

FILED

JAN 29 2018

No. 35372-9-III

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CONNELL OIL, INC.,
Respondent,

v.

ERIK MCCONNELL JOHNSON and JACKIE MCCONNELL
JOHNSON,

Petitioners.

BRIEF OF RESPONDENT

Brian G. Davis
WSBA No. 43521
LEAVY SCHULTZ DAVIS, P.S.
2415 W. Falls Ave.
Kennewick, WA 99336
bdavis@tricitylaw.com
Attorney for Respondent

TABLE OF CONTENTS

I.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF THE CASE	2
III.	ARGUMENT	6
	A.	
	The lower court did not commit error because the lower court did not rely on the Commentary in reaching its decision	6
	B.	
	The lower court did not commit error because it correctly found that the cardlock is not a credit card under TILA or Regulation Z definitions of “credit card.”.....	7
	C.	
	Even if the lower court did rely on the Commentary, which it did not, such reliance was not in error because Congress has not “directly spoken to the precise question at issue and the applicable provision of the Commentary is not “demonstrably irrational.”.....	12
	1) Congress has not directly spoken to the precise question of whether Connell Oil’s cardlocks are credit cards under TILA, thus permitting a court to review the Commentary.....	14
	2) The Board’s Commentary in 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(ii)(B) is not arbitrary, capricious, or manifestly contrary to statute.....	17
	D.	
	Since application of the Commentary would not have been an error, Connell Oil’s cardlock is exempted from TILA and Regulation Z because it meets the Commentary’s Exclusion.....	19
	E.	
	Even if this Court found that the provisions of TILA are applicable, which they are not, Connell Oil should nevertheless be immune from civil liability because it reasonably relied upon the Commentary	21

IV. ATTORNEY’S FEES.....	22
V. CONCLUSION	23

TABLE OF AUTHORITIES

Table of Cases

<i>Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.</i> , 467 U.S. 837, 104 S.Ct. 2778 (1984).....	16, 19
<i>Ford Motor Credit Co. v. Milhollin</i> , 444 U.S. 555, 100 S. Ct. 790 (1980).....	142, 13, 14, 16
<i>Hamm v. Ameriquest Mortg. Co.</i> , 506 F.3d 525 (7th Cir. 2007)	13, 14
<i>Household Credit Servs. v. Pfennig</i> , 541 U.S. 232, 124 S. Ct. 1741 (2004 2003).....	13, 14, 15, 16, 17, 19
<i>In re Washington Mut. Overdraft Protection Litigation</i> , 539 F. Supp.2d 1136 (C.D. Cal. 2008)	13
<i>Pierce County Sherriff v. Civil Serv. Com.</i> , 98 Wn.2d 690, 658 P.2d 648 (1983).....	17, 19
<i>State v. Rowe</i> , 93 Wn.2d 2777, 609 P.2d 1348 (1980).....	17
<i>Swanson v. Bank of Am., N.A.</i> , 566 F. Supp.2d 821 (N.D. Ill. 2008)	13, 14
<i>Telco Communications Group, Inc. v. Race Rock</i> , 57 F. Supp. 340 (E.D. Va. 1999)	15, 16

United States Code

15 U.S.C. § 1601(a)	5, 12, 17
15 U.S.C. § 1602(f).....	4, 10, 15
15 U.S.C. § 1602(l).....	12, 15
15 U.S.C. § 1604(a)	14, 18

Code of Federal Regulations

12 CFR § 226.1(a).....13
12 CFR § 226.2(14)10
12 CFR § 226. 2(15)(i).....10
12 CFR § 226.12(b)(1)(ii).....1
12 CFR § 226.12(b)(2)(ii).....1, 10

Federal Reserve Board’s Official Commentary

12 CFR § 226, Supp. 1 (1)13, 18, 20, 22
12 CFR § 226, Supp. 1 (A) § 226.2 (a)18
12 CFR § 226, Supp. 1 (A) § 226.2 (a)(15)(2)(ii)(B)1, 17, 18, 20, 21

Washington RCW

RCW 4.84.33022

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the cardlock issued by Connell Oil, Inc. (hereinafter “Connell Oil”) a “credit card” under TILA and Regulation Z?
2. Is the express language of TILA and Regulation Z supplemented by federal staff commentaries pertaining to certain cards, keys, plates, or other devices that are “used in order to obtain petroleum product for business purposes from a wholesale distribution facility or to gain access to that facility, and [are] required to be used without regard to payment terms”? 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(2)(ii)(B).
3. If the express language of TILA and Regulation Z is supplemented by federal staff commentaries, does the cardlock issued by Connell Oil meet the exclusion stated in 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(2)(ii)(B)?
4. If the cardlock issued by Connell Oil is not a “credit card” under TILA, are the cardholders in this case entitled to limitations on liability for their stolen cardlock under 12 CFR § 226.12(b)(1)(ii) and disclosures regarding the same under 12 CFR § 226.12(b)(2)(ii)?
5. If the cardlock issued by Connell Oil is a “credit card” under TILA, and if the cardholders in this case are entitled to limitations on liability for their stolen cardlock under 12 CFR § 226.12(b)(1)(ii) and disclosures regarding the same under 12 CFR § 226.12(b)(2)(ii), is

Connell Oil nonetheless immune from civil liability pursuant to 15 U.S.C. § 1640(f) for its good faith reliance on the Federal Reserve Board's official interpretation of the definition of "credit card" under TILA and Regulation Z contained in the Federal Reserve Board's Official Commentary?

II. STATEMENT OF THE CASE

Connell Oil, Inc. ("Connell Oil") is in the business of selling and distributing wholesale fuel for commercial purposes. CP 410. It contracts with qualified applicants to provide them access to a select number of fueling stations that are not operated or overseen by full time employees. *Id.* These stations are recognized as Pacific Pride Stations and are commonly used by police, fire, transit, and school districts. *Id.*

Approved applicants use a device known as a "cardlock" to gain access to fuel pumps. *Id.* Through a magnetic strip, the cardlock communicates to the computer the account number of the customer and what type of fuel the customer is permitted to access. *Id.* For security, the customer must enter in an access code, or pin number, before the pump is activated. *Id.* In addition, the customer is prompted to disclose other information such as their vehicle's mileage. CP 410. For further security, customers are provided locations for cardlock stations, pin numbers, and instructions to keep the pin number separate from the cardlock. *Id.* Once

the customer completes fueling, an invoice is generated for the specific amount of fuel purchased and sent to the customer for payment. Customers are required to pay that invoice in full. *Id.*

Qualified applicants must be approved before gaining access to fuel. Invoices are sent to the customer on the 15th and the end of a given month. CP 411. The invoices are due in full and, without making specific arrangements, a customer must pay the total amount due or risk having their cardlock access denied. *Id.*

Appellants, Erik Johnson and Jackie Johnson (hereinafter the “Johnsons”) were partners who owned and operated an agricultural business in Eltopia, Washington. *Id.* Under that capacity, the Johnsons entered into a contract for access to the cardlock system. In fact, multiple contracts for access into the cardlock system were executed since 2009. CP 411—12, 415—20. The Johnsons each had a cardlock and also assigned a cardlock to employees. CP 326, 374—94.

The Johnsons agreed to the terms of the contract which include, “I hereby request that Connell Oil, Inc. issue me / my company the following cardlock cards. I accept responsibility for payment of all charges applied to these cards.” CP 411—12, 415—20. They further agreed that “If a card is lost or stolen, I understand that I am responsible for payment of all charges for 24 hours after I inform Connell Oil, Inc. **in writing** to

invalidate the card.” *Id.* The language of the contract makes it a point to bold the text, “**in writing.**” *Id.*

The Johnsons claim that on or about July 27, 2014, Mr. Johnson’s wallet was stolen from his truck. CP 412. Contained within the wallet was a Connell Oil cardlock with the accompanying pin number. *Id.* Mr. Johnson claimed he contacted Connell Oil by phone on July 31, 2014 to request the stolen cardlock to be shut off. *Id.* However, according to Connell Oil, the context of the conversation was to request new cardlocks.¹ *Id.* In response, Connell Oil sent the proper form to request new cardlock cards. *Id.* On the bottom of this request is a section where the customer can request a cardlock to be invalidated. CP 412—13, 423—24. The form was never returned to Connell Oil. In fact, it is undisputed that the Johnsons never requested to have the stolen cardlock invalidated in writing. CP 413.

On or about September 8, 2014, Connell Oil was alerted by Banner Fuel of suspicious activity on one of the Johnsons’ cardlocks. *Id.* In response, Connell Oil contacted the Johnsons and the cardlock was deactivated. *Id.* During that time, the cardlock was used to access fuel distribution centers. *Id.* Due to the fact that the cardlock was accompanied with the pin number, the fuel obtained was invoiced under the Johnsons’

¹ This is contrary to the facts that the the Johnsons state.

account. *Id.* In all, \$34,649.68 was invoiced. *Id.* While the fuel was being accessed, Connell Oil continued to invoice the Johnsons in its usual course. *Id.* Even so, the Johnsons never alerted Connell Oil or requested to have the card deactivated in writing. *Id.*

Connell Oil demanded payment and the Johnsons objected. CP 413. The Johnsons initiated an investigation by complaint to the Attorney General of Washington State, Consumer Protection Division. CP 414. After conclusion of their investigation into a violation of the Consumer Protection Act, the Johnsons' complaint was closed without penalty or assessment. CP 414, 427—33. Connell Oil again demanded payment.

Suit was filed by Connell Oil for breach of contract. CP 1—5. The Johnsons answered and asserted an affirmative defense that Connell Oil's claim was barred by operation of the Truth and Lending Act (TILA), 15 U.S.C. § 1601 *et. seq.* CP 6—11.

On April 10, 2017, the lower court heard the parties' cross motion for summary judgment and correctly ruled that TILA and Regulation Z did not apply in this case because Connell Oil's cardlocks do not meet the TILA or Regulation Z definitions of "credit card." RP 1, 36—37; CP 278. The Johnsons subsequently filed their appeal.

III. ARGUMENT

This Court should affirm the ruling of the lower court and find that the provisions of TILA and Regulation Z do not apply in this case. Even if this Court reverses the lower court's ruling, this Court should nevertheless find Connell Oil immune from civil liability for any violation of TILA or Regulation Z pursuant to 15 U.S.C. § 1640(f) for its good faith reliance on the Federal Reserve Board's official interpretation of the definition of "credit card" contained in the Federal Reserve Board's Official Commentary (hereinafter the "Commentary").

A. The lower court did not commit error because the lower court did not rely on the Commentary in reaching its decision.

The Johnsons claim that the lower court erred by relying on the Commentary without adhering to the "expressed intent of Congress" within TILA. *Brief of Appellants*, p. 6. However, nothing in the record supports this claim.

In fact, the lower court reached its decision that the cardlock does not meet definition of "credit card" under TILA or Regulation Z *without* relying on the Commentary. RP 36: 23—24; CP 278. Contrary to the Johnsons' claim, the lower court applied *only* the TILA and Regulation Z definitions and found that the cardlock "is not the provision of an item on credit *as defined by statute*." RP 36: 23—24 (emphasis added). Because

the lower court only applied TILA and Regulation Z, the lower court did not commit an error as the Johnsons allege. Accordingly, this Court should uphold the lower court's finding that Connell Oil's cardlock is not a credit card under TILA or Regulation Z.

B. The lower court did not commit error because it correctly found that the cardlock is not a credit card under TILA or Regulation Z definitions of "credit card."

In the lower court, the Johnsons argued that Connell Oil's cardlock bears a "credit feature" that was not present in Connell Oil's prior fuel access devices and is therefore a credit card under TILA and Regulation Z. RP 25: 16—18; RP 24: 1—2. However, a simple review of Connell Oil's cardlock system explains not only the cardlock's purpose, but also demonstrates why it does not meet the TILA or Regulation Z definitions of a "credit card."

Originally, Connell Oil utilized a keylock to activate unmanned fuel pumps. CP 410, CP 435. Due to advancements in technology, Connell Oil switched to the Optical-lock card. CP 410, CP 436. The Optical-lock card utilized holes punched into a card to trigger the operation of an unmanned fuel pump. CP 410—11. With further technological advancements, the holes on the Optical-lock cards were eventually replaced with a magnetic strip to trigger the operation of an unmanned fuel

pump. CP 411. These are now referred to as “cardlocks.” *Id.*; *see also* CP 438-43.

With a cardlock, a person inserts the cardlock at an unmanned fuel pump and enters a PIN. This process triggers the operation of the unmanned fuel pump. An invoice is then generated and sent to the person. CP 410. The only thing that has changed in Connell Oil’s process of allowing persons to unlock fuel pumps is the device that is used to unlock the fuel pump; from a key to a card with a magnetic strip. The nature of the transaction, as the lower court recognized, has always remained the same.

The Johnsons conceded that all prior forms of the cardlock devices were *not* credit cards. RP 23: 1—14; RP 24. The Johnsons conceded this point even though Connell Oil’s invoice practice for the cardlock is the same invoice practice used for all of Connell Oil’s fuel unlocking devices. *Id.* The Johnsons conceded this point even though the *only* thing that has changed for Connell Oil’s fuel access is the *form* of the fuel access devices, and not the *nature* of the transaction involved. *Id.*

The lower court quickly realized that the Johnsons’ argument rested on the form of a cardlock rather than the actual substance of a cardlock transaction. The Honorable Judge Alex Eckstrom asked the following:

“Where you have a lock, which is what a card lock used to be before it became an optical reader...the lock grants you access to the commodity, which is recorded and you just pay it regularly. How does that convert to a credit card type transaction? Isn’t that simply just commodity access as opposed to in, I guess, you can take from that that I don’t see any evidence in the record that you can buy a windsock or anything like that with these cards...You can get fuel...but if all you can get is fuel, how is [the cardlock] a credit card?” RP 21—22:16—25; 1—4.

“Well...I presume here that the only thing that’s changed with the addition of the card and the PIN as opposed to a key is the mode of access to the fuel; but everything else is the same and has always been. You get a bill on a regular basis and you pay the bill. How does – you’re talking about form over substance. How does the use of a scan card to access a pump make it any different than a key?” RP 24: 6—15.

In response, the Johnsons argued that the cardlock is a credit card because it is no longer a typical key, but a card that the holder swipes, enters a pin, and obtains fuel. RP 23:1—14. According to the Johnsons, Connell Oil’s historical switch from a typical key to a cardlock with a PIN made the cardlock a credit card because “that’s the way the credit card works” and therefore “credit’s associated with it”. RP 25: 20—21. The Johnsons went further and stated that if the cardlock was still a typical key to unlock and access fuel, then TILA would not apply. RP 23: 1—8. The Johnsons failed, however, to articulate a single argument to the lower court as to how the *substance* of the cardlock, rather than its *form*, gave it a credit feature. RP 36: 5—10.

Now, the Johnsons have once again failed to articulate a single argument to this Court on how Connell Oil's cardlocks meet the TILA and Regulation Z definitions of "credit card." Instead, the Johnsons repeatedly state that the cardlocks have "credit features" without any attempt to actually identify these alleged features, apply the statutory language to these features, or provide any legal analysis in support of this statement.

Contrary to the Johnsons' unsupported arguments, the cardlocks are not credit cards under TILA or Regulation Z. Under TILA, a credit card is, "any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit." 15 U.S.C. § 1602(1). A similar definition is found under Regulation Z— "any card, plate, or other single credit device that may be used from time to time to obtain credit." 12 C.F.R. § 226.2(15)(i). Credit is defined as "the right to defer payment of debt or to incur debt and defer its payment." 12 C.F.R. § 226.2(14).²

Here, Connell Oil's cardlocks are not utilized to obtain products or services on credit, because cardlock users do not have a "right to defer payment of a debt" nor a right to "incur debt and defer its payment." Rather, cardlock users have a right to *access* fuel from Connell Oil and pay an invoice. CP 410. Invoices are immediately payable in full. The

² Under TILA, credit is defined as, "the right granted by a creditor to a debtor to defer payment of a debt or to incur debt and defer its payment." 15 U.S.C. § 1602(f).

lower court recognized such distinctions. *Id.*; RP 24: 6—15; RP 36: 19—24.

Cardlock users have no right to accrue debt like credit card holders. CP 410. Unlike a credit card, Connell Oil cardlocks cannot be used to buy anything. *Id.* In fact, cardlocks can only be used to *access* fuel, and *only* fuel. *Id.* Cardlocks cannot be used for a spending spree that the user plans on paying off over time and at a later date. Connell Oil would not allow for such use and the cardlocks are simply incapable of such function. CP 410—11.

Cardlocks are most analogous to an account receivable. Cardlock users access a product supplied by a company, the company invoices the user on a regular interval, and the user pays the invoice in full. The lower court recognized this analogy—

“You’re not really deferring anything, payment you’re just – you know, that’s the ledger of what you’ve done and you present to me and you pay it. So if there is a distinction between those acts, the idea of purchasing on credit versus, for lack of a better term, having a tab that is paid on a regular basis, how do we even get to this being a credit card?” RP 19—20: 24—6.

A finding that Connell Oil’s cardlocks are a credit card under TILA and Regulation Z would have a devastating effect on the business world. Such a finding would render *all* accounts receivable and “net payable” contracts “credit cards” under TILA and Regulation Z. Because

the purpose of TILA is “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and to avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices,” Congress surely did not intend to subject accounts receivable and other similar business invoicing practices, like Connell Oil’s cardlocks, to the rigorous requirements of TILA. 15 U.S.C. § 1601(a).

Because Connell Oil’s cardlock is not a credit card under TILA or Regulation Z, this Court should affirm the lower court’s finding.

C. Even if the lower court did rely on the Commentary, which it did not, such reliance was not in error because Congress has not “directly spoken to the precise question at issue” and the applicable provision of the Commentary is not “demonstrably irrational.”

In enacting TILA, Congress expressly delegated authority to the Federal Reserve Board (hereinafter the “Board”) to promulgate regulations with “such classification, differentiations, or other provisions” that are in the Board’s opinion, “necessary or proper to effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.” 15 U.S.C. § 1604(a). “Congress has specifically designated the [Board] and staff as the primary source for interpretation and application of truth-in-lending law.” *Ford Motor Credit Co. v.*

Milhollin, 444 U.S. 555, 566, 100 S. Ct. 790 (1980) (hereinafter “*Ford*”). Accordingly, courts have recognized that the Board “play[s] a pivotal role in ‘setting [TILA] in motion...’” and have consistently afforded the Board’s interpretations and regulations great deference. *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 238, 124 S. Ct. 1741 (2004) (hereinafter “*Household*”) (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S. Ct. 790 (1980)); see also *Swanson v. Bank of Am., N.A.*, 566 F. Supp.2d 821 (N.D. Ill. 2008) (hereinafter “*Swanson*”); see also *Hamm v. Ameriquest Mortg. Co.*, 506 F.3d 525 (7th Cir. 2007) (hereinafter “*Hamm*”); see also *In re Washington Mut. Overdraft Protection Litigation*, 539 F.Supp. 2d 1136 (C.D. Cal. 2008).

As an exercise of its delegated authority, the Board has promulgated a detailed and comprehensive set of rules regulating TILA known as “Regulation Z” and codified in Title 12 of the Code of Federal Regulations, section 226. 12 C.F.R. § 226.1(a). The Board also issues official interpretations of Regulation Z in its Commentary. According to the “Introduction” of the Commentary, it is “the vehicle by which the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation Z.” 12 C.F.R. Part 226 Supp. I. (1).

In analyzing TILA claims, a court—

“looks to the language of the statute, the implementing regulation, and the relevant [Board] Commentary. Congress has expressly delegated to the [Board] the authority to prescribe regulations – including “Regulation Z,” 12 C.F.R. § 226.1, *et seq.* – to effectuate the purpose of TILA. The Court must “pay particular heed” to the Board’s Official Commentary when interpreting TILA, and “[u]nless demonstrably irrational, [the Board’s] staff opinion construing [TILA] or Regulation should be dispositive.”

Swanson, 566 F. Supp.2d 821 (N.D. Ill. 2008) (citing *Household*, 541 U.S. at 238) (quoting *Hamm*, at 528).

To determine if the Board’s regulations and/ or interpretations of TILA are binding, courts are “faced with only two questions.” *Household*, 541 U.S. at 239. First, the court must ask if “Congress has directly spoken to the precise question at issue.” *Id.*

Second, if “Congress has ‘explicitly left a gap for the agency to fill,’ the agency’s regulation is ‘given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.’” *Id.* Said otherwise, the Board’s regulations and official interpretations are dispositive unless they are “demonstrably irrational.” *Ford*, 444 U.S. at 564.

1. Congress has not directly spoken to the precise question of whether Connell Oil’s cardlocks are credit cards under TILA, thus permitting a court to review the Commentary.

TILA defines “credit card” as “any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property,

labor, or services on credit.” 15 U.S.C. § 1602(l). TILA defines “credit” as “the right granted by a creditor to a debtor to defer payment of a debt or to incur debt and defer its payment.” 15 U.S.C. § 1602(f).

Upon inspection of this plain language and the TILA statutory scheme, it is readily apparent that TILA itself does not directly speak to the precise question at issue – whether the cardlock issued by Connell Oil to access petroleum product at unmanned fuel stations is included within the TILA definition of “credit card.” Such specificity in ascertaining whether Congress has explicitly addressed the precise question at issue is recognized by the Supreme Court. *See Household*, 541 U.S. 232 (2004) (ruling that “over-credit-limit fees” were not “finance charges” under TILA, even though such charges arguably met the TILA definition, because Congress did not directly speak to the precise issue of whether such charges were finance charges and provisions in Regulation Z specifically excluded them from the TILA definition).

Additionally, such specificity to determine whether Congress has directly spoken to the precise issue at question was utilized in *Telco Communications Group, Inc. v. Race Rock* – a case the Johnsons heavily rely upon. 57 F. Supp. 2d 340 (E.D. Va. 1999) (hereinafter “*Telco*”). In *Telco*, the court was faced with determining whether telephone calling cards were a credit card under the same TILA and Regulation Z

definitions before this Court. *Id.* at 343. To assist in making this determination, the court reviewed the Commentary, presumably because it found that the provisions of TILA did not directly speak to the precise question at issue—whether telephone calling cards meet the TILA and Regulation Z definitions of credit card. *Id.* The Johnsons even conceded to the lower court that TILA did not directly speak to the issue of whether the telephone calling cards at issue in *Telco* were credit cards. RP 26: 13—17.

Just as the case before this Court, it is readily apparent that TILA itself does not directly speak to the precise question at issue – whether the cardlock issued by Connell Oil to access petroleum product at unmanned fuel stations is included within the TILA definition of “credit card.” Accordingly, even though the lower court did not rely upon the Commentary, it was clearly within its rights to do so. Because Congress has not explicitly addressed the precise question at issue, the Board’s regulations and interpretations issued to fill such gaps are controlling on this Court unless arbitrary, capricious, or manifestly contrary to the statute.” *Household*, 541 U.S. at 238 (quoting *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843—44, 104 S. Ct. 2778 (1984)).

2. The Board's Commentary in 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(2)(ii)(B) is not arbitrary, capricious, or manifestly contrary to statute.

If a court is permitted to review the Commentary, the court must afford the Commentary “controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.” *Household*, 541 U.S. at 239. The party seeking to demonstrate that an action is arbitrary and capricious carries “a heavy burden.” *Pierce County Sheriff v. Civil Serv. Com.*, 98 Wn.2d 690, 696, 658 P.2d 648 (1983) (hereinafter “*Pierce County*”). “Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” *Id.* (citing *State v. Rowe*, 93 Wn.2d 2777, 284, 609 P.2d 1348 (1980)).

TILA was enacted to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and to avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.” 15 U.S.C. § 1601(a). Congress delegated authority to the Board to issue Commentary that is “necessary or proper to

effectuate the purposes of [TILA], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.” 15 U.S.C. § 1604(a).

Here, it is clear that the Board’s Commentary at issue is not arbitrary, capricious, or manifestly contrary to statute. Under 12 CFR § 226, Supp. 1 (A) § 226.2(a), the Board lists specific examples of what types of devices are and are not “credit cards” and thus not subject TILA or Regulation Z. Applicable in the present case, is the following example of what *does not* constitute a credit card:

A “credit card does not include, for example . . . Any card, key, plate, or other devise that is used in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that is required to be used without regard to payment terms.” 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(2)(ii)(B) (hereinafter the “Exclusion”).

The Exclusion is not arbitrary, capricious, or manifestly contrary to statute because it conforms to the goals of TILA.

As stated earlier, Congress surely did not intend to subject accounts receivable and other similar business invoicing practices, like Connell Oil’s cardlocks, to the rigorous requirements of TILA. The Board’s Exclusion interpreting TILA’s definition of credit card furthers this intention. Additionally, the protections provided to credit card holders under TILA would be useless for cardlocks, and other similar devices, because such devices can only be used to unlock a fuel pump— the

devices are not used to actually purchase anything. CP 410—11. Furthermore, if Congress had intended for cardlocks to be included in the definition of TILA, Congress would have amended the statutory provisions to state that the Commentary and Exclusion were inapplicable.

A difference in opinion with the Board’s Commentary and the Exclusion is insufficient for this Court to rule that the Exclusion is arbitrary, capricious, or manifestly contrary to TILA. *Pierce County*, 98 Wn.2d at 696. Rather, the Johnsons must demonstrate that the Board willfully issued the Exclusion “without consideration and in disregard of facts and circumstances.” *Id.* The Johnsons have failed to satisfy their burden and the Exclusion is clearly not arbitrary, capricious, or manifestly contrary to TILA. Accordingly, the Exclusion is binding authority on this Court. *Household*, 541 U.S. at 238 (quoting *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843—44, 104 S. Ct. 2778 (1984)).

D. Since application of the Commentary would not have been an error, Connell Oil’s cardlock is exempted from TILA and Regulation Z because it meets the Commentary’s Exclusion.

The application of TILA and Regulation Z do not apply because the cardlock is specifically excluded from the TILA and Regulation Z definitions of “credit card” by the Exclusion contained in the

Commentary. Thus, TILA and Regulation Z, and any protections afforded therein, do not apply to the cardlocks or Connell Oil.

The Exclusion exempts the following from the definition of “credit card” and subsequently from TILA provisions:

A “*credit card* does not include, for example . . . Any card, key, plate, or other device that is used in order to obtain petroleum products for business purposes from a wholesale distribution facility or to gain access to that facility, and that is required to be used without regard to payment terms.” 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(2)(ii)(B) (emphasis added).

Pursuant to this binding Exclusion, it is clear that the cardlock issued by Connell Oil is not a credit card under TILA or Regulation Z.

The cardlock issued by Connell Oil is a device that is used to gain access to Connell Oil’s unmanned wholesale distribution facilities. CP 410—11. At these unmanned fuel stations, cardlock holders use their cardlocks to obtain petroleum products for a business purpose. *Id.* A cardlock device is required in order to access Connell Oil’s unmanned fuel stations. *Id.* Connell Oil’s cardlock devices can only be used to access petroleum products at Connell Oil’s unmanned fuel stations. *Id.* The cardlocks serve no other purpose and cannot be used to purchase anything. *Id.*

Contrary to the Johnsons’ argument, the payment terms associated with Connell Oil’s cardlocks are non-dispositive in determining whether

the cardlocks are or are not credit cards. The Exclusion specifically, and unambiguously, states that payment terms are not regarded. 12 CFR § 226, Supp. 1 (A) § 226.2(a)(15)(2)(ii)(B). Applied to the present case, the contractual terms between the Johnsons and Connell Oil regarding their payment to gain access to Connell Oil's unmanned fuel stations are irrelevant in determining if the Exclusion applies. As such, the Johnsons' argument suggesting otherwise is simply incorrect.

In the case before this Court, the Exclusion specifically excludes Connell Oil's cardlocks from the TILA and Regulation Z definitions of credit card. Thus, TILA and Regulation Z, and any protections afforded therein, including limitations on "cardholder" liability, do not apply and are unavailable relief for the Johnsons.

E. Even if this Court found that the provisions of TILA are applicable, which they are not, Connell Oil should nevertheless be immune from civil liability because it reasonably relied upon the Commentary.

Both TILA and Regulation Z provide protections on civil liability when creditors act in good faith compliance with the statutory and regulatory scheme. So too does the Commentary—

"This commentary is the vehicle by which the staff of the Division of Consumer and Community Affairs of the Federal Reserve Board issues official staff interpretations of Regulation Z. Good faith compliance with this commentary affords protection from liability under 130(f) of the Truth in Lending Act. Section 130(f) (15 U.S.C. 1640) protects creditors from civil liability for any act done or

omitted in good faith conformity with any interpretation issued by a duly authorized official or employee of the Federal Reserve System.” 12 C.F.R. Part 226, Supp. I(1) (emphasis added).

Creditors receive civil liability when its “act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.” 15 U.S.C. § 1604(f).

Here, Connell Oil has relied on the Commentary that excludes cardlocks from the protections of TILA and Regulation Z. Said otherwise— Connell Oil “acted” upon that interpretation issued by the Board. Should this Court be the first to apply the provisions of TILA and Regulation Z to a cardlock, then a judicial authority will have determined the Commentary to be invalid. Thus, Connell Oil’s “act or omission” based on good faith reliance on the Commentary “interpretation” will have been “determined by judicial...authority to be invalid” which will provide Connell Oil with civil liability protection. *Id.*

Should this Court determine a cardlock is a credit card, despite the fact that it is not, then Connell Oil is protected from civil liability because it acted in good faith reliance on the Commentary. This Court should affirm the lower court’s decision stating such. RP 37: 1—8.

IV. ATTORNEY’S FEES

Pursuant to RCW 4.84.330 and contract, Connell Oil is entitled to

an award of attorney's costs and fees. Accordingly, Connell Oil respectfully requests that this Court make such award pursuant to RAP 18.1.

V. CONCLUSION

The lower court did not error in ruling that the cardlocks are not credit cards subject to TILA or Regulation Z because cardlocks are only keys that unlock fuel pumps—and nothing more, as ruled by the lower court. This Court should affirm the same holding.

Even if this Court finds that the lower court relied upon the Commentary, any such reliance was proper because TILA does not directly speak to the precise question at issue and the Exclusion is not arbitrary, capricious, or manifestly contrary to TILA. Furthermore, the Commentary, which would have been appropriately relied upon, specifically excludes the cardlocks from the definition of credit card and the application of TILA and Regulation Z.

Finally, even if this Court holds that TILA and Regulation Z do apply to the cardlocks, Connell Oil is exempted from civil liability. This Court should uphold the lower court's decision.

Respectfully submitted this the 26th day of January, 2018.

A handwritten signature in black ink, appearing to read "Brian G. Davis", written over a horizontal line.

Brian G. Davis, WSBA No. 43521
LEAVY SCHULTZ DAVIS, P.S.
2415 W. FALLS AVE.
KENNEWICK, WA 99336
Attorney for Respondent

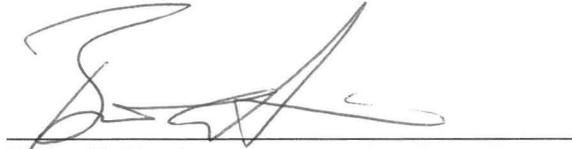
CERTIFICATE OF SERVICE

On January 26th, 2018, I served the Brief of Respondent via first

class mail, postage pre-paid to:

Mr. Alan McNeil
Mr. Brian Cameron
421 Riverside Ave. #660
Spokane, WA 99201

Renee Townsley, Clerk/Administrator
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201



Brian G. Davis