

1 FOR PUBLICATION

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:)	ADV. CASE NO. 98-90181-H13
)	
Dianne Mannion Wepsic,)	MEMORANDUM DECISION
)	
Debtor.)	
)	
Related Bankruptcy Court)	
Case No. 97-15509-H13)	
_____)	
Dianne Mannion Wepsic,)	
)	
Plaintiff,)	
)	
v.)	
)	
Jackie Josephson,)	
)	
Defendant.)	
_____)	

On April 10, 1998, debtor Dianne Mannion Wepsic ("Wepsic") filed this adversary complaint against Jackie Josephson ("Josephson") to determine the allowance of Josephson's claim and the validity and extent of Josephson's secured status. Wepsic alleged that Josephson violated the Truth in Lending Act ("TILA") and California law¹ and, therefore, sought to avoid Josephson's

¹ The Court does not address any violations of California law in this Memorandum Decision because Wepsic failed to cite to any specific law.

1 secured lien on her residence. The parties filed cross motions for
2 summary judgment.

3 This Court has jurisdiction to determine this matter pursuant
4 to 28 U.S.C. §§ 1334 and 157(b)(1) and General Order No. 312-D of
5 the United States District Court for the Southern District of
6 California. This is a core proceeding pursuant to 28 U.S.C.
7 § 157(b)(2)(B) and (K).

8
9 FACTS

10
11 On October 24, 1996, Wepsic obtained a loan from Josephson in
12 the amount of \$76,560 which was secured by a second deed of trust
13 on her residence in Del Mar. The purpose of the loan was to pay
14 off an existing second trust deed securing an obligation to
15 Sea Coast Financial in the amount of \$26,593.98 and to obtain a
16 substantial amount of cash for her personal use. A California
17 licensed real estate and mortgage broker, John Conlon ("Conlon")
18 assisted the parties with the loan documentation. Wepsic was
19 provided with a number of documents,² including inter alia, the
20 Truth in Lending Disclosure Statement ("Disclosure Statement").
21 The loan closed on or about November 1, 1996, with monthly interest

22 _____
23 ² In making her loan application, Wepsic filled out a Standard FNM
24 ("Fannie Mae") Uniform Residential Application, form 1003. At that time, initial
25 loan documents were prepared, signed by Wepsic and copies furnished to her
26 including (1) a Mortgage Loan Disclosure Statement/Good Faith Estimate; (2) a Letter
27 of Explanation/Derogatory Credit; (3) a Fair Lending Disclosure Statement; (4) a
28 Borrower's Certification and Authorization; (5) a Borrower Authorization; and (6)
a Purpose of Loan and Cash Out Letter of Explanation. Final loan papers were
drawn, including the appropriate note and deed of trust, the Truth and Lending
Disclosure Statement, the RESPA Servicing Disclosure, a second revised Uniform
Residential Loan Application, an Income Acknowledgment Statement, and a
Acknowledgment and Authorization of pre-payment of interest, instructions to escrow,
and the final Mortgage Loan Disclosure Statement/Good Faith Estimate.

1 payments of \$892.56 per month, commencing December 1, 1996. The
2 final payment of one month's interest plus the principal balance
3 was due on December 1, 2003.

4 After payment of the prior second trust deed and fees and
5 costs associated with the loan, Wepsic received net proceeds in
6 cash of \$37,176.98. In addition, six months of payments, for
7 payments due December 1, 1996 through May 1, 1997, were held in
8 escrow by Josephson and subsequently credited for the first six
9 months of payments. The loan's interest rate was 13.99% per annum.

10 Wepsic defaulted when her first payment came due on June 1,
11 1997. Wepsic also defaulted on her payments to the first trust
12 deed holder causing Josephson to advance \$18,137.78 prior to
13 Wepsic filing her bankruptcy.

14 On October 20, 1997, Wepsic filed her chapter 13 bankruptcy
15 petition. Wepsic initially scheduled Josephson's debt as secured,
16 but on March 28, 1997, Wepsic filed a Notice of Rescission with
17 Josephson regarding the loan agreement between them. Wepsic
18 amended her schedules to reflect the debt owed to Josephson as
19 unsecured in the amount of \$48,000.

20 Wepsic's Del Mar residence is allegedly worth between \$1.3 and
21 \$1.6 million. [Trial Transcript 16:20-21]. After subtracting the
22 secured obligations on the property, including Josephson's
23 interest, Wepsic has over \$500,000 in equity. Wepsic's residence
24 is currently listed for sale.

25 Josephson is a 54-year-old retired individual who invested a
26 portion of her life savings in this loan.

27 ///

28 ///

1 must go beyond the pleadings and, by its own
2 affidavits or by the depositions, answers to
3 interrogatories, and admissions on file, come
4 forth with specific facts to show that a
5 genuine issue of material fact exists.
6 Fed.R.Civ.P. 56(e); see Hughes, 953 F.2d at
7 541-42. When the nonmoving party relies only
8 on its own affidavits to oppose summary
9 judgment, it cannot rely on conclusory
10 allegations unsupported by factual data to
11 create an issue of material fact. See U.S. v.
12 1 Parcel of Real Property, 904 F.2d 487, 492
13 n.3 (9th Cir. 1990) (citing Marks v. U.S., 578
14 F.2d 261, 263 (9th Cir. 1978)).

15 Hansen v. U.S., 7 F.3d 137, 138 (9th Cir. 1993).

16 Josephson admits to several errors in making the loan⁴ but
17 contends she is entitled to summary judgment because any violations
18 of the TILA were merely technical. Alternatively, Josephson
19 contends she is entitled to reformation of the loan documents to
20 conform to the parties' intentions at the time of contracting.

21 Wepsic moves for summary judgment on the grounds that there is
22 no issue of material fact with respect to Josephson's violations of
23 the TILA. Therefore, Wepsic alleges she is entitled to rescind the
24 loan transaction as a matter of law.

25 B. Truth in Lending Violations.

26 The TILA is a disclosure statute, codified at 15 U.S.C. §§
27 1601-1667f, requiring the accurate and uniformly computed
28 disclosures of the critical elements of credit cost. See Rodash v.
AIB Mortgage Co., 16 F.3d 1142, 1144 (11th Cir. 1994) (citation
omitted). Generally, creditors must disclose the finance charge,
the annual percentage rate ("APR"), and many other terms of the
credit transaction. In addition, certain transactions involving

⁴ [Josephson's P&A's 5:18-6:11].

1 real property used as a principal dwelling may be rescinded. 15
2 U.S.C. § 1635.

3 In 1969, the Federal Reserve Board ("Board") published an
4 implementing regulation of the TILA known as Regulation Z ("Reg.
5 Z").⁵ The Board supplements Reg. Z with official staff commentary.

6 Reg. Z § 226.1(c) provides that, in general, the TILA applies
7 to each individual or business that offers or extends credit when
8 the following four conditions are met:

- 9 1. The credit is offered or extended to consumers.
- 10 2. The offering or extension of credit is done
11 regularly.
- 12 3. The credit is subject to a finance charge or is
13 payable by a written agreement in more than four
14 installments.
- 15 4. The credit is primarily for personal, family, or
16 household purposes.

17 There apparently is no dispute that the transaction in question
18 falls within the TILA or that Josephson is a creditor falling
19 within the scope of the statute.⁶

20 1. Inaccurate Disclosures.

21 Wepsic contends that Josephson improperly calculated the APR

22 ⁵ Reg. Z is set forth in 12 U.S.C. Code of Federal Regulations ("C.F.R.")

23 ⁶ 15 U.S.C. § 1602(f) states in relevant part:

24 a creditor refers only to a person who both (1) regularly
25 extends . . . consumer credit which is payable by agreement
26 in more than four installments or for which the payment of
27 a finance charge is or may be required, and (2) is the
28 person to whom the debt arising from the consumer credit
transaction is initially payable on the face of the
evidence of indebtedness Any person who . . .
originates 1 or more mortgages through a mortgage broker
shall be considered to be a creditor for purposes of this
subchapter.

1 and finance charge. According to Wepsic, the proper APR is
2 17.717%, the amount financed for the subject loan is \$70,959.17 and
3 the finance charge would be \$86,194.05. Thus, all three amounts
4 were understated in addition to the understatement of the number of
5 payments (84 versus 85). Wepsic also contends that the Notice of
6 the Right to Rescind was inaccurate because it set forth the wrong
7 date and was presented to Wepsic six days before the Disclosure
8 Statement. Due to these inaccuracies, Wepsic contends that she is
9 entitled to rescission of the loan transaction for non-compliance
10 with the TILA requirements. The Court addresses each contention.

11 a. Understatement of Finance Charge

12 15 U.S.C. § 1605 entitled "Determination of Finance
13 Charge" sets forth which charges must be included in calculating a
14 finance charge and which charges are exempted from computation.
15 The types of charges which are applicable include, but are not
16 limited to, interest, service or carrying charges, loan fees,
17 finder's fees, and fees for investigation or credit report. 15
18 U.S.C. § 1605(a)(1)-(4). Under 15 U.S.C. § 1605(e), certain items
19 are exempted from the computation of the finance charge including
20 fees for preparation of loan-related documents (subsection (2)) and
21 appraisal fees (subsection (5)). The finance charge is the cost of
22 consumer credit as a dollar amount. Reg. Z § 226.4. There are
23 many exceptions set forth in the regulation.

24 The finance charge is calculated by subtracting the prepaid
25 finance charges from the face value of the note (creating the
26 amount financed), calculating the amount of interest that would be
27 paid over the life of the loan using the actuarial method, and then
28 adding that amount of interest to the prepaid finance charges to

1 disclose the total finance charge. Josephson stated the finance
2 charge on the Disclosure Statement as \$85,681.23. Wepsic contends
3 that it should have been \$86,194.05 (a \$512.82 difference).
4 [Wepsic's Exh. 2]. According to Wepsic, since the finance charge
5 was understated in the Disclosure Statement and varied more than
6 \$100 from the actual finance charge this constitutes a violation of
7 the TILA under 15 U.S.C. § 1605(f).⁷

8 Josephson disputes the numbers used by Wepsic and claims that
9 Wepsic fails to recognize the distinction between the amount
10 financed and the finance charge in coming up with her number of
11 \$86,194.05. In addition, Josephson points out that when Wepsic
12 calculated the finance charge with her computer program, the
13 finance charge showed as \$80,592.89. [Wepsic's Exh. 2]. Moreover,
14 in Wepsic's Notice of Rescission [Wepsic's Exh. 6], Wepsic
15 calculated the finance charge as \$85,721.06.

16 Josephson's disclosed finance charge of \$85,681.23 is lower
17 than two of Wepsic's numbers, but higher than one. In the event
18 the finance charge disclosed by Josephson is actually overstated,
19

20 ⁷ 15 U.S.C. 1605(f) provides:

21 In connection with credit transactions not under an open end credit plan that are
22 secured by real property or a dwelling, the disclosure of the finance charge and
23 other disclosures affected by any finance charge --

(1) shall be treated as being accurate for purposes of this subchapter
24 if the amount disclosed as the finance charge --

(A) does not vary from the actual finance charge by more
25 than \$100; or

(B) is greater than the amount required to be disclosed
26 under this subchapter; and

(2) shall be treated as being accurate for purposes of section 1635 of
27 this title if --

(A) except as provided in subparagraph (B), the amount
28 disclosed as the finance charge does not vary from the
actual finance charge by more than an amount equal to one-
half of one percent of the total amount of credit extended
. . . .

1 it would fall within the tolerance levels set forth in 15 U.S.C. §
2 1605 (f)(1)(B) and (2)(A). Nonetheless, there is a material issue
3 of fact as to what the actual finance charge should be. Therefore,
4 summary judgment for both parties is denied on this issue.

5 b. Inaccurate Disclosure of APR.

6 Reg. Z § 226.22(a)(1) defines the APR as "a measure of
7 the cost of credit, expressed as a yearly rate, that relates the
8 amount and timing of value received by the consumer to the amount
9 and timing of payments made." It further provides that the APR
10 shall be determined in accordance with either the actuarial method
11 or the U.S. Rule method.

12 Similar to the finance charge (which includes the APR), the
13 APR in this case appears to be a moving target which is hardly
14 conducive to a summary judgment motion. The disclosed APR was
15 17.464. [Josephson's Exh. C]. Josephson subsequently recalculated
16 the APR to be 15.636 [Josephson's Exh. F]. Wepsic calculated the
17 APR at 17.717%. Josephson subsequently recalculated the APR to be
18 16.1%. In any event, Wepsic stipulated at the hearing that she was
19 "willing to go with the defendant's numbers for this purpose,
20 because they do not solve defendant's problem." [Transcript 15:13-
21 15]. Accordingly, the Court uses Josephson's 15.636 number.

22 Josephson argues that violation of the TILA occurs when the
23 APR for a loan transaction is understated to a borrower, due the
24 fact that understatement may affect the decision of the borrower to
25 obtain a particular loan. Overstatement on the other hand does not
26 damage the borrower. Consequently, disclosure of an APR which is
27 greater than the amount required to be disclosed does not
28 constitute a violation of the TILA. Josephson contends that

1 because the APR for the loan at issue is 15.636% rather than the
2 17.464% that was disclosed in the Disclosure Statement dated
3 October 31, 1996, there is no actionable violation of the TILA.

4 15 U.S.C. § 1606(c) and Reg. Z § 226.22(a)(2) state the
5 general rule for the accuracy of the APR: the APR shall be
6 considered accurate if it is not more than one eighth of one
7 percentage point above or below the APR determined in accordance
8 with Reg. Z § 226.22(a)(1).⁸ The 1995 Amendments Act, however,
9 added 15 U.S.C. § 1605(f)⁹, permitting more generous tolerances in
10 credit transactions not under an open-end plan that are secured by
11 real property or a dwelling such as in this case. The new
12 tolerances give creditors a larger margin for error in disclosing
13 the finance charge for closed-end credit transactions. This
14 amendment became effective October 21, 1996, is applicable to
15 mortgage loans consummated on or after September 30, 1995, and,
16 therefore, would apply to this case. The new tolerance applies
17 specifically to loans secured by real property and applies to the
18 disclosed finance charge, as well as any disclosure affected by the
19 finance charge, such as the APR. The Court finds there is no issue
20 of material fact regarding Josephson's disclosed APR which was
21 overstated. Therefore, Josephson's APR was accurate under the
22 guidelines set forth in 15 U.S.C. § 1605(f)(1)(B).¹⁰

24 ⁸ The parties do not dispute that the loan transaction in question was
25 a regular transaction. Reg. Z § 226.22(a)(3) footnote 46.

26 ⁹ See supra n. 7.

27 ¹⁰ The Court notes that it is unable to determine whether the APR is
28 accurate for purposes of rescission under 15 U.S.C. § 1605(f)(2)(A) because there
has been no finding that the finance charge was accurate or that the APR resulted
from the disclosed finance charge. See Reg. Z 226.22(a)(1)-(5).

1 c. Understatement of Number of Payments

2 In the Disclosure Statement, Josephson disclosed that
3 Wepsic would make 83 payments of \$892.56 and one final payment of
4 \$77,452.56 (for a total of 84). However, Wepsic contends that the
5 Note, which controls the true number and amount of payments, shows
6 that payments would last from November 1, 1996, through December 1,
7 2003, with the final payment of the amount financed due on the
8 first of the month (for a total of 86 payments). Wepsic contends
9 that the true number of monthly payments was 85, that the final
10 payment would be \$77,452.56 (the amount disclosed by Josephson),
11 and that the total of all payments would equal \$152,427.60 as
12 opposed to the \$151,535.22 disclosed on the Disclosure Statement.
13 Josephson does not dispute that the \$152,427.60 is the correct
14 number. [Decl. of Josephson 6:21]. Wepsic contends that not only
15 was the number of payments inaccurate, but the total of all
16 payments was understated as well.

17 Josephson argues that it was a "clerical error" that the
18 initial payment stated in the promissory note was November 1, 1996,
19 instead of December 1, 1996. Josephson does not dispute that the
20 number of payments is 85, i.e., 84 payments of interest only in the
21 amount of \$892.56 with one final payment in the amount of
22 \$77,452.56. Josephson relies on Veale v. Citibank, F.S.B., 85 F.3d
23 577 (11th Cir. 1996) wherein the court found that a discrepancy in
24 the total number of payments set forth in the note did not rise to
25 the level of a TILA violation when the disclosure statement set
26 forth the correct number of payments. However, Veale is
27 distinguishable from this case because Josephson has admitted that
28 the total number of payments disclosed on the Disclosure Statement

1 is inaccurate.

2 Failure to make a material disclosure may trigger the debtor's
3 right to rescind. 15 U.S.C. § 1602(u), defines a material
4 disclosure to include, inter alia, the total of payments and the
5 number and amount of payments. Footnote 48 to Reg. Z § 226.23
6 (a)(3) defines material disclosures to mean, inter alia, the
7 required disclosure of the total of payments (as required to be
8 disclosed under Reg. Z § 226.18(h)).

9 Josephson has cited to no provision or authority that would
10 allow a tolerance of an understatement of the total of payments or
11 an inaccurate number of payments. Moreover, Josephson also has not
12 cited to any authority that would treat such inaccuracies as
13 "clerical errors" nor has she proved by a preponderance of the
14 evidence that a clerical error in fact occurred. See 15 U.S.C. §
15 1640(c). Therefore, Wepsic's right to rescind would be triggered
16 by these violations. The Court finds that Josephson has violated
17 the TILA by setting forth the inaccurate number and total of
18 payments in the Disclosure Statement.

19 d. Faulty Notice of Right of Rescission

20 Wepsic's right to rescind is found at 15 U.S.C. § 1635.

21 Subsection (a) provides:

22 Except as otherwise provided in this section,
23 in the case of any consumer credit transaction
24 . . . in which a security interest, including
25 any such interest arising by operation of law,
26 is or will be retained or acquired in any
27 property which is used as the principal
28 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

1 containing the material disclosures required
2 under this subchapter, whichever is later. . .

3 Wepsic contends that the Notice of Right of Rescission provided by
4 Josephson was inaccurate. According to Wepsic, the notice failed
5 to comply with the requirements set forth in Reg. Z § 226.23 in
6 that it was dated approximately six days prior to the date of
7 consummation (as shown by the Disclosure Statement) and further
8 failed to accurately count the proper number of business days
9 following the notice in violation of Reg. Z §§ 226.5 and 226.23.

10 Josephson stated in the Notice of the Right to Rescind that
11 the date of the transaction was October 24, 1996, and that Wepsic
12 must send a notice to rescind no later than midnight October 28,
13 1996. Wepsic contends that proper date would have been October 29,
14 1996, because October 24th was a Thursday and only business days
15 are counted.

16 The Court finds that under these facts the notice of
17 rescission was ineffective. One court noted:

18 A consumer has the right to rescind a credit
19 transaction until the third business day
20 following the date of the consummation of the
21 transaction or until delivery of all the
22 disclosures required, whichever is later. The
23 regulations contemplate that a consumer credit
24 transaction is consummated when a contractual
25 relationship exists between a creditor and
customer. When the transaction is consummated
the creditor must give notice of the right to
rescind, which should contain, among other
things, . . . the date not earlier than the
third business day following the date of the
transaction on which the customer may cancel.

26 Doggett v. County Savings and Loan Co., 373 F.Supp. 774, 776 (E.D.
27 Tenn. 1973). Josephson gave the Notice of Right of Rescission at
28 least six days prior to consummation of the loan (as shown the

1 October 31, 1996 date on the Disclosure Statement). Therefore, the
2 date of October 28, 1996, as the last day to rescind was misleading
3 in two respects. First, there was no transaction in existence at
4 this time which could have been canceled. Second, even assuming
5 that the notice was timely given, the date of October 28, 1996, as
6 the last day to rescind was incorrect because only business days
7 are counted. Thus, the last date to rescind would have been
8 October 29, 1996. The Court finds that Josephson violated the TILA
9 based on her improper Notice of Right of Rescission.

10 C. Wepsic's Right To Rescind.

11 Wepsic has exercised her right to rescind and seeks to have
12 the security interest of Josephson declared void. Such a finding
13 would render Josephson's claim unsecured and Josephson would have
14 to return all finance charges. 15 U.S.C. § 1635(b) provides:

15 When an obligor exercises his right to rescind
16 under subsection (a) of this section, he is not
17 liable for any finance or other charge, and any
18 security interest given by the obligor,
19 including any such interest arising by
20 operation of law, becomes void upon such a
21 rescission. Within 20 days after receipt of a
22 notice of rescission, the creditor shall return
23 to the obligor any money or property given as
24 earnest money, down payment, or otherwise, and
25 shall take any action necessary or appropriate
26 to reflect the termination of any security
27 interest created under the transaction. If the
28 creditor has delivered any property to the
obligor, the obligor may retain possession of
it. Upon the performance of the creditor's
obligations under this section, the obligor
shall tender the property to the creditor,
except that if return of the property in kind
would be impracticable or inequitable, the
obligor shall tender its reasonable value.
Tender shall be made at the location of the
property or at the residence of the obligor, at
the option of the obligor. If the creditor
does not take possession of the property within
20 days after tender by the obligor, ownership
of the property vests in the obligor without

1 obligation on his part to pay for it. The
2 procedures prescribed by this subsection shall
apply except when otherwise ordered by a court.

3 If the required notice or material disclosures are not delivered,
4 the right to rescind shall expire three years after consummation,
5 upon transfer of all of the consumer's interest in the property, or
6 upon sale of the property, whichever occurs first. 15 U.S.C. §
7 1635(f).

8 The TILA rescission remedy provides that once the transaction
9 in question is rescinded, Wepsic must return any monies advanced to
10 her by Josephson and Josephson must take steps to release her
11 security interest and return finance and other charges. Some
12 courts have struggled with the possibility of a creditor's
13 forfeiture when an indigent borrower seeks to rescind a loan under
14 TILA. Trimmel v. General Elec. Credit Corp., 555 F.Supp. 264, 267-
15 68 (D. Conn. 1983). To avoid such results courts have exercised
16 their equitable discretion to condition the rescission on the
17 obligor's tender of the monies advanced by the lender. Palmer v.
18 Wilson, 502 F.2d 860, 862 (9th Cir. 1974).¹¹ The Ninth Circuit has
19 held that a district court errs when it does not do so, at least
20 where the TILA violations are not egregious. LaGrone v. Johnson,
21 534 F.2d 1360, 1362 (9th Cir. 1976).

22 Some bankruptcy courts have also conditioned the use of a
23 consumer-debtor's right to rescind under TILA. In re Buckles, 189
24 B.R. 752 (Bankr. D. Minn. 1995); Lynch v. GMAC Mortgage Corp., 170
25 B.R. 26 (D.N.H. 1994). These courts equitably conditioned the
26 voiding of a creditor's security interest on the debtor's tender of

27
28 ¹¹ See also Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1142 (11th
Cir. 1992); FDIC v. Hughes Dev. Co., 938 F.2d 889 (8th Cir. 1991).

1 payment of the loan proceeds.¹²

2 This Court adopts the reasoning set forth in Buckles and
3 Lynch. "Rescission of contract is to result in the return of both
4 parties to the status quo ante: each side is to be restored to the
5 property and legal attributes that it enjoyed before the contract
6 was entered and performed." Buckles, 189 B.R. at 764 (citations
7 omitted). Debtor seeks to avoid Josephson's security interest,
8 keep her residence, and pay Josephson 100% of her unsecured claim
9 after all offsets, over the course of thirty-six months or more.
10 Debtor has no unsecured creditors (other than Josephson) and has
11 indicated her property is worth between \$1.3 and \$1.6 million
12 leaving her with over \$500,000 in equity.¹³ Wepsic has clearly
13 demonstrated the tendency to default on her installment
14 obligations. Wepsic never made one payment to Josephson on her
15 loan and has entered into adequate protection orders post-petition
16 with both Josephson and the first trust deed holder providing that
17 if Wepsic defaults on her payments to the first trust deed holder,
18 either party will be able to initiate foreclosure proceedings. In
19 addition, Wepsic evidently has her residence listed for sale.

21 ¹² But see Celona v. Equitable Nat'l Bank, 98 B.R. 705 (E.D. Pa. 1989)
22 (court ordered rescission and treated the remaining lender claim in a chapter 11
23 reorganization as totally unsecured); In re Pitre, 11 B.R. 777 (Bankr. N.D. Ill.
24 1991) (stating as to debtor's duty under 15 U.S.C. § 1635(b) to return money and
25 property, "neither of which can be accomplished by the debtor under the
26 circumstances of this bankruptcy."); In re Piercy, 18 B.R. 1004 (Bankr. W.D.
27 Kentucky 1982) (holding that conditioning rescission upon the debtor's payment.
28 . . . imposes an obligation from which the debtor has been legally freed . . . there
is a legitimate, legal impediment to the debtor's reciprocal performance. . .")

¹³ On Wepsic's schedules and in opposition to the relief from stay filed
by both Josephson and the first trust deed holder, Wepsic alleged that the property
was worth approximately \$670,000, which would have left her with at least \$100,000
of equity in the property. Since that time, Wepsic has found out that the property
is evidently worth quit a bit more.

1 Given these facts, the Court finds that Wepsic's proposal of
2 treating Josephson's claim as unsecured, and paying her over the
3 course of three or more years, cuts against the purpose of
4 rescission which is to return both parties to the status quo ante.
5 See In re Cox, 162 B.R. 191, 195 (Bankr. C.D. Ill. 1993). A TILA
6 "violation does not automatically cause the mortgage on the
7 property to become void." In re Apaydin, 201 B.R. 716, 723 (Bankr.
8 E.D. Pa. 1996). The TILA "gives the courts the power to regulate
9 the manner in which a consumer may exercise the right of
10 rescission." Id. Wepsic's receipt of the benefits of rescission
11 therefore will be conditioned on her tender of her duty of
12 repayment under the statute. As one court noted:

13 Were the court to find that the security
14 interest is void, the following result would
15 occur: the defendant would have a totally
16 unsecured claim, the plaintiff would retain
17 [her] residence, have an unencumbered homestead
18 right and could pay the creditor under the
19 chapter 13 plan only a fraction of the
20 creditor's remaining claim. This result is
21 after the plaintiffs' finance charges have been
22 credited to them to reduce the principal amount
23 of the loan, statutory penalties have been
24 awarded and attorney fees have been assessed.
25 In short, the debtor/plaintiff would receive
26 all of the benefits accruing from a TILA
27 violation and be relieved of the obligation to
28 pay the remaining principal then due.

Lynch, 170 B.R. at 30.

23 To find otherwise would put payment of Josephson's claim in
24 jeopardy. If Josephson's security interest is voided, Wepsic could
25 easily default under her chapter 13 case and allow the case to be
26 dismissed. Once free from the jurisdiction of the bankruptcy
27 court, Wepsic could sell her home, pocket approximately \$93,000
28 additional equity which is the amount of Josephson's secured claim,

1 and leave Josephson to seek her collection remedies outside of this
2 Court. This result is clearly inequitable given that Wepsic has
3 considerable equity in her home and no other unsecured creditors.
4 On the other hand, if Josephson's lien remains, even if Wepsic's
5 residence is sold, the monies will be turned over to the chapter 13
6 trustee who will pay Josephson's claim. Alternatively, if Wepsic
7 defaults and her case is dismissed, Josephson will still be
8 protected by retaining her lien on the residence.

9 In sum, the Court finds that Josephson's claim, subject to any
10 offsets set forth in § 1635(b), shall remain secured by Wepsic's
11 residence until such time Wepsic has tendered her performance as
12 required under 15 U.S.C. § 1635(b).

13 D. Damages.

14 Wepsic requests statutory damages amounting to twice the
15 finance charge in connection with this transaction, but not less
16 than \$200 nor more than \$2,000 as to the original violations. 15
17 U.S.C. § 1640 entitled "Civil liability" provides in relevant part:

18 Except as otherwise provided in this section,
19 any creditor who fails to comply with any
20 requirement imposed under this part, including
21 any requirement under section 1635 of this
22 title, . . . with respect to any person is
23 liable to such person in an amount equal to the
24 sum of --

25

26 (2)(A)(i) in the case of an
27 individual action twice the amount of
28 any finance charge in connection with
the transaction, . . . or (iii) in
the case of an individual action
relating to a credit transaction not
under an open end credit plan that is
secured by real property or a
dwelling, not less than \$200 or
greater than \$2000. . . .

28 ///

1 Subsection (e) provides that any action under this section may be
2 brought . . . within one year from the date of the occurrence of
3 the violation. In this case, Wepsic has alleged (1) understatement
4 of the finance charge; (2) inaccurate disclosure of the APR; (3)
5 understatement of the number of payments; and (4) faulty Notice of
6 Right of Rescission. As to all of these claims, the one-year
7 statute of limitations runs from the date on which the parties
8 consummated the loan. In re Woolaghan, 140 B.R. 377, 382 (Bankr.
9 W.D. Pa. 1992) (citations omitted). "Nondisclosure has been held
10 not to be a continuing violation for the purposes of the statute of
11 limitations. Id. In this transaction, the one-year would begin to
12 run from November 1, 1996. Wepsic should have brought these
13 damages claims by November 1, 1997. The statute of limitations
14 therefore bars these damages claims. See also In re Craig, 7 B.R.
15 864 (Bankr. E.D. Tenn. 1980).

16 E. Attorney Fees.

17 15 U.S.C. § 1640(a)(3) provides that in a case of a successful
18 action to enforce a right of rescission, the costs of the action,
19 together with a reasonable attorney's fee as determined by the
20 court. Wepsic has provided no information upon which this Court
21 can determine whether the costs or attorney fees associated with
22 this action are reasonable. Therefore, the Court makes no ruling
23 with respect to Wepsic's request at this time.

24 F. Reformation.

25 Josephson seeks to have the agreement between her and Wepsic
26 reformed pursuant to Cal.Civ.C. § 3399 which provides in relevant
27 part:

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1 When, through fraud or mutual mistake of the
2 parties, or a mistake of one party, which the
3 other at the time knew or suspected, a written
4 contract does not truly express the intention
5 of the parties, it may be revised on the
6 application of the party aggrieved, so as to
7 express that intention, so far as it can be
8 done without prejudice to rights acquired by
9 third persons, in good faith and for value.

10 Josephson contends this principle is applicable to note and
11 deed of trust obligations. First American Title Ins. & Trust Co.
12 v. Cook, 12 Cal.App.3d 592 (1970) (court reformed usurious
13 provision in note obligation to bring that obligation in
14 conformance with the intentions of the parties). Josephson wants
15 this Court to reform the loan documents, including, but not limited
16 to the promissory note and trust deed between the parties and to
17 eliminate any irregularities not intended by the parties which
18 would have the effect of defeating the mutual intent of the parties
19 at the time of contracting. Wepsic has attacked the default
20 interest rate and the prepayment penalty portions of the promissory
21 note. Josephson has conceded though that she is not trying to
22 enforce these provisions. Therefore, the Court finds its
23 unnecessary to reform the promissory note. In addition, it is
24 questionable whether reformation, a principle under California
25 state law, could be allowed in cases where there is TILA violation
26 and the party is seeking rescission. Josephson points to no
27 authority in this regard. In fact, the rescission remedy under the
28 TILA appears to preempt reformation principles that exist under
 state law. 15 U.S.C. § 1610(d).

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1 This Memorandum Decision constitutes findings of fact and
2 conclusions of law pursuant to Federal Rule of Bankruptcy
3 Procedure 7052. Wepsic is directed to file with this Court an
4 order in conformance with this Memorandum Decision within ten (10)
5 days from the date of entry hereof.

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7 Dated: September 1, 1998

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JOHN J. HARGROVE
United States Bankruptcy Judge

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