IT IS ORDERED as set forth below:

Date: March 31, 2008

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: A06-70925-PWB
BELITA PAIGE,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
BELITA PAIGE,	:	
Plaintiff	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 06-6401-PWB
BYRIDER SALES OF INDIANA S, INC. d/b/a J.D. BYRIDER-PEACHTREE,	:	
Defendant.	:	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff in this adversary proceeding, Belita Paige ("Debtor"), seeks recovery from the defendant, Byrider Sales of Indiana S, Inc. d/b/a J.D. Byrider-Peachtree ("Byrider") for

violation of the Truth in Lending Act ("TILA" 15 U.S.C. § 1601 *et seq*). The Debtor contends that her contract with Byrider for the purchase of a 1998 Chevrolet Cavalier fails to comply with TILA's requirements regarding the disclosure of her payment schedule because it is confusing and misleading. Byrider contends that it has complied with the statute and that there is no basis for liability. Because this is a non-core proceeding, the Court's duty is to hear the matter and submit proposed findings of fact and conclusions of law to the District Court for *de novo* review. 28 U.S.C. § 157(c)(1); FED. R. BANKR. P. 9033. Based on the proposed findings and conclusions set forth below, the undersigned recommends that the District Court enter judgment in favor of the Defendant.

I. Procedural History

The Debtor filed a petition for relief under chapter 13 of the Bankruptcy Code on September 4, 2006, and listed her potential TILA claim as an asset in her schedules. On September 19, 2006, the Debtor commenced this action against Byrider for the alleged TILA violation. The Debtor converted the case to chapter 7 on November 28, 2006. The Chapter 7 Trustee abandoned her interest in the Debtor's TILA claim and, thus, it is the Debtor's asset. The Debtor received a chapter 7 discharge, and her bankruptcy case was closed.

The Debtor alleges in her complaint that Byrider is liable for violation of TILA because the contract's payment schedule fails to comply with the disclosure requirements regarding the number, amount, and due dates or period of payments scheduled to repay the total of payments as required by 28 U.S.C. § 1638(a)(6) and Regulation Z's 12 C.F.R. § 226.18(g). Specifically the Debtor contends that the contract violates TILA because it fails to include the second payment date for the starting month of semi-monthly payments. Byrider contends that its disclosure complies with TILA, but that even if it does not, it has attempted in good faith to comply with the statute and

regulations and, therefore, has a good faith defense to liability pursuant to 15 U.S.C. § 1640(f).

On April 10, 2007, the Court held a hearing on the parties' cross-motions for summary judgment[1] and the issue of jurisdiction that the Court had raised sua sponte. (Doc. No. 12). Subsequently, the Court entered an Order setting forth proposed findings of fact and conclusions of law with respect to jurisdiction and the issues raised by the parties' cross motions for summary judgment. (Doc. No. 22). For the reasons set forth in the Order, the Court concluded (1) that this matter is a non-core proceeding over which the Bankruptcy Court lacks jurisdiction to enter a final order or judgment; and (2) that the Court is to submit proposed findings of fact and conclusions of law to the District Court for *de novo* review and entry of a final order and judgment.

With respect to the merits of the Debtor's TILA claim, the Order determined that the contract's payment provisions do not contain sufficient information for the Debtor to determine all of the payment due dates. Nevertheless, the Order further determined that Byrider may be entitled to invoke the "good faith defense" of 15 U.S.C. § 1640(f) that could relieve it of liability. Because the issue of whether Byrider acted in good faith is a factual one, the Order scheduled a trial in order for Byrider to establish facts relating to its good faith defense. The Order deferred the submission of its determinations as proposed findings of fact and conclusions of law required by 28 U.S.C. § 157(c)(1) and FED. R. BANKR. P. 9033 until their incorporation into proposed findings of fact and conclusions of law to be submitted with regard to the remaining issues at the conclusion of trial.

The trial having been held, the Court now enters this Order that submits to the District

---

[1] Byrider's motion seeks entry of judgment on the pleadings. Because it refers to matters outside the pleadings, the Court treats its motion as one for summary judgment. FED. R. CIV. P. 12(c) (made applicable by FED. R. BANKR. P. 7012).

Court for *de novo* review this Court's proposed findings of fact and conclusions of law. The submission adopts and incorporates this Court's determination that partial summary judgment should be granted as set forth in the Court's previous Order (Doc. No. 22), attached hereto as Exhibit A. Proposed findings of fact and conclusions of law based on the trial are set forth below.

II. Byrider's Good Faith Defense

The Court conducted a trial on November 15, 2007. The Court analyzes the evidence and applicable law relating to the good faith defense as follows.

At the hearing, Byrider presented the testimony of Steven Wedding, the chief financial officer of JD Byrider Systems and president of Byrider Franchising, Inc. and Byrider Sales of Indiana S, Inc. Mr. Wedding testified that part of his job duties include insuring the company's compliance with requirements governing retail installment contracts in conjunction with the company's IT and legal departments. Mr. Wedding testified that he is familiar with TILA requirements and that, since 1998, he has been responsible for testing TILA disclosures in retail installment contracts. He further testified that he is aware of Regulation Z and the Federal Reserve Board Commentary to 12 C.F.R. § 226.18(g) (hereinafter referred to as the "Commentary")[2] which provides that a creditor can disclose the timing of payments by disclosing the payment frequency and the calendar date that the beginning payment is due and stated "that's why we do it the way we do." When asked by counsel for Byrider whether Byrider relied on the Commentary in using semi-monthly payments in its contract, Mr. Wedding testified "yes."He testified that, because of the complicated requirements of TILA, the company uses outside counsel to insure compliance and stay aware of novel issues; attends industry meetings; and reviews industry publications. In

[2]The Board's official commentary accompanying 12 C.F.R.§ 226.18(g) is included as a supplement to Regulation Z, 12 C.F.R. Part 226, Appendix C, Supp. I.

addition, Mr. Wedding stated that Byrider has originated approximately 109,000 contracts using semi-monthly terms since 1989. He testified that he is unaware of any challenge to the use of the semi-monthly term interval and that Byrider also relies on this in its usage of the terminology in its contracts.

Following the hearing, the parties submitted post-trial briefs on the reliance issue. The Debtor appears to make two arguments: (1) if Byrider was mistaken in its interpretation of Regulation Z and the Commentary with respect to the use of semi-monthly payments and only the starting payment, it can never claim reliance on the applicable regulations and commentary; and (2) because the commentary upon which Byrider relies does not specifically refer to semi-monthly payments, it cannot rely on it for purposes of the good faith defense.

The purpose of the good faith defense is to shelter from liability a creditor who is indeed mistaken or wrong, but who nevertheless in good faith relies on the pronouncements and interpretation of the Federal Reserve Board and acts in conformity with the law. The good faith defense, however, "does not protect a creditor from its own mistaken interpretation of the law." *Cox v. First Nat. Bank of Cincinnati*, 751 F.2d 815, 825 (6th Cir. 1985). What, though, does it mean to be mistaken? The Court did not find that Byrider's payment structure failed to comply with TILA because Byrider had departed from Board recommendations and Commentary. Indeed, the opposite is true. Byrider's payment history complies *literally* with the requirements of the Commentary. It is Byrider's literal compliance of disclosing only the starting date (and not the second semi-monthly date) that does not "enable a consumer to determine all of the payment due dates." 12 C.F.R. Part 226, App. C, Supp. I. Nevertheless, if a good faith defense were not available in a situation such as this, a creditor could be faced with choosing between its own interpretation and the Board's, a choice, the Supreme Court has recognized, Congress specifically

sought to avoid by amending TILA to include a good faith defense. *See Ford Motor Credit Co. Milhollin*, 444 U.S. 555, 566-567 (1980).[3]

Byrider has not misinterpreted the Commentary; it has literally applied it. To this end, the Court concludes that the Commentary's failure to make reference to the term semi-monthly in its discussion of payment frequency is not decisive on the issue of reliance. The fact that the Commentary does not include the term "semi-monthly" does not mean that Byrider has misinterpreted the provision or that its reliance is misplaced. The Commentary uses the terms "monthly" and "bi-weekly" in the discussion of timing of payments, but such terms are merely illustrative and nothing in the Commentary indicates that the usage of such terms is exclusive. As a result, the fact that the term "semi-monthly" is not used for demonstrative purposes in the Board's Commentary does not mean that Byrider cannot rely on the guidance given by the Board with respect to periodic payment options.[4] None of the cases cited by the Debtor require a contrary result.

The evidence shows that Byrider has studied and attempted to comply with TILA requirements. The Court concludes that Byrider has demonstrated reliance on Regulation Z and the Board's Commentary in its disclosure of semi-monthly payment terms and only the starting date of the payments. As such, the Court concludes that Byrider is protected from liability by the good

---

[3]Although it is not relevant to the issue of reliance or even liability under the statute, the Court notes that the Debtor was largely able to comply with the payment terms of the contract. As reflected in Byrider's Exhibit 1 admitted at trial, of the 23 semi-monthly payments that came due while the loan was active, the Debtor made 17 payments on time, 2 early, and 4 late.

[4]At the trial, Byrider introduced a copy of "Appendix J" (Exhibit 2) which contemplates semi-monthly payments in the context of annual percentage rate computations. The Court concludes that the existence of Appendix J is irrelevant to the issue of whether Byrider relied on the Commentary with respect to the disclosure of periodic payments in this case.

faith defense of 15 U.S.C. § 1640(f).

III. Proposed Findings of Fact and Conclusions of Law

The Court has considered the record in this case as appropriate in connection with the determination of jurisdictional issues and the motions for summary judgment; has heard evidence at the trial conducted on November 15, 2007; and has considered the post-trial briefs submitted by the parties with respect to issues not addressed by the Order entered September 5, 2007. Based thereon, the Court submits the following proposed findings of fact and conclusions of law for the District Court's consideration and de novo review in accordance with 28 U.S.C. 157(c)(1) and FED. R. BANKR. P. 9033.

1. On September 21, 2005, the Debtor purchased a 1998 Chevrolet Cavalier from Byrider for $8,896.10, financed with interest at 21%. The Retail Installment Contract provides for "Irregular deferred down payments" of $300.00 due October 10, 2005; $300.00 due October 25, 2005; and $100.00 due November 10, 2005. The contract then provides for 81 payments of $156.87 "semi-monthly beginning November 10, 2005."

2. The Debtor filed a petition for relief under chapter 13 of the Bankruptcy Code on September 4, 2006. The Debtor listed her potential TILA claim as an asset in her schedules. She converted the case to chapter 7 on November 28, 2006. The Chapter 7 Trustee has abandoned her interest in the Debtor's TILA claim and, thus, it is the Debtor's asset.

3. For the reasons set forth in the Court's September 5, 2007 Order and incorporated herein as conclusions of law, the Court concludes that Byrider's disclosure of only the starting date for semi-monthly payments does not comply with the requirement to disclose "the number, amount, and due dates or period of payments scheduled to repay the total of payments" as required by 15

U.S.C. § 1638(a)(6).

4. For the reasons set forth in the Court's September 5, 2007 Order and incorporated herein as conclusions of law, the Court concludes that Byrider bears the burden of proof in establishing reliance upon Federal Reserve Board rules, regulations, and interpretations, in order to invoke the "good faith defense" of 15 U.S.C. § 1640(f).

5. Based upon the evidence presented at the trial as discussed above, the Court finds as a matter of fact that Byrider in good faith relied on Regulation Z, 12 C.F.R. § 226.18(g) and the accompanying Commentary of the Federal Reserve Board in its disclosure of semi-monthly payment terms and only the starting date of the payments in the contract with the Debtor.

6. Based upon Byrider's reliance on Regulation Z and the Board's Commentary, it is shielded from liability pursuant to the good faith defense of 15 U.S.C. § 1640(f).

Based on the proposed findings of fact and conclusions of law set forth above and in the Court's September 5, 2007 Order, incorporated herein, this Court proposes that the District Court, after consideration and *de novo* review of them, accept this Court's proposed findings of fact and conclusions of law and enter judgment in favor of the Defendant.

End of Document

Distribution List

Andrew D. Gleason
Lefkoff, Rubin & Gleason PC
Suite 900
5555 Glenridge Connector
Atlanta, GA 30342

Ralph Goldberg
Goldberg & Cuvillier, P.C.
Suite 600
755 Commerce Drive
Decatur, GA 30030

David W Thompson
McGlinchey Stafford PLLC
Suite 406
25550 Chagrin Blvd
Cleveland, OH 44122

James S. Wertheim
McGlinchey Stafford PLLC
25550 Chagrin Blvd., Ste. 406
Cleveland, OH 44122

IT IS ORDERED as set forth below:

Date: September 05, 2007

Paul W. Bonapfel
Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: A06-70925-PWB
BELITA PAIGE,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
BELITA PAIGE,	:	
Plaintiff	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 06-6401-PWB
BYRIDER SALES OF INDIANA S, INC. d/b/a J.D. BYRIDER-PEACHTREE,	:	
Defendant.	:	

ORDER AND NOTICE OF TRIAL

The Debtor seeks recovery from Byrider Sales of Indiana S, Inc. d/b/a J.D. Byrider-Peachtree ("Byrider") for violation of the Truth in Lending Act ("TILA;" 15 U.S.C. § 1601 *et seq.*).

EXHIBIT "A"

The Debtor contends that her contract with Byrider for the purchase of a 1998 Chevrolet Cavalier fails to comply with TILA's requirements regarding the disclosure of her payment schedule because it is confusing and misleading. Byrider contends that it has complied with the statute and that there is no basis for liability.

For the reasons stated herein, the Court concludes that the contract's payment provisions do not contain sufficient information for the Debtor to determine all of the payment due dates. However, the Court further concludes that Byrider may be entitled to invoke the "good faith defense" of 15 U.S.C. § 1640(f) that could relieve it of liability. Because the issue of whether Byrider acted in good faith is a factual one, the Court will set this for further hearing as set forth herein.[1]

As an initial matter, the Court must determine its jurisdiction of this proceeding. Section 1334(b) of Title 28 vests original, but not exclusive, jurisdiction of "proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]" in the district courts. Under 28 U.S.C. § 157(a), a district court may refer such proceedings to its bankruptcy judges. In this District, the District Court has referred all proceedings within its bankruptcy jurisdiction to the bankruptcy judges. LR 83.7, NDGa.

On April 10, 2007, the Court held a hearing on pending motions and the issue of jurisdiction which the Court had raised sua sponte. (Doc. No. 12). After consideration of the issues, the Court concludes that it has jurisdiction of this proceeding because it relates to a case under the Bankruptcy Code. The Debtor commenced this case as a chapter 13 case and scheduled

---

[1]This matter is before the Court on the Debtor's motion for summary judgment and Byrider's motion for judgment on the pleadings. Because Byrider has referred to matters outside the pleadings, it is appropriate to treat its motion as one for summary judgment also. FED. R. CIV. P. 12(c) (made applicable by FED. R. BANKR. P. 7012).

her TILA claim as an asset of the estate. Jurisdiction attaches at the commencement of the case and, notwithstanding the Debtor's subsequent conversion to chapter 7 and abandonment of the asset by the trustee, the Court's jurisdiction over the proceeding continues. *Cf. Fidelity & Deposit Co. v. Morris (In re Morris)*, 950 F.2d 1531, 1534 (11th Cir. 1992) ("the dismissal of an underlying bankruptcy case does not automatically strip a federal court of jurisdiction over an adversary proceeding which was related to the bankruptcy case at the time of its commencement.").

A further jurisdictional issue is whether this constitutes a core proceeding. Section 157(b)(1) of Title 28 provides that a bankruptcy judge may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, and may enter appropriate orders and judgments. Section 157(b)(2) sets forth 16 categories of core proceedings. A bankruptcy judge may hear a non-core proceeding but, instead of determining it, submits proposed findings of fact and conclusions of law to the district court. 28 U.S.C. § 157(c)(1).

Byrider contends that the Debtor's TILA claim is not a core proceeding because it involves no substantive rights created by bankruptcy law and does not affect the bankruptcy estate. *Lewis v. Option One Mortgage, Inc. (In re Lewis)*, 2004 WL 2191600, *2 (Bankr. D.Kan. 2004) (Debtor's TILA, RICO, fraud, and negligence claims were not core proceedings because they were independent actions that did not depend on bankruptcy law for existence). The Debtor contends that this is a core proceeding because it is a counterclaim by the estate against a person filing a claim against the estate. 28 U.S.C. § 157(b)(2)(C). *See, e.g., In re Cooley*, 362 B.R. 514, 519 (Bankr. N.D. Ala. 2007) (Debtor's TILA claim is "unquestionably" a counterclaim against creditor who filed claim in case).

Whether the counterclaim rule applies to make this a core proceeding is complicated by two facts. First, the Debtor filed the complaint, while her case was pending under chapter 13, prior

to the filing of a proof of claim by Byrider. Second, during the pendency of this proceeding, the Debtor converted her chapter 13 case to chapter 7, the chapter 7 trustee abandoned this claim, and there were no assets for distribution. As a result, there was no recovery for the Defendant on any potential claim it had against the Debtor, and the estate is not bringing the Debtor's claim against Byrider.

These circumstances raise at least two issues. First, does a claim trigger the core proceeding provision as a "counterclaim" if it is filed prior to the assertion of the creditor's claim in the bankruptcy case? Second, if the answer is yes, does the status of the converted chapter 7 case affect the core/non-core status of the proceeding?

The Court declines to resolve the potentially complicated question of whether this proceeding is core or non-core. Instead, out of an abundance of caution and because of the current posture of the case, and in the interests of judicial economy, the Court will treat it as a non-core proceeding so that an Article III judge determines it, thus removing any doubt about the constitutional and statutory authority of a bankruptcy judge to do so. This approach is appropriate for two reasons. First, the Chapter 7 Trustee has abandoned the TILA claim and, therefore, it is no longer an asset of the estate; it is an asset belonging solely to the Debtor and has no bearing on the administration of the case which has, in fact, been discharged and closed. Second, the District Court was, and is, a proper forum for claims of this nature that are within its jurisdiction regardless of the bankruptcy filing.

Because the Court thus treats this as a non-core proceeding related to a bankruptcy case, the Court must submit proposed findings of fact and conclusions of law to the District Court for *de novo* review and entry of a final order and judgment. 28 U.S.C. § 157(c)(1). This Order announces proposed findings of fact and conclusions of law with regard to jurisdiction, as just

discussed, and the parties' motions, as set forth below. The Court will submit them for *de novo* review by the District Court in connection with the submission of further proposed findings of fact at the conclusion of the evidentiary hearing scheduled herein.

I. Proposed Findings of Fact

On September 21, 2005, the Debtor purchased a 1998 Chevrolet Cavalier from Byrider for $8,896.10, financed with interest at 21%. The Retail Installment Contract provides for "Irregular deferred down payments" of $300.00 due October 10, 2005; $300.00 due October 25, 2005; and $100.00 due November 10, 2005. The contract then provides for 81 payments of $156.87 "semi-monthly beginning November 10, 2005."

The Debtor filed a petition for relief under chapter 13 of the Bankruptcy Code on September 4, 2006. The Debtor listed her potential TILA claim as an asset in her schedules. She converted the case to chapter 7 on November 28, 2006. The Chapter 7 Trustee has abandoned her interest in the Debtor's TILA claim and, thus, it is the Debtor's asset.

II. Proposed Conclusions of Law

The purpose of TILA is to promote the "informed use of credit" by assuring "meaningful disclosure of credit terms" to consumers. 15 U.S.C. § 1601(a). Among its many requirements, TILA requires disclosure of the "number, amount, and due dates or period of payments scheduled to repay the total of payments." 15 U.S.C. § 1638(a)(6). Congress has delegated authority to the Federal Reserve Board to enact appropriate regulations to carry out the statute's purpose. 15 U.S.C. § 1604. The Supreme Court has recognized the Board as the primary source of interpretation and application of TILA and has given the Board deference. *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 239 (2004); *Ford Motor Credit Co. v. Milhollin*, 444 U.S.

555, 566 (1980).

Pursuant to its delegated authority, the Federal Reserve Board has promulgated Regulation Z, 12 C.F.R. § 226.1 *et seq.*, which gives further instruction regarding TILA's disclosure requirements. Under Regulation Z, a creditor must disclose a payment schedule consisting of "the number, amounts, and timing of payments scheduled to repay the obligation." 12 C.F.R. § 226.18(g).

The Board has further explained this regulation in its official commentary, included as a supplement to Regulation Z, 12 C.F.R. Part 226, Appendix C, Supp. I.[2] The commentary states in pertinent part:

> *4. Timing of payments. 1. General Rule.* Section 226.18(g) requires creditors to disclose the timing of payments. To meet this requirement, creditors may list all of the payment due dates. They also have the option of specifying the "period of payments" scheduled to repay the obligation. As a general rule, creditors that choose this option must disclose the payment intervals or frequency, such as "monthly" or "bi-weekly," and the calendar date that the beginning payment is due. For example, a creditor may disclose that payments are due "monthly beginning on July 1, 1998." This information, when combined with the number of payments, is necessary to define the repayment period and enable a consumer to determine all of the payment due dates.

---

[2]The commentary (and all TILA regulations) are available at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=36a6ae5427a12221fc9147cf763b0c05&rgn=div9&view=text&node=12:3.0.1.1.7.6.8.2.21&idno=12.

Thus, if a contract does not list all of the payment due dates, it must set forth the period of payments including (1) the payment intervals or frequency and (2) the calendar date of the beginning payment such that the combined information that defines the repayment period would *"enable a consumer to determine all of the payment due dates."* *Id.* (emphasis added). If it does not, a violation of 15 U.S.C. § 1638(a)(6) occurs, for which 15 U.S.C. § 1640(a) imposes liability.

Even if a court determines that the disclosure does not comply with § 1638, a creditor may nevertheless be immune from liability under § 1640(a) pursuant to the "good faith" defense set forth in 15 U.S.C.§ 1640(f), which provides:

> No provision of [§ 1640] . . . . imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the [Federal Reserve] Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

The Debtor contends that Byrider is liable for violation of TILA because the contract's payment schedule fails to comply with its disclosure requirements regarding the number, amount and due dates or period of payments scheduled to repay the total of payments. Specifically, the Debtor contends the contract violates TILA because it fails to include the second payment date for the starting month of semi-monthly payments. Byrider contends that its disclosure complies with TILA, but even if it does not, Byrider has attempted in "good faith" to comply with the statute and

regulations and, therefore, has a good faith defense to liability.

Thus, in this proceeding the Court must make two determinations: (1) Whether Byrider's disclsosure of the timing and period of payments complies with TILA; and (2) if it does not, whether Byrider has a defense from liability based on good faith compliance with a rule, regulation or interpretation of the Federal Reserve Board.

A. Sufficiency of payment disclosures

Byrider's disclosure calls for two payments each month and contains only the starting date of the first payment (81 payments of $156.87 "semi-monthly beginning November 10, 2005."). The problem is that this disclosure does not provide a means for determining when all payments will be due.

The Board's commentary uses bi-weekly or monthly examples to demonstrate how a disclosure of frequency of payments plus the payment starting date may satisfy the period of payment disclosure. The reason that disclosures containing the words monthly or bi-weekly combined with a starting date of payment satisfy the requirement is that both, combined with the number of payments, allow consumers to calculate when all payments are due. A month is a set time period that does not change. Although a month may vary in the number of days, a monthly payment that is due, for example, on the 1st day of the month each month will comply. Similarly, with bi-weekly payments, after the start date, the consumer need only count two weeks from the starting date to determine when the next payment is due.

The term "semi-monthly" means payments on two fixed dates per month. Neither the Debtor nor Byrider has cited any case dealing with semi-monthly payments and this Court's own research has not revealed one either. Though the Debtor's contract reveals that her first semi-monthly payment is due November 10, by definition, her second payment in that month can come

any time after that date and before the end of such month. A payment that can occur any time after the tenth of the month fails to inform the consumer of when the payment is due and does not "enable a consumer to determine of all of the payment due dates." 12 C.F.R. Part 226, Supp. I.

While one could presume that the second payment would be due fifteen days later (half of a month), the purpose of TILA is not to have a consumer guess or presume when her payments are due. Nor should the Debtor be expected to assume that the regular semi-monthly payments will follow a schedule similar to that for the down payments which, according to the contract, are "irregular." Further, "the sufficiency of TILA-mandated disclosures is to be viewed from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor." *Smith v. Cash Store Management*, 195 F.3d 325, 328 (7th Cir. 1999) (internal quotation marks omitted). The elimination of guesswork or confusion is underscored by the commentary's statement that the disclosure of frequency of payments and starting date when combined with the number of payments, will "enable a consumer to determine all of the payment due dates." 12 C.F.R. Part 226, Supp. I. This disclosure does not do so.

In sum, the failure to disclose only the starting date for semi-monthly payments does not comply with the requirement to disclose "the number, amount, and due dates or period of payments scheduled to repay the total of payments." 15 U.S.C. § 1638(a)(6).

B. Good faith defense

Notwithstanding a determination that the disclosure of the period of payments was insufficient, it is not a court's role to create new disclosure requirements. Because of the deference given to the Federal Reserve Board's rulemaking authority, it would be extraordinarily unfair to impose liability upon a creditor who has relied on the Board's official published interpretation of the statute.

To that end, § 1640(f) provides that a creditor is not subject to liability for "any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor."

The Supreme Court has explained the history and significance of the good faith defense as follows, *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-567 (1980):

> Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law. Because creditors need sure guidance through the "highly technical" Truth in Lending Act, S.Rep.No. 93-278, p. 13 (1973), legislators have twice acted to promote reliance upon Federal Reserve pronouncements. In 1974, TILA was amended to provide creditors with a defense from liability based upon good-faith compliance with a "rule, regulation, or interpretation" of the Federal Reserve Board itself. § 406, 88 Stat. 1518, *codified* at 15 U.S.C. § 1640(f). The explicit purpose of the amendment was to relieve the creditor of the burden of choosing "between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act." S.Rep. No. 93-278, *supra*, at 13. The same rationale prompted a further change in the statute in 1976, authorizing a liability defense for "conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals. . . ." § 3(b), 90 Stat. 197, *codified* at 15 U.S.C. § 1640(f) (citations

omitted).

Furthermore, *Milhollin* recognizes that the good faith defense "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative" and that the "language in the legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Milhollin,* 444 U.S. at 567-568.

The "good faith defense" is an affirmative defense. As such, Byrider bears the burden of proof in establishing it. A creditor must demonstrate "reliance" upon Federal Reserve Board rules, regulations, and interpretations before it can successfully invoke the good faith defense of 1640(f). *Jones v. Bill Heard Chevrolet, Inc.*, 212 F.3d 1356, 1363 (11th Cir. 2000), *overruled on other grounds by Turner v. Beneficial Corp.*, 242 F.3d 1023 (11th Cir. 2001); *McGowan v. Credit Ctr. of North Jackson, Inc.*, 546 F.2d 73, 77 (5th Cir. 1977).[3]

Byrider contends in its motion and response to Debtor's motion that it relied in good faith on the official commentary issued by the Federal Reserve Board as set forth in 12 C.F.R., Part 226, Supp. I, which provides that creditors may satisfy the timing of payments disclosure requirement of § 226.18(g) by "disclos[ing] the payment intervals or frequency, such as 'monthly' or 'bi-weekly,' and the calendar date that the beginning payment is due." But, Byrider has offered no evidence, in the form of affidavit or testimony, to demonstrate its reliance on the official commentary. In order for Byrider to establish facts relating to its good faith defense, the Court shall schedule this matter for an evidentiary hearing. Accordingly, it is

ORDERED that the Court shall hold an evidentiary hearing on October 2, 2007, at 2:00

[3]The Eleventh Circuit adopted as binding precedent all decisions of the Fifth Circuit issued prior to October 1, 1981, in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

p.m., in Courtroom 1401, U.S. Courthouse, 75 Spring Street, S.W., Atlanta, Georgia, so that Byrider may demonstrate reliance upon Federal Reserve Board rules, regulations, and interpretations in support of its good faith defense under 15 U.S.C. § 1640(f). After the hearing, the Court will make further proposed findings of fact and conclusions of law and will incorporate them with the proposed findings and conclusions set forth herein for submission to the District Court in accordance with 28 U.S.C. § 157(c)(1) and FED. R. BANKR. P. 9033. The Court thus defers the submission of the proposed findings of fact and conclusions of law set forth herein pending the evidentiary hearing, and this Order announcing them shall not be deemed to be a submission of them under Rule 9033.

Counsel for the parties shall confer as to whether any further pre-trial procedures, a pre-trial conference, or pre-trial order would be appropriate. If counsel for either party desires a pre-trial conference, counsel shall file a request within 10 days and contact the courtroom deputy clerk with regard to scheduling.

End of Document

Distribution List

Andrew D. Gleason
Lefkoff, Rubin & Gleason PC
Suite 900
5555 Glenridge Connector
Atlanta, GA 30342

Ralph Goldberg
Goldberg & Cuvillier, P.C.
Suite 600
755 Commerce Drive
Decatur, GA 30030

David W Thompson
McGlinchey Stafford PLLC
Suite 406
25550 Chagrin Blvd
Cleveland, OH 44122