IT IS ORDERED as set forth below:

Date: March 25, 2008

C. Ray Mullins

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U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: EDWARD W. JOHNSON, VERA M. JOHNSON, Debtors,	CASE NO. 05-73789-CRM CHAPTER 13
EDWARD W. JOHNSON, VERA M. JOHNSON, Plaintiffs, v. SOUTHTOWNE MOTORS OF STONE MOUNTAIN, INC., Defendant.	ADVERSARY PROCEEDING NO. 05-6393-CRM

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on the Debtor-Plaintiffs' Motion for

Summary Judgment (the "Motion") (Doc. No. 12). The Debtor-Plaintiffs commenced the above-styled adversary proceeding against Southtowne Motors of Stone Mountain, Inc. (the "Defendant") seeking statutory damages of $1,000.00[1] under the Truth In Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq*., and TILA's implementing regulation, Federal Reserve Regulation Z, 12 C.F.R. § 226. The Defendant filed a Response and adopted the material facts from the Motion (Doc. No. 14).

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b), as well as Rule 1070-1 of the Local Rules of Practice for the United States Bankruptcy Court for the Northern District of Georgia. Where the Debtor's claim for statutory damages arises from a loan made by a Defendant-Creditor, the adversary action amounts to "counterclaims by the estate against persons filing claims against the estate . . . ." *Cooley v. Wells Fargo Fin. (In re Cooley)*, 362 B.R. 514, 519 (Bankr. E.D. Ala. 2007) (quoting 28 U.S.C. § 157(b)(2)(C)). Accordingly, this adversary action is a core proceeding under 28 U.S.C. § 157(b)(2)(C).[2]

In accordance with Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Bankruptcy Court pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, the Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Finally, the moving

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[1] According to 28 U.S.C. § 1640(a)(2)(A)(i), a creditor who fails to comply with any TILA requirement in a transaction with an individual is liable for twice the financing charge.

[2] Both Debtor-Plaintiffs and Defendant agree that this is a core proceeding.

party has the burden of establishing the right of summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir.1982).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir.1985). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

The material facts are undisputed. The Defendant states in its Response to the Motion that: "Defendant does not dispute the Statement of Material Facts submitted by Debtors/Plaintiffs." (Doc. No. 14, p. 2, ¶ 2). The parties agree that the Debtor-Plaintiffs purchased a vehicle for personal, family, and household purposes from the Defendant, who regularly extends credit where a finance charge is imposed. Additionally, the parties agree that the GAP insurance fee incurred in the transaction was not a finance charge.

On November 24, 2004, the parties[3] entered into a Retail Installment Contract and Security Agreement (the "Agreement") for a 2004 Hyundai Elantra. The terms of the Agreement included 60 monthly payments of $444.84 beginning January 8, 2005. The Agreement financed $15,798.80 at an annual interest rate of 21.85%. The Debtor-Plaintiffs also elected to purchase GAP at the same time they entered into the Agreement. The GAP Waiver was an addendum to the Agreement. The GAP Waiver included general information about the vehicle and was titled: "Installment Sales Contract/Loan/Lease GAP Waiver Addendum - Election Form." The remainder of the addendum included one boxed portion of text that stated in capital bolded letters: "**YES, I ELECT THE GAP WAIVER."** The text

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[3] The Agreement included an Assignment clause that reads, "This Contract and Security Interest is assigned to Americredit Fin. Servs., Inc."

of the disclosures followed the bolded "Yes" phrase. In non-bolded, smaller font, the required TILA disclosures were provided. Specifically, the first sentence of text read: "I understand that the purchase of the GAP Waiver Addendum is voluntary and is not required . . . ." Following this boxed portion of text was a second boxed, text portion on the addendum that stated: **"NO, I DO NOT ELECT THE GAP WAIVER."** Smaller text followed this heading, indicating responsibilities of the purchasing party. The required TILA disclosures under the "Yes" option were in a smaller font than the text following the "No" option.

Only a question of law remains: whether the Installment Contract/Loan/Lease Gap Waiver Addendum - Election Form (the "GAP[4] Waiver"), executed concurrently with the Debtor-Plaintiffs purchase of a motor vehicle, satisfies the disclosure requirements of TILA. The TILA statue at issue is 15 U.S.C. 1638(a) with the corresponding regulations, 12 C.F.R. §§ 226.17(a)(1) and 226.4(d)(3). Under TILA, creditors are required to make disclosures "clearly and conspicuously." 12 C.F.R. §§ 226.17(a)(1). "Conspicuousness is a question of law. . . ." *Rivera v. Gossinger Autoplex, Inc.*, 274 F.3d 1118,1122 (7th Cir. 2001).

The stated purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and to avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 28 U.S.C. § 1601(a); *Parker v. Potter*, 232 Fed. Appx. 861, 864 (11th Cir. 2007) (citing *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998)). Section 1638 governs transactions other than under an open end credit plan. 28 U.S.C. § 1638. Subsection (a) lists the required disclosures by a creditor. 28 U.S.C. § 1638(a). A creditor has additional obligations to a consumer when in connection with a credit transaction other contracts are entered into by the parties. *Bragg v.*

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[4]Guaranteed Automobile Protection

Bill Heard Chevrolet, Inc., 374 F.3d 1060, 1065 (11th Cir. 2004).

The Federal Reserve created corresponding regulations to TILA, including Regulation Z which is applicable in this action. 12 C.F.R. § 226. Specifically, section 226.4(d)(3)(i) provides that fees for debt collection coverage, including guaranteed automobile protection ("GAP") insurance, may be excluded from the finance charge. *Rodriguez v. Lynch Ford*, *Inc.*, No. 03-C-7727, 2004 U.S. Dist. LEXIS 23663, 2004 WL 2958772 (N.D. Ill. Nov. 18, 2004) (stating that GAP insurance is a form of debt cancellation coverage). Section 226.4(d)(3)(ii) further clarifies the scope of subsection 226.4(d)(3)(i) by stating that it "applies to fees paid for debt cancellation coverage of all or part of the debtor's liability for amounts exceeding the value of the collateral securing the obligation . . . ." 12 C.F.R. § 226(d)(4)(ii).

TILA "requires the creditor to make certain disclosures to the buyers before they become obligated on a [retail installment sales contract] in which the creditor has excluded the charge for such insurance from the finance charge, and included it in the amount financed." *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004). Regulation Z sets forth the specific content and timing requirements of such disclosures. 12 C.F.R. § 226.17. Subsection (a) of § 226.17 addresses the form of the required disclosure. It provides in subpart (1): " The creditor shall make the disclosures required by this subpart *clearly and conspicuously* in writing . . . ." 12 C.F.R. § 226.17(a)(1) (emphasis added). Conspicuous is defined as "a question of law under TILA that, like clarity, is governed by an objective, reasonable person approach." *Smith v. Check-N-Go of Ill., Inc.*, 200 F.3d 511, 514-15 (7th Cir. 1999).

The Debtor-Plaintiffs argue that the GAP Waiver did not comply with the form disclosure requirements under TILA because the voluntary nature of GAP is not "clear and conspicuous" as required by 12 C.F.R. § 226.17(a)(1). The Debtor-Plaintiffs' primary argument is that the size of the font indicating the voluntary nature of the GAP election is

smaller than any other text on the page. The Defendant argues, that although the text indicating the voluntary nature of GAP coverage is smaller, the overall format and bolded headings on the GAP Waiver are sufficiently conspicuous to indicate that the Debtor-Plaintiffs had a voluntary choice when electing to obtain GAP coverage.

In *Rivera v. Grossinger Autoplex, Inc.*, 274 F.3d 1118 (7th Cir. 2001), the Seventh Circuit found that the creditor's disclosures were sufficiently conspicuous and satisfied 12 C.F.R. § 226.17. The court viewed the addendum in question in its entirety from the viewpoint of an ordinary consumer. *Id.* at 1122. The court noted that the required disclosures for GAP coverage, as a debt cancellation fee, were labeled and had capital letters "to draw the reader's attention to material portions of the agreement, namely those disclosing that GAP coverage is voluntary and not a prerequisite to the obtainment of credit." *Id.*

In contrast, the district court in *Rodriguez v. Lynch Ford, Inc.*, No. 03-C-7727, 2004 U.S. Dist. LEXIS 23663, 2004 WL 2958772 (N.D. Ill. Nov. 18, 2004), found that the required disclosures were not conspicuous. The district court held that although the plain language of the disclosure were sufficient in substance, the form violated TILA because the disclosure was printed at the bottom in the smallest type on the page. *Id.* at *31-*32 (stating also that the GAP agreement conflicted with the retail installment contract and that the plaintiff testified that he was told orally that GAP insurance was a requirement by law, that he didn't understand the forms, and that he required a translator to testify in court).

Jones v. GMAC, No. 06-80150-JAC-13, slip op., 2007 Bankr. LEXIS 2049, 2007 WL 1725593 (Bankr. N.D. Ala. June 13, 2007), is most analogous to the matter before the Court. The bankruptcy court found that the Application for Insurance, which accompanied the Retail Installment Sales Contract and included GAP coverage, was sufficiently conspicuous and complied with the disclosure requirements of TILA under 12 C.F.R. § 226.17. *Id.* at *18. The bankruptcy court compared the disclosures to those in *Rivera* and found that the creditor did not bold or use capital letters in its disclosures. *Id.* at

*17. However, the court found that "[a]lthough other terms following the GAP disclosures appear in a slightly larger font, the font used for the disclosures and the placement of same is nevertheless conspicuous. The font used is not so small as to be difficult to read and the placement of the disclosures immediately following the heading '**APPLICATION FOR INSURANCE,**' which is capitalized and in bold, draws the reader's eye to same." *Id.* at *18. Additionally, the bankruptcy court determined that the ordinary consumer could have easily read and understood the disclosures. *Id.* at *17.

After careful consideration, the Court finds that the GAP Waiver satisfies the "clearly and conspicuously" requirement of 12 C.F.R. § 226.17(a)(1). The Court believes that an ordinary consumer would find the disclosures clear, conspicuous, and readable. Specifically, the heading on the GAP Waiver is analogous to the *Jones* case. It is capitalized, bolded, and indicates that it is an election form. Additionally, the boxed portions of text include capitalized and bolded options titled, **"YES, I ELECT THE GAP WAIVER"** or **"NO, I DO NOT ELECT THE GAP WAIVER."** This clear and conspicuous option indicates to the ordinary consumer that the election of GAP coverage is voluntary. Additionally, the text following the "Yes" option provides in plain language that the election is voluntary and is not a prerequisite for the extension of credit. As in *Jones,* the text size of the disclosure is not determinative. The smaller text of the disclosures in the GAP Waiver does not, on its own, violate TILA. The Court finds that the Defendant's GAP Waiver disclosures are legally sufficient.

The Debtor-Plaintiffs also assert that required disclosures must be on one page grouped together to comply with TILA's conspicuous requirement. Segregated disclosures are permitted regarding debt cancellation fees, according to statute and caselaw. 12 C.F.R. § 226.17(a), n. 38; *Vallies v. Sky Bank*, 432 F.3d 493 (3d Cir. 2006) (stating that an addendum can satisfy TILA); *Williams v. Lynch Ford, Inc.*, No. 03-C-5830, 2004 U.S. Dist. LEXIS 25883, 2004 WL 2997508 (N.D. Ill. Dec. 23, 2004); *see also Rivera*, 274 F.3d at 1122

(holding that disclosures in the addendum to the retail installment contract complied with TILA). The Court finds that the GAP Waiver disclosures satisfy TILA, and their placement in a concurrently executed document does not establish a TILA violation. Accordingly,

IT IS HEREBY ORDERED that the Motion is **DENIED.**

The Clerk's Office is directed to serve a copy of this Order upon the Plaintiff's Counsel, the Defendant, Defendant's Counsel, and the Chapter 7 Trustee.

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