UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW MEXICO

BRANDON K ELI
Plaintiff

v.

U.S. BANK NATIONAL ASSOCIATION AND NATIONSTAR MORTGAGE INC.,
Defendants

Civil Action No.
16-CV-156 KK/SCY

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT WITH PREJUDICE

COMES NOW Plaintiff, Brandon K. Eli, by and through his own counsel and with this memorandum in opposition to Defendants' Motion to Dismiss Complaint with Prejudice states;

On May 9, 2016 Defendants' Motion to Dismiss Complaint with Prejudice was entered into this case. Defendants' Motion holds as its central position that this action is premised to be an application, to the Court, by the Plaintiff, seeking a 1635 TILA Rescission. [1]

A careful reading of the Complaint, however, shows that nowhere does Plaintiff seek TILA Rescission from the Court.[2] TILA Rescission is a non-judicial action. Nor do the Plaintiffs invoke the Court's Jurisdiction of the subject matter regarding whether or not TILA Rescission has occurred in regards to the loan claimed in ownership by the Defendant.

It appears the Defendants attempt to invoke jurisdiction of the subject matter on its own in an attempt to come to a disposition of issues not sought by the Plaintiff.

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[1] Defendants' Motion to Dismiss Complaint with Prejudice (Doc 7) page 1 "Introduction"

[2] Complaint (Doc 1) paragraph 10 page 3 lines 5 thru7

This memorandum of opposition will attempt to bring more clarity to the Plaintiff's and Defendants' rights under TILA rescission, how those rights were understood previously and how the recent understanding of those rights affects this case.

The Defendants' position is understandable to one looking to the more than sixty years of judicial disagreement in regard to the exercise of TILA Rescission[3]. However, there was a clarity brought to these disagreements by the Supreme Court of the United States recently in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015).

When Congress enacted TILA, it empowered the Federal Reserve Board with rulemaking authority to implement the statute to achieve TILA's purposes.[4] TILA's implementing regulations became known as Regulation Z and included a rescission process.[5] Congress subsequently enacted landmark financial regulatory reform legislation, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and transferred this authority from the Federal Reserve Board to the Consumer Financial Protection Bureau ("CFPB") in 2011.[6] The CFPB is now the agency empowered by Congress to promulgate rules implementing TILA and to enforce TILA's provisions.[7] Thus, the CFPB is the primary source for interpretation and application of TILA. The CFPB re-promulgated the relevant provision of Regulation Z, which

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[3] Alexandra P. Everhart Sickler," *And the Truth Shall Set You Free: Explaining Judicial Hostility to the Truth in Lending Act's Right to Rescind a Mortgage Loan*, 12 Rutgers J.L. & Pub. Pol'y 463, 481 (Summer 2015)

[4] The Federal Reserve Board originally had authority to promulgate regulations implementing TILA. *See Consumer Credit Protection Act, Pub. L.* No. 90-321, § 105, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1604(a)). The Board promulgated Regulation Z, TILA's implementing regulations, pursuant to this authority. *See* 12 C.F.R. § 226 (2011).

[5] 12 C.F.R. § 1026.23 (2014).

[6] The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 transferred the Federal Reserve Board's authority to the Consumer Financial Protection Bureau on July 21, 2011. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1061, 124 Stat. 2035 (2010), (codified as amended at 12 U.S.C. § 5511).

[7] In December 2011, the CFPB re-promulgated Regulation Z. *See* 12 C.F.R. § 1026.

details how a borrower exercises her right to rescind a mortgage loan.[8] That provision, Section 1026.23, confirms that written notification is the means by which borrowers exercise their right to rescind.[9]

However, the Courts have disagreed whether written notice to the lender is sufficient to validly exercise the borrower's right to rescind as opposed to the formal filing of a complaint in federal court. Three circuits have held that written notice to the lender is sufficient.[10] Five circuits, in contrast, ruled that written notice alone is insufficient to validly exercise TILA's right to rescind.[11] The majority circuits perhaps so ruled because *Beach v. Ocwen,* the United States Supreme Court case on the issue is only tangentially relevant.[12] Exacerbating the split were three separate Eighth Circuit decisions on this issue that contain dissenting and concurring opinions that illustrate how federal judges were divided on what appears to be an issue of simple statutory interpretation.[13]

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[8] *Id.* at § 1026.23.

[9] *Id.*

[10] *See generally Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1188 (10th Cir. 2012) (holding that a consumer borrower must file a lawsuit to exercise her right to rescission under TILA); *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2012) (same). *Cf. Sherzer v. Homestart.*

[11] *Jesinoski v. Countrywide Home Loans, Inc.*, 729 F.3d 1092 (8th Cir. 2013) *cert. granted*, 134 S. Ct. 1935 (2014) and *rev'd and remanded*, 135 S. Ct. 790 (2015); *Hartman v. Smith,* 734 F.3d 752 (8th Cir. 2013); *Lumpkin v. Deutsche Bank National Trust Co.*, 534 F. App'x 335 (6th Cir. 2013); Keiran v. Home Capital, Inc., 720 F.3d 721 (8th Cir. 2013); *Sobieniak v. BAC Home Loans Servicing*, No. 12-1053 (8th Cir. filed July 12, 2013); *Rosenfield*, 681 F.3d at 1172; *McOmie-Gray*, 667 F.3d at 1325; *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49 (1st Cir. 2002).

[12] *Beach v. Ocwen* Fed. Bank, 523 U.S. 410 (1998)

[13] *Jesinoski*, 729 F.3d at 1092; *Keiran,* 720 F.3d at 721.

The majority circuits expressly rejected traditional methods of statutory interpretation, favoring the policy argument articulated in *Beach*, and even going as far as to state that *Beach* constrained them.[14]

The majority circuits' reliance on *Beach* was misplaced. *Beach* is neither dispositive nor instructive on the question of how a borrower exercises his TILA right to rescind.[15] Nothing in *Beach* merits the majority circuit rulings that TILA requires the filing of a lawsuit to exercise the right to rescind.[16]

Rather than focusing on the narrow issue of what the statute requires for a borrower to exercise her right, the parties involved in the rescission cases debated the role Congress intended the judiciary to play in TILA's rescission process.[17] The majority circuits effectively amended TILA and its implementing regulation by ruling that a judicial declaration is required to effectuate rescission under Section 1635.[18]

Several commenters opined on an interpretation of the statute in line with the minority position.[19]

This discrete issue was subject to such intense dispute that the Supreme Court decided to resolve the issue.[20] In early 2015, the Court followed the minority review in a perfunctory and

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[14] *See, e.g., Id.* at 1182; *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012).

[15] *See Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015) ("Although §1635(f) tells us *when* the right to rescind must be exercised, it says nothing about *how* that right is exercised.").

[16] *Id.*

[17] *See, e.g.,* Brief of Consumer Fin. Protection Bureau, *supra* note 48.

[18] Alexandra P. Everhart Sickler," *And the Truth Shall Set You Free: Explaining Judicial Hostility to the Truth in Lending Act's Right to Rescind a Mortgage Loan*, 12 Rutgers J.L. & Pub. Pol'y 463, 481 (Summer 2015)

[19] See, e.g., Francesco Ferrantelli, Jr., Comment, Truth in Lending? The Survival of a Borrower's Statutory Claim for Rescission, 44 Seton Hall L. Rev. 695 (2014); see also Caroline Hatton, Comment, TILA: The Textualist-Intentionalist Litmus Act?, 44 Seton Hall L. Rev. 207 (2014).

unanimous decision, emphasizing that the statutory language unequivocally requires nothing more than written notice to the lender.[21]

The Supreme Court's extremely brief decision emphasizes the plain language of Section 1635(a) as controlling. In reversing the Eighth Circuit, it held:

> Section 1635(a) explains in unequivocal terms how the right to rescind is to be exercised: It provides that a borrower "shall have the right to rescind . . . *by notifying the creditor, in accordance with regulations of the Board, of his intention to do so*". The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. **This conclusion is not altered by §1635(f),** which states *when* the right to rescind must be exercised, but says nothing about *how* that right is exercised.[22] (emphasis added)

The Court clearly rejected all arguments that TILA should be interpreted as requiring a borrower to file a lawsuit in order to rescind a mortgage loan.[23] The *Jesinoski* decision resolved the debate over how to effectuate, or accomplish, rescission under Section 1635.

Among the arguments brought prior to *Jesinoski*, in support of requiring the borrower filing of a lawsuit, is that the TILA rescission mechanism looks more like rescission-in-equity, which requires a judicial declaration of rescission, and less like rescission-at-law, which is accomplished privately by the parties upon tender of the rescinding party.[24] However, *Jesinoski* is clear that "rescission is effected" by a borrower's written notice to the lender that he intends to rescind.[25]

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[20] *Jesinoski v. Countrywide Home Loans, Inc.*, 134 S. Ct. 1935 (2015).

[21] *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015).

[22] *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015) (emphasis added).

[23] See Id.

[24] *See infra* Section VI.

[25] *Jesinoski*, 135 S. Ct. at 792.

Traditionally, and previous to TILA, there were two types of rescission available to parties: legal and equitable rescission.[26] Legal rescission is "effected by the agreement of the parties."[27] In this above situation, one party unilaterally cancels the contract because the other party committed a material breach of the agreement or because of some other valid reason.[28] Ordinarily, the rescinding party tenders or returns the value of any consideration received from the other party in order to effectuate rescission.[29] Judicial intervention is ordinarily not involved unless other party does not reciprocate.[30] If the other party did not reciprocate, the rescinding party would then sue for restitution of the value being retained.[31]

Equitable rescission is a court-ordered unwinding of a contract.[32] In this situation, one of the parties asks the court to make a judicial declaration cancelling the contract.[33] No tender is required to effectuate equitable rescission.[34]

But TILA is a form of statutory rescission that is neither entirely legal nor entirely equitable in nature. Rather, TILA rescission shares characteristics with both. Nothing in the statute specifies whether TILA rescission is meant to be equitable or legal. But the TILA

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[26] *See, e.g.*, *Omlid v. Sweeney*, 484 N.W.2d 486, 490 (N.D. 1992) (stating "[a] rescission action at law is essentially an action for restitution based upon a party's prior unilateral rescission whereas an action in equity seeks to have the court terminate the contract and order restoration." (internal citation omitted)).

[27] Black's Law Dictionary 1332 (8th ed. 2004).

[28] *Fischer*, *supra* note 6, at 736; Megan Bittakis, *The Time Should Begin to Run When the Deed Is Done: A Proposed Solution to Problems in Applying Limitations Periods to the Rescission of Contracts*, 44 U.S.F. L. REV. 755, 758 (2010).

[29] *See, e.g.*, *Fischer*, *supra* note 6, at 736; 17A AM. JUR. 2D *Contracts* § 574 (2d ed. 2015) (stating "[i]nherent in the remedy of rescission is the return of the parties to their precontract positions. Therefore, the general rule is that a party who wishes to rescind a contract must return the opposite party to the status quo." (internal citations omitted)).

[30] *Fischer*, *supra* note 6, at 736.

[31] *Id.*

[32] Id.

[33] *Bittakis*, supra note 196, at 758.

[34] *Fischer,* supra note 6, at 736-37.

rescission process is definitely meant to be non-judicial.[35] Additionally, the plain language of Regulation Z indicates that written notice to the lender triggers a rescission process.[36] In this way TILA rescission therefore appears somewhat analogous to legal rescission, which requires tender by the party seeking to rescind.[37]

For this discussion it is important to note that, nothing in our jurisprudence, and no tool of statutory interpretation, requires that a Congressional Act must be construed as implementing its closest common-law analogue.[38]

TILA, as courts have acknowledged, substantially liberalizes common law rescission by reversing the sequence in which the rescinding party must tender.[39] Specifically, TILA requires the lender to release the security interest before the borrower must tender.[40]

The statute further provides, a lender must return any consideration paid by the borrower and cancel the security interest in the property within twenty days of receiving a notice of

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[35] See *Belini v. Wash. Mut. Bank, FA*, 412 F.3d 17, 25 (1st Cir. 2005)

[36] Fischer, supra note 6, at 738-39.

[37] Cf. *Ray v. CitiFinancial, Inc.*, 228 F. Supp. 2d 664, 667-68 (D. Md. 2002) (holding that Congress's use of the word "rescission" in its legal sense did not signify a cancellation accomplished by unilateral notice, but rather provide a remedy that restores the status quo ante, which is accomplished only by the rescinding party returning any benefit she has received).

[38] *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 793 (2015) citing Cf. *Astoria Fed. Sav. & Loan Assn.* v. *Solimino,* 501 U. S. 104, 108–109 (1991).

[39] *Williams v. Homestake Mortg. Co.*, 968 F.2d 1137, 1140 (11th Cir. 1992) (characterizing Section 1635(b) as a "reordering of common law rules governing rescission."); *see also*

Palmer v. Wilson, 502 F.2d 860, 861 (9th Cir. 1974) ("Although tender of consideration received is an equitable prerequisite to rescission, the requirement was abolished by the Truth in Lending Act.").

[40] 15 U.S.C.A § 1635(b) (2011); *see also* 12 C.F.R. 1026.23 (2014).

rescission. Only after the lender has performed its obligations under Section 1635(b) must a borrower then tender to the lender.[41]

The principles found within *Jesinoski* do not, however, amount to holding the process automatic and complete upon a borrower's written notice of rescission. But, although the lender is not without recourse, a lender's own in-action could have a negative legal affect.

In this instant case, after Defendants received Plaintiffs' notice of rescission, it had two options. The first option, of course, would be to comply with statutory law. By complying, the Defendants could have accelerated the unwinding process by returning Plaintiff's money and taking action to reflect the termination of the security interest, pursuant to 15 U.S.C. § 1635(b). If lender (Defendant) had timely complied, such compliance would have pulled the trigger requiring Plaintiff to tender a payoff to the lender.[42]

The second option would be to pursue a resolution of whatever dispute they believe existed with the borrower's right to rescind. The receipt of Notice, created the opportunity to resolve whatever dispute they may have had. A resolution of their dispute could have come privately between the rescindee and the rescindor, or the Defendants could have sought resolution through a determination made by way of a Federal Court action. However, the Defendants were under an obligation to reach resolution of any dispute within twenty days of receiving notice to avoid becoming liable for damages under section 1640.

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[41] *Williams*, 968 F.2d at 1140; *Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1030 (9th Cir. 2014) (citing Shepard, *supra* note 23, at 196 (stating: "by reversing the traditional sequence for common law rescission sequence", TILA shifts significant leverage to consumers, consistent with the statute's general consumer-protective goals. (internal citation omitted))); *Shepard, supra* note 23, at 178 n.29 ((stating "[i]t is common for creditors to ignore borrowers' rescission notices.") (citing *Prince v. U.S. Bank Nat'l Ass'n*, No. 08-00574-KD-N, 2009 WL 2998141, at *1 (S.D. Ala. Sept. 14, 2009)).

[42] See *Lippner*, 544 F. Supp. 2d at 702 ("The issue of whether [the borrower] can satisfy her rescission obligations [does] not arise until [the lender] ha[s] completed [its] obligations pursuant to TILA.")

Estoppel by Silence is a type of estoppel that prevents someone from asserting something when that person had both the duty and the opportunity to speak up about earlier. To constitute an estoppel by silence, there must not only be an opportunity, but an obligation to speak to avoid consequence. *Wiser v. Lawler*, 189 U.S. 260 (U.S. 1903). Because Defendants for twenty days remained silent, in regards to their dispute of Plaintiff's right to rescind, that previous silence estoppels them now from asserting that dispute. The assertion of that dispute later constitutes deceptive effort to avoid the damages the Defendants are then liable for under section 1640 through silence.

In *United States v. Tweel* No. 76-2324. 550 F.2d 297 (1977) U.S. Court of Appeals, Fifth Circuit, an agent of the Internal Revenue Service, Don L. Miller, was determined to have committed fraud, along with the IRS and the U.S. Justice Department, by his remaining silent rather than warning the taxpayer that the investigation was intended to result in the deprivation of Mr. Tweel's rights. Under *Tweel*, an untimely assertion of dispute becomes a deliberate effort by the Defendants and the agents of the Defendants to deprive Plaintiff of his statutory rights to relief by intentionally concealing the previous acceptance of rescission through their previous silence, and therefore, this untimely assertion of dispute is an act of fraud.

Additionally *Jesinoski* directs "*Section 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions*"[43], so in turn, even if there is some issue, real or not, as to the borrower's right to exercise, rescission occurs upon notice. The result of this direction from *Jesinoski* is that a lender may sue to resolve a dispute of the borrower's ability to rescind, but TILA rescission is unaffected until the lender does so in a timely manner.

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[43] *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct.

Notably, the *Jesinoski* Court validates TILA's negation of traditional rescission-at-law sequence.[44] *Jesinoski* is clear that timely "rescission is effected" by a borrower's written notice to the lender that he intends to rescind.[45]

Under this practical consequence of *Jesinoski*, upon notice, the non-judicial process of TILA rescission becomes a reality, the Plaintiffs' debt was terminated, the note which represents the debt was terminated, and the mortgage which secures the debt is void by operation of law. Defendants, having neglected to pursue their statutorily available legal recourse, are then left without a legal or equitable ability to dispute rescission, as a result of their own in-action.

As its cause in this lawsuit, Plaintiff does not seek declaratory judgment as to rescission but rather Plaintiff seeks judicial notice as to the terminations and liabilities created under operation of law by a TILA rescission which has already occurred by notice.

CONCLUSION

Like the two mothers with the same child in King Solomon's court, adjudication, even when equitable, may seem unfair. TILA rescission, may allow a borrower a stronger bargaining position than there would have under common law rescission, however it is not unfair to the learned sophisticated lender and the drafter of the instruments, whose current status of position is due to failure to timely act. Plaintiffs' exercise of TILA was effected upon notice, unaltered by §1635(f)[46]. Once noticed, Defendants had obligations under the law, and the notice of those obligations provided an opportunity to seek resolution of any dispute. Defendant knew or should

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[44] *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 793 (2015) ("It is true that rescission traditionally required either that the rescinding party return what he received before a rescission could be effected (rescission at law), or else that a court affirmatively decree rescission (rescission in equity). But the negation of rescission-at-law's tender requirement hardly implies that the Act codifies rescission in equity . . . this is simply a case in which statutory law modifies common-law practice").

[45] *Jesinoski v. Countrywide Home Loans, Inc*, 135 S. Ct. at 790.

[46] *Id.*

have the known their legal remedy, certainly had the resources to understand the consequences and still failed to timely act. The failure to timely act has created an estoppel to dispute the rescission now. None-the-less, the rights and protections under TILA were granted through Congressional Act and the exercise of those rights has been recently resolved by a unanimous Supreme Court. It is improper to grant Defendants special advantages not recognized by the law simply because in the pursuit of higher gains their practices have become lax, and they now appear to be disadvantaged.

THEREFORE; Plaintiff properly moves this Court for relief enumerated in the Complaint, and whatever other remedy is right and proper.

Respectfully submitted,

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I hereby certify that on May 16, 2016, I served a copy of the foregoing document to the following:

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