IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GEORGE EMERSON BURNETT, Plaintiff, vs. ALA MOANA PAWN SHOP, Defendant.	CIV. NO. 90-267

Clearinghouse No. 46,771

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

This matter came on for trial before this court on June 19-21, 1991. Present at trial were plaintiff, represented by John Paer, Charles Hite, and Marcus Oshiro, and defendant, represented by Stephen Hioki. The parties were asked to file supplemental briefs, which were filed. Having carefully considered the pleadings, evidence, oral arguments of counsel, and the entire record in this case, the court renders the following findings of fact and conclusions of law, and orders judgment in favor of plaintiff.

The court finds that defendant has violated the Truth in Lending Act (TILA), and Hawaii Revised Statutes (HRS) § 480-2. Therefore, plaintiff is entitled to recover $1,950.00, the return of his camera (provided plaintiff returns the $550.00 given

plaintiff by defendant for such camera), and reasonable attorneys' fees and costs.

II. FINDINGS OF FACT

1. Defendant is Ala Moana Pawn Shop doing business in the State of Hawaii.

2. Mr. Benedict Tabar and Mr. Reynold Hirazumi are co-owners of Ala Moana Pawn Shop.

3. On or about November 7, 1989, plaintiff and defendant entered into an agreement wherein plaintiff gave his camera, its lens, and case (hereinafter referred to in the aggregate as "camera"), to defendant in exchange for $550.00 and the right to "repurchase" the camera upon plaintiff's agreement to pay $660.00 within 30 days. This was evidenced by plaintiff's exhibit "1", No. 9296.

4. On or about December 23, 1989, plaintiff and defendant entered into a second agreement wherein plaintiff gave his ring to defendant in exchange for $140.00 and the right to "repurchase" the ring upon plaintiff's agreement to pay $168.00 within 30 days. This was evidenced by plaintiff's exhibit "2", No. 9663.

5. Defendant has admitted that it did not provide any TILA disclosure to plaintiff.

6. Defendant claimed that the transactions were sales with an option to repurchase. Plaintiff claimed the transactions

were intended as loans with the ring and camera to serve as security for the loans.

7. Defendant's forms used for the transactions were entitled "AGREEMENT OF SALE" and stated that plaintiff agreed to "sell" his camera and ring. In addition, the forms stated that "SELLER MAY REPURCHASE THE PERSONAL PROPERTY SOLD AND DESCRIBED ABOVE FOR THE SUM OF ____ in cash to be paid to [defendant] on or before _____ 19____." The forms also stated that "IT IS EXPRESSLY UNDERSTOOD THAT PROPERTY NOT REPURCHASED BY THE DUE DATE ABOVE SHALL BECOME THE SOLE PROPERTY OF" defendant. The forms also stated "THIRTY DAYS" at the top of the forms.

8. The evidence presented was conflicting. The following evidence was presented by plaintiff to prove that the transactions were loans:

A. The forms specified no particular fee for the option to repurchase;

B. The forms stated that the items involved in the transactions did not immediately become the "sole property" of defendant; rather it did so only after the 30-day "option" period. In addition, the 30-day "option" period could be extended by making monthly service fee payments, which indicates the service fees were interest payments;

C. Defendant expected that plaintiff would exercise the "option to repurchase" within 30 days. In fact, more than 75% of all of defendant's transactions structured such as those at issue concluded with a repurchase within 30 days;

D. Plaintiff testified that he told defendant that he wanted to obtain loans from defendant, and understood the transactions to be loans. Defendant has admitted that plaintiff told defendant that the transaction of November 7, 1989 was to be a loan. Defendant has also admitted that plaintiff told defendant that the transaction of December 23, 1989 was to be a loan. However, defendant did state that the transactions were to be sales. In addition, plaintiff testified that he did not understand the terms of the forms used in the transactions;

E. Plaintiff did not intend to sell or permanently part with either the ring or camera.

F. In both transactions defendant gave plaintiff the "option to repurchase" within 30 days at 120% of the original "sales" price. If plaintiff did not exercise the "option to repurchase" within 30 days, an additional service charge of 20% of the amount given plaintiff was charged for each additional 30 day period. In other words, there was a 20% fee charged each month on items that were not repurchased that was similar to a computation of interest. Defendant characterizes these charges as service fees;

G. There was little relationship between the amount plaintiff was given for the items and the fair market value of the items.

For example, plaintiff's expert witness, in the area of jewelry and gold appraisal, gave his opinion that the wholesale

value of the ring was $560.00; four times the $140.00 given to plaintiff.

With respect to the camera, which was "sold" for $550.00, before trial, plaintiff moved for summary judgment and asserted that the value of the camera was $300.00. At trial, plaintiff testified that he valued the camera lens alone at $1,500.00. Also at trial plaintiff presented evidence valuing the camera and accessories at approximately $1,600.00. Plaintiff's exhibit 4.[1]

Defendant presented evidence indicating that the retail value of the camera and lens was $634.00. Defendant also presented evidence indicating that at the time of the transaction it checked and determined the average wholesale price of the camera and lens was $231.00. Defendant's exhibit 32. This amount does not account for the value of the camera case which evidence showed was worth $149.00. Thus, the evidence indicates that the minimum value of the camera, lens, and case was $380.00, which was significantly less than the "sales price" of $550.00.

The court finds that the actual value of the camera and accessories was $1,000.00.

Thus, the court finds that the camera was "purchased for a little over one half its value. Even accepting defendant's valuation, in neither case did the sum received by plaintiff

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[1] Plaintiff's exhibit 4 indicated that the camera was worth $649.00, the lens $849.00, and the case $149.00. These items totaled $1647.00.

correspond to or appear to be measured by the fair market value of the property.

H. Although defendant claimed the items were sold to it, it agreed with plaintiff to keep the items in defendant's safe, not to use them, and noted the serial number of the camera on the receipt given to plaintiff so that plaintiff could return and reclaim the items;

I. Plaintiff felt he was personally liable to repay the amount advanced for the items, as well as to make monthly service fee payments;

J. The testimony indicated that the amount given plaintiff was based at least partially on plaintiff's need. Tabar indicated that the amounts given to plaintiff were based in part on plaintiff's representation that he needed money to pay his bills;

K. Defendant's ledger has a column entitled "P.U. Amount" which stands for pick-up amount. Most of defendant's transactions, as per the ledger submitted to the court, do show a service fee of 20% per month;

L. Defendant has stated that plaintiff's exhibit #1, Agreement of Sale, #9296 is a pawn slip. Defendant has also stated that plaintiff's exhibit #2, Agreement of Sale, #9663 is a pawn slip; and

M. Defendant's name is Ala Moana Pawn Shop. Defendant's business cards advertised that it made loans. Defendant holds a pawnbrokers license. At the same time,

defendant testified that it used only two types for forms for documenting its transactions. One type were the forms at issue which were for transactions that were allegedly sales with options to repurchase. The other type of form was used for "straight out buys." "Straight out buys" involved the purchase of the item without an option to repurchase.

9. Defendant presented the following evidence to prove that transactions were sales:

A. The forms were entitled "Agreement of Sale" and were expressed as sales with an option to repurchase;

B. Title passed to defendant (subject to the "option to repurchase" and the inconsistent language that it did not become sole property of the buyer until after 30 days);

C. The forms created no obligation to repay defendant for the money advanced.

D. Plaintiff's expert testified that the forms created no personal liability on the part of plaintiff;

E. Plaintiff did not appear to "pledge" the items within the meaning of HRS §§ 445-131 or 445-133;

F. The 20% service fee was fully disclosed to plaintiff such that he knew exactly what he was bargaining for;

G. Plaintiff's credibility in testifying that the transactions were loans and that he did not understand the terms of defendant's forms was not particularly strong in light of the fact that he had dealt with pawnshops involving similar issues in the past. In one past encounter with a pawn shop named

"Peter Pawn" in 1983, plaintiff wrote in the word "loan" on an "Agreement of Sale" that was similar to the forms at issue;

H. There was no evidence that defendant attempted to deceive plaintiff regarding the terms of the forms. Defendant testified that it informed plaintiff the transactions were sales. In addition, the forms used were forms that were in compliance with the requirements of the Honolulu Police department;

I. Defendant testified that it did not make loans. In addition, it testified that it canceled its advertisement in the phone directory wherein it held itself out as a pawn shop. Although defendant advertised "Fast Cash -- Money to Loan" in the 1989-90 Oahu Hawaiian Telephone Yellow Pages, defendant did not authorize either the listing or publication of the advertisement in the 1989-90 Oahu Hawaiian Telephone Yellow Pages and subsequently removed the advertisement;

J. Defendant holds a second-hand dealers license which is used by persons and businesses engaged in the purchase and sale of items; and

K. There was testimony indicating that the amount of money given plaintiff for the "sales" was "negotiated" after discussion, although Tabar testified a portion of the amount was based on what plaintiff persuaded Tabar he "needed."

10. Plaintiff made two service fee payments of $40.00 and $80.00 to extend the option to "repurchase" his camera. Plaintiff never "repurchased" the camera.

11. Plaintiff made no service fee payments on the ring. However, he paid defendant $300.00 to "repurchase" his ring.

12. The total service fee for the camera was $230.00 ($40.00 service fee payment + $80.00 service fee payment + $110.00 (the service fee portion of the amount to "repurchase")).

13. The total service fee for the ring was $160.00 ($300.00 (the cost to "repurchase") - $140.00 (the "sale" price)).

14. The court finds the transactions were loans.

15. Any finding of fact deemed a conclusion of law shall be so deemed.

III. CONCLUSIONS OF LAW

1. This court has jurisdiction to hear and decide the present case pursuant to Section 130(e) of TILA, 15 U.S.C. § 1640(e), and 28 U.S.C. §§ 1337, and 1367.

A. THE NATURE OF THE TRANSACTIONS

2. The testimony was conflicting at trial, with defendant claiming that the parties intended the transactions to

be sales, while plaintiff claimed they were loans. Since this case is based in part on TILA, which regulates "credit" transactions such as loans, it is necessary to first determine whether the transactions at issue were sales, which are presumably not subject to TILA, or loans.

3. The intent of the parties is to be the controlling factor in determining whether a transaction is a sale or a mortgage loan. In re Corey, 892 F.2d 829, 837 (9th Cir. 1989), cert. denied, 111 S.Ct. 56 (1990) (citing In re Ellis, 674 F.2d 1238, 1247 (9th Cir. 1982); In re Estate of Damon, 5 Haw.App. 304 (1989)) (Hawaii law); see also Western Ent., Inc. v. Arctic Office Machines, Inc., 667 P.2d 1232, 1234 (Alaska 1983) (in disagreement over whether transaction was a sale or lease, court holds that "the labels used by a party to characterize its transaction are not determinative; it is the substance of the transaction and the intent of the parties that controls.").

4. In attempting to distinguish the difference between a sale and a loan, one California court has made the following observation:

> A sale is the transfer of the property in a thing for a price in money. The transfer of the property in the thing sold for a price is the essence of the transaction. The transfer is that of the general or absolute interest in the property as distinguished from a special property interest. A loan, on the other hand, is the delivery of a sum of money to another under a contract to return at some future time an equivalent amount with or without an additional sum agreed upon for its use; and if such be the intent of the parties the transaction will be deemed a loan regardless of its form. [Citations]
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> In a sale the delivery of the absolute property in a thing and the receipt of a price therefor consummate the transaction. In a loan the initial transaction creates a

debit and credit relationship which is not terminated until replacement of the sum borrowed with agreed interest.

Milana v. Credit Discount Co., 163 P.2d 869, 871 (Cal. 1945); see also Cullen v. Bragg, 350 S.E.2d 798, 799 (Ga.App. 1986).

5. "It is well recognized that a sale subject to an option to repurchase is, in some circumstances, a disguised loan. . . ." Swallow Ranches, Inc. v. Bidart, 525 F.2d 995, 997 (9th Cir. 1975) (citing cases). "But a sale accompanied by an option to repurchase is not necessarily, or even presumptively, a disguised loan." Id. at 998 (citing, inter alia, Conway's Executors & Devisees v. Alexander, 11 U.S. (7 Cranch) 218, 236-37 (1812)).

6. Swallow Ranches, involved the sale of real estate with the option to repurchase at a price that was higher than the sales price. The court was faced with a situation such as the one at bar. One party claimed the transaction was a mortgage (i.e., a loan) while the other claimed it was a sale. In deciding whether the transaction was a sale or a loan, the court considered several factors:

(1) the parties "negotiat[ion] for a sale from the outset." Id.

(2) the request for a loan during the negotiations that was promptly rejected. Id.

(3) the fact that the buyer did not merely seek a return on invested funds. Id.

(4) the actions of the parties after the transaction which indicated that the buyer's principal motive was "to

establish ownership, with substantially all its prerogatives and risks." Id.

(5) the disparity of the fair market price and the contract price on the date of the sale which would compel the seller to exercise the option. Id.

Applying the Swallow Ranches factors to the instant transactions leads to the conclusion that the transactions were loans.

The first factor indicates a loan. Plaintiff testified that when he approached defendant he asked for loans. Tabar's testimony confirms this.

The second factor is inconclusive. Tabar testified that when plaintiff made his request for a loan, plaintiff was told that defendant only bought items. However, plaintiff disputes this.

The third factor indicates a loan. Defendant was not necessarily seeking a return on the "invested funds" because he faced the risk of no return on the money if plaintiff decided simply not to return to repurchase the items. However, the evidence indicated that more than 75% of defendant's transactions structured as the ones at issue resulted in the "sellers" returning and repurchasing the items at the "option" price. Defendant expected plaintiff to return and "repurchase" the items. Plaintiff definitely intended a loan - he wanted the items back, and he wanted them kept separately in defendant's safe for plaintiff pursuant to his instructions.

Factor four indicates a loan. A sale is initially indicated by the fact that defendant took possession of the items and the forms are entitled as an "Agreement of Sale." In addition, the forms indicated that defendant would take title to the items. However, a loan is indicated in that the forms state that the items would not become the "sole property" of defendant until after the "option" period expired. In addition, defendant had a practice of extending the "option" period beyond 30 days by charging an additional 20% (of the "purchase" price) per month service fee. This was analogous to the charging of interest. It was possible that defendant would not take title even if it continued to hold the items beyond the initial 30 days.

Moreover, defendant kept the items in defendant's safe for plaintiff, and defendant expected plaintiff to return and reclaim the items. In addition, Tabar referred to receipts given plaintiff for the items as pawn slips. The transactions were recorded in a log book kept by defendant containing columns for the "pick-up" amount and "pick-up" date of the items. These acts are inconsistent with a sale.

The court interprets the ambiguous language of the forms against defendant, who drafted the forms, and finds that it does not establish ownership.

The fifth factor indicates that the transactions were loans. The "sales" prices appeared to be substantially lower than the fair market value of the items. For example, the ring

had a fair market wholesale value of $560.00[2] but it was "sold" for $140.00. The transaction amount was based on the need of plaintiff rather than fair market value.

The camera is more troublesome. As noted above, before trial plaintiff moved for summary judgment and asserted that the value of the camera was $300.00. At trial, plaintiff testified that he valued the camera lens alone at $1,500.00. Plaintiff introduced evidence at trial indicating the aggregate value of the camera, lens, and case he "sold" to defendant was in excess of $1,600.00. Plaintiff's exhibit 4. Defendant presented conflicting evidence indicating the camera and lens had a value ranging from $231.00 to $634.00 (not including the value of the case). Defendant's exhibit 32. The camera (and accessories) were purchased for $550.00. The court notes that plaintiff thought the camera lens alone was worth approximately $1,500.00. Based on this, plaintiff would surely feel compelled to exercise the option because he had "sold" the camera for only $550.00. Notwithstanding this, as noted previously, the court finds the fair market value of the camera was $1,000.00 - far more than the amount given for it. Therefore, the amount the camera was sold for was not based on the fair market value but rather on plaintiff's need.

7. The Swallow Ranches factors indicate that the transactions were loans.

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[2] Plaintiff's expert testified that the retail value of the ring was approximately $1,120.00.

8. In Kawauchi v. Tabata, 49 Haw. 160 (1966), the Hawaii Supreme Court considered whether a transaction structured as a sale of land with a lease-back provision and option to repurchase was in actuality a mortgage loan. The court held that the transaction was a loan. The court considered the following factors in making its determination:

(1) the absence of personal liability on the part of the seller/borrower. 49 Haw. at 172-76.

(2) the "`inadequacy'" of the transaction price. Id. at 177-79.

(3) the fact that a mortgage was involved in the transaction. Id. at 179-80.

(4) the actions of the parties indicating ownership. Id. at 180.

Applying the Kawauchi factors, the first factor indicates that the transactions were sales. Plaintiff had no personal liability.

However, the second factor indicates loans. As noted before, the evidence indicates that the "purchase" price of the ring was inadequate. The Kawauchi court found significant the fact that the parties did not intend the "sales" price to represent the value of the property. This appears to be the case here. Although there was some testimony that the value of the items was fixed based on defendant's calculation of fair market value, Tabar admitted the final amount was based on plaintiff's needs. Moreover, plaintiff's expert established that the value

of the ring was nearly four times greater than the price "paid" by defendant.

As noted above, the adequacy of $550.00 for the camera and accessories is debatable. Plaintiff presented evidence valuing the camera and accessories at approximately $1,600.00. Defendant presented evidence indicating that the retail value of the camera and lens was $634.00. Defendant also presented evidence indicating that the average wholesale price of the camera and lens was $231.00. Defendant's exhibit 32. This amount does not account for the value of the camera case which evidence showed was worth $149.00. Thus, the evidence indicates that the minimum value of the camera, lens, and case was $380.00. The court finds that the actual value of the camera and accessories was $1,000.00. The court finds that the "purchase" price of $550.00 was inadequate in comparison to the actual value of $1,000.00.

9. In Kawauchi, the court held that when the "purchase" price is inadequate, such inadequacy "overweighs all other circumstances, including absence of personal liability." Id. at 177. Because, the price is inadequate, this factor overweighs all others, and negates the first factor indicating that the transactions were sales.

10. Therefore, even though factor (3) favors treating the transactions as sales because there was no mortgage, the court finds the inadequacy of the "sales" price mandates that the transactions be classified as loans.

11. Moreover, the last Kawauchi factor indicates a loan. Although defendant took possession of the items which would indicate ownership, it held them for plaintiff and put them in the safe. In addition, defendant was directed not to use the items. Defendant fully expected plaintiff to return and retake possession of the items. Title did not vest until the "option" period expired, and defendant had a practice of extending such "option" periods for a monthly 20% service fee. Tabar referred to receipts given plaintiff for the items as pawn slips. In addition, the transactions were recorded in a log book kept by defendant containing columns for the "pick-up" amount and "pick-up" date of the items. This is inconsistent with absolute ownership.

12. Based on the Kawauchi factors, the court finds that the transactions should be treated as loans.

13. In Browner v. District of Columbia, 549 A.2d 1107 (D.C.App. 1988), the court considered whether real estate transactions labelled as sales with lease-back provisions and repurchase options were actually loans. The court found that the transactions were loans. The court found the following factors relevant in making the determination:

(1) the "buyers" advertised "money to loan." 549 A.2d at 1114.

(2) no negotiations or bargaining on the "sales" price. Id.

(3) the relationship between the "sales" price and the value of the "sellers" equity in the property. Id.

(4) whether "sellers" had actively attempted to sell. Id.

(5) acts indicating ownership subsequent to the "sales." Id.

(6) whether there was an evaluation of the borrower's credit. Id.

Applying the Browner factors to the case at bar, the court finds that the first factor indicates a loan. Defendant advertised that it made loans in its business cards, was named the Ala Moana Pawn Shop, and held a pawnbroker's license.

With respect to factor two, the negotiations or bargaining on the "sales" prices were based on plaintiff's needs and not on the fair market value of the items. This indicates loans.

The third factor - the relationship between the "sales" price and the value of the "sellers" equity in the property - is the same inquiry as the Swallow Ranches' "disparity" of the purchase price inquiry, and Kawauchi's "inadequacy" inquiry. As noted above, the court finds that the prices were disparate and inadequate. Therefore, this factor militates in favor of finding the transactions were loans.

The fourth factor indicates loans. Plaintiff testified that he never intended to sell his items. He testified that he

approached defendant and requested loans. Tabar testified that plaintiff did request loans (although he testified he told plaintiff the transactions would be sales). Moreover, Tabar referred to receipts given plaintiff for the items as pawn slips. In addition, the transactions were recorded in a log book kept by defendant containing columns for the "pick-up" amount and "pick-up" date of the items.

The fifth factor indicates a loan for the same reasons set out in the previously discussed cases with respect to the "ownership" factor - the items were kept in defendant's safe for later reclamation by plaintiff; defendant was directed not to use the items; and defendant fully expected plaintiff to return and reclaim the items.

The last factor indicates a loan. As noted in Browner, the traditional loan situation involves an evaluation of the borrower's credit. Here, there was none. However, this was not necessary because defendant retained "security" for the loan that far exceeded the amount of the loan. See Browner, 549 A.2d at 1114.

14. The Browner factors indicate that the transactions were loans.

15. Based on the previously-cited case law and accompanying analysis, the court finds that the transactions were loans.

B. TILA

16. Loans are typically thought to involve a debt, or the extension of credit: "In a loan the initial transaction creates a debit and credit relationship which is not terminated until replacement of the sum borrowed with agreed interest." Milana, 163 P.2d at 871. The court must now determine whether the loans in this case are subject to TILA. If they are, the disclosures defendant failed to make to plaintiff makes defendant civilly liable. 15 U.S.C. § 1640.

17. TILA's purpose is to require disclosure in "credit" transactions. 15 U.S.C. §§ 1601(a), 1631(a).

18. Congress was aware that merchants might attempt to circumvent the objectives of TILA by "burying the cost of credit in the price of goods sold". Mourning v. Family Publications Services, Inc., 411 U.S. 356, 366, 93 S.Ct. 1652, 36 L.Ed.2d 318 (1973).

19. A pawn can be a credit transaction subject to TILA. Dennis v. Handley, 453 F.Supp. 833 (N.D. Ala., 1978) at p. 836; FRB letters of July 17, 1969 and September 18, 1969; FTC staff opinion of August 18, 1969.

20. FRB interpretations and letters are entitled to great weight. Mourning v. Family Publications Service, Inc., supra. "The Court is not at liberty to substitute its own discretion for that of administrative officers who have kept

within the bounds of their power." Bone v. Hibernia Bank, 493 F.2d 135 (9th Cir., 1974).

21. "Congress designed [TILA] law to apply to all consumers, who are inherently at a disadvantage in loan and credit transactions." Semar v. Platte Valley Federal Savings & Loan Association, 791 F.2d 699 (9th Cir. 1986).

22. Most TILA plaintiffs are not model borrowers. Semar, supra. Plaintiff is an example of this. Plaintiff appears to engage in the none too admirable practice of going to pawn shops using forms such as the ones at issue, entering into transactions, and then threatening to sue if the pawn shops do not settle with him.

23. Plaintiff owed a debt to defendant by virtue of these transactions such that if he did not pay the debt, he would summarily lose his property.

24. It is plausible, but not believable, that people who visit pawn shops would sell their property with an option to repurchase in one month. The court finds that most, like plaintiff, enter this kind of pawn transaction for purposes of a short term loan secured by their property.

25. Those people who wish to sell personal property normally do so without an option to buy it back. It strains credibility to think that 75% of defendant's customers intend to sell their property and buy it back 30 days later at a price 120% higher. Rings, cameras, and the like do not usually appreciate that much in such a short period of time.

26. "The TILA civil liberty provisions were designed largely to encourage consumers to bring small damage actions and thereby promote compliance with the Act." Dias v. Bank of Hawaii, 732 F.2d 1401 at p. 1403 (9th Cir., 1984). See also Kessler v. Associates Financial Services of Hawaii, 573 F.2d 577 (9th Cir., 1977).

27. TILA should be construed liberally in light of its board remedial purpose. Eby v. Reb Realty, Inc., 495 F.2d 646 (9th Cir., 1974).

28. Under TILA, "a creditor or lessor shall disclose to the person who is obligated on a consumer lease or a consumer credit transaction the information required under this title." 15 U.S.C. § 1631(a) (emphasis added). It is uncontested that defendant did not make the disclosures required under TILA. However, issues remain as to whether the loans were a "consumer credit transactions," whether defendant was a "creditor," and whether plaintiff was a "consumer" within the meaning of TILA.

29. The definition of "credit" under TILA is as follows: "The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. § 1602(e). Regulation Z also contains a similar definition: "'Credit' means the right to defer payment of debt, incur debt or to incur debt and defer its payment." 12 C.F.R. § 226.2(a)[14]. The court finds that the loans were credit within the meaning of TILA. Defendant granted

plaintiff the right to incur debt and defer the payment of monies given for the items.

> 30. The adjective "consumer," used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family or household purposes.

15 U.S.C. § 1602(h). Plaintiff was a natural person who received money from defendant to pay other debts. The court finds that plaintiff was a consumer.

31. The definition of "consumer credit" is found in Regulation Z: "'Consumer credit' means credit offered or extended to a consumer primarily for personal, family, or household purposes." 12 C.F.R. Section 226.2(a)[12]. As noted above, plaintiff was a consumer who was extended credit by the defendant for personal purposes.

> 32. The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required; and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.

15 U.S.C. Section 1602(f) (emphasis added). Regulation Z (revised) also contains a similar definition for "creditor:"

> A person (i) who regularly extends consumer credit that is subject to a finance charge, or is payable by written agreement in more than four installments (not including down payment), and (ii) to whom the obligation is initially payable, either on the face of the note or contract, or by

> agreement when there is no note or contract, loans, sales of property or services, or otherwise.

12 C.F.R. Section 226.2(a)[17][i] (emphasis added).

33. The forms at issue make clear that the obligations were payable by plaintiff to defendant.

34. Defendant argues that it is not a "creditor" within the meaning of TILA because there was no evidence that either of the transactions required more than four installment payments. Additionally, defendant contends that there is no evidence that plaintiff was required to pay a "finance charge."

35. The court rejects defendant's first contention that it is not a creditor because the transactions did not involve more than four installment payments. Reading the definitions of "creditor" in both the statute and regulation makes apparent that there need not be more than four installment payments when the lender "regularly extends consumer credit that is subject to a finance charge." This is particularly apparent when reading Regulation Z: "A person (i) who regularly extends consumer credit that is subject to a finance charge, or is payable by written agreement in more than four installments" is a creditor. 12 C.F.R. § 226.2(a)[17][i] (emphasis added). The statute, though less clear, also contains the "or" language that makes it apparent that there need not be four installment payments if defendant regularly extends credit subject to a finance charge.

36. Moreover, defendant required plaintiff to pay a "finance charge" by way of its service fees and "options to repurchase." A finance charge "includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit." Regulation Z, 12 C.F.R. § 226.4(a). Examples of finance charges are service, transaction, activity and carrying charges. These include, but are not limited to, such charges when related to checking or other transaction accounts. Regulation Z, 12 C.F.R. § 226.4(b)(2); Joseph v. Norman's Health Club, 532 F.2d 86 (8th Cir., 1976); Killings v. Jeff's Motors, Inc., 490 F.2d 865 (5th Cir., 1974); Pearson v. Easy Living, Inc., 534 F. Supp. 884 (S.D. Ohio, 1981); Ferran v. Sanchez, 105 N.M. 518, 734 P.2d 758 (1987).

37. The monthly 20% service fees, and the amounts that defendant charged plaintiff to "repurchase" the items were finance charges within the meaning of TILA because they were "an incident to or as a condition of the extension of credit." Moreover, defendant was "regularly" extending consumer credit subject to such finance charges. This is evidenced by Tabar's testimony that defendant engaged in several thousand transactions like the ones at issue per year.

38. Defendant, plaintiff, and the transactions were subject to TILA. Defendant did not make disclosures required under TILA. Therefore, defendant is liable under TILA, 15 U.S.C. § 1640.

39. Under 15 U.S.C. § 1640(a)(2)(A) plaintiff is entitled to recover "twice the amount of any finance charge in connection with the transaction, . . . except that liability . . . shall not be less than $100 nor greater than $1,000."

The total finance charge for the camera transaction was $230.00 ($40.00 service fee payment + $80.00 service fee payment + $110.00 (the service fee portion of the amount to "repurchase")). Therefore, plaintiff is entitled to $460.00 in damages for this transaction under § 1640(a)(2)(A).

The total finance charge for the ring transaction was $160.00 ($300.00 (the cost to "repurchase") - $140.00 (the "sale" price)). Therefore, plaintiff is entitled to $320.00 in damages for this transaction under § 1640(a)(2)(A).

Plaintiff is entitled to a total of $780.00 pursuant to § 1640(a)(2)(A).

40. Plaintiff is entitled to actual damages under TILA. 15 U.S.C. § 1640(a)(1). The court finds that plaintiff was damaged in not being able to effectuate the return of his camera. Therefore, the court finds that plaintiff is entitled to the return of his camera provided he return the $550.00 defendant loaned to plaintiff for the camera. Cf. Gerasta v. Hibernia Nat. Bank, 575 F.2d 580, 584 (5th Cir. 1978) ("Section 1640 does not provide for forfeiture of the creditor's property. . . . § 1640 . . . serves the congressional purpose of restoring the parties to the status quo ante and is consistent with [TILA's] remedial character.").

41. Plaintiff is entitled to costs and reasonable attorneys' fees pursuant to 15 U.S.C. § 1640(a)(3). Such amounts will be decided upon motion supported by proper affidavits of plaintiff's counsel reflecting time and expenses, with opportunity to defendant to object.

C. HRS 480-2

42. Plaintiff also alleged in the complaint that defendant violated HRS 480-2. Plaintiff argued that if there was a violation of TILA, then there was also a violation of HRS § 480-2.

43. The elements of a cause of action based on H.R.S. § 480-2 prior to May 10, 1988 were: (1) a violation of Chapter 480; (2) injury to plaintiff's business or property resulting from such violation; (3) proof of the amount of damages; and (4) a showing that the action was in the public interest or that defendant was a "merchant." Beclar Corp. v. Young, 7 Haw.App. 183, 750 P.2d 934, 941 (Haw.App. 1988).

44. In 1987 and 1988, H.R.S. § 480-2 was amended by Act 274, 1987 Haw.Sess.Laws, and Act 51, 1988 Haw.Sess.Laws. See Kukui Nuts of Hawaii v. R. Baird & Co., 7 Haw.App. 598, 789 P.2d 501, 507 n.6 (Haw.App. 1990). H.R.S. § 480-2 was amended and subsection (c) was added. Subsection (c) provided: "No showing that the proceeding or suit would be in the public interest . . . is necessary in any action brought under this section."

45. In addition, the amendments added subsection (d) to H.R.S. § 480-2. Subsection (d) required that a plaintiff be either a "consumer, the attorney general or the director of the office of the consumer protection" in order to maintain an action under § 480-2. Kukui Nuts of Hawaii, 789 P.2d at 507 n.6.

46. H.R.S. § 480-13 was also amended. H.R.S. § 480-13 was amended to delete language previously requiring a defendant be a merchant in order to maintain an action under chapter 480. Compare H.R.S. § 480-13(1) (1985) with H.R.S. § 480-13 (1987); cf. Kukui Nuts of Hawaii, 789 P.2d at 507 n.8.

47. The amendments revised the elements of a cause of action under H.R.S. § 480-2 for claims arising after May 10, 1988.[3] The current elements of a claim for unfair and deceptive trade practices under § 480-2 can now be restated as follows:

(1) a violation of H.R.S. § 480-2;

(2) injury to plaintiff's business or property resulting from such violation;

(3) proof of the amount of damages; and

(4) a showing that the plaintiff was a "consumer."

In the case at bar, the transactions occurred on November 7, 1989, and December 23, 1989. Thus, they would be subject to the amended elements of H.R.S. § 480-2.

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[3] The effective date of the 1987 amendment was June 24, 1987. The 1988 amendment became effective on May 10, 1988.

1. Violation of H.R.S. § 480-2

48. Section 480-2

> is virtually a duplication of § 5(a)(1) of the Federal Trade Commission Act [(FTCA)]. [Former] HRS § 480-3 (1976) contains a clear legislative intent that interpretation of § 5(a)(1) by the Commission and federal courts should guide our courts in their construction of § 480-2. But "our courts must interpret and apply the statute in light of conditions in Hawaii."

Rosa v. Johnston, 3 Haw.App. 420, 426 (1982) (citations and footnotes omitted).

49. The mandate in Rosa to follow the FTC and federal courts while also considering the conditions in Hawaii in construing § 480-2 was modified and/or clarified by the Hawaii legislature in subsequent amendments (the 1987 and 1988 amendments) to the statute. In the post-Rosa amendments, the legislature directed courts to rely more on the developing Hawaii caselaw:

> The purpose of [the 1988 amendment to H.R.S. § 480-2] is to make clear that, in construing section 480-2, the courts in Hawaii must give consideration to, but are not bound to follow, rules, regulations and decisions of the federal courts.
>
> Your committee received testimony that there are now some Hawaii Court decisions which deal with section 480-2. Additionally more recent federal decisions reduce the value of provisions similar to section 480-2 to the consumer.

House Standing Committee Report No. 483-88 (1988); see also Senate Standing Committee Report No. 2329 (1988).[4]

50. An "unfair" practice is defined as a practice that is "'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" Eastern Star, Inc. v. Union Building Materials Corp., 6 Haw.App. 125, 133 (1985) (quoting Rosa, 3 Haw.App. at 427) (quoting Spiegel, Inc. v. F.T.C., 540 F.2d 287, 293 (7th Cir. 1976)). A "deceptive" practice is defined as "an act causing, as a natural and probable result, a person to do that which he would not otherwise do." Eastern Star, Inc., 6 Haw.App. at 133 (quoting Bockensette v. FTC, 134 F.2d 369 (10th Cir. 1943)). "However, . . . actual deception need not be shown; the capacity to deceive is sufficient." Id.

51. A violation of the TILA is a violation of the FTCA. Seekonk Freezer Meats, Inc., et al., 82 F.T.C. 1025, 1052, 1055 (1973); 15 U.S.C. § 1607(c). Because there is no Hawaii

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[4] Your Committee received testimony from the Office of Consumer Protection stating that when Chapter 480, HRS, was initially enacted, there was no experience on the state level upon which to base any decisions on unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Now, however, there is experience and state court decisions upon which to make determinations of law. These decisions should be the determining factors when it comes to policy decisions affecting the state.

This [amendment to H.R.S. § 480-2] will preserve the reference to federal authority, but allow the Office of Consumer Protection and the courts to pursue Hawaii trends and to follow Hawaii law.

Senate Standing Committee Report No. 2329 (1988).

authority on this point, the legislative history of § 480-2 indicates that this court should refer to federal authority for guidance. It is clear that federal authority finds that a violation of TILA is a violation of the FTCA.

52. Thus, the court finds that a violation of TILA is also be a violation of § 480-2.

53. Plaintiff also claims that a violation of H.R.S. §§ 478 (usury), 445-131 and 445-133 (pawnbrokers), and 481A (uniform deceptive trade practices), are also violations of H.R.S. § 480-2.

An "unfair" practice is defined as a practice that is "'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" Eastern Star, Inc., 6 Haw.App. at 133. Charging interest on a loan at the annual percentage rate of 240% (20% per month) is "oppressive" to consumers. The court finds that defendant's practice of charging 20% per month interest is an unfair trade practice and therefore is a violation of § 480-2.

With respect to Chapter 481A, "[a] trade practice deceptive under HRS chapter 481A cannot escape the condemnation of HRS § 480-2." Kukui Nuts of Hawaii, Inc., 789 P.2d at 511. Plaintiff claims that Chapter 481A was violated by defendant's calling the transactions sales, which plaintiff asserts is a classic "bait and switch" technique in violation of § 481A-3(a)(9) and (12).

§ 481A-3(a)(9) states that "[a] person[5] engages in a deceptive trade practice when, in the course of the person's business . . . , the person . . . [a]dvertises goods or services with intent not to sell them as advertised." H.R.S. § 481A-3(a)(9).

HRS § 481A-3(a)(12) provides that a person engages in a deceptive trade practice when he "[e]ngages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding."

The court finds there was a violation of Chapter 481A. There was a likelihood of confusion or of misunderstanding because plaintiff was not told that the annual interest rate for the transactions was 240%. The policy of TILA is full disclosure with respect to interest rates and finance charges so that a borrower is completely informed and completely understands the implications of a transaction. Defendant's failure to disclose would likely lead to a misunderstanding or confusion since plaintiff was not fully informed as to the transactions.

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[5] "Person" is defined as "any individual, corporation, . . . partnership, unincorporated association . . . , or any other legal or commercial entity." HRS § 481A-2.

2. Injury to Plaintiff's Business or Property Resulting from Such Violation

54. Plaintiff was injured in his property to the extent he paid the service fees and "options to repurchase", and lost the use of his camera.

3. Proof of the Amount of Damages

55. Plaintiff has proven the amount of his damages. He has suffered $230.00 in unlawful fiance charges for the camera transaction and $160.00 for the ring transaction. Thus, his total damages for the transactions were $390.00.

4. Plaintiff as a "Consumer."

56. "Consumer" is defined in H.R.S. § 480-1 as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in an investment."

Plaintiff was a consumer because he purchased defendant's service for personal purposes.

57. Defendant is liable to plaintiff under Chapter 480. HRS § 480-13(b)(1) provides that

> [a]ny consumer who is injured by any unfair and deceptive act or practice forbidden or declared unlawful by section 480-2 . . . [m]ay sue for damages

> sustained by the consumer, and, if judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than $1,000 or threefold damages by the plaintiff sustained, whichever sum is greater, and reasonable attorneys fees together with costs of suit. . . .

The court finds that plaintiff is entitled to $1,170.00 in damages ($390.00 x 3), plus costs and reasonable attorneys' fees under § 480-13(b)(1).

58. Any conclusion of law deemed a finding of fact shall be so deemed.

IV. CONCLUSION

The court finds that plaintiff is entitled to a judgment in his favor in the amount of $780.00 pursuant to § 1640(a)(2)(A) of TILA. In addition, plaintiff is entitled to the return of his camera provided he return to defendant the $550.00 lent.

Plaintiff is entitled to judgment in the amount of $1,170.00 under HRS § 480-13(b)(1).

Plaintiff is also entitled to attorneys' fees and costs under both § 1640(a)(3) of TILA and HRS § 480-13(b)(1). Such fees and costs will be decided upon motion supported by proper affidavits of plaintiff's counsel reflecting time and expenses.

Accordingly, judgment shall be entered in plaintiff's favor for $1950.00. In addition, plaintiff is entitled to the

return of his camera provided he return the $550.00 loaned by defendant. Plaintiff is also entitled to costs and reasonable attorneys' fees.

DATED at Honolulu, Hawaii OCT 17 1991

United States District Judge

GEORGE EMERSON BURNETT v. ALA MOANA PAWN SHOP; CIV. NO. 90-267 ACK; DECISION; FINDINGS OF FACT AND CONCLUSIONS OF LAW.