UNITED STATES BANKRUPTCY COURT
EASTERN DIVISION, DISTRICT OF MASSACHUSETTS

IN RE: Gary R. and Kimberly A. Marquis, DEBTORS	Chapter 13 Case No. 07-30528-HJB
Gary R. & Kimberly A. Marquis, Plaintiffs, v. Frement Lending Corporation, Manning Credit Management Corporation, New England Merchants Corp., Defendants.	ADVERSARY PROCEEDING No. 08-3008

Motion of Defendants, Frement Lending Corporation and Manning Credit Management Corporation, for Partial Summary Judgment
and
Memorandum in Support of Motion

Motion.

Defendants Frement Lending Corporation ("Frement") and Manning Credit Management Corporation ("Manning") move the Court to enter partial summary judgment in their favor on Counts I, II, III, IV, V, VI, VII, VIII, X and XII[1] of the Verified Complaint of plaintiffs Gary and Kimberly Marquis (collectively "the Marquis"). The grounds for this motion are set forth in the following memorandum.

[1] There is no Count XI of the Verified Complaint.

Memorandum.

Frement and Manning submit this memorandum of law in support of their motion for partial summary judgment. As more fully set forth below, this Court should grant their motion because the undisputed material facts entitle Frement and Manning to judgment as a matter of law.

1. Facts.

In and around September, 2006, the Marquis contacted New England Merchants Corp. ("NEM"), a loan broker, about refinancing their home located at 65 Hillcrest Drive, Bernardston, Massachusetts ("the Property").[2] Verified Complaint, Exhibit "S" to the Affidavit of Kevin P. Scanlon in Support of Frement Lending Corporation and Manning Credit Management Corporation's Motion for Partial Summary Judgment ("Scanlon Affidavit"), filed herewith, ¶16. At the time, the Marquis were experiencing financial difficulty and were having difficulty paying both a mortgage on the Property and a mortgage on investment property located at 105 L Street, Turners Falls, Massachusetts (the "Turners Falls property"), both held by Easthampton Savings Bank. Verified Complaint, ¶¶10-14. Easthampton Savings Bank had sent the Marquis foreclosure notices regarding both properties. Verified Complaint, Exhibit S, ¶15.

On or before October 31, 2006, Christopher Bartlett of NEM interviewed the Marquis by telephone and prepared both a "Good Faith Estimate [of Settlement Charges]" and a "Uniform Residential Loan Application" ("October 2006 Application"), both of which were signed by both Gary and Kimberly Marquis on October 31, 2006. See Gary Marquis' Deposition, Exhibit "A" to Scanlon Affidavit, pp. 89-91; Deposition of Kimberly A. Marquis ("Kimberly Marquis' Deposition"), Exhibit "B" to Scanlon Affidavit, p. 51; Good Faith Estimate, Exhibit "J" to the

[2] NEM was not an agent of Frement, nor was it affiliated with Frement in any way. NEM was an independent contractor simply looking for a lender on behalf of the Marquis. See Deposition of Gary R. Marquis ("Gary Marquis' Deposition"), Exhibit "A" to Scanlon Affidavit, p. 41.

Scanlon Affidavit; Uniform Residential Loan Application, Exhibit "I" to the Scanlon Affidavit. Both the Good Faith Estimate and the October 2006 Application indicated a proposed loan amount of $150,000 and a total proposed monthly payment of $1,871.13, consisting of $1,658.13 in principal and interest, $46 for hazard insurance escrow and $167 for real estate tax escrow. Id. The October 2006 Application also indicated that the loan was to have an adjustable rate (the "ARM" box was checked). See October 2006 Application, Exhibit I.

NEM submitted the Marquis' loan application to Frement. NEM then ordered an appraisal of the Property, which the Marquis paid for in the amount of $325. See Itemization of Amount Financed, Exhibit "H" to the Scanlon Affidavit. Frement approved the loan. The proposed loan, as represented in the Marquis' loan application, had a debt to income ratio of approximately 49%, indicating that the Marquis' income would be sufficient to cover the monthly payments. See October 2006 Application, Exhibit I. The Marquis also represented in the Application that they had a total gross income of $4,526.06. Id.

A closing was scheduled for December 14, 2006. Prior to the closing, Frement completed an analyses of whether the loan was a "high cost loan" subject to either Massachusetts G.L. c. 183C or the federal Home Owners Equity Protection Act ("HOEPA"). See "State High Cost Analysis," Exhibit "V" to the Scanlon Affidavit; "Section 32 Computation," Exhibit "W" to the Scanlon Affidavit. These analyses showed that the loan was not a high cost loan under either the Massachusetts or federal definitions.

The closing took place on December 14, 2006. Although the Marquis contend that the closing took place on a Saturday, December 14, 2006, was a Thursday. The closing was conducted by Amanda Florek, of Cater Law Offices, a firm chosen by NEM. At the closing, both Gary and Kimberly Marquis were presented, had the opportunity to review, and then signed

multiple documents, all dated December 14, 2006, including the following:

--"HUD-1 Settlement Statement," Exhibit "C" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, pp.74-75; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Addendum to HUD-1," Exhibit "D" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.80; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Certification Addendum to HUD-1 Settlement Statement," Exhibit "F" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.86; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Federal Truth-in-Lending Disclosure Statement" ("TILA Statement"), Exhibit "G" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.87; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Itemization of Amount Financed" with "Payoff Schedule," Exhibit H to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.88; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Good Faith Estimate of Settlement Charges," dated December 14, 2006, Exhibit "X" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.92; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Adjustable Rate Note," Exhibit "K" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.96; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Adjustable Rate Rider," Exhibit "L" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.97; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Mortgage," Exhibit "M" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.98; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Initial Escrow Account Disclosure Statement," Exhibit "N" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.99; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Payment Letter to Borrower," Exhibit "R" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.103; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Uniform Residential Loan Application" ("December 2006 Application") with

"Continuation Sheet/Residential Loan Application," Exhibit "P" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.100; Kimberly Marquis' Deposition, Exhibit B, p. 51);

--"Mortgage Loan Rate Lock Commitment," Exhibit "Q" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.102; Kimberly Marquis' Deposition, Exhibit B, p. 51); and

--"ARM Program Disclosure," Exhibit "O" to the Scanlon Affidavit (see also Gary Marquis' Deposition, Exhibit A, p.99-100; Kimberly Marquis' Deposition, Exhibit B, p. 51).

The Marquis admit that "the closing attorney might have pointed out the loan terms on the documents at closing." Verified Complaint, Exhibit S, ¶24.

The Marquis first payment of $1,903.59 was due on February 1, 2007. See Payment Letter to Borrower, Exhibit R. They never made a single payment. See Gary Marquis' Deposition, Exhibit A, p. 115; Kimberly Marquis' Deposition, Exhibit B, p. 125. Frement began foreclosure proceedings against the Marquis because they breached the terms and conditions of their mortgage.

On December 11, 2007, the Marquis filed a Petition for Relief under Chapter 13 of the United States Bankruptcy Code. Verified Complaint, Exhibit S, ¶49. On March 5, 2008, the Marquis commenced this Adversary Proceeding. Verified Complaint, Exhibit S.

2. Argument.

2.1 The standard for summary judgment.

A court should award summary judgment when "the record demonstrates that there is no genuine issue of material fact and that ... [the moving party is] entitled to judgment as a matter of

law."[3] The court must review the record in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor.[4]

2.2 This Court should enter summary judgment on Counts I and V of the Marquis' Verified Complaint, alleging fraud and negligent or intentional misrepresentation, because, even if their allegations were true, they cannot prove that their reliance, if any, was reasonable.

In Count I of their Verified Complaint, the Marquis claim that Manning and Frement are guilty of fraud because they induced the Marquis to enter into the loan by making false statements concerning the terms of the loan and the use of the loan proceeds. Count V, alleging negligent or intentional misrepresentation, is based on the same alleged misconduct. Both claims fail as a matter of law, however, because, the Marquis could not have reasonably relied upon Frement's allegedly false statements. The Marquis are, therefore, bound by the terms of the documents they signed.

2.2.1 Any reliance was unreasonable.

To state a claim for common law fraud, the plaintiff "must allege and prove that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to [her] damage." Masingill v. EMC Corp., 449 Mass. 532, 540 (2007) (Emphasis added). With regard to the reasonable reliance element of the claim, the Supreme Judicial Court recently stated:

> It is unreasonable as a matter of law to rely on prior oral representations that are (as a matter of fact) specifically contradicted by the terms of a written contract. This is a rule of long standing....

Id. at 541. (Emphasis added).

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[3] Devlin v. WSI Corporation, 833 F.Supp. 69, 73 (D. Mass. 1993). See also, LeBlanc v. Great American Insurance Company, 6 F.3d 836, 841 (1st Cir. 1993).

[4] LeBlanc, 6 F.3d at 841. See also, Hayes v. Douglas Dynamics, Inc., 8 F.3d 88, 90 (1st Cir. 1993).

In the present case, the Marquis claim: (1) that in their prior communications with the loan broker, they "got the impression" that the loan was to be for a term of 30 years with a fixed rate of "about 12%," but the loan actually had a variable rate (Verified Complaint, Exhibit S, ¶24); (2) by having them sign a "stipulation," which is not in evidence, Frement allegedly misrepresented to the Marquis that the loan proceeds would be used in part to pay off a $14,000 car loan (Id. at ¶19); (3) the closing attorney misrepresented to the Marquis that the payment of approximately $14,000 listed on the HUD-1 Settlement Statement was the payoff of the car loan (Id. at ¶27); and (4) the closing attorney misrepresented to them at the closing that the figure of about $1,600 listed on some closing documents represented their total monthly payment on the Frement loan, including principal, interest and escrows for insurance and taxes (Verified Complaint, Exhibit S to Scanlon Affidavit, ¶27). None of these alleged misrepresentations constitutes actionable fraud or misrepresentation.

With regard to the Marquis "impression" that they were getting a 30 year fixed rate loan, they admit that the closing attorney "might have pointed out the loan terms on the documents at closing." Id. at ¶24. Having conceded that the closing attorney attempted to alert them to the terms of their loan, the Marquis can hardly claim that the same attorney attempted to fraudulently conceal those same terms. Further, even if the closing attorney had not pointed out the terms of the loan, the Marquis could not have reasonably relied on their "impression" that they were getting a 30 year fixed rate loan when any such belief was specifically contradicted by the terms of the documents they were signing. Masingill, 449 Mass. at 541. The variable rate feature of the loan was set forth not just in the Note, but also in the Adjustable Rate Rider to the Mortgage, the federal Truth-in-Lending Disclosure Statement and the ARM Program Disclosure,

all of which the Marquis admit signing. See Kimberly Marquis' Deposition, Exhibit B, p. 51; supra, p. 3.

Nor could the Marquis have reasonably believed that the loan proceeds would be used to pay off their car loan, based either upon the so-called "stipulation" or on the closing attorney's alleged misrepresentation to that effect. Even a cursory review of the Itemization of Amount Financed or the HUD-1 Settlement Statement would have alerted the Marquis that the $14,180.98 payment was made to Easthampton Savings Bank, the lender on the Turners Falls mortgage, not to Wells Fargo, the holder of the car loan.[5] See Gary Marquis' Deposition, Exhibit A, p. 83 (where Gary Marquis testified that the HUD-1 did not contain a payoff to Wells Fargo); Letter, dated November 30, 2006, from Kroll, McNamara, Evans, & Delehanty, LLP to Christopher Bartlett of NE Merchant Corp., Exhibit "E" to the Scanlon Affidavit (the letter shows that $14,180.98 was the amount of the payoff of the Easthampton Savings Bank loan secured by the Turners Falls property).

Even a brief look at the documents would also have alerted the Marquis to the fact that the $1,658.13 amount listed on certain closing documents represented only the monthly payment of principal and interest, not the full monthly payment of principal, interest, and escrows for

[5] In her deposition, Kimberly Marquis also claimed that the payment of $6,889 to Commerce Bank listed on the Addendum to HUD-1, Exhibit D to the Scanlon Affidavit, was wrong and should not have been made because that car was owned solely by her ex-husband. She further claimed that at the closing she told the closing attorney that the payment should not be made and that the closing attorney agreed to correct the alleged error after the closing. Deposition of Kimberly Marquis, Exhibit B, pp.64-65. This claim, which was not asserted in the Verified Complaint, fails because the Marquis have offered no evidence establishing that title to the vehicle in question was solely in the name of Kimberly Marquis ex-husband on the closing date. The documents which she presented to the closing attorney indicate only that the Probate Court had ordered that title to the car was to be transferred to the ex-husband, not that the transfer had occurred.

Further, even assuming, for the sake of argument, that the closing attorney agreed that the payment would not be made to Commerce Bank and to correct the loan documents after the closing to reflect that they payment was not made, any such agreement obviously was conditional on the truth of the facts which Kimberly Marquis had presented to the closing attorney, namely that title to the car was solely in the ex-husband's name. Because the Marquis provided no evidence of this crucial fact, the closing attorney acted properly in making the payoff to Commerce Bank.

insurance and taxes. Their reliance, if any, on the closing attorney's alleged misstatement that the "1600 plus" was the full monthly payment was unreasonable as a mater of law. Multiple documents executed by the Marquis, both prior to and at the closing, made crystal clear that the total monthly payment was considerably in excess of $1,658. See Good Faith Estimate, Exhibit J and Payment Letter to Borrower, Exhibit R. October 31, 2006, six weeks prior to the closing, the Marquis signed a Good Faith Estimate which showed a total monthly payment of $1,871.13 and listed the principal and interest component of that payment as $1,658.13. See Good Faith Estimate, Exhibit J. On the same day, they signed a Uniform Residential Loan Application which listed the total monthly payment on their proposed loan as $1,871.13, again showing the principal and interest component of that payment as $1,658.13. See October 2006 Application, Exhibit I. At the closing, the Marquis signed an updated Good Faith Estimate of Settlement Charges showing a total payment of $1,903.59 per month and again showing the principal and interest component of that payment as $1,658.13. See Exhibit X. They also signed a Payment Letter To Borrower (Exhibit R) and Initial Escrow Account Disclosure Statement (Exhibit N) showing the same information. Having been alerted at least four times that the monthly payment was far more than $1,658, the Marquis simply could not reasonably rely on any alleged contrary statement made by the closing attorney.

2.2.2 The Marquis are bound by the documents they signed even if they failed to read them.

Although the Marquis claim that they failed to read the documents they signed because the closing was rushed, nothing prevented the Marquis from taking whatever time they needed to read the loan documents or from refusing to sign the documents until their questions were answered. As a matter of law, the Marquis are presumed to know and understand the contents of legal documents they sign. In Salois v. Dime Savings Bank of New York, FSB, 128 F.3d 20

(1st Cir. 1997), the plaintiff borrowers claimed that Dime had fraudulently concealed the terms of their loan, which led to negative amortization. Affirming the District Court's dismissal of the complaint, the United States Court of Appeals for the First Circuit stated:

> In this case, the inquiry is over before it begins. Regardless whether negative amortization was inevitable with Impact Loans, the documents contained all of the information necessary to determine the interaction of Dime's formula with prevailing interest rates. It was attorney consultation, rather than newly-discovered information, that prompted plaintiffs' lawsuit. Therefore, sufficient facts-indeed, *all* the facts-were available to place plaintiffs on inquiry notice of fraudulent conduct. Moreover, even if we regard plaintiffs' consultation with an attorney as "discovered" information that revealed Dime's alleged concealment, it cannot be said that plaintiffs were reasonable in waiting until 1994 to consult an attorney, when it was clear as early as 1988 that their loans had begun to accrue deferred interest. As the district court observed, "The loan documents notified plaintiffs of the possibility of negative amortization, when it would apply, and how it would work," so that even "[i]f [Dime] had misrepresented the nature of the loans, the loan documents plaintiffs signed would have put them on notice of the fraud."

Id. at 26. (Underlining added, italics in original). In a footnote, the Court continued:

> In addition, we note that, under Massachusetts law, "one who signs a writing that is designed to serve as a legal document ... is presumed to know its contents." ... Thus, as a matter of Massachusetts law, plaintiffs were on notice of their claims when they signed their loan documents in 1986 and 1987.

Id. at 26 n.10. (Emphasis added).

Similarly, in Collins v. Huculak, 57 Mass. App. Ct. 387 (2003), brothers whose father had required them to sign a deeds benefiting their sister claimed that the father had fraudulently induced them to sign the documents by telling them that the documents were "for the bank" and concealing that they were deeds. The Appeals Court rejected the fraud claim, stating:

> Even if we accept the plaintiffs' argument that each of them relied upon the father's misrepresentation, we must consider whether such reliance was reasonable. The plaintiffs were summoned

individually to meet with their father. He demanded they sign a document folded over to avoid their review. Their signatures were required for the document to be valid; hence, the father's demands. The plaintiffs could see their names appearing in type below the signature lines. At a minimum, the circumstances were suspicious. The father pulled the document away from Robert when he grasped it, and he responded harshly to any questioning. All three plaintiffs should have been on notice that the document was of significance and legal import. ....

Moreover, even the most cursory examination of the document would have revealed (a) that it was not "for the bank" as the father had represented, and (b) that it was in fact a deed conveying away the plaintiffs' interests in the Brookline property. See, e.g., Kuwaiti Danish Computer Co. v. Digital Equip. Corp., supra at 468, 781 N.E.2d 787 ("cursory review of ... language ... would have alerted [plaintiffs] that they could not rely on ... statements"). We conclude that the record supports the judge's finding that it was not reasonable or justifiable in these circumstances for the plaintiffs to sign the document without reading it.

Id. at 392-93. In a footnote, the Collins Court continued:

See and compare Farrell v. Chandler, Gardner & Williams, Inc., supra at 343-344, 147 N.E. 822 ("[b]right, intelligent person [who could] read English and [ ] had fifteen years of business experience" was bound by agreement she signed, which was given to her "folded over," and which she did not read); Kuwaiti Danish Computer Co. v. Digital Equip. Corp., supra ("[r]eliance on any statement or conduct... was unreasonable as a matter of law because it conflicted with the qualifying language [in a document plaintiff chose not to read]"); Markell v. Sidney B. Pfeifer Foundation, Inc., supra ("One who knowingly signs a writing that is obviously a legal document without bothering to ascertain the contents of the writing is ordinarily bound by its terms, in the same manner as if he had been fully aware of those terms, unless it can be proved that he was induced to sign it by fraud or undue influence.... That he does not know the terms that he is agreeing to is not a mistake, but a conscious choice and a known risk"); Mayflower Seafoods, Inc. v. Integrity Credit Corp., 25 Mass.App.Ct. 453, 459, 519 N.E.2d 1355 (1988) (even if he did not read lease agreement, plaintiff who "signed what was 'obviously a legal document without bothering to ascertain' its contents ..., as matter of law, was bound by its terms [in the absence of a clear fiduciary relationship, which does not appear here]" [citation omitted]); Hull v. Attleboro Sav. Bank, 33

> Mass.App.Ct. 18, 24, 596 N.E.2d 358 (1992) ("One who signs a writing that is designed to serve as a legal document ... is presumed to know its contents"); Commerce Bank & Trust Co. v. Hayeck, 46 Mass.App.Ct. 687, 693, 709 N.E.2d 1122 (1999) (plaintiff was bound "by the terms of a note he voluntarily signed but did not read")....

Id. at 393 n.7. See also Deluca v. Bear Stearns & Co., Inc., 175 F.Supp.2d 102, 115-16 (D. Mass. 2001); Kilgallen v. Network Solutions, Inc., 99 F.Supp.2d 125, 129-30 (D. Mass. 2000); Haufler v. Zoto's, 446 Mass. 489, 501 (2006); Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 438 Mass. 459, 465 (2003); Marciano v. Gelineau, 65 Mass. App. Ct. 1119, 2006 WL 455302, *1 (2/24/06) (unpublished); Hull v. Attleboro Savings Bank, 33 Mass. App. Ct. 18, 25 (1992); Markell v. Sydney B. Pfeifer Foundation, 9 Mass. App. Ct. 412, 440 (1980).

In summary, there was no fraud or misrepresentation because, even if Frement or the closing attorney misrepresented the terms of the loan, the Marquis could not reasonably have relied on such misrepresentations in the face of loan documents which specifically contradicted what they had been told. In the absence of fraud, the Marquis are presumed to know and understand the contents of the documents they signed.

2.3 Frement and Manning are entitled to partial summary judgment on Count II of the Verified Complaint, alleging violations of the federal Truth-in-Lending Act and Massachusetts G.L. c. 140D.

2.3.1 The Marquis' claims for rescission under TILA and c.140D are bared because they did not exercise the right of rescission within three business days.

Under the Massachusetts Consumer Credit cost Disclosure Act ("CCCDA"), G.L. c. 140D, §10(a), and the federal Truth-in-Lending Act ("TILA"), 15 U.S.C. §1635(a), a borrower may only rescind 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." It is undisputed that the Marquis did not attempt to rescind the loan within three business days of its consummation. Their rescission claim is, therefore, time barred.

While the time for rescission can be extended where the lender fails to provide certain material disclosures, in the present case all material disclosures were given and the right of rescission expired three business days after the closing. See infra, §2.3.2.

2.3.2 Frement and Manning are entitled to partial summary judgment on Count II of the Verified Complaint to the extent the Marquis' claims for damages or rescission are based upon Manning or Frement's: (1) alleged misrepresentation of the facts of the transaction, including the Amount Financed relative to the non-payment of the Marquis' car loan; (2) alleged failure to provide the Marquis with copies of so-called "stipulations" which they claim to have signed; (3) alleged failure to make disclosures to the Marquis concerning legal representation; (4) alleged failure to make other TILA/140D disclosures prior to the closing.

2.3.2.1 The undisputed facts show that the defendants did not misrepresent the facts of the loan transaction and, specifically, did not misrepresent that the loan proceeds would be used to pay off the Marquis' car loan.

Although the Marquis assert broadly that Manning and Frement misrepresented the facts of the loan transaction, they cite only one example, alleging that they were led to believe that the loan proceeds would be used to pay off their car loan, held by Wells Fargo. Verified Complaint, Exhibit S, ¶19. They claim that because the car loan should have been paid, but was not, the Amount Financed listed on the Truth-in-Lending Disclosure Statement is incorrect. Id. at ¶60.

However, the undisputed facts establish that the Frement loan was never intended to pay off the car loan and that the TILA/140D disclosures by Manning and Frement were accurate in that regard. In their Verified Complaint, the Marquis claim that they signed "stipulations" indicating that the car loan would be paid off from loan proceeds. Yet they have not provided any evidence that such stipulations existed. The Truth-in-Lending Disclosure Statement, the

Itemization of Amount Financed and its "attached "Schedule," all signed by the Marquis, accurately show that the loan proceeds were not being applied to pay off the car loan. In fact, the car loan was not paid off. Gary Marquis knew it and or should have known it because he knew that his car loan was held by Wells Fargo and Wells Fargo was not listed on the HUD-1 Settlement Statement. See Gary Marquis' Deposition, Exhibit A, p. 83. Thus, the disclosures provided to the Marquis accurately reflected the reality of the transaction. As the Amount Financed was accurate, and the Marquis challenge neither the Finance Charge nor the arithmetic used by Manning/Frement, the Annual Percentage Rate shown on the Truth-in-Lending Disclosure Statement also was accurate.

2.3.2.2 The Marquis can prove no TILA/140D violation based on Manning or Frement's alleged failure to provide them copies of the alleged stipulations.

The Marquis claim in ¶20 of their Verified Complaint (Exhibit S) that they were not given copies of the stipulations they claim to have signed. As set forth above, however, there is no evidence that the stipulations referred to by the Marquis ever existed. Even if they did, any failure on the part of Manning or Frement to give the Marquis copies of the stipulations would not be a TILA/140D violation, as they were not disclosures required by those statutes.

2.3.2.3. The undisputed facts refute the Marquis' claim that they were not given disclosures concerning legal representation.

In ¶23 of their Verified Complaint, the Marquis claim that they were not given required disclosures concerning legal representation. This appears to be a reference not to TILA or c.140D, but instead to the requirement of Massachusetts G.L. c. 184, §17B. However, the December 2006 Application which the Marquis signed at closing contains these disclosures on its Continuation Sheet. See Continuation Sheet/Residential Loan Application, Exhibit P. If the October 2006 Application did not contain the disclosures required by §17B, that was the fault of

NEM, which produced that application and for whose acts or omissions Manning and Frement are not responsible.

2.3.2.4 Truth-in-Lending disclosures need only be made at the time of closing and need not be provided in advance of the closing.

The Marquis also complain that "prior to closing ... [they] did not get written disclosures about the loan." Verified Complaint, Exhibit S, ¶24. However, Truth-in-Lending disclosures generally need only be made by the time of consummation of a loan (i.e. at closing), not in advance of closing as the Marquis claim. Regulation Z, 12 CFR §226.17(b).

Only two kinds of Truth-in-Lending disclosures must be given prior to closing, those for variable rate or high cost loans. As set forth below, this loan is not a high cost subject to HOEPA or Massachusetts G.L. c. 183C. See §2.8, infra.

While the loan to the Marquis had a variable rate feature, it was disclosed to the Marquis when they applied for the loan. The Application itself (Exhibit I), which they signed on October 31, 2006, identifies the loan as an "ARM" (Adjustable Rate Mortgage). While the Marquis claim not to have been given certain variable rate disclosures prior to closing, even if that were true it would not entitle the Marquis to rescind after expiration of the initial three day period. TILA and c.140D require that the lender give the borrower two sets of disclosures for certain variable rate loans.

> TILA requires lenders who make variable interest rate loans that are secured by a consumer's principal dwelling and have a term greater than one year to provide the consumer with two sets of disclosures. The first set must be given "at the time the application form is provided or before the consumer pays a non-refundable fee, whichever is earlier" and includes "[t]he booklet titled Consumer Handbook on Adjustable Rate Mortgages" and various other disclosures about how and when the rate will change. 12 C.F.R. § 226.19(b). The second set is given at the time of closing and consists of two statements: (1) "that the transaction includes a variable-rate feature"; and (2) "that variable-rate disclosures have been provided earlier." 12 C.F.R. § 226.18(f)(2).

Pulphus v. Sullivan, 2003 WL 1964333, *14 (N. D. Ill. 4/28/03). It is undisputed that

Manning/Frement provided the second set of disclosures at the closing as part of the Truth-in-Lending Disclosure Statement. See Truth-in-Lending Disclosure Statement, Exhibit G. Additional ARM Program disclosures were also provided at closing. See ARM Program Disclosure, Exhibit O. See also Mortgage Loan Rate Lock Commitment, Exhibit Q (which indicates that the loan has an adjustable rate and states the "ARM Margin"). The Marquis appear to claim that they were not provided the first set of disclosures when they applied for the loan. See Verified Complaint, Exhibit S, ¶¶24.

However, even if Frement and Manning failed to give the Marquis any or all of the first set of variable rate disclosures at the time of application, any such mistake does not entitle the Marquis to rescind the loan more than 14 months after the closing. Only a failure to disclose the very existence of the variable rate constitutes a "material" non-disclosure which would extend the right of rescission. Any other non-disclosure is not a basis for rescission at this time.[6] Further, even a failure to disclose to the Marquis at the time of application that the loan had a variable rate feature would not extend the rescission period for three (TILA) or four (CCCDA) years. Because it is undisputed that the variable rate feature of the loan was disclosed at the December 14, 2006, closing, along with all other material disclosures, the three day rescission period began to run at that time and expired no later than midnight of the third business day after closing, December 19, 2006, about one year prior to the Marquis' bankruptcy petition and more

[6] Regulation Z, Official Staff Commentary, §226.23(a)(3)-2 ("Material disclosures. Footnote 48 sets forth the material disclosures that must be provided before the rescission period can begin to run. Failure to provide information regarding the annual percentage rate also includes failure to inform the consumer of the existence of a variable rate feature. Failure to give the other required disclosures does not prevent the running of the rescission period..."); Andrews v. Chevy Chase Bank, 240 F.R.D. 612, 621 (E.D. Wis. 2007); Pulphus v. Sullivan, 2003 WL 1964333 (N.D. Ill. 4/28/03); RTC v. Martinez, 1994 WL 1631035 (S.D. Ohio 8/24/95); Hopkins v. First NLC Fin. Serv. LLC, 2007 WL 1812778 (Bkrtcy. E.D. Pa. 6/22/07); Oscar v. Bank One, 2006 WL 401853 (E.D. Pa. 2/17/06).

than 14 months prior to the filing of the Marquis' Verified Complaint.[7] See Verified Complaint, Exhibit S.

2.3.2.5 Because the Amount Financed, Finance Charge, APR, Total Payments and Payment Schedule, as well as the adjustable rate disclosure, were properly given, there has been no material non-disclosure, and the right to rescind was not extended beyond the three day period.

Once the lender gives all "material disclosures," the borrower's right to rescind is terminated. As set forth Regulation Z, 12 CFR §226.23(a)(3) n.48, "The term "material disclosures" means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total payments, the payment schedule," and certain disclosures for high cost loans not applicable here. In this case, as set forth above, Frement and Manning properly made all material disclosures, including the variable rate nature of the loan. Doing so ended the Marquis' right to rescind.

2.4 Frement and Manning are entitled to partial summary judgment on Count III to the extent it asserts a violation of Massachusetts G.L. c. 184, §17B or c.93A.

As set forth in §2.3.2.3, supra, Frement and Manning complied with c.184, §17B by making the required disclosures concerning attorney representation in the Continuation Sheet to the December 2006 Application which the Marquis signed at closing. If the October 2006 Application did not contain the disclosures required by §17B, that was the fault of NEM, which produced that Application and for whose acts or omissions Manning and Frement are not responsible. The Marquis have not alleged that NEM was Frement or Manning's agent.

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[7] Oscar, 2006 WL 401853, *3 ("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"); Pulphus, 2003 WL 1964333, *14 (rescission period began to run after borrower received, at closing, second set of disclosures, despite fact that borrower had never been given first set of disclosures required to be given at time of application).

Further, even if Frement or Manning did violate c.184, §§17B or 17D as alleged in Count III, this Court should enter summary judgment on the Marquis c.93A claim because their Verified Complaint fails to allege that they served a demand letter as required by c.93A, §9 and the Marquis' purported demand letter was inadequate. This issue is more fully addressed in §2.9, infra.

2.5 Frement and Manning are entitled to summary judgment on Count IV of the Verified Complaint, alleging that they violated Massachusetts G.L. c. 183, §28C, by making a loan not in the borrowers' interest.

The Marquis claim that Frement and Manning violated Massachusetts G.L. c. 183, §28C, by making a loan not in the Marquis' best interests. Verified Complaint, Exhibit S, ¶69. They also assert that they were "provided a copy of the analysis of borrower's interest by Frement, as required by the statute and/or the related regulations." Id. at ¶70. As set forth below, this claim fails because the undisputed facts establish that the loan was in the Marquis' best interests and that Frement and Manning complied with c.183, §28C in all respects.

The regulations implementing c.183, §28C, require that a lender not make a loan covered by the statute without having determined that the refinancing is in the borrower's best interest. Factors to be considered by a lender in determining if the refinancing is in the borrower's interest are listed in 209 CMR 53.04(3) and include "(f) the refinancing is necessary to respond to a bona fide personal need or an order of a court of competent jurisdiction." In the present case, the Marquis obviously needed the loan "to respond to a bona fide personal need...." They admit that they sought the loan from Frement in order to avoid foreclosure of existing mortgages held by Easthampton Savings Bank. Verified Complaint, Exhibit S, ¶¶14-17. The statutory factors therefore warrant the conclusion that the loan was in the Marquis' best interest.

With regard to the Marquis' allegation in ¶70 of the Verified Complaint they were

"provided a copy of the analysis of borrower's interest by Frement, as required by the statute and/or the related regulations," it is difficult to see how an allegation that Frement complied with its obligations states a valid claim. Assuming, however, that ¶70 was intended to alleged that Frement has not provided the Marquis with a copy of the Massachusetts Borrower Interest Worksheet Table, the Marquis misunderstand the requirements of §28C. While the statute and regulations require a lender to determine whether the loan is in the borrower's best interest, they do not require that the lender provide to the borrower any documentation of this analysis.

2.6 Frement and Manning are entitled to summary judgment on Count VI of the Verified Complaint, alleging breach of contract and servicing regulations.

Count VI of the Marquis' Verified Complaint consists largely of allegations already covered by other counts, alleging fraud, misrepresentation, non-disclosure and making a loan defendants knew the Marquis could not repay. The Marquis' breach of contract claim is based on defendants' alleged failure "to perform certain terms of the loan as they represented to the Marquis, such as the payoff of the balance on the car loan." Although phrased in terms of a failure to perform, this allegation is yet another rehash of the fraud and misrepresentation claims. As set forth previously, there is no evidence that Manning or Frement ever represented to the Marquis that the proceeds of the loan would be used to pay off their car loan or that the Marquis could reasonably have relied upon any such alleged misrepresentation by the closing attorney given that the loan documents made clear that the car loan was not being paid off.

There was no failure to perform and no breach of contract by Frement or Manning. The HUD-1 Settlement Statement and Itemization of Amount Financed accurately listed the fees, charges and payoffs, and those amounts were properly paid.

The Marquis' claim for breach of the covenant of good faith and fair dealing also fails. As the Supreme Judicial Court recently explained: