification clarifying that both Mr. and Mrs. Silcox had the right to cancel. Directly above the signature block containing the signatures of Mr. and Mrs. Silcox, Defendant inserted the phrase, "[e]ach borrower/owner in this transaction has the right to cancel." Exhibit D and Exhibit 2. This language clearly and unequivocally clarifies that the right to cancel belongs to both the borrower (Mrs. Silcox) as well as any other owner of the encumbered property, in this case, Mr. Silcox. Plaintiffs' argument that the Notice of Right to Cancel is defective because it only has a single signature line in the cancellation box is also unavailing. Defendant modified the model form to include "[t]he exercise of this right [to cancel] by one borrower/owner shall be effective to all borrowers/owners." *Id*. Therefore, it was not necessary to provide more than one signature line for the right to cancel because the exercise of the right by either Mr. Silcox or Mrs. Silcox would be effective as to both of them.

After reviewing the Notice of Right to Cancel, the Court concludes that Plaintiffs' contention that "a reading of that Notice would lead one to believe that Mr. Silcox did not have any cancellation right, any more than any other person on earth who is not named on the notice," is quite an exaggeration. Plaintiffs' Response and Cross-Motion for Summary Judgment at 6. Defendant used a model form. *See* 15 U.S.C. § 1604(b) ("A creditor or lessor shall be deemed to be in compliance with the disclosure provisions of this subchapter . . . if the creditor or lessor (1) uses any appropriate model form or clause as published by the

Board."). Further, Defendant's modifications served to "clearly and conspicuously" disclose that both Mr. and Mrs. Silcox had the right to cancel as required by 15 U.S.C. § 1632(a). The modifications serve to limit the disclosure of the right to cancel as well as the power to exercise that right to the borrower and any owner of the encumbered real estate. This complies with the TILA disclosure requirements. *See* 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(b)(1). Accordingly, Plaintiffs' motion for summary judgment on the issue of defective notice to Mr. Silcox of his right to cancel is denied and the Court grants summary judgment to Defendant on this issue.[2]

3. Receipt of the Proper Number of Copies of the Notice of Right to Cancel

The only issue that remains regarding the April 2002 home equity loan is the relatively minor one of the number of copies provided to Plaintiffs at the closing. There is no dispute that Plaintiffs were notified of their right to rescind the loan, they acknowledge that they received a copy of the right to cancel. Their argument, however, is that they did not receive three extra copies as required by 15 U.S.C. § 1635 and 12 C.F.R § 226.23(b)(1). Because both Plaintiffs owned the home subject to the loan, § 226.23(b)(1) requires that they receive four copies in total of the Notice of Right to Cancel. Although it seems trivial, the technical

[2]The Silcoxs have also raised this defective notice claim in the March 2003 refinancing loan. The Notice of Right to Cancel used in the March 2003 refinancing loan is nearly identical to the form used in the April loan in all material respects. *Compare* Exhibit D and Exhibit 2 *with* Exhibit H and Exhibit 5. Accordingly, Plaintiffs' motion for summary judgment on the defective notice in the March 2003 refinancing loan is similarly denied and Defendant is granted summary judgment on this issue.

requirements of the TILA must be strictly complied with. *See e.g., Kocsis v. Pierce*, 192 Mich. App. 92, 480 N.W.2d 598 (1991) (holding that lenders' failure to provide a second copy of the notice of the right to rescind to each plaintiff was an actionable violation).

At the April 2002 closing, Plaintiffs both signed a Notice of Right to Cancel acknowledging that each of them received two copies of the Notice of Right to Cancel and one copy of the Truth in Lending Disclosure Statement. Exhibit D attached to Defendant's Brief. Under 15 U.S.C. § 1635(c), this acknowledgment of receipt creates a rebuttable presumption that the correct number of copies were delivered. The burden now shifts to Plaintiffs to come forward with evidence that they did not receive the required number of copies. *See Jackson v. New Century Mortgage Corp.*, 320 F. Supp.2d 608, 611 (E.D. Mich. 2004).

Plaintiffs respond by offering an affidavit stating that they received only one copy of the Notice of Right to Cancel. Exhibit 1 Affidavit of Brian and Holly Silcox at ¶ 5 attached to Plaintiffs' Response and Cross-Motion for Summary Judgment. They also state that the folder they received at the closing remained in their file cabinet and basement until they visited their attorney. *Id.* at ¶ 11. They contend their affidavit rebuts the presumption of delivery. In support Plaintiffs cite this Court's decision in *Stone v. Mehlberg*, 728 F. Supp. 1341 (W.D. Mich. 1989) (Hillman, J.). In *Stone*, the Court granted summary judgment to plaintiffs, a husband and wife, on their claim that they did not each receive two copies of their rescission rights. 728 F. Supp. at 1354. The Court held that plaintiffs' uncontroverted

affidavit stating that they did not receive two copies of their rescission rights rebutted the presumption of delivery raised by their written acknowledgment of receipt. *Id*. at 1353-54. Further, because defendant failed to respond with evidence that delivery in fact occurred, the Court granted summary judgment to the plaintiffs. *Id*. In this case, Plaintiffs argue that their affidavit rebuts the presumption of delivery and places the burden back upon Defendant to produce additional evidence of delivery. *Id*.

Defendant responds with two affidavits from employees of Michigan Mortgage, the closing agent who conducted the April 2002 closing. Affidavit of Robert Sabourin and Affidavit of Donna Dittenber, Exhibits 1 and 2 attached to Defendant's Response and Reply to Plaintiff's Cross-Motion for Summary Judgment. The affidavits set forth Michigan Mortgage's closing procedures for residential mortgage loans. Affidavit of Robert Sabourin at ¶ 5. According to Sabourin, prior to a closing, Michigan Mortgage prepares a closing folder for the borrowers that includes two copies of the Notice of Right to Cancel for each person with an interest in the property. *Id*. at ¶ 5. Further, according to Dittenber she conducted the April 2002 closing with Plaintiffs according to Michigan Mortgage's procedures and provided Plaintiffs with a folder of all documents they were entitled to receive. Affidavit of Donna Dittenber at ¶ 4. Defendants also contend that Plaintiffs have failed to rebut the statutory presumption of delivery because their affidavit is contradicted by their own prior deposition testimony. *See* Depositions of Brian Silcox and Holly Silcox attached to Defendant's Reply and Response Brief at Exhibits 3 and 4.

After reviewing the affidavits and depositions in this case, the Court holds that this issue cannot be disposed of on summary judgment. This is a close case but in light of the fact that the Court must draw all reasonable inferences in Plaintiffs' favor on Defendant's motion for summary judgment and this circuit's policy of liberally construing the TILA in the consumers' favor, the Court must deny summary judgment. *Begala*, 163 F.3d at 950; *Hanover Ins. Co.*, 33 F.3d at 730 (citing *Matsushita*, 475 U.S. at 586-88). While Plaintiffs' deposition testimony raises some doubt as to the validity of the claims made in their affidavit, it does not render them incredible. Thus, Plaintiffs' affidavit rebuts the presumption of delivery raised by their acknowledgment of receipt. *Stone*, 728 F. Supp. at 1354. But, unlike *Stone*, it does not entitle Plaintiffs to summary judgment because Defendant submitted the affidavits of Sabourin and Dittenber controverting Plaintiffs' claims.

At bottom, the Court is confronted with a situation in which both side's evidence is flawed. Plaintiffs are asserting that they did not receive the correct number of copies at the closing because the documents are not now, over two years later, in the folder they received at the closing. Thus, they are inferring that because the documents are not in the folder now, they must have never been in the folder. This is possible. But it is also possible that they received the extra copies of the Notice of Right to Cancel at the closing and have since lost them. Further, the affidavits offered by Defendant are flawed because they infer that Plaintiffs received the proper number of copies because the closing agent has a procedure for insuring that the correct number of copies are made and they always follow their procedure

at mortgage closings. This inference is possible as well. Thus, a trial on this issue is necessary. There is a factual dispute that the Court cannot resolve without assessing the credibility of witnesses, a task it cannot engage in on summary judgment. *See Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 181, 186 (6th Cir. 1993) ("Where the district court must assess the relative credibility of witnesses, the case is particularly inappropriate for summary judgment and requires a full hearing on the merits.") (quoting *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 909 (6th Cir. 1982)). Accordingly both parties' motions for summary judgment on this issue are denied.

B. The March 2003 Refinancing Loan

The violations specific to the March 2003 refinancing loan involve the inconsistency between the HUD-1 Settlement Statement and the Itemization of Amount Financed. Plaintiffs contend that Defendant violated the TILA because the HUD-1 Settlement Statement and the Itemization of Amount Financed were not identical. They also assert a violation based upon Defendant's use of the incorrect amounts listed in the Itemization of Amount Financed for "closing fee" and "copy fee" to calculate the required disclosures in the Truth in Lending Disclosure Statement, resulting in the APR, amount financed, and finance charge being incorrect. Defendant first contends that Plaintiffs do not have a right to rescind the loan under the TILA because it was a refinancing transaction.

Under the TILA, a borrower in a consumer credit transaction in which a security interest is taken on their principal dwelling has a right to rescind the transaction. *See* 15

U.S.C. § 1635(a). The statute, however, exempts certain transactions from this right, including a refinancing transaction. *See* 15 U.S.C. § 1635(e)(2) ("This section does not apply to . . . (2) a transaction which constitutes a refinancing or consolidation (with no new advances) . . . .). Regulation Z clarifies this exemption:

> "[t]he right to rescind does not apply to the following . . . (2) A refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling. The right of rescission shall apply, however, to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation."

12 C.F.R. § 226.23(f)(2). The parties do not dispute that the March 2003 loan was a refinancing of Plaintiffs' January 2002 mortgage with Defendant. *See* Exhibit A (Jan. 2002 mortgage note) and Exhibit G (March 2003 HUD-1 Settlement Statement) attached to Defendant's Motion for Summary Judgment. The parties, however, do dispute whether there has been a "new advance" in the March 2003 refinancing loan that would trigger the right to rescind.

Plaintiffs argue that the March 2003 refinancing loan provided a new advance for city and county taxes that made the transaction rescindable. *See* Exhibit G attached to Defendant's Motion for Summary Judgment. The amounts for city and county taxes appear in the HUD-1 Settlement Statement as part of the Settlement Charges under the heading "Reserves Deposited with Lender." *Id*. While Plaintiffs contend that the city and county taxes are new advances, they do not cite any authority for this proposition. Indeed, it appears

to the Court that this money is not considered a new advance under the Federal Reserve Board's interpretation of Regulation Z.[3]

In the Federal Reserve Board's official staff interpretation of the right of rescission under § 226.23 it states "[f]or purposes of the right of rescission, a new advance does not include amounts attributed solely to the costs of the refinancing. These amounts would include § 226.4(c)(7) charges . . . as well as insurance premiums and other charges that are not finance charges." 12 C.F.R. pt. 226 Supp. I, § 226.23. Among the charges listed in § 226.4(c)(7) are "[a]mounts required to be paid into escrow or trustee accounts if the amounts would not otherwise be included in the finance charge." 12 C.F.R. § 226.4(c)(7)(v). Finally, 15 U.S.C. § 1605(e)(3) provides that when "escrows for future payments of taxes and insurance" are charged, they are not included in the finance charge of the transaction. 15 U.S.C. § 1605(e)(3).

According to the above statutes and regulations, the city and county taxes were "amounts attributed solely to the costs of refinancing" because they were placed in escrow for future payment of taxes and were not included in the finance charge. Therefore they were not a "new advance" as a matter of law. *See* 12 C.F.R. pt. 226 Supp. I, § 226.23. Plaintiffs do not assert that other charges detailed in the HUD-1 Settlement Statement constitute "new

[3]The Supreme Court has held that it is proper for courts to look to the interpretation of a statute given by the administrative agency charged with the statute's administration, especially in the context of the Federal Reserve Board's interpretation of the TILA and Regulation Z. *See Milhollin*, 444 U.S. at 566.

advances." Therefore, because the March 2003 refinancing loan did not involve any new advances, it is non-rescindable as a matter of law. *See* 15 U.S.C. 1635(e)(2); 12 C.F.R. § 226.23(f)(2).

Plaintiffs contend that Defendant should be estopped from arguing that the March 2003 refinancing loan was non-rescindable because Defendant provided them with a Notice of Right to Cancel stating that they had three days to rescind the transaction. The provision of the Notice of Right to Cancel, however, is a nullity because this was a non-rescindable refinancing transaction as a matter of law. As such, Plaintiffs never had a right to rescind the transaction. Any argument that they received notice is rendered moot by operation of the statute and Regulation Z. Accordingly, the Court denies Plaintiffs' motion for summary judgment seeking rescission of the March 2003 refinancing loan and grants Defendant's motion for summary judgment on this issue.[4]

[4]The Court also notes that, based upon its ruling, Plaintiffs' argument that they did not receive the proper number of copies of the Notice of Right to Cancel at the March 2003 closing is moot because they did not have a right to rescind as a matter of law. Therefore, Plaintiff cannot obtain rescission based on receipt of an insufficient number of copies of the Notice of Right to Cancel. Accordingly, the Court grants Countrywide's motion for summary judgment on this issue and denies the Silcoxs' motion for summary judgment. Plaintiffs, however, have also alleged that they did not receive the proper number of copies of the Truth in Lending Disclosure Statement. Although they are not entitled to rescission on this basis, they may be entitled to statutory and actual damages from this alleged violation. The Court's analysis regarding the receipt of the Notice of Right to Cancel in the April 2002 home equity loan applies to this loan as well. Therefore, this minor claim survives summary judgment.

Plaintiffs have requested that, in the event the Court holds that the March 2003 refinancing loan is non-rescindable, they be permitted to amend their Complaint to rescind the original mortgage loan made to them by Countrywide in January 2002. They contend that the January 2002 loan used the same "defective" Notice of Right to Cancel as the two transactions at issue in this case. The Court has reviewed the Notice of Right to Cancel for the January 2002 loan. Exhibit 8 attached to Plaintiffs' Reply Brief. It is identical in all material respects to the notices at issue in this case. Therefore, because the Court has held in this opinion that the Notice of Right to Cancel is not defective, it would be futile for the Plaintiffs' to amend their Complaint to assert a claim on this basis for the January 2002 loan.

Plaintiffs also claim Defendant violated the TILA by providing a HUD-1 Settlement Statement and Itemization of Amount Financed that were not identical. Further, they argue that Countrywide violated the TILA by using the incorrect amounts in the Itemization of Amount Financed to compute the APR, amount financed, and finance charge.

Plaintiffs' first claim based upon the inconsistencies between the HUD-1 Settlement Statement and the Itemization of Amount Financed is without merit. The TILA and Regulation Z require that certain material disclosures such as amount financed, finance charge, and the APR be made to the consumers. *See* 15 U.S.C. § 1602(u); 12 C.F.R. § 226.18(a)-(f). In residential mortgage transactions subject to RESPA, 12 C.F.R. § 226.19 provides "the creditor shall make good faith estimates of the disclosures required by § 226.18 . . . ." RESPA applies to "any loan . . . secured by a first or subordinate lien on residential

real property . . . designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property." 12 U.S.C. § 2602(1)(A). The March 2003 refinancing loan clearly was subject to RESPA. Therefore under § 226.19, Defendant was only required to make good faith estimates of the required disclosures. Nothing in the statute or regulation requires that the HUD-1 Settlement Statement and the Itemization of the Amount Financed be identical. Accordingly, Plaintiffs' cannot prevail on their claim that Defendant violated the TILA based upon the inconsistencies between the HUD-1 Settlement Statement and the Itemization of Amount Financed.

Plaintiffs' other claim, that Defendant's use of the incorrect figures in the Itemization of Amount Financed is a TILA violation, is also not actionable. There is no dispute that Defendant improperly computed the finance charge, amount financed, and APR by using an incorrect closing and copy fee. Both parties agree this error resulted in an overstated finance charge and an understated amount financed and APR.

In asserting that this is a violation of the TILA, Plaintiffs overlook the TILA's tolerance provision. *See* 15 U.S.C. § 1605(f)(1). Section 1605(f)(1) provides:

> (f) Tolerances for accuracy. In connection with credit transactions not under an open end credit plan that are secured by real property or a dwelling, the disclosure of the finance charge and other disclosures affected by any finance charge –
> (1) shall be treated as being accurate for purposes of this subchapter if the amount disclosed as the finance charge –
>
> . . . .
>
> (B) is greater than the amount required to be disclosed under this title.

15 U.S.C. § 1605(f)(1)(B). Further, Regulation Z amplifies the tolerance provision in § 1605(f)(1):

> (1) Mortgage Loans. In a transaction secured by real property or a dwelling, the disclosed finance charge and other disclosures affected by the disclosed finance charge (*including the amount financed and the annual percentage rate*) shall be treated as accurate if the amount disclosed as the finance charge:
>
> . . . .
>
> (ii) is greater than the amount required to be disclosed.

12 C.F.R. § 226.18(d)(1)(ii) (emphasis added). In this case, as a matter of law, Plaintiffs' claim is not actionable because the tolerance rule applies. The finance charge was overstated on the Itemization of Amount Financed. This overstatement resulted in the amount financed and APR being incorrect as well. According to the TILA and Regulation Z, however, the finance charge and the amount financed and annual percentage rate are considered accurate because the amount disclosed as the finance charge is greater than the amount required to be disclosed. *See* 15 U.S.C. § 1605(f)(1); 12 C.F.R. 226.18(d)(1). Indeed, this Court has previously held that where a finance charge is overstated the tolerance provisions apply rendering it not actionable. *See Vandenbroeck v. Commonpoint Mtg. Co.*, 22 F. Supp.2d 677, 687-88 (W.D. Mich. 1998) (Quist, J.). Plaintiffs attempts to distinguish their case from the operation of the tolerance rule and *Vandenbroeck* are unavailing.[5] Accordingly, the Court

[5]Moreover, their citation to *In re Ralls*, also does not assist their case. *In re Ralls* did not address the tolerance provisions because the finance charge in that case was understated. 230 B.R. at 516. In this case, the tolerance provisions clearly apply.

denies Plaintiffs' motion for summary judgment and grants Defendant's motion for summary judgment on Plaintiffs' alleged TILA violations in the March 2003 refinancing loan.

IV.

Accordingly, the Court denies Plaintiffs' motion for summary judgment and grants in part and denies in part Defendant's motion for summary judgment. The only remaining claims are whether Plaintiffs received the required number of copies of the Notice of Right to Cancel and Truth in Lending Disclosure Statement at the April 2002 closing and whether they received the required number of copies of the Truth in Lending Disclosure Statement at the March 2003 closing. An order will be entered consistent with this opinion.

Date: April 6, 2005

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE