IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THOMAS ZIMMERMAN and
PATRICIA ZIMMERMAN,

Plaintiffs,

v.

GREG LOGEMANN, 1st RATE MORTGAGE CORP.,
GRETTA HAUN, BOARDWALK REALTY, INC.,

OPINION AND ORDER

Defendants,

09-cv-210

COUNTRYWIDE BANK, N.A., and
AMERICA'S WHOLESALE LENDER,

Defendants and
Third-Party Plaintiffs,

v.

TRI-COUNTY TITLE & ABSTRACT, LLC and
TERRI S. OSWALD,

Third-Party Defendants.

This case tells the increasingly familiar tale of real people sucked into the vortex of America's 2006 housing market bust. Plaintiffs and first-time home buyers Thomas Zimmerman and Patricia Zimmerman are bankrupt and living in a home that no longer is worth what they paid for it. In this civil case for damages, statutory penalties and equitable relief, plaintiffs allege that they were duped into accepting a mortgage loan that they could not afford by a mortgage broker, an appraiser and lenders who falsified plaintiffs' financial information and knowingly inflated the appraised value of the property by as much as $120,000. Plaintiffs bring claims under the Truth in Lending Act, the Credit Repair Organizations Act and various state laws. Jurisdiction is present under 28 U.S.C. §§1331 and 1367.

The following summary judgment motions are before the court:

> (1) Defendants Boardwalk Realty, Inc. and Gretta Haun's motion for summary judgment on plaintiffs' claims of fraud, deceptive trade practices and conspiracy, dkt. 167;
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> (2) Defendants Countrywide Bank, N.A.'s and America's Wholesale Lender's motion for summary judgment on plaintiff's claims of violations under the Truth in Lending Act, common law fraud, deceptive trade practices and conspiracy, dkt. 178;
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> (3) Defendants Countrywide Bank, N.A.'s and America's Wholesale Lender's motion for summary judgment on the cross-claim by defendants Greg Logemann and 1st Rate Mortgage Corp. for indemnification, dkt. 197;
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> (4) Defendants Countrywide Bank, N.A.'s and America's Wholesale Lender's motion for summary judgment on their third party complaint against Tri-County Title and Abstract LLC and Terri S. Oswald, dkt. 202, and Oswald's cross-motion on the same claim, dkt. 216; and
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> (5) Plaintiffs' motion for partial summary judgment on their action for rescission under the Truth in Lending Act and on their claims that defendants Logemann and 1st Rate violated Wis. Stat. § 224.79 and the Credit Repair Organizations Act, 15 U.S.C. § 1679b, dkt. 207.

For the reasons discussed below, the court is granting motions (1), (2) and (3) and is denying (4) as moot. Plaintiffs' motion for partial summary judgment, (5) is denied as to their claim for rescission of the mortgage contract and is granted as to their statutory claims against Logemann and 1st Rate.

One matter deserves mention before setting out the facts: In an order entered October 28, 2010, I permitted the law firm retained by Logemann and 1st Rate to withdraw, finding that counsel had no choice in light of their clients' direction that they perform no more work on the case. Dkt. 162. Logemann has soldiered on pro se, responding to plaintiffs' motion for partial

summary judgment. (He has not, however, opposed defendant Countrywide's motion for summary judgment on the cross-claim filed by Logemann and 1st Rate for indemnification.) 1st Rate has not responded to any motion, perhaps because it knows that a corporation may appear in federal court only through licensed counsel. *Rowland v. California Men's Colony*, 506 U.S. 194, 201-02 (1993); *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 924 (7th Cir. 2003).

As discussed below, I am granting plaintiffs' motion as to their claims that Logemann and 1st Rate committed violations of Wisconsin's laws governing mortgage broker agreements and the federal Credit Repair Organizations Act, but reserving ruling on whether plaintiffs are entitled to damages under either statute. Also remaining for trial are plaintiffs' claims against Logemann and 1st Rate for common law and consumer fraud and violation of Wisconsin's rules governing direct marketing. If 1st Rate does not retain counsel for trial on these matters, then it cannot appear at trial to defend against plaintiffs' claims.

From the parties' proposed findings and the record, I find that the following facts are material and undisputed for the purposes of deciding the motions for summary judgment:

FACTS

I. The Zimmermans Obtain a Construction Loan

In March 2006, plaintiffs Thomas and Patricia Zimmerman, who are husband and wife, decided to purchase real property at 510 First Street, La Velle, Wisconsin, and to erect on that property a modular home to be used as their primary residence. This was the first time the Zimmermans had bought real estate. Greg Logemann, a mortgage broker employed by and working on behalf of 1st Rate Mortgage, contacted the Zimmermans to assist with financing for

their new home. Logemann met with the Zimmermans at their residence on May 16, 2006. The Zimmermans told Logemann that they could only afford a monthly payment of $1,000 a month. (Whether this $1,000 target was to include property taxes and insurance or was merely the desired mortgage payment is disputed but immaterial to the dispositive motions.)

At this meeting, Logemann provided documents for the Zimmermans to sign, including a "Mortgage Broker Agreement" and a loan application. The Zimmermans signed the loan application, even though it did not yet contain any information about their income. They also signed the Mortgage Broker Agreement. They paid Logemann $300, which he was to use to hire an appraiser. The Mortgage Broker Agreement was a standardized document that had a number of blank spaces to be filled in on a case-by-case basis. In the Zimmermans' case, some of the spaces were left blank, such as the number of days the agreement was to be in effect, the principal amount and interest rate of the mortgage being sought, and whether the mortgage could be subject to negative amortization or locked in.

After the Zimmermans decided on the home they were going to build, Logemann looked for a bank to finance its construction. Because approval of a construction loan is based on the borrower's ability to obtain "end" financing once the construction is complete, Logemann's task included looking for a mortgage lender who would refinance the Zimmermans' construction loan after the home was built. Logemann decided to go with defendant Countrywide Bank, N.A.,[1] which he liked for its fast response time, easy application process, friendly representatives and online software. Although Logemann arranged 60 - 70% of his loans through Countrywide,

[1] Defendant America's Wholesale Lender is a registered trade name for Countrywide under which Countrywide does business, and all parties have treated them as a singular entity. For ease of reference, I will refer to these defendants collectively as "Countrywide."

Logemann did not have a contract or any other obligation requiring him to use Countrywide. In fact, 1st Rate had relationships with at least 10 lenders whom Logemann could have approached for refinancing. Countrywide did not provide Logemann with a W-2, pay his health insurance or require him to use its services.

To determine if the Zimmermans would qualify for a mortgage loan with Countrywide, Logemann used an internet portal that gave him direct access to Countrywide's computer system, which allowed brokers to analyze whether Countrywide would approve funding to a hypothetical borrower based on hypothetical facts. Logemann inquired about a stated-income, stated-asset loan from Countrywide. Such loans were a product offered by Countrywide in which the lender accepted the borrower's income and assets as stated by the borrower (or mortgage broker, as the case may be) without requiring any verification such as W-2s, pay stubs, tax returns or similar documentation. Countrywide's e-approval system had no mechanism for checking whether the inputted information was correct nor did it have any instruction to brokers using the program not to lie about a borrower's income.

Logemann knew what type of work the Zimmermans performed and how long they had been at their respective jobs, but he did not know their annual income. When asked by Countrywide's e-approval system to input salary information, Logemann entered income figures that were substantially higher than what the Zimmermans actually earned. (At his deposition, Logemann did not recall whence he obtained his salary figures, but thinks he may have used the website salary.com, which provides a range of incomes for particular occupations. Plaintiffs say they provided Logemann with pay stubs or income tax returns showing their actual income prior to closing on the loans at issue, but Logemann disputes this. It is undisputed, however, that

Logemann did not verify the plaintiffs' actual income before seeking conditional or final loan approval from Countrywide on their behalf.) Based on this and other information inputted by Logemann, including the future home's predicted appraised value of $270,000, Countrywide represented through its e-approval system that plaintiffs were conditionally approved for a mortgage loan. Conditional loan approvals were just that: conditional. They were subject to receipt of a loan application and to further review and branch verification, including an appraisal of the completed home.

Having obtained conditional approval from Countrywide that the Zimmermans would qualify for a mortgage (based on the substantially inflated income figures), Logemann arranged a $200,000 construction loan with First National Bank on behalf of the Zimmermans.

The closing on the construction loan occurred on June 5, 2006, at the Zimmermans' home and was conducted by Terri Oswald, a closing agent for Tri-County Title. Oswald presented numerous documents to the Zimmermans for them to sign, including a loan application that had been prepared by Logemann. The loan application included the same inaccurate income figures that Logemann had used to obtain conditional loan approval from Countrywide. Nonetheless, the Zimmermans signed the document under oath, affirming that the information was accurate. According to plaintiffs, they did not actually read the document and did not see that the income stated on the loan application was incorrect.

The Zimmermans signed the First National Bank mortgage note on June 5, 2006. The note provided for the terms of payment, including a balloon payment. Specifically, the note stated: "This is a construction loan and interest is payable on the amounts advanced beginning July 5, 2006 and continuing at monthly time intervals thereafter. A final payment of the unpaid principal and accrued interest is due on March 5, 2007."

Construction on the Zimmermans' home was complete in September 2006. The Zimmermans sold their mobile home and moved into the new home before refinancing the construction loan.

II. The Zimmermans Refinance

After the home was complete, Logemann sought final approval on the refinancing/ mortgage loan from Countrywide, which included getting the home appraised. Logemann arranged for defendants Haun and Boardwalk Realty to appraise the property on September 16, 2006. They appraised the home at $272,400. This appraisal was sent to Countrywide.

Countrywide's underwriting department received the Boardwalk appraisal but questioned its reliability, noting that the properties used as "comparables" were not similar to the Zimmermans' home. Countrywide ordered a second appraisal, which was performed by All State Appraisal on October 19, 2006. All State appraised the property at $215,000. Countrywide's underwriting department accepted the All State appraisal and approved a loan to the Zimmermans based on a total appraised value of $215,000. Countrywide did not rely on the Boardwalk appraisal when deciding how much to lend to the Zimmermans.[2]

Among the factors Countrywide used to determine whether to lend money to the Zimmermans was information provided in a loan application submitted by Logemann that the Zimmermans signed the day of the closing. In the course of approving the refinancing, Countrywide's underwriters verified where Thomas and Patricia Zimmerman worked and their

[2] Plaintiffs claim otherwise, but the evidence does not establish a genuine dispute of this fact. *See infra* at 12-14.

job titles. They did not ask the Zimmermans to verify their income with W-2s or pay stubs because the Zimmermans were applying for a stated income, stated asset loan, which did not require such documentation.

Countrywide offered the Zimmermans a total refinancing package of $212,000, split into two loans: the first was a loan for $172,000 with an interest rate of 7.125%, with an $1158 monthly payment for 30 years; the second was a loan of $40,000 with an interest rate of 9.25%, with a $329.07 monthly payment with a balloon payment of $32,302.76 due on November 2, 2021. Although the monthly payments due under these loans exceeded the their stated bottom line of $1,000, the Zimmermans did not ask Logemann to shop any other banks for better terms or seek to negotiate Countrywide's terms. (Plaintiffs claim that they were not aware until closing what their monthly payments would be, but Logemann says he discussed this with the Zimmermans before the closing date. They also say that Logemann led them to believe that accepting the split-loan package from Countrywide was their only refinancing option; this fact is also in dispute.) Logemann assured plaintiffs that he would be able to obtain refinancing for them by December 2007 that had more favorable monthly payments.

Closing on this refinance took place on October 26, 2006. As with the construction loan, Terri Oswald of Tri-County Title served as the closing agent and went over the documentation with the Zimmermans. The Uniform Residential Loan Application, dated October 26, 2006, showed the value of the home as $215,000, and again gave inflated figures for plaintiffs' respective incomes. In spite of the inaccurate income listed on the application, the Zimmermans both signed it.

The Zimmermans signed the notes and mortgages on October 26, 2006 and received $212,000 from Countrywide. The Zimmermans did not have the funds to pay off their construction loan so therefore needed this mortgage loan to pay the balloon payment owed to First National Bank. It is unclear from the record why the Zimmermans borrowed $212,000 instead of $200,000.

Under federal law, Oswald was required at closing to give two copies of the Truth in Lending Statement to the Zimmermans, but she provided only one copy. The HUD Settlement Statement completed with regard to the loans showed All State Apprisal received an appraisal fee relating to the loan.

From October 2006 until October 2008, the Zimmermans made all the monthly payments due on both of the loans. They contacted Logemann in 2007 to request his assistance in refinancing the loans, but he was unable to find a willing lender.

IV. The Zimmermans Attempt To Rescind the Contract

On October 30, 2008, the Zimmermans mailed notices of rescission on both loans to Countrywide. Countrywide received the notices on November 12, 2008. It responded by mail on February 3, 2009, stating that it would not honor the rescission.

Meanwhile, on December 11, 2008, the Zimmermans filed a Chapter 13 bankruptcy petition. Under the terms of the amended reorganization plan approved by the bankruptcy court on August 26, 2009, plaintiffs are allowed to pursue this action, with any proceeds

recovered to be reported to the Bankruptcy Court. *See* Amended 13 Plan for Reorganization, dkt. 238, exh. A., at ¶5.5.[3]

V. The Zimmermans File Suit in Federal Court

On April 9, 2009, the Zimmermans filed a complaint against Countrywide and America's Wholesale Lender, 1st Rate, Logemann, Boardwalk and Haun for damages they allegedly incurred in connection with the purchase of their home. In general, the Zimmermans alleged that defendants conspired to induce them into obtaining mortgage loans they could not afford. The Zimmermans subsequently filed an amended complaint on June 10, 2009, which was the subject of various motions to dismiss. In an opinion and order entered December 1, 2009, I allowed some claims to go forward and dismissed others, and granted plaintiffs one last opportunity to amend their complaint. Dkt. 89, Op. and Order, 09-cv-210-slc, Dec. 21, 2009. The Zimmermans filed their second amended complaint on December 21, 2009 (dkt. 90). The specific claims as to the various defendants will be discussed in the analysis below.

OPINION

I. Summary Judgment Standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels*

[3] Defendant Logemann also filed for bankruptcy. On February 10, 2010, the bankruptcy court entered an order granting the Zimmermans relief from the automatic stay so they could pursue this case against Logemann. Dkt. 106.

Int'l-Ind., Inc., 211 F.3d 392, 396 (7th Cir. 2000). The reviewing court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Chelios v. Heavener*, 520 F.3d 678, 685 (7th Cir. 2008); *Spath*, 211 F.3d at 396. Where the moving party fails to meet its strict burden of proof, a court cannot enter summary judgment for the moving party even if the opposing party fails to present relevant evidence in response to the motion. *Cooper v. Lane*, 969 F.2d 368, 371 (7th Cir. 1992).

In responding to a summary judgment motion, the nonmoving party may not simply rest upon the allegations contained in the pleadings but must present specific facts to show that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e)(2); *Celotex*, 477 U .S. at 322-26; *Johnson v. City of Fort Wayne*, 91 F.3d 922, 931 (7th Cir. 1996). A genuine issue of material fact is not demonstrated by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, or by "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252.

II. Plaintiffs' Claims Against Haun and Boardwalk Realty

The Zimmermans allege three different claims against Boardwalk and its agent, Haun: (1) fraud; (2) a violation of Wisconsin's Deceptive Trade Practices Act, Wis. Stat. § 100.18; and (3) civil conspiracy. All three claims rest on the contention that Boardwalk's appraisal, which the Zimmermans allege was artificially inflated, "was used to solicit and grant the mortgage

loans" that plaintiffs ultimately received from Countrywide. Second Amended Complaint, dkt. 90, ¶¶ 51-56. Haun and Boardwalk have moved for summary judgment, contending that the Zimmermans are unable to prove this pivotal contention.[4]

Haun and Boardwalk cannot be found liable because Countrywide did not rely on their appraisal when it loaned $212,000 to plaintiffs. As Haun and Boardwalk point out, the evidence of record shows that Countrywide did *not* use the Boardwalk appraisal as a basis for lending $212,000 to the Zimmermans, but instead used the All State Appraisal. Countrywide's Rule 30(b)(6) witness, Barry Weisman, testified that although Countrywide received and reviewed the Boardwalk appraisal, it rejected it on the ground that the properties used as "comparables" were not similar to the plaintiffs' property. According to Weisman, Countrywide based its loan determination on the All-State appraisal. Weisman's testimony is corroborated by: (1) the Uniform Residential Loan Application signed by plaintiffs at the October 26, 2006 closing showed the home's value as $215,000, which was the value stated in the All-State Appraisal; (2) the absence of the Haun/Boardwalk appraisal from Countrywide's loan file; and (3) the HUD Settlement Statement, which shows that All State Apprisal received an appraisal fee relating to the loan.

The Zimmermans argue that the record contains conflicting facts concerning whether Countrywide relied on the Haun/Boardwalk appraisal, but their arguments are insufficient to create a genuine factual dispute for trial. For instance, the Zimmermans point to several

[4] Worth noting is that plaintiffs do not suggest that Boardwalk and Haun had anything to do with their initial construction loan for $200,000 from First National Bank. Rather, plaintiffs' claims against Boardwalk and Haun are tied to the $212,000 in loans from Countrywide, a loan plaintiffs admit they needed to pay off the construction loan. Thus, it appears that Boardwalk and Haun's liability, if there were to have been any, would have been limited to $12,000, which is the difference between the loan plaintiffs were already in and the $212,000 loan from Countrywide.

documents produced by Countrywide that refer to a purported value of $272,400 for the home and other documents showing that the Haun/Boardwalk appraisal was received by Countrywide. Pls.' Br. in Opp., dkt. 231, at 34-38. However, nothing in any of these documents identifies the source of this number or, more importantly, shows that this number was used for any purpose by Countrywide in deciding the amount of the mortgage loan. At most, these documents show that Countrywide received or reviewed the Boardwalk Appraisal at some point during the underwriting process, a fact that Countrywide admits.

The Zimmermans speculate that because Countrywide's underwriters saw the appraisal, they *must* have relied on it somehow in connection with the October 26, 2006 mortgage loans. Plaintiffs also suggest that in order for Countrywide to establish that it did not rely on the Haun/Boardwalk appraisal, it had to produce a document or testimony from the individuals who underwrote the loan indicating that the appraisal was rejected. Neither of these arguments is well taken. As defendants point out, the Zimmermans have advanced no argument that Weisman's preparation was somehow inadequate or that he was not able to describe with reasonable particularity the steps taken by Countrywide's underwriting department with respect to the plaintiffs' loans.

To the extent the Zimmermans suggest that the individuals who actually underwrote the loans should have been deposed, Countrywide was not–and is not–obliged to corroborate Weisman's testimony on this point. If plaintiffs had thought it important to attempt to adduce this testimony, then it was plaintiffs' obligation to do so. Summary judgment is the "put up or shut up" moment in a lawsuit. *E.g. Goodman v. National Security Agency Inc.*, 621 F.3d 651, 654

(7th Cir. 2010).[5] Having put up no evidence showing reliance by Countrywide on the Haun/Boardwalk appraisal, the Zimmermans can at best suggest a metaphysical doubt about the facts. This will not defeat summary judgment for defendants on these claims.

III. Countrywide's Motion for Summary Judgment on Plaintiffs' Claims

Plaintiffs have sued Countrywide under the following theories: (A) violations of the Truth in Lending Act; (B) common law fraud; (C) violation of Wis. Stat. § 100.18; and (D) conspiracy. Countrywide has moved for summary judgment on all of the claims asserted against it. I address each of plaintiffs' theories in turn:

A. Truth in Lending Act—Right of Rescission

The Zimmermans allege that Countrywide failed to provide certain disclosures required by the Truth in Lending Act 15 U.S.C. § 1601 *et seq*. ("TILA") and its implementing regulation, Regulation Z. In addition to seeking actual and statutory damages and attorney fees, plaintiffs ask the court to enforce their right to rescind the mortgage contract. Amended Complaint, dkt. 90, at ¶¶95-102. Countrywide asks this court to deny plaintiffs' action for rescission as a matter of law, on the ground that plaintiffs are unable to tender the loan proceeds.

The purpose of the 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

[5] Even if plaintiffs *had* attempted this discovery, one has to wonder whether the actual underwriters could have been located, whether they would have had any recollection of this particular loan file, and whether pursuing this ostensible discovery lead would have passed muster under F.R. Civ. Pro. 26(b)(2)(C).

avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). It requires creditors to make "clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998). If the creditor fails to do so, then it can be held liable for criminal penalties, see 15 U.S.C. § 1611, and a debtor can sue for damages including a statutory penalty of twice the finance charge. *See* 15 U.S.C. § 1640(a). *Beach*, 523 U.S. at 412. The TILA mandates strict compliance with required disclosures; technical violations will not provide creditors an escape from liability. *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407, 416 (7th Cir. 1980).

For loan transactions involving security interests in a debtor's primary residence, such as the loan involved in this case, the debtor can demand that the creditor rescind the mortgage if certain material disclosures are not made. *See* 15 U.S.C. § 1635(a). The TILA provides that each borrower must receive two copies of a notice of the right to rescind the mortgage within a certain period after closing. 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(b)(1). If proper notice is not provided, then the right to rescind survives for three years from the consummation of the transaction. 12 C.F.R. § 226.23(a)(3).

Section 1635(b) governs the return of money or property when a debtor exercises the right to rescind. The statute adopts a sequence of rescission and tender that must be followed unless the court orders otherwise: within 20 days of receiving a notice of rescission, the creditor is to return any money or property and reflect termination of the security interest; when the creditor has met these obligations, the borrower is to tender the property. Section 226.23 of Regulation Z implements § 1635(b). It tracks the statute and states:

(d) Effects of rescission.

> (1) When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge.
>
> (2) Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest.
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> (3) If the creditor has delivered any money or property, the consumer may retain possession until the creditor has met its obligation under paragraph (d)(2) of this section. When the creditor has complied with that paragraph, the consumer shall tender the money or property to the creditor . . . .
>
> (4) The procedures outlined in paragraphs (d)(2) and (3) of this section may be modified by court order.

12 C.F.R. § 226.23. As courts and commentators have pointed out, the sequence of rescission and tender set forth in § 1635(b) is "a reordering of common law rules governing rescission," *Willams v. Homesake Mortgage Co.*, 968 F.2d 1137, 1140 (11th Cir. 1992), insofar as it requires the non-rescinding party, the creditor, to tender first.

In this case, Countrywide's closing agent, Oswald, failed to make a material disclosure required by the Truth in Lending Act when she failed at closing to give one copy of the Truth in Lending Statement to each of the Zimmermans. Because of that error, the Zimmermans had three years from the loan closing, as opposed to the usual three days, to seek to rescind their loan. 12 C.F.R. 226 ("Reg Z"), § 226.15(a)(3). The Zimmermans mailed a notice of rescission to Countrywide within three years of the closing date.

Even so, Countrywide contends that rescission is not appropriate unless the Zimmermans first establish that they are able to tender the loan proceeds to Countrywide, which, it maintains, they cannot do. Countrywide points to a number of decisions in which courts have found that the last sentences of 15 U.S.C. § 1635(b) and Regulation Z provide courts with discretion to modify the rescission procedures when required to do so to obtain an equitable outcome. *See American Mortgage Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007); *Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1170-71 (9th Cir. 2003); *AFS Financial, Inc. v. Burdette*, 105 F. Supp. 2d 881 (N.D. Ill. 2000). This includes the ability to condition rescission on the borrower's return of any property received to the lender. *Yamamoto*, 329 F.3d at 1171; *Williams*, 968 F.2d at 1141-42 (voiding creditor's security interest in home may be conditioned on consumer's tender of amount owed to creditor after subtracting finance charges and penalties); *FDIC v. Hughes Dev. Co.*, 938 F.2d 889, 890 (8th Cir. 1991); *Bustamante v. First Fed. Sav. & Loan Ass'n*, 619 F.2d 360, 365 (5th Cir. 1980) (creditor's TILA obligations were not automatically triggered until obligor tendered repayment); *Becker v. GMAC Mortgage, LLC*, 2010 WL 1286993, *7 (E.D. Wis. 2010) (even if rescission was warranted, remedy would be futile because borrower lacked ability to tender loan proceeds); *AFS Financial*, 105 F. Supp. 2d at 881; *In re Wepsic*, 231 B.R. 768, 776 (Bankr. S.D. Cal. 1998) (conditioning "the benefits of rescission" on the borrower's tender of "her duty of repayment under the statute").

The Zimmermans counter that, although the last sentence of the statute may provide the court discretion to modify the rescission *procedure*, nothing in either the TILA or Regulation Z conditions the *right* of rescission on the ability to tender. Plaintiffs contend that their mortgage contract with Countrywide terminated automatically upon their notice of rescission. They have

asserted a separate claim under the TILA for Countrywide's failure to take the second step required in § 1635(b).

Read in isolation, the language of § 1635(b) arguably supports plaintiffs' position. Indeed, some district courts in this circuit have found that despite the risks posed to a creditor by allowing the debtors to cancel their contract and void the security interest unilaterally upon even a technical TILA violation, this is exactly what Congress intended when it enacted this consumer-friendly Act. *See, e.g.*, *Velazquez v. HomeAmerican Credit, Inc.*, 254 F. Supp. 2d 1043, 1045 (N.D. Ill. 2003) (although TILA's scheme of requiring creditor to act first by cancelling security interest without assurance that consumer will tender "risks leaving the creditor high and dry," "this is exactly what Congress intended" when it enacted TILA to protect consumers); *see also Lippner v. Deutsche Bank Nat. Trust. Co.*, 544 F. Supp. 2d 695, 701-702 (N.D. Ill. 2008) (mortgage lender was obliged to honor borrower's rescission demand within 20 days regardless whether borrower had ability to tender). But these courts are in the clear minority. Most courts have applied equitable principles to conclude that the benefits of rescission under TILA should be conditioned upon a debtor's tender of repayment. The Court of Appeals for the Seventh Circuit has not ruled on this question.

In the absence of binding circuit authority, I am persuaded that the majority position is correct. As the Ninth Circuit observed in *Yamamoto*, 329 F.3d at 1172, allowing for an unconditional right of rescission would allow "a borrower [to] get out from under a secured loan simply by *claiming* TILA violations, whether or not the lender had actually committed any." (Emphasis in original). The Ninth Circuit also pointed out why, practically speaking, it makes no real difference whether "rescission" technically occurs at the time of notice or afterwards:

> As rescission under § 1635(b) is an on-going process consisting of a number of steps, there is no reason why a court that may alter the sequence of procedures *after* deciding that rescission is warranted, may not do so *before* deciding that rescission is warranted when it finds that, assuming grounds for rescission exist, rescission still could not be enforced because the borrower cannot comply with the borrower's rescission obligations no matter what. Such a decision lies within the court's equitable discretion, taking into consideration all the circumstances including the nature of the violations and the borrower's ability to repay the proceeds. If, as was the case here, it is clear from the evidence that the borrower lacks capacity to pay back what she has received (less interest, finance charges, etc.), the court does not lack discretion to do before trial what it could do after.
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> *Yamamoto*, 329 F.3d at 1173.

Even in *Williams,* 968 F.2d at 1141-42, a case on which plaintiffs rely, the court found that although, technically speaking, rescission is automatic upon notification under TILA and Regulation Z, the court may "impose conditions that run with the voiding of a creditor's security interest upon terms that would be equitable and just to the parties in view of all surrounding circumstances." Like these courts, I conclude that there is no reason to believe that in allowing rescission, Congress intended to alter the ordinary goal of the remedy, which is to restore the parties to the *status quo ante*. *Shelton*, 486 F.3d at 820; *Williams*, 968 F.2d at 11421.

Accordingly, I find that, notwithstanding § 1635(b), the Zimmermans' announcement that they wished to rescind did not automatically void Countrywide's security interest and it did not in any way modify the debt owed by the Zimmermans to Countrywide. The Zimmermans' right to rescind was subject to legitimate dispute in this litigation and Countrywide was under no obligation to honor the Zimmermans' demand and cancel its security interest prior to a judicial determination that the Zimmermans actually possessed an enforceable right of rescission.

The next question is whether the Zimmermans have shown a reasonable ability to tender such that rescission should be ordered. Plaintiffs admit that they do not have the money to tender the loan proceeds to Countrywide and they are unable to borrow money because of their Chapter 13 bankruptcy plan. Nonetheless, they argue that they *might* be able to obtain refinancing if Countrywide released its security interest on their home and refunded to them the $41,944.26, which is the amount plaintiffs say they have paid to Countrywide under the terms of the two loans. The Zimmermans appear to understand that with $41,944.26 in hand, they could obtain an accelerated bankruptcy discharge by "paying off their Chapter 13 Plan," and then "be in a position to seek refinancing, if they need to, without the encumbrance of being involved in a Chapter 13 Plan." Pls.'s Response to Mots. for Summ. Judg., dkt. 231, at 47.

Plaintiffs misunderstand their obligations under the Chapter 13 Plan. The plan does not permit them to use any recovery in this suit as they see fit. Rather, the amended Chapter 13 plan makes clear that, in the event they recover any assets in this lawsuit, this must be reported to the Bankruptcy Court *and the plan amended*. *See* Amended 13 Plan for Reorganization, dkt. 238, exh. A., at ¶5.5. The Zimmermans cite no support for their belief that the bankruptcy court would permit them merely to "pay off" the creditors the amounts they are scheduled to receive under the current bankruptcy plan–which is far less than the original debts incurred by plaintiffs–and discharge the bankruptcy. The more likely scenario is that any new proceeds recovered by plaintiffs would be applied to the benefit of plaintiffs' unsecured creditors, who under the plan are likely to receive no more than 10% of the amount of money owed to them, with the bankruptcy plan to continue for the required 60 months. As the Zimmermans admit,

they are unable to obtain a loan while in bankruptcy. Plaintiffs' scenario, in which they retain both the benefits of rescission *and* the benefits of the current bankruptcy plan, is unrealistic.

The Zimmermans also suggest that this court could modify the mortgage loan terms, or that the parties could reach their own agreement as to the terms of plaintiffs' tender obligation. However, they do not suggest what the terms of any modified plan should be or how they would make any payments on such a loan. At best, they raise only mere speculation that they *might* be able to meet their tender obligations if only the court would order rescission. This is not enough to convince me that rescission would be anything but a futile remedy. Accordingly, Countrywide is entitled to summary judgment on the Zimmerman's rescission claim, as well as their corresponding claim for statutory damages based on Countrywide's alleged failure to comply with its rescission obligations.

Finally, I note that in addition to their claim for rescission, plaintiffs seek actual and statutory damages based on Oswald's failure to provide proper copies of the TILA's required disclosures. Although no party has raised the issue, it appears that this claim is time-barred by 15 U.S.C. § 1640(e), which requires that plaintiffs bring suit "within one year from the date of the occurrence of the violation." The upshot is that the Zimmermans are not entitled to any relief on any of their TILA claims against Countrywide.[6]

[6] In light of this conclusion, Countrywide's motion for summary judgment on its third-party complaint against Tri-County Title & Abstract, LLC, and Terri Oswald, in her individual capacity, is moot. *See* dkt. 203.

B. Common Law Fraud and Deceptive Trade Practices under Wis. Stat. § 100.18

Plaintiffs' fraud claims against Countrywide are based on a number of allegedly false statements defendants made to plaintiffs before closing on the mortgage. *See* Pls.' Br. in Opp. to Mot. for Summ. Judge., dkt. 231, at 17-19. To prove common law fraud, plaintiffs must prove (1) a false representation; (2) made with intent to defraud; (3) reliance on the misrepresentation; and (4) injury resulting from the reliance. *Batt v. Sweeney*, 2002 WI App 119, ¶13, 254 Wis. 2d 721, 647 N.W. 2d 868. Though not identical, the elements of a claim under the Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18(1), are somewhat similar in that they require plaintiffs to prove (1) the defendant made a representation to "the public" with the intent to induce an obligation, (2) the representation was "untrue, deceptive or misleading," and (3) the representation materially caused a pecuniary loss to the plaintiff. *Novell v. Migliaccio*, 2008 WI 44, ¶ 49, 309 Wis. 2d 132, 749 N.W.2d 544. For the purposes of Wis. Stat. § 100.18(1), a plaintiff may be a member of the public. *E.g., K & S Tool & Die Corp. v. Perfection Machinery Sales, Inc.*, 2007 WI 70, ¶25, 301 Wis. 2d 109, 124, 732 N.W.2d 792, 800 (2007) (framing question as whether the "plaintiff is a member of 'the public.'"); *Kailin v. Armstrong*, 2002 WI App 70, ¶ 44, 252 Wis. 2d 676, 643 N.W.2d 132 (same); *Bonn v. Haubrich*, 123 Wis. 2d 168, 174, 366 N.W.2d 503 (Ct. App. 1985)(same). Given the similarity between the common law and consumer fraud claims, I address them together.

Plaintiffs' misrepresentation claims under Wis. Stat. § 100.18(1) and common law fraud rest upon the following alleged misrepresentations:

> 1) Countrywide (through Logemann and its own conduct) falsified plaintiffs' income;

> 2) Countrywide (through Logemann) assured plaintiffs that they would obtain future refinancing;
>
> 3) Countrywide used the inflated Haun/Boardwalk appraisal; and
>
> 4) Countrywide falsely "qualified" plaintiffs for a loan that was based upon inaccurate income figures.
>
> Pls.' Br. in Opp., dkt. 231, at 17-19.

I already have found that there is no evidence that Countrywide relied on the Haun/Boardwalk appraisal, so the third statement, to the extent it could be characterized as one, no longer is at issue.[7] As for the remaining statements, it is undisputed that neither plaintiff ever spoke to a representative or agent of Countrywide at any time. Plaintiffs' fraud and deceptive trade practices claims against Countrywide rest on two theories: 1) Logemann was acting as Countrywide's agent; and 2) Countrywide induced the Zimmermans into borrowing more than they could afford through its e-approval system.

1. Logemann did not have an agency relationship with Countrywide and AWL

To show an agency relationship between Logemann and Countrywide, plaintiffs must "show that the relationship is based on an agreement between the parties that embodies three factual elements: (1) "conduct of the principal showing that the agent is to act for him or her"; (2) "conduct of the agent showing that he or she accepts the undertaking"; and (3) "understanding of the parties that the principal is to control the undertaking." *SWS, LLC v. Weynand*, Slip Copy, 2011 WL 534978 (Wis. App. Feb. 17, 2011) (publication pending),

[7] Plaintiffs now suggest in their brief that the All-State appraisal was also inflated, dkt. 231, at 38-39, but they have not sued All-State. Accordingly, I have disregarded these arguments.

quoting Wis JI-Civil 4000. *See also St. Paul Mercury Ins. Co. v. The Viking Corp.*, 539 F.3d 623, 626 (7th Cir. 2008) ("To establish agency under Wisconsin law, a principal must: (1) manifest an express or implied intent to have another party act for him, (2) retain the right to control the details of the other party's work, and (3) operate in a distinct occupation or business from the other party.") (citations omitted). Thus, as plaintiffs concede in their response brief, the paramount factor is the principal's ability to control the agent's conduct.

The Zimmermans first point to two documents from which they say a jury could infer an agency relationship between Logemann and Countrywide: 1) the loan application, which references Logemann as an employee of Countrywide; and 2) correspondence between Countrywide and Logemann that references Logemann as a "partner." This evidence falls far short. Clearly, the loan application is inaccurate. Logemann denied that he was employed by Countrywide, and it is undisputed that Countrywide did not provide him with a W-2, health insurance or any other benefits that demonstrate the existence of an employment relationship. Apart from the one stray reference that plaintiffs have identified among a host of documents, there is not one actual fact that shows that Logemann was employed by Countrywide. To the contrary, the undisputed facts show that Logemann was an employee of 1st Rate.

The mere fact that Countrywide referred to Logemann in correspondence as a "partner" is no more indicative of an agency relationship. As defendants point out, to meet their burden of showing an agency relationship, plaintiffs must adduce facts showing that Countrywide exercised some manner of control over Logemann's activities. Merely calling someone a "partner" does not make him one.

When the facts are examined, it is plain that Logemann was not Countrywide's agent. As plaintiffs admit, Logemann was free to submit their loan application to a number of lenders. Countrywide did not instruct or control where Logemann sought refinancing or how he completed the loan application. Conversely, Logemann lacked the authority to bind Countrywide to a promise of refinancing or to control the ultimate terms upon which refinancing would be offered. To the extent Logemann was acting as anyone's agent, he was plaintiffs' agent, not Countrywide's.

The Zimmermans argue that although Logemann may not have *started* out as Countrywide's agent, he *became* one once he decided to submit plaintiffs' application to Countrywide. According to plaintiffs, Countrywide "had the right to control Mr. Logemann's activities from then on." This argument overreaches. Of course Countrywide retained control over its financing decisions and had the right to specify what information it needed from the borrowers and when. This does not, however, establish that Logemann was acting *for* Countrywide when he complied with Countrywide's requirements for obtaining a loan on the Zimmermans' behalf. Indeed, accepting plaintiffs' argument would mean that anyone who followed Countrywide's process for obtaining a loan, or that of any other creditor, for that matter, would become that creditor's agent. Obviously, this is not the case.

Logemann could have pulled the plug on the Countrywide deal at any time and looked elsewhere for end-loan financing for the Zimmermans. Countrywide provided the loan product and it dictated the steps to be followed in order to fund the loan, but it did not control Logemann's actions with respect to the Zimmermans, and Logemann could not bind Countrywide through his actions. In short, Logemann was not Countrywide's agent.

Accordingly, Countrywide is not liable for his alleged misrepresentations regarding plaintiffs' income and future refinancing.[8] *Accord Sandry v. First Franklin Financial Corp.*, 2011 WL 202285, *3 (E.D. Cal. Jan. 20, 2011) (mortgage broker is usually retained by borrower and is therefore borrower's agent); *Harmon v. BankUnited*, 2009 WL 3487808, *3-5 (D. Md. Oct. 22, 2009) (complaint failed sufficiently to allege agency relationship between lender and broker where lender, not broker, selected loan applicants); *Morilus v. Countrywide Home Loans, Inc.*, 651 F. Supp. 2d 292, 300 (E.D. Pa. 2008) (independent mortgage broker who was free to place loans with various lenders lacked agency relationship with lender); *Hawthorne v. American Mortgage, Inc.*, 49 F.2d 480, 484-85 (E.D. Pa. 2007) (same).

2. Countrywide's loan approval system

In addition to contending that Logemann's alleged misrepresentations should be imputed to Countrywide, the Zimmermans contend that Countrywide engaged in its own fraudulent conduct. According to plaintiffs, by offering a product that did not require income verification and by using an e-approval system that merely accepted a mortgage broker's inputs, Countrywide not only turned a "blind eye" to fraud but participated in it. The Zimmermans contend that if they had known that Countrywide was not actually verifying their income when making both its conditional and final loan approvals, then they would not have taken out either

[8] In light of the conclusion that the only actionable misrepresentations–to the extent there were any–were made by Logemann/1st Rate in their capacity as independent mortgage brokers and not as agents of Countrywide, I will grant Countrywide's unopposed motion for summary judgment on Logemann/1st Rate's cross-claim for indemnification.

the construction loan from First National (which they say was made based on Countrywide's conditional approval of end loan financing) or the mortgage loan from Countrywide.

These fraud theories against Countrywide based on the conditional approval fail for at least two reasons. First, the Zimmermans have failed to adduce any evidence to support their contention that First National Bank relied on the conditional approval when it approved their construction loan. Second, to the extent that the Zimmermans contend that *they* relied on the conditional loan approval as a basis for incurring what turned out to be excess debt, they simply cannot show that their reliance was reasonable. It is undisputed that the conditional loan approval was just that: a conditional approval that indisputably was predicated on future events, including branch review and verification. As such, it is not actionable. *See, e.g., Jefferson v. Briner, Inc.*, 2006 WL 1720692 (E.D. Va. June 21, 2006) (plaintiffs could not bring fraud claim based on conditional loan approval because final approval depended on future events); *Aitken v. Taylor Bean & Whitaker Mortgage Corp.*, 2008 WL 755264 (N.D. Ohio 2008) (pre-approval letter does not create enforceable contract for a mortgage loan).

As for the final loan approval, the Zimmermans cannot establish that they suffered any injury resulting from that approval. As Countrywide points out, plaintiffs needed to obtain the refinancing from Countrywide in order to pay the balloon payment already owed on the construction loan to First National Bank. Absent the refinance, plaintiffs would have defaulted on the construction note and suffered all the same damages they now claim. Although plaintiffs assert in their brief that "simple math" shows that they would not have incurred the $12,000 debt above the amount of their debt to First National, *see* dkt. 231 at 33, plaintiffs have adduced no evidence suggesting that Countrywide required them to borrow the entire amount that it had

approved. Further, it is undisputed that plaintiffs did not ask Logemann in 2006 to seek financing from other lenders, and they did not ask him to renegotiate the debt with First National Bank, as they now assert they would have done had they known of the alleged fraud. Absent any credible evidence suggesting that they would have done things differently, plaintiffs have failed to show they were damaged by the inflated income figures.

Then there is the fact that it makes no sense for plaintiffs to claim that they were defrauded by statements about their own income that they provided to Countrywide. As other courts have noted in similar cases, if plaintiffs were not aware of the use of an inflated income to qualify them for the loan, then they could not possibly have relied on that misrepresentation. Conversely, if the Zimmermans *did* know that their income was falsified, then they should not have signed the loan application. In either case, plaintiffs cannot establish that they reasonably relied on the inflated income numbers to their detriment. *Accord Newsom v. Countrywide Home Loans, Inc.*, 714 F. Supp. 2d 1000, 1014 (N.D. Cal. 2010) (dismissing fraud claim based on allegedly inflated income numbers on loan application because alleged misstatement was made to lender and not the plaintiffs); *Oglesbee v. IndyMac Fin. Services,* Inc., 686 F. Supp. 2d 1313, 1316 (S.D. Fla. 2010) (same); *Battah v. ResMAE Mortgage Corp.*, 2010 WL 4260530, *4 (E.D. Mich. 2010) ("[]t is absurd for a person to sue for fraud based on the claim that he reasonably relied on inflated statements regarding his own income on a loan application"). Certainly, plaintiffs cannot be suggesting that they believed they made more money because it said so on the loan application.

In the end, the Zimmermans' real beef with Countrywide appears to be that the bank should have had better controls in place to verify borrower income and protect against broker

fraud. Such a claim is not actionable under Wisconsin's deceptive trade practices statute, which prohibits "only affirmative assertions, representations, or statements of fact that are false, deceptive, or misleading." *Tiestsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶40, 270 Wis. 2d 146, 677 N.W. 2d 233. And the Zimmermans advance no argument to show a duty on Countrywide's part that would give rise to liability under a tort theory. Simply listing a number of things Countrywide *could* have done and stating "the jury should decide whether this is a fraud" is not enough. *See, e.g., Fabriko Acquisition Corp. v. Prokos*, 536 F.3d 605, 609 (7th Cir. 2008) (litigant who fails to support theory with pertinent authority waives it).

For all these reasons, plaintiffs' fraud claims against Countrywide, along with the conspiracy claim predicated on that alleged conduct, must be dismissed.

V. Plaintiffs' Motion for Partial Summary Judgment on Certain Claims Brought Against Logemann and 1st Rate

Finally, the Zimmermans have filed their own motion for summary judgment against defendants Logemann and 1st Rate on the Zimmermans' claims that these defendants violated Wisconsin's Mortgage Broker laws and the Credit Repair Organizations Act. As noted previously, only Logemann has responded to the motion.

A. The Mortgage Broker Agreement

Plaintiffs allege that the Mortgage Broker Agreement that they signed on May 16, 2006 is "invalid" because it failed to include certain information that plaintiffs say is required by Wis. Stat. § 224.79 (Wisconsin Statutes 2005-2006) and Wis. Admin. Code DFI-Bkg 44.01. Plaintiffs point out that the Agreement was never signed by Logemann or any other

representative of 1st Rate and omitted various pieces of information, including the number of days it was to be in effect, the principal amount and interest rate of the mortgage being sought, whether the mortgage could be subject to negative amortization or locked in and other information. As a result of these omissions, say plaintiffs, the Agreement is void, Logemann and 1st Rate are subject to statutory penalties totaling $12,000 *and* these defendants are liable for $714,435.80, which is the total of all of the loans that were "illegally arrang[ed]" under the invalid Mortgage Broker Agreement.

Plaintiffs appear to have established the elements necessary to prove a violation of Wis. Stat. § 224.79 (Wisconsin Statutes 2005-2006) and Wis. Admin. Code DFI-Bkg 44.01, meaning that the burden shifts to Logemann/1st Rate to adduce evidence showing a genuine dispute for trial. Logemann has not clearly identified such evidence and does not offer any arguments in opposition to plaintiffs' claim that his failure to fill in all the blanks on the Mortgage Broker Agreement or to sign it constitute violations of Wis. Stat. § 224.79 (Wisconsin Statutes 2005-2006) and Wis. Admin. Code DFI-Bkg 44.01. Although the court liberally construes briefs submitted by *pro se* litigants, it does not craft entire arguments for them. *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001). By remaining silent on the issue, Logemann effectively has admitted the claim.

That said, I am unable to find that plaintiffs have established their claim for liquidated and actual damages under the statute. Plaintiffs rest their claim for liquidated and actual damages on Wis. Stat. § 224.80(2). Under that statute, a person "aggrieved" by an act by a mortgage broker that is prohibited under Wis. Stat. § 224.77(1) can bring a private cause of action for damages in an amount equal to the greater of the following:

> 1. Twice the amount of the cost of loan origination connected with the transaction, except that the liability under this subdivision may not be less than $100 nor greater than $2,000 for each violation.
>
> 2. The actual damages, including any incidental and consequential damages, which the person sustained because of the violation.

Plaintiffs appear to be seeking both types of damages, when the statute says they must pick the greater of the two. Further, plaintiffs have adduced no evidence showing that they were "aggrieved" by the omissions from the Mortgage Broker Agreement. Specifically, plaintiffs have not alleged that they would not have hired Logemann and 1st Rate had the missing information been set forth in the Mortgage Broker Agreement, that they relied on anything in that document when they decided to borrow money from First National Bank to construct a home or that they were misled in any way by that document. Absent such allegations, plaintiffs are entitled only to summary judgment on liability under the statute, not damages. Plaintiffs may present evidence of their damages, if they have any, at trial.

B. Credit Repair Organizations Act

Finally, plaintiffs seek summary judgment on their claim that Logemann and 1st Rate violated the Credit Repair Organizations Act, 15 U.S.C. § 1679b(a), which states:

No person may–

> (1) make any statement, or counsel or advise any consumer to make any statement, which is untrue or misleading (or which, upon the exercise of reasonable care, should be known by the credit repair organization, officer, employee, agent, or other person to be untrue or misleading) with respect to any consumer's credit worthiness, credit standing, or credit capacity to—
>
> * * *

(B) any person—

(I) who has extended credit to the consumer; or

(ii) to whom the consumer has applied or is applying for an extension of credit.

Plaintiffs assert that Logemann and 1st Rate violated this provision by overstating plaintiffs' income on the loan applications to First National Bank and Countrywide and AWL. Logemann does not dispute that the income figures he used on the loan applications substantially overstated plaintiffs' income and that he did not take steps to verify plaintiffs' actual income. Under these facts, and hearing no opposition from either Logemann or 1st Rate, I am satisfied that plaintiffs have established that these defendants violated the CROA. Again, however, it will be plaintiffs' burden at trial to established that they were damaged by this violation. This may be difficult for them to do in light of the fact that both plaintiffs signed the loan applications, thereby verifying under oath the accuracy of this income information.

ORDER

IT IS ORDERED that:

1. The motion of defendants Boardwalk Realty, Inc. and Gretta Haun for summary judgment on plaintiffs' claims of fraud, deceptive trade practices and conspiracy, dkt. 167, is GRANTED;

2) The motion of defendants Countrywide Bank, N.A. and America's Wholesale Lender for summary judgment on plaintiff's claims of violations under the Truth in Lending Act, common law fraud, deceptive trade practices and conspiracy, dkt. 178, is GRANTED;

3) The motion of defendants Countrywide Bank, N.A.'s and America's Wholesale Lender for summary judgment on the cross-claim by defendants Greg Logemann and 1st Rate Mortgage Corp. for indemnification, dkt. 197, is GRANTED;

4) The motion of defendants Countrywide Bank, N.A. and America's Wholesale Lender for summary judgment on their third party complaint against Tri-County Title and Abstract LLC and Terri S. Oswald, dkt. 202, and Oswald's cross-motion on the same claim, dkt. 216, are DENIED as moot; and

5) The motion of plaintiffs Thomas and Patricia Zimmerman for partial summary judgment, dkt. 207, is DENIED IN PART and GRANTED IN PART. The motion is DENIED with respect to plaintiffs' action for rescission under the Truth in Lending Act. It is GRANTED with respect to their claims that defendants Logemann and 1st Rate violated Wis. Stat. § 224.79 and the Credit Repair Organizations Act, 15 U.S.C. § 1679b .

Entered this 17th day of March, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge