

1 ("TILA"), the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607 ("RESPA"), the 2 Home Ownership Equity Preservation Act, 15 U.S.C. § 1639 ("HOEPA"), the Fair Debt 3 Collection Practices Act, 15 U.S.C. § 1692(e) ("FDCPA"), and against the Bank and 4 Hargrove for breach of contract, negligent misrepresentation, negligence, and fraud. 5 Plaintiffs now seek summary judgment on two TILA claims. They argue that the Bank 6 violated TILA (1) by failing to fully disclose the interest payment schedule during the 7 construction phase of the loan, and (2) by paying construction draw proceeds directly to the 8 contractor. The Bank moves for summary judgment on each of the claims asserted in 9 plaintiffs' amended complaint.

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A.

Plaintiffs first argue that the Bank violated TILA by failing to properly disclose the
payment schedule for the construction phase of their loan. The plaintiffs' Disclosure
Statement provided only that plaintiffs were obligated to make "12 payments of interest only
during construction." <u>PSOF</u>, ex. 4.

TILA generally requires that a creditor disclose the "number, amount, and due dates 15 16 or period of payments scheduled to repay the total of payments." 15 U.S.C. § 1638(a)(6). 17 Plaintiffs contend that their loan is governed by 12 C.F.R. § 226.18(g)(2), which provides, 18 "[i]n a transaction in which a series of payments varies because a finance charge is applied 19 to the unpaid principal balance," the creditor must disclose "(i) [t]he dollar amounts of the largest and smallest payments in the series; [and] (ii) [a] reference to the variations in the 20 21 other payments in the series." 12 C.F.R. § 226.18(g)(2). Plaintiffs argue that the Disclosure 22 Statement's notation of "12 payments of interest only during construction," does not satisfy 23 this disclosure requirement.

We agree with the Bank that plaintiffs' reliance on § 226.18(g)(2) is misplaced. Instead, plaintiffs' loan is governed by 12 C.F.R. § 226.17(c)(6), which applies to a loan that is "a multiple-advance loan to finance the construction of a dwelling," that will be permanently financed by the same creditor. Where the "creditor chooses to disclose the construction and the permanent financing as one transaction," as the Bank did here, we look

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1 to 12 C.F.R. § 226, Appendix D, Part II(C) for the relevant disclosure requirements. Under 2 Appendix D, Part II(C)(1), the disclosure need not "reflect[] the number or amounts of 3 payments of interest only that are made during the construction period." Instead, the Bank 4 is only required to disclose "[t]he fact that interest payments must be made and the timing 5 of such payments." 12 C. F. R. § 226, Appendix D, Part II(C)(1). Plaintiffs' TILA 6 Disclosure Statement disclosed that plaintiffs would be required to make "12 payments of 7 interest only during construction." This satisfied 12 C.F.R. § 226.17(c)(6), including 12 8 C.F.R. § 226, Appendix D, Part II(C).

We reject plaintiffs' argument that the Bank's disclosure obligation is instead
governed by Appendix D, Part II(C)(2), which applies to multiple-advance construction loans
where the borrower is required to pay interest on the entire loan amount from the loan's
inception without regard to actual disbursements. The evidence does not show that plaintiffs
paid interest on the entire loan amount during the construction phase.

14 Plaintiffs' Disclosure Statement provided that after the construction period, plaintiffs 15 were required to make 48 equal monthly payments of \$2,586.41, followed by 299 equal 16 monthly payments of \$2,373.54. In contrast, the payments made during the construction 17 phase varied widely, indicating the application of interest to a changing principal balance. 18 Moreover, the pre-construction payments were significantly less than the post-construction 19 payments applied to the full loan amount. We conclude that the Bank's disclosure 20 obligations were governed by 12 C.F.R. § 226.17(c)(6) and that the Bank satisfied its 21 disclosure obligations.

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B.

Relying on 12 C.F.R. § 226.34(a)(i), plaintiffs next contend that the Bank violated TILA by paying the construction draw proceeds directly to Larry Hargrove, plaintiffs' contractor, rather than directly to them, or jointly to them and Hargrove. Section 226.34(a) applies to a "consumer credit transaction that is secured by the consumer's principal dwelling, and in which . . . [t]he total points and fees payable by the consumer at or before loan closing will exceed the greater of 8 percent of the total loan amount, or \$400." <u>See</u> 12

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1 C.F.R. § 226.32(a)(1)(ii). Plaintiffs borrowed \$437,500. To fall within § 226.34(a) they 2 would have had to pay \$35,000 in points and fees (\$437,500 x .08), but they paid less than 3 \$2,000. See PSOF, ex. 5. Therefore, because plaintiffs did not pay points and fees that 4 exceeded 8% of their total loan amount, § 226.34(a) does not apply.

5 Moreover, on April 9, 2008, plaintiffs and the Bank executed a construction loan 6 agreement that explained the method by which payments would be made during construction. 7 The agreement expressly stated that "disbursements of Construction Loan proceeds by 8 Lender shall be made pursuant to wire transfers paid to the Contractor . . . or directly to 9 Borrower, as Lender may determine." DSOF, ex. 10 at § 4.03. Therefore, plaintiffs 10 expressly authorized direct payments to Hargrove.

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Π

The Bank did not violate TILA by paying loan proceeds directly to the contractor.

13 The Bank moves for summary judgment on all claims asserted in plaintiffs' amended complaint. Plaintiffs do not respond to the Bank's motion with respect to Counts 2 (RESPA), 14 15 3 (HOEPA), 4 (FDCPA), 8 (breach of duty of good faith and fair dealing), 9 (negligent 16 misrepresentation), 10 (negligence), 11 (fraud), and 12 (negligent infliction of emotional 17 distress). Therefore, the Bank's motion for summary judgment is granted on each of these 18 claims. See Fed. R. Civ. P. 56(e)(3); LRCiv 7.2(i).

19 With respect to Count 5 (breach of contract), plaintiffs allege that the Bank, through 20 its loan officer, Bob Goodrich, breached the construction loan agreement by advancing funds 21 to contractor Larry Hargrove without first verifying that Hargrove had fully performed each 22 phase of the construction. Amended Complaint ¶ $128.^{1}$

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The construction loan agreement provided that "Lender is under no duty to visit the 24 construction site, or to supervise or observe construction." <u>DSOF</u>, ex. 10, ¶ 7.13(c). 25 Nevertheless, plaintiffs claim that Bob Goodrich "led [them] to believe that before any

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- ¹Plaintiffs assert numerous other allegations to support their breach of contact claim, 27 but they abandon those claims by failing to respond to the Bank's motion for summary 28 judgment. See Fed. R. Civ. P. 56(e)(3); LRCiv 7.2(i).

construction loan funds [were] disbursed to the contractor, the bank would inspect the
 property to make sure that the work that needed to be done was 100% complete." <u>PCSOF</u>
 ¶ 67. Plaintiffs contend that Goodrich's representations orally modified the written
 agreement and imposed upon the Bank an affirmative duty to inspect plaintiffs' property
 before disbursing construction funds. We disagree.

6 The Bank advanced five construction disbursements, each at plaintiffs' written 7 authorization. DSOF, ex. 9. Plaintiffs were personally involved in the construction project, 8 completing much of the work themselves. <u>Amended Complaint</u> ¶ 42. They were therefore 9 aware of the construction progress as they continued to authorize the disbursements. On 10 February 15, 2009, after 8 months of construction and 4 disbursement authorizations, 11 plaintiffs met with Hargrove and once again approved his request for a disbursement. Id. ¶¶ 12 40-45. Plaintiffs signed the disbursement form provided by Hargrove and the Bank 13 disbursed the funds on the same day.

Plaintiffs' own allegations belie their claim that the parties orally modified the
contract to require the Bank to inspect the property before disbursing funds. Plaintiffs were
aware of the construction delays but continued to authorize disbursements. Id. ¶¶ 41-42.
Plaintiffs have not presented a triable issue of fact showing that the written agreement was
orally modified. Therefore, we grant the Bank's motion for summary judgment on the breach
of contract claim in Count 5.

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III

Finally, the plaintiffs move for entry of default judgment against Larry Hargrove (doc.
58). Plaintiffs served Hargrove on January 22, 2008, but he has failed to answer or otherwise
defend this action. Therefore, pursuant to Rule 55(b)(2), Fed. R. Civ. P., we grant plaintiffs'
motion for entry of default judgment against Larry Hargrove (doc. 58).

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IV

IT IS ORDERED GRANTING defendants' motion for summary judgment (doc. 64),
and DENYING plaintiffs' motion for summary judgment (doc. 59). Judgment is granted in
favor of defendant M&I Marshall & Ilsley Bank and against plaintiffs on all claims.

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1	IT IS ORDERED DENYING plaintiffs' motion to strike as moot (doc. 60).
2	IT IS FURTHER ORDERED GRANTING plaintiffs' motion for default judgment
3	against Larry Hargrove (doc. 58). Plaintiffs shall file with the court a proposed form of
4	default judgment against Hargrove no later than 10 days from entry of this order.
5	DATED this 10 th day of May, 2011.
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7	Frederick J. Martone
8	Frederick J. Martone United States District Judge
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