

1 UNITED STATES DISTRICT COURT
2 for the
3 DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

16 MAY 16 PM 3:43

4)
5 BRANDON K ELI)
6 *Plaintiff*)

7)
8 v.)

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

9)
10 U.S. BANK NATIONAL ASSOCIATION AND)
11 NATIONSTAR MORTGAGE INC.,)
12 *Defendants*)

13 **PLAINTIFF'S RESPONSE TO DEFENDANTS'**
14 **MOTION TO DISMISS COMPLAINT WITH PREJUDICE**

15 COMES NOW Brandon K. Eli, and in response to Defendants' Motion to Dismiss

16 Complaint with Prejudice states;

17 Plaintiff hereby incorporates the facts, arguments and authorities set forth in Plaintiff's
18 Memorandum in Opposition, as if set forth in their entirety herein.

19 **INTRODUCTION**

20 Plaintiff's Action seeks that this Court grant, according to law, the statutory remedies
21 entitled to the Plaintiff under 15 U.S.C. § 1640¹, which allows damages to the consumer, when a
22 creditor, in this instance, Defendants acting as agent and principal, do not pursue the available
23 legal remedies or comply with the statutory obligations as a lender noticed of a non-judicial

¹ 15 U.S.C. § 1640 US Code - Section 1640: Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) of section 1641 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction,

(a) Individual or class action for damages; amount of award; factors determining amount of award Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) of section 1641 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction,

1 TILA Rescission pursuant to 15 U.S.C. § 1635. Because no dispute of this rescission was
2 resolved in favor of the dispute within the statutory twenty day time limit, any dispute of this
3 rescission is now estopped by the silence of the lender.

4 RESPONSE

5 Long before the *Jesinoski* Court held for strict statutory application of 15 U.S.C. § 1635,
6 *Belini v. Wash. Mut. Bank, FA*, 412 F.3d (1st Cir. 2005) held that there is clear recognized legal
7 understanding that TILA rescission is a private process, worked out within twenty days of notice
8 between creditor and debtor without the intervention of the courts².

9 The Notice received by Defendants on November 30, 2015 stated “*No Loan between*
10 *Nationstar and me or any other loan in connection to my property at 4721 South Warner Street,*
11 *Tacoma WA 08409 has ever been consummated within the appropriate legal definition of*
12 *consummation.*” It appears by Defendants’ Motion that Defendants are now attempting to
13 dispute the Notice and argue that consummation did occur, and Plaintiff’s right to rescind is
14 barred under the statute of repose.

15 *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015) resolves that a
16 borrower exercising his right to rescind under the Act need only provide written notice to his
17 lender within the 3-year period following consummation.³ Plaintiff’s Notice unequivocally

² Should the creditor not take these steps within twenty days, then the creditor has generally violated a "requirement" of section 1635 and can be held liable for damages under section 1640. See, e.g., *Mijo v. Avco Fin. Servs. of Haw., Inc.*, 1991 WL 126660, at *1 (9th Cir. July 1, 1991) (unpublished); *Smith v. Fid. Consumer Disc. Co.*, 898 F.2d 896, 903 (3d Cir.1990); *Smith v. Am. Fin. Sys., Inc.*, 737 F.2d 1549, 1552 (11th Cir.1984); *Arnold v. W.D.L. Invs., Inc.*, 703 F.2d 848, 850 (5th Cir.1983); *Gerasta*, 575 F.2d at 584; *Rowland v. Novus Fin. Corp.*, 949 F.Supp. 1447, 1455 (D.Haw.1996); see also *Ralph C. Clontz, Jr.*, *2 Truth in Lending Manual* § 10.03[4], at 10-4 (2000). We know of no court that has come to the contrary position. Further, this result is sensible: section 1635 is written with the goal of making the rescission process a private one, worked out between creditor and debtor without the intervention of the courts. *Belini v. Wash. Mut. Bank, FA*, 412 F.3d (1st Cir. 2005)

³ A borrower exercising his right to rescind under the Act need only provide written notice to his lender within the 3-year period, not file suit within that period. Section 1635(a)'s unequivocal terms—a borrower “shall have the right to rescind . . . by notifying the creditor . . . of his intention to do so” (emphasis added)—leave no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. This conclusion is

1 asserts an exercise of Plaintiff's right to rescind was made under the Act within the 3-year period
2 following consummation, by averring consummation had not yet occurred.

3 *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015) further resolves
4 that "Section 1635(a) nowhere suggests a distinction between disputed and undisputed
5 rescissions, much less that a lawsuit would be required for the latter." In other words, TILA
6 Rescission was in effect upon Notice, and the process of this rescission proceeded without
7 distinction in regards to the dispute to the rescission brought by these Defendants.

8 Upon receipt of Notice, Defendants had an opportunity to resolve whatever dispute they
9 may have had. A resolution of their dispute could have come privately between the rescindee
10 and the rescindor, or the Defendants could have sought resolution through a determination made
11 by way of a Federal Court action. The Defendants were under an obligation to reach resolution
12 of any dispute within twenty days of receiving notice to avoid becoming liable for damages
13 under section 1640.

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

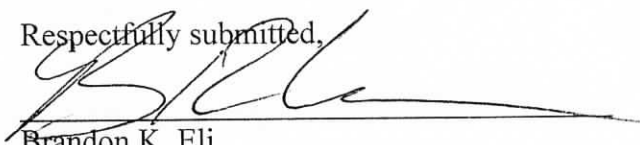
21 In *United States v. Tweel* No. 76-2324. 550 F.2d 297 (1977) U.S. Court of Appeals, Fifth
22 Circuit, an agent of the Internal Revenue Service, Don L. Miller, was determined to have

not altered by §1635(f), which states *when* the right to rescind must be exercised, but says nothing about *how*
that right is exercised. *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015)

1 committed fraud, along with the IRS and the U.S. Justice Department, by his remaining silent
2 rather than warning the taxpayer that the investigation was intended to result in the deprivation
3 of Mr. Tweel's rights. In this Motion, Defendants, through counsel, are committing a sneaky and
4 deliberate deception in order to deprive Plaintiff of his statutory rights to relief pursuant to 15
5 U.S.C. § 1635 and 15 U.S.C. § 1640 by concealing they previously consented to rescission by
6 their silence.

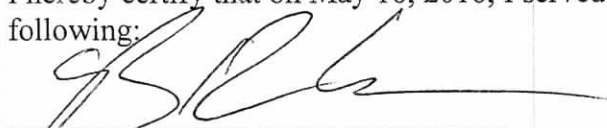
7 Defendants' Motion, using an estoppel dispute, in a deceptive effort by the Defendants
8 and the agents of the Defendants to avoid the damages the Defendants are now liable for under
9 section 1640, constitutes a fraud. This Motion cannot be granted.

10 Respectfully submitted,



11
12 Brandon K. Eli
13 P.O. Box 35037
14 Albuquerque, NM 87176
15 Telephone: 505-200-2819

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



18
19 Brandon K. Eli

20 Attorneys for U.S. Bank National Association and Nationstar Mortgage Llc

21 Jamie G. Siler, Esq.
22 James P. Eckels, Esq.
23 MURR SILER & ACCOMAZZO, P.C.
24 410 Seventeenth Street, Suite 2400
25 Denver, Colorado 80202
26 Telephone: (303) 534-2277

27 Joshua A. Spencer, Esq.
28 MURR SILER & ACCOMAZZO, P.C.
29 500 Marquette Ave NW, Suite 1200
30 Albuquerque, NM 87102
31 TEL: (505) 881-4048