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Appendix A.1

SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 11, 2018

CASE NO: SC18-549

Lower Tribunal No(s):

3D17-1281; 132009CA006638000001

JAVIER A. CARRILLO, ET AL. Petitioner(s) vs. U.S.

BANK NATIONAL ASSOCIATION, ET AL.,

Respondent(s).

This case is hereby dismissed. This Court lacks jurisdiction to review an unelaborated decision from a district court of appeal that is issued without opinion or explanation or that merely cites to an authority that is not a case pending review in, or reversed or quashed by, this Court. See *Wells v. State*, 132 So. 3d 1110 (Fla. 2014); *Jackson v. State*,

2a

926 So. 2d 1262 (Fla. 2006); Gandy v. State, 846 So. 2d 1141 (Fla. 2003); Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002); Harrison v. Hyster Co., 515 So. 2d 1279 (Fla. 1987); Dodi Publ'g Co. v. Editorial Am. S.A., 385 So. 2d 1369 (Fla. 1980); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing or reinstatement will be entertained by the Court.

A True Copy

Test:

/s/

John A. Tomasino Clerk, Supreme Court.

Seal:

td

Served:

KIMBERLY S. MELLO MAYRA E. FARIAS

JAVIER A. CARRILLO

HON. MARY CAY BLANKS, CLERK

HON. HARVEY RUVIN, CLERK

HON. MONICA GORDO, JUDGE

Appendix A.2

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

MARCH 07, 2018

JAVIER A. CARRILLO AND MAYRA E. FARIAS,

CASE NO.: 3D17-1281 Appellant(s)/Petitioner(s),

vs.

L.T. NO.: 09-6638

U.S. BANK NATIONAL ASSOCIATION,

et al.,

Appellee(s)/Respondent(s),

Upon consideration, appellants' motion to
strike against the appellee's response to motion for
rehearing en banc is hereby denied.

Upon consideration, Javier A. Carrillo and Myra Elizabeth Jimenez a/k/a Myra E. Farias's motion for rehearing en banc is treated as having included a motion for rehearing. The motion for rehearing is denied.

ROTHENBERG, C.J., and LOGUE and EMAS, JJ., concur.

The motion for rehearing en banc is denied.

A true copy

/s/ Mary Cay Blanks. Seal: Clerk, District Court of Appeal, State of Florida, Third District.

cc: Kimberly S. Mello Vitaliy Kats

Javier A. Carrillo Mayra E. Farias la

Appendix A.3
IN THE THIRD DISTRICT COURT OF APPEAL OF
FLORIDA

JAVIER A. CARRILLO, MAYRA E. FARIAS,

Appellants **3D17-1281**

vs. L.T. 09-6638CA01

U.S. BANK NATIONAL ASSOCIATION,

AS TRUSTEE FOR LEHMAN XS TRUST

MORTGAGE PASS-THROUGH CERTIFICATES,

SERIES 2006-16N; ONE WEST BANK,

F.S.B.; ET AL, Appellee(s) /

**APPELLANTS' MOTION TO STRIKE AGAINST
THE APPELLEE'S RESPONSE TO MOTION
FOR REHEARING EN BANC; OR IN
ALTERNATIVE MEMORANDUM OF LAW**

COMES NOW, Javier A. Carrillo and Mayra Eliza
beth Jimenez a/k/a Mayra E. Farias (hereinafter
collectively “FARIAS/CARRILLO); file this Motion to
Strike against the Appellee’s Response to Motion for
Rehearing en Banc (hereinafter “the Motion”); or in
alternative Memorandum of Law; and stated:

A) The motion shall be denied as moot for the following reasons:

1. Motion for Rehearing en Banc and Determination of Cause in the Third District Court of Appeal en Bank (hereinafter “Motion for Rehearing en Banc”) was filed pursuant to only the Rule 9.331 of Fla. R. App. P., on January 25, 2018.

2. The motion was UNTIMELY filed on February 12, 2018; **18-days after of the Motion for Rehearing en Banc.**

3. The motion is time-barred and out of time because it was not filed within 10 days of the service of the Motion for Rehearing en Banc pursuant to the Rule 9.331(d)(1) of Fla. R. App. P.

4. Rule 9.331(d)(2) of Fla. R. App. P. shows that:

“In every case the duty of counsel (or Pro Se litigants) is discharged without filing a motion for rehearing en banc unless one of the grounds set forth in (1) is clearly met”.

B) The grounds set forth in subdivision (1) are clearly met:

I. JESINOSKI v. COUNTRYWIDE HOME

LOANS, INC., 135 S. Ct. 790

(January 13, 2015)

5. The Motion for Rehearing en Banc has demonstrated a basis for reversal the Per Curian affirmed order, the Final Judgment of Foreclosure; the Post Judgment Proceedings; the Order to issue a Writ of Possession; and; the Writ of Possession; it is obviously meritorious appeals because **the binding precedent** in U.S. Supreme Court's Opinion in Jesinoskis case [**Exhibits 17 & 18** of the Appendix filed with the Initial Brief (hereinafter "IB")] substantially alters former common-law practice in the traditional process for unwinding such a unilaterally rescinded transaction under 15 U.S.C.

§1635 (TILA) [See Motion for Rehearing en Banc at Pages 2-9].

6. This 3DCA denied without opinion the Farias/Carrillo appeal against the Final Judgment of Foreclosure, Case #3D11-3188 consolidated to the Case #3D12-151; and, the Supreme Court of Florida denied discretionary jurisdiction because the 3DCA's decision was without opinion on January 02, 2014 (Exhibit 13); BUT, the U.S. Supreme Court's opinion in Jesinoskis case was entered until January 13, 2015 (Exhibit 18); and, Jesinoskis opinion was first alleged in the Appellants' Objections to the Reset Foreclosure Sale; and, Objections for the Request to Issue Re-Notice of Sale filed on January 20, 2015 (Exhibit 16).

7. This transaction was closed on **August 22, 2006** (Exhibits 1 & 2); and, Farias/Carrillo amended Answer, Affirmative Defenses and Counterclaim were TIMELY filed on **August 13, 2009**; in which, its First Affirmative Defense and Counterclaim alleged the Rescission rights pursuant to TILA & Reg. Z; and, the **Counterclaim's paragraph 78** served as proper notice of the right to rescission, within 3-years of the loan's consummation, as Jesinoskis made in their case; **both rescission are timely** (Exhibits 1, 2, 4 at paragraph 78; and, Exhibit 18).

8. **The lower court did not entry a Compulsory Counterclaim's Final Judgment.** The recoupment claim has been replaced by the compulsory counter claim. In Maynard v. Household Finance Corp. III,

861 So. 2d 1204 (Fla. 2d DCA 2003). See also Neil v. S. Fla. Auto Painters, Inc., 397 So. 2d 1160, 1164 (Fla. 3d DCA 1981).

A “Counterclaim” is a cause of action that seeks affirmative relief while an affirmative defense defeats the Plaintiff's cause of action by a denial or confession and avoidance. See Schupler v. Easterm Mortgage Co., 160 Fla. 72, 33 So. 2d 586 (1948); and, Lovett v. Lovett, 93 Fla. 611, 612 So. 768 (1927).

9. In accordance with the Rules 1.420(a)(2) and 1.420(c) of Fla. R. C. P.; and, the Federal Rules of Civil Procedure, Rule 41(2) show that:

“Except as provided in Rule 41(a)(1), an action may be dismissed at the plainti-

ff's request only by court order, on terms that the court considers proper. **If a defendant has pleaded a counter claim** before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection **ONLY IF THE COUNTERCLAIM CAN REMAIN PENDING FOR INDEPENDENT ADJUDICATION.** Unless the order states otherwise, **a dismissal under this paragraph (2) is WITHOUT PREJUDICE”** (Emphasis added).

**II. THE U.S. BANKRUPTCY COURT,
SOUTHERN DISTRICT OF FLORIDA
DISCHARGED THIS DEBT.**

10. The U.S. Bank's counsel alleged in the hearings of the lower court on the post judgment proceedings that Farias' bankruptcy had been dismissal pursuant to the lower court's docket showing a Notice of filing Dismissal of Bankruptcy on 12/29/2014 (See lower court's docket). The sale needs to be re-scheduled for judicial sale because chapter 7 has been discharged (Exhibit 15).

11. Appellee has waived to the foreclosure because did not file any objection within of the deadline to object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts (Exhibit 14).

12. Appellee did not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in Appellants without any obligation on their part to pay for it. The judgment and/or debt has been satisfied because **the lender failed to rescind and do the acts necessary to effect rescission, the right to retain the principal vests in the borrower, 15 U.S.C. 1635 (b).**

13. Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts, Case 12-11159-AJC, **Doc. 9** at Page 4 of 4 shows that (**Exhibit 14**):

"Exempt Property. The debtor is permitted by law to keep cer-

tain property as exempt.

EXEMPT PROPERTY WILL NOT
BE SOLD AND DISTRIBUTED
TO CREDITORS” (Emphasis added).

14. The **Doc 19**, Page 2 of the Discharge of Debtor(s)'s order ordered that (**Id.**):

“Collection of Discharged Debts Prohibited. The discharge prohibits to file **OR CONTINUE A LAWSUIT;** and, **A creditor who violates that order can be required to pay damages** and attorney's fees to the debtor.” (Emphasis added).

15. Furthermore, the Final Judgment of Foreclosure's paragraph 4 shows that:

“4. Lien on Property, Plaintiff, whose

17a

address is c/o **ONEWEST BANK, FSB**

..., holds a lien for the total sum specified
in Paragraph 2 herein. The lien of the
plaintiff is superior in dignity to any right
... and all persons, corporations, or other
entities claiming by, through, ... and
the property will be sold free and clear of
all claims of the defendants, **with the**
exception of any assessments that are
superior pursuant to Florida Statutes,
Section 718.116..." (Emphasis added)

[Exh. 12].

16. U.S. Bank lacks of law capacity to file the post
judgment procedure and to be the subject property's
purchaser as provided by the paragraphs 2 & 4 of
the Judgment ["Plaintiff must be the owner and hol-

der of the note and mortgage”. Edason v. Cent.

Farmers Trust Co., 129 So. 698, 700 (Fla. 1930).

[See Motion for Rehearing en Banc at Final line,
Page 16; and, first paragraph, Page 17].

III. THE FUNDAMENTAL RIGHTS

17. Farias/Carrillo’s fundamental rights have been violated in this case because the Constitution of the United States, the Laws of the United States and all Treaties made, or which shall be made, under the Authority of the United States:

“shall be the **supreme Laws of the Land**; and the **JUDGES IN EVERY STATE** shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding” (Article VI.2, U.S. Constitution).

The judicial Power shall extend to all Cases, **IN LAW AND EQUITY**, arising under the Constitution, the Laws of the United States, and Treaties made...under their authority (Article III, §§1 & 2 U.S. Constitution). Furthermore, there is only one federal court that **BINDS ALL STATE COURTS** as to the interpretation of federal law and the federal Constitution: the Supreme Court of the United States itself. Elliot v. Albright, 209 Cal. App. 3d 1028, 1034 (1989) [Emphasis added]. See also Gideon v. Wainwright, 372 U.S. 335 (1963); in which, **a federal provision was imposed over laws of the Florida state.**

**IV. APPELLANTS' SUGGESTION PURSUANT
TO THE RULE 9.125**

18. Farias/Carrillo readapt, re-allege, and reaffirm the material allegations contained in Appellants' suggestion pursuant to the Rule 9.125 filed in this 3DCA on June 13, 2017.

19. U.S. Congress enacted TILA in **1968**; see Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356, 363-366 (1973); and, the Board of Governors of the Federal Reserve promulgated its Regulation Z. Furthermore, U.S. Congress enacted TILA to include the Rescission Rights in Foreclosure. 15 U.S.C. §1635(i)[**1995**]. The Board of Governors of the Federal Reserve promulgated its Regulation Z **in 1996**.

20. U.S. Congress promulgated the U.S. Bankruptcy Code decades ago.

21. Appellants suggestion pursuant to the Rule 9.125 was filed because the Courts of the Florida State have not complied their U.S. Constitutional obligations pursuant to the material allegations of the previous paragraph 17, decades ago.

V. RULE 9.130 PROCEEDING TO REVIEW
NON-FINAL ORDERS AND SPECIFIC FINAL
ORDERS

22. Subdivision 9.130(a)(5) grants a **right of review** of orders on motions seeking relief from a previous court order on the grounds of mistake, **fraud, satisfaction of judgment, or other grounds** listed in Fla. R. C. Pro., **1.540**. Subdivision 9.130(a)(5) is intended to authorize appeals from orders entered on motions for relief from judgment that are specifically contemplated by a specific rule

of procedure (e.g., the current version of Fla. R. C. Pro., **1.540**). See complete Committee Notes to the Rule 9.130 Amendments.

23. Farias/Carrillo filing multiple post-judgment motions including the Emergency Quiet Title Motion (Exhibit 26), Emergency Response in Opposition to the Motion for Writ of Possession; and, Motion to Stay the Motion for a Writ of Possession seeking to set aside the Final Judgment of Foreclosure (Exhs. 28-29) because the transaction is rescinded **on August 13, 2009**, the debt is discharged **on April 20, 2012**; and, U.S. Bank lacks of law capacity to file the post judgment procedure and to be the subject property's purchaser as provided by the paragraphs 2 & 4 of the Judgment ["Plaintiff must be the owner and holder of the note and mortgage". Edason v.

Cent. Farmers Trust Co., 129 So. 698, 700 (Fla. 1930)].

24. The issues are of exceptional importance and that a consideration by the full court is necessary to maintain uniformity of decisions in this court **with the binding precedent** in U.S. Supreme Court opinion in Jesinoskis; the U.S. Bankruptcy Court's Order in Farias' Bankruptcy; and, as provided by the paragraphs 2 and 4 of the Final Judgment of Foreclosure.

25. Only, once a timely motion for rehearing en banc is filed in conjunction with a traditional petition for rehearing, the 3 judges on the initial panel must consider the motion (It is not the case here). The district courts will not enter orders deny-

ing motions for en banc rehearing pursuant to the Subdivision (c) (3).

26. Court Commentary 1994 Amendment to the Rule 9.331 shows that:

“The presumption is that en banc consideration will usually be limited to the division in which the case is pending. However, recognizing that in exceptional instances it may be preferable for the matter under review to be considered by the whole court, the case can be brought before all regular active judges by the chief judge or by an affirmative vote of three-fifths of the regular active judges on the whole court. Once the matter is before the whole court en banc, a vote on the merits will be by a majority of the regular active judges as now provided in rule 9.331”.

27. Farias/Carrillo repeat, re-allege and reaffirm the allegations contained in the Motion for Rehearing en Banc, the IB; and, the exhibits of the filed Appendix.

28. The issues are of exceptional importance and a consideration by the full court is necessary to maintain uniformity of decisions in this court with the U.S. Supreme Court opinion in Jesinoskis case; the U.S. Bankruptcy Court's Order in Farias' Bankruptcy case; and, as provided by the paragraphs 2 and 4 of the Final Judgment of Foreclosure. Committee Notes to the Rule 9.331 shows that:

“such a vote does suggest that the matter is one that should be certified to the Supreme Court for resolution” (All emphasis added).

Conclusion: There is basis for a Rehearing en banc; and, Appellants' Request for a Written Opinion has merit. This Court may relief those reversible errors in complying to your oath of comply and respect the Federal Constitution; U.S. laws; and, the "rule of law" is no one is above the law. The Motion for Rehearing en Banc and determination of cause in the 3DCA en Banc shall be granted. The Per Curian affirmed order, the Final Judgment of Foreclosure, the Post Judgment proceedings, the order on U.S. Bank's motion for an order directing Clerk to Issue a Writ of Possession, the Order denying Defendants' Motion to Stay Writ of Possession; and, the Writ of Possession shall be reversed pursuant to the **Rules 1.540(b)(4) & (b)(5) of the Fla. R. C. Pro.**; and, Rules 59, 60 and 61 of the Federal Rules of Civil Procedure; **the Article X, Section 4 of the Florida**

Constitution; and, the Constitution of the United States because the judgment and decree are VOID and AVOIDABLE by this 3DCA; as a matter of law, the judgment and decree have been **satisfied** and the **debt was discharge** by the U.S. Bankruptcy Court (as provided by the paragraphs 2 & 4 of the judgment); and prior judgments and decrees upon which it was based (rescission rights) have been reversed by the U.S. Supreme Court's opinion in Jesinoskis case, and, it is no longer equitable that the judgment and decree should have prospective application.

WHEREFORE based on the foregoing, Farias/ Carrillo respectfully request to this Honorable Court en Banc, to entry a written opinion order to strike the Appellee's Response to Motion for Rehearing en

Banc; granting the Motion for Rehearing en Banc in its entirety; and, any other relief as this Court consists just and appropriate.

NOTICE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was provided via U.S. Mail to Greenberg Traurig, P.A. Kimberly S. Mello, Esq., at 101 E. Kennedy Blvd., Ste. 1900 Tampa, FL 33602; and, a courtesy copy to Leslie B. Rothenberg, 3DCA's Chief Judge; and, to the Judge Monica Gordo at 73 West Flagler Street, Room 626, Miami, Florida 33130: this February 13, 2018.

| | |
|--------------------|----------------------|
| JAVIER A. CARRILLO | MAYRA E. FARIAS |
| 89 NW 1st Street, | 11011 SW 160 Street, |
| Miami, FL 33128. | Miami FL 33157 |

Appendix A.4
IN THE THIRD DISTRICT COURT OF APPEAL OF
FLORIDA

JAVIER A. CARRILLO, MAYRA E. FARIAS,

Appellants **3D17-1281**

vs. L.T. 09-6638CA01

U.S. BANK NATIONAL ASSOCIATION,

AS TRUSTEE FOR LEHMAN XS TRUST

MORTGAGE PASS-THROUGH CERTIFICATES,

SERIES 2006-16N; ONE WEST BANK,

F.S.B.; ET AL, Appellee(s) /

MOTION FOR REHEARING EN BANC AND
DETERMINATION OF CAUSE IN THE THIRD
DISTRICT COURT OF APPEAL EN BANC

COMES NOW, Javier A. Carrillo and Mayra Elizabeth Jimenez a/k/a Mayra E. Farias (hereinafter collectively “FARIAS/CARRILLO) file this Motion for Rehearing en Banc and determination of cause in the 3DCA en Banc pursuant to the Rule 9.331 of Fla. R. App. Procedure; and stated:

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COMMON ALLEGATIONS

- 1) This transaction is governed by the Federal Truth in Lending Act 15 U.S.C. Sec. 1601 et. Seq. (TILA) [1995]; the Regulation Z [1996]; subject to damage claims under §1640; and, was closed on **August 22, 2006** pursuant to the Exhibits 1 & 2 of the Appendix filed with the Initial Brief (hereinafter “IB”).
- 2) This foreclosure action was filed on January 28, 2009 (lower court’s docket).
- 3) Farias/Carrillo amended Answer, Affirmative Defenses and Counterclaim were TIMELY filed on **August 13, 2009**; in which, its First Affirmative Defense and Counterclaim alleged the Rescission rights pursuant to TILA & Reg. Z; and, the Counterclaim’s paragraph 78 served as proper notice of the right to rescission (Exhibit 4).

- 4) Farias' Motion for Judgment of Compulsory Counterclaim; and, Carrillo's Judgment to Compulsory Counterclaim were filed on 09/06/2011. Order denying Defendants' Motions for Judgment of Compulsory Counterclaim was entered on September 14, 2011 and docketed one day after (See lower court's docket).
- 5) Duplicate Final Judgment of Foreclosure was ordered on December 12, 2011; in which, the Counterclaim was not resolved by the lower court (Exhibit 12).
- 6) Farias filed a chapter 7 bankruptcy case to the United States Bankruptcy Court, Southern District of Florida, Case 12-11159-AJC, on January 17, 2012; and, **Appellee had waived to the foreclosure because did not file any objection within of the**

**deadline to object to Debtor's Discharge or to
Challenge Dischargeability of Certain Debts
(Exhibit 14).**

7) U.S. Bank's counsel alleged in the hearings of the lower court on the post judgment proceedings that Farias' bankruptcy had being dismissal pursuant to the lower court's docket showing a Notice of filing Dismissal of Bankruptcy on 12/29/2014 (See lower court's docket).

8) Appellee's Motion to Reset Foreclosure Sale and issue Re-Notice of Sale was entered on January 08, 2015. "The sale needs to be reset because chapter 7 has been discharged" (See paragraph 2 & 4 of the Final Judgment).

9) The Supreme Court of the United States entered its unanimous opinion in Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790 on **January 13, 2015 (Exhibits 17 & 18)**.

10) Farias/Carrillo repeat and re-allege the allegations contained in the Initial Brief including but not limited to the paragraph C. Proceeding Below and Common Allegation, Pages 9-12; and, the exhibits of the filed Appendix.

“Exhibits attached to a complaint or other pleading are a part of the complaint” (See **Copies Certified by the U.S. Bankruptcy Court, Southern District of Florida; and, by the lower court**). See Bott v. City of Marathon, 949 So. 2d 295 (Fla. 3rd DCA 2007); and, “Any exhibit attached

to a pleading shall be considered a part thereof for all purposes", according to Fla. R. of Civil Procedure 1.130(b). See Harry Pepper & Assoc., Inc. v. Lasseter, 247 So. 2d 736 (Fla. 3rd DCA 1971).

REASONS FOR GRANTING THIS MOTION EN BANC AND DETERMINATION OF CAUSE IN THE 3DCA EN BANC

11) Fla. R. C. Pro., **RULE 1.540 RELIEF FROM JUDGMENT, DECREES, OR ORDERS (b)** shows that:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the

following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be made within a reasonable time, and for

reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding as entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation.

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court (Emphasis added).

I. JESINOSKI v. COUNTRYWIDE HOME

LOANS, INC., 135 S. Ct. 790

(January 13, 2015)

12) The Initial Brief and Appendix have demonstrated a preliminary basis for reversal the Final Judgment of Foreclosure; the Post Judgment Proceed-

dings; the Order to issue a Writ of Possession; and; the Writ of Possession; it is obviously meritorious appeals because the U.S. Supreme Court's Opinion in Jesinoskis case substantially alters former common-law practice in the traditional process for unwinding such a unilaterally rescinded transaction under 15 U.S.C. §1635 (TILA). The U.S. Supreme Court's binding precedent in Jesinoski shows but not limited to:

“Finally, respondents invoke the common law. 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). 2D. Dobbs, Law of Remedies §9.3(3), pp. 585-586 (2d ed. 1993).

It is also true that **the Act disclaims the common-law condition** precedent to rescission at law that the borrower tender the proceeds received under the transaction.

15 U.S.C. §1635(b). But the negation of rescission-at-law's tender requirement hardly implies that **the Act codifies rescission in equity**. Noting in our jurisprudence, and no tool of statutory interpretation, requires that a congressional Act must be construed as implementing its closest common-law analogue. Cf. Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U.S. 104, 108-109, 111 S. Ct. 2166, 115 L.Ed. 2d 96 (1991).

The clear import of §1635(a) is that a borrower need only provide written notice to a lender in order to exercise his right to rescind. To the extent §1635 (b) alters the traditional process for unwind ing such a unilaterally rescinded transaction, **this is**

**simply a case in which statutory law
modifies common-law practice. The
Jesinoskis mailed respondents written noti-
ce of their intention to rescind within three
years of their loan's consummation. Because
this is all that a borrower must do in
order to exercise his right to rescind
under the Act, the court below erred in
dismissing the complaint. Accordingly, we
reverse the judgment of the Eighth Circuit
and remand the case for further proceedings
consist with this opinion. It is so ordered”
(Emphasis added).**

- 13) The judgment and/or debt has been satisfied
**because the lender failed to rescind and do the
acts necessary to effect rescission, the right to
retain the principal vests in the borrower.** 15
U.S.C. 1635 (b) established:

"If a creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without any obligation on his part to pay for it."

14) **Federal Reserve Board** expressly provided for vesting. Reg Z 226.23(d)(3):

**"if the creditor has delivered any
money or property, the consumer
may retain possession until the
creditor has met its obligation under
paragraph (d) (2) ... If the creditor
does not take possession of the money
or property within 20 calendar days
after the consumers tender the consumer
may keep it without further obligation."**

(All emphasis added)

15) The LIEN was automatically Void as a matter of Federal Law when Farias/Carrillo sent to Plaintiff's attorney firm the Notice of Rescission ¹.

“VOID JUDGMENT IS A NULLITY THAT CANNOT BE VALIDATED BY THE PASSAGE OF TIME AND MAY BE ATTACKED AT ANY TIME” Shepheard v. Deutsche Bank Trust Co. Am.s, 922 So. 2d at 345 (Fla. 5th DCA 2006).

16) The U.S. Supreme Court's commentary established that:

¹ See Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790 (2015); Official Staff Commentary to Reg. Z 226.2(a)(22)-2 issued by the Federal Reserve Board; 15 U.S.C. §1635(b) and 15 U.S.C. §1635(i); and, Reg. Z §226.23(d)(1)-(2), O.S.C. 226.23(d)(1) (2)(3), Sosa, Yslas v. D.K. Gunther, 342 So. 2d 859 (2 DCA 1977).

“if judgment or decree is void as a matter of law, no discretion would exist but to give proper relief.” Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (All Emphasis added).

17) This transaction was consummated on August 22, 2006; and, Farias/Carrillo sent the Notice of Rescission on August 13, 2009; within 3-years of the loan's consummation as Jesinoskis made in their case; **both rescission are timely (Exhibits 1, 2, 4 at paragraph 78; and, Exhibit 18).**

18) On February 5, 2013, in its opinion in Sherzer v. Homestar Mortgage Services, et. al.², the Third

² Case No. 11-4254, 2013 U.S. App. LEXIS 2486, at page 17 (3d. Cir. Feb 5, 2013) in the United States District Court for the Eastern District of Pennsylvania: Daniel and Geraldine Sherzer v. Homestar Mortgage Services, Et Al., and Consumer Financial Protection Bureau as Amicus Curiae. [quoting Gilbert v. Residential Funding LLC, 678 F. 3d. 271, 277-78 (4th Cir. 2012)].

Circuit aligned with the Fourth Circuit, holding that:

“an obligor exercises the right to rescission by sending the creditor valid written notice of rescission, and need not also file suit within three years of consummation of the loan transaction”³. In so doing, the Third Circuit adopted the position advocated by the Consumer Financial Protection Bureau (hereinafter “CFPB”) in an amicus brief. The CFPB is “the primary source for interpretation and application of truth-in-lending law”. Household Credit Servs. v. Pfennig, 541 U.S. 232, 238 (2004).

19) The Dodd-Frank Wall Street Reform and Consumer Protection Act transferred exclusive authority

³ Id. (quoting Gilbert v. Residential Funding LLC, 678 F. 3d. 271, 277-78 (4th Cir. 2012)).

to interpret and promulgate rules regarding TILA from the Board of Governors of the Federal Reserve System to the Bureau on July 21, 2011. See Pub. L. No. 111-243, §§ 1061(b)(1), (d) (2010), codified at 12 U.S.C. §§5581(b)(1), (d); Designated Transfer Date, 75 Fed. Reg. 57.252 (Sept. 20, 2010).

The Bureau, exercising this authority, republished Regulation Z in December 2011. See 76 Fed. Reg. 79,768-01, 79,803 (Dec. 22, 2011)(codified at 12 C.F.R. §1026 et seq.). In the view of the Bureau, the interpretation of TILA adopted by the majority of court (AS FLORIDA COURTS), erroneously restricts consumers' right of rescission [U.S. Supreme Court held that **no** must a borrower file a lawsuit within three years of the consummation of the transaction, as the First, Sixth,

Eighth, Ninth; and, Tenth Circuits have erroneously held]. To rescind a mortgage loan under TILA and Regulation Z, consumers must notify their lenders within three years of obtaining the loan, but are not also required to sue their lenders within that same timeframe if the lenders contest the rescission (**Exhibit 10**) [Emphasis added].

20) This transaction is rescinded on August 13, 2009; and Appellee did not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in Farias/Carrillo without any obligation on their part to pay for it cau-

sing that the Final Judgment of Foreclosure ⁴ ; the post judgment proceedings; the sale, the certificate of title, the order to issue a Writ of Possession; and, the Writ of Possession are void and may have been avoidable by the lower court pursuant to the **Rules 1.540(b)(4) & (b)(5) of the Fla. R. C. Pro.**; and, **Rules 59, 60 and 61 of the Federal Rules of Civil Procedure**; the **Article X, Section 4 of the Florida Constitution**; and, the **Constitution of the United States** because the judgment and decree are void; the judgment and decree have been

⁴ Farias/Carrillo respectfully request the Court en Banc to take judicial notice of the CFPB's Amicus Program available on the internet at <http://www.consumerfinance.gov/amicus/> at Statute Truth-In-Lending Act's cases. See Oken v. Williams, 23 So. 3d 140, 149 n.9 (Fla. 1st DCA 2009) pursuant to §§90.202(5), (11), (12) and/or (13), and 90.203, Fla. Evid. Code.

satisfied, and prior judgments and decrees upon which it is based have been reversed by the Supreme Court of the United States, and, it is no longer equitable that the judgment and decree should have prospective application.

Therefore, this Motion for Rehearing en Banc and determination of cause in the 3DCA en Banc shall be granted. The Per Curian affirmed order; The Final Judgment, the post judgment proceedings; the order on U.S. Bank's motion for an order directing Clerk to Issue a Writ of Possession, the Order denying Defendants' Motion to Stay Writ of Possession; and, the Writ of Possession shall be reversed.

II. THE U.S. BANKRUPTCY COURT,

SOUTHERN DISTRICT OF FLORIDA

DISCHARGED THIS DEBT.

21) Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines to Object to Debtor's Discharge or to Challenge Dischargeability of Certain Debts, Case 12-11159-AJC, **Doc. 9** was filed on 01/20/12 Pages 3-4 were served to Appellee; and, the Page 4 of 4 shows that (**Exhibit 14**):

“EXPLANATIONS Discharge of Debts.

The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may **NEVER** try to collect the debt from debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code §727(a) or that a debt owed to you is not dischargeable under Bankruptcy Code §523(a)(2), (4), or (6), you must start a law suit by filing a complaint- **or file a motion** if you assert the discharge should be denied

under §727(a)(8) or (a)(9)- by the “Deadline to Object to Debtor’s Discharge or to Challenge Dischargeability of Certain Debts” listed on the front side of this form. The bankruptcy clerk’s office must receive the complaint **or motion** and the required filing fee by that deadline ... Exempt Property. **The debtor is permitted by law to keep certain property as exempt. EXEMPT PROPERTY WILL NOT BE SOLD AND DISTRIBUTED TO CREDITORS.** The debtor must file a list of all property claimed as exempt. **If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk’s office must receive the objections by the “Deadline to Object to Exemptions” listed on the front side**” (Emphasis added).

22) Farias was granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code) by U.S. Bankruptcy Court, Southern District of Florida on April 20, 2012 (**Exhibit 14**).

23) The **Doc 19**, Page 2 of 2 of the Discharge of Debtor(s)'s order ordered that:

“EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE. This court order grants a discharge to the person(s) named as the debtor(s). It is not a dismissal of the case... **Collection of Discharged Debts Prohibited.** The discharge prohibits any attempt to collect from the debtor(s) a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file **OR CONTINUE A LAWSUIT**, to attach wages or other pro-

perty, or to take any other action to collect a discharged debt from the debtor(s) ...

A creditor who violates this order can Be required to pay damages and attorney's fees to the debtor. However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor(s)' property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case.

Also, a debtor may voluntarily pay any debt that has been discharged. **Debts That are Discharged.** The chapter 7 discharge order eliminates a debtor's legal obligation to pay that is discharged.

Most, but not all, types of debts are discharged **if the debt existed on the date the bankruptcy case was filed”** (Emphasis added).

24) As a matter of law, the lien became void as a result of the Notice of Rescission on August 13, 2009; and, the Final Judgment of Foreclosure's paragraph 4 shows that:

“4. Lien on Property, Plaintiff, whose address is c/o **ONEWEST BANK, FSB**, 155 North Lake Avenue, 3rd Floor, Pasadena, California 91101, holds a lien for the total sum specified in Paragraph 2 herein. The lien of the plaintiff is superior in dignity to any right, title, interest or claim of the defendants and all persons, corporations, or other entities claiming by, though, or under the defendants or any of them and the property will be sold free and clear of all claims of the defendants, with the exception of any assessments that are superior pursuant to Florida Statutes, Sec-

tion 718.116..." (Emphasis added).

25) Farias/Carrillo re-allege that on **March 19, 2009**, the FDIC completed the sale of IndyMac Federal Bank, F.S.B., to OneWest Bank, F.S.B.

Take this Court en Banc notice pursuant to the §§90.202(5), (11) thru (13) and §90.203 of the Florida Evidence Code to see <https://www.fdic.gov/bank/individual/failed/indymac.html>

26) Appellee alleged in the hearings on the lower court that the Farias' bankruptcy was dismissal pursuant to the Notice of filing Dismissal of Bankruptcy entered in the lower court's docket on 12/29/2014. This is fraud in the lower court.

27) This debt was discharged by U.S. Bankruptcy Court causing that the judgment, the post judgment

proceeding and the Writ of Possession are VOID and avoidable by this Honorable Court pursuant to the **Rules 59, 60 and 61 of the Federal Rules of Civil Procedure; TILA Regulation Z; and, the Constitution of the United States** because the judgment and decree are void; as a matter of law, the judgment and decree have been **satisfied**-discharge, and prior judgments and decrees upon which it was based have been reversed by the Supreme Court of the United States' opinion in Jesinoskis case, and, it is no longer equitable that the judgment and decree should have prospective application.

III. THE FUNDAMENTAL RIGHTS

28) Farias/Carrillo repeat and re-allege all allegations contained on the previous paragraphs.

29) The Bankruptcy Code and 15 U.S.C. §1635 were approved by the U.S. Congress pursuant to the Article I of the U.S. Constitution.

30) Jesinoskis case concerned the right to rescind certain transactions under the Truth in Lending Act (TILA or the Act), 15 U.S.C. 1601 et seq. The Consumer Financial Protection Bureau (CFPB or Bureau) is authorized to “prescribe regulations (Regulation Z) to carry out the purposes” of the Act, 15 U.S.C. 1604(a), and shares authority for enforcing the Act with other federal regulators, 15 U.S.C. 1607. The United States therefore had a substantial interest in the Supreme Court of the United States’ resolution of the question presented in Jesinoskis case pursuant to the Article II of the U.S. Constitution as just as it is the case here.

31) Farias/Carrillo's fundamental rights have been violated in this case because the Constitution of the United States, the Laws of the United States and all Treaties made, or which shall be made, under the Authority of the United States, "shall be the **supreme Laws of the Land; and the JUDGES IN**
EVERY STATE shall be bound thereby, any
Thing in the Constitution or Laws of any State
to the Contrary notwithstanding "(Article VI.2, U.S. Constitution). The judicial Power shall extend to all Cases, **IN LAW AND EQUITY**, arising under the Constitution, the Laws of the United States, and Treaties made...under their authority (Article III, §§1 & 2 U.S. Constitution). Furthermore, there is only one federal court that **BINDS ALL STATE**
COURTS as to the interpretation of federal law and

the federal Constitution: the Supreme Court of the United States itself. Elliot v. Albright, 209 Cal. App. 3d 1028, 1034 (1989) [Emphasis added). See also Gideon v. Wainwright, 372 U.S. 335 (1963); in which, **a federal provision was imposed over laws of the Florida state.**

IV. APPELLANTS' SUGGESTION

PURSUANT TO THE RULE 9.125

32) The Notice of Appeal of Non-Final Order shows but not limited to see Fla. R. App. P. [March 23, 2017]: 9.030(b)(1)(B); 9.030(b)(2)(A); 9.030(b)(3); 9.040(c) & (d); **9.125**; and, **9.130**.

33) Farias/Carrillo readapt, re-allege, and reaffirm the material allegations contained in the Paragraphs 1 through 32, and the allegations contained on Appellants' suggestion pursuant to the Rule 9.125 fi-

led in this 3DCA on June 13, 2017; and, further alleges as follows; to wit,

34) Farias/Carrillo requested and are requesting that the Court declare the mortgage transaction rescinded pursuant to the Rule 1.540(b)(4) and (b)(5); and, Farias/Carrillo are not liable for any such finance or other charge, and **any security interest given by them**, including **any such interest arising by operation of law, became void upon such a rescission [§1635(b) & Reg. Z(d)].**

“Within 20 days after receipt the notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or other wise, and **SHALL TAKE ANY ACTION NECESSARY OR APPROPRIATE TO REFLECT THE TERMINATION OF**

**ANY SECURITY INTEREST CREA-
TED UNDER THE TRANSACTION".**

15 U.S.C. §1635(b), 12 C.F.R. §1026.15

(d)(2), 1026(d)(2)[Id.] (Emphasis added).

35) As provided by the paragraph 4 of the Final Judgment of foreclosure, One West Bank is the holder-owner of the lien in the subject property and the debt; and, NOT U.S. Bank whom has never served to OneWest Bank of the post judgment proceedings; and, the debt was satisfied for the noncompliance with the Section 1635(b).

36) U.S. Bank was not permitted to continue this lawsuit pursuant to the allegations above.

37) Farias/Carrillo expressed a belief, based on a reasoned and studied judgment of the Supreme Court of the United States' unanimous opinion in Jesinoskis case and the Bankruptcy Code that this

appeal would require immediate resolution by the Florida Supreme Court and (a) is of great public importance, and (b) will have a great effect on the administration of justice throughout the Florida state. See Gideon v. Wainwright, 372 U.S. 335 (1963); in which, a federal provision was imposed over laws of the Florida state.

V. RULE 9.130 PROCEEDING TO REVIEW

NON-FINAL ORDERS AND SPECIFIC

FINAL ORDERS

38) Notice of Appeal shows that the nature of the appealed orders are on Purchaser, U.S. Bank- Plaintiff's Motion for an Order directing Clerk to Issue a Writ of Possession properly viewed as an appealable, non-final order determining the right to immediate possession of property (Writ of Possession

and, Order denying Defendants' Motion to Stay Writ of Possession [9.130(a)(3)(C)(ii)] **[Exhibits 28 & 29].**

39) As a matter of law, Farias is entitled to absolute and qualified immunity in a civil rights claim arising under bankruptcy code pursuant to the Subdivision 9.130(a)(3)(C)(vii). Subdivision 9.130 (a)(3)(C)(viii) was added in response to the supreme court's request in Tucker v. Resha, 648 So.2d 1187 (Fla. 1994). The Court directed the committee to propose a new rule regarding procedures for **appeal of orders denying immunity in federal civil rights cases consistent with federal procedure**. Compare Johnson v. Jones, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), with Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). **The Florida Supreme Court held that such orders are “sub-**

ject to interlocutory review to the extent that the order turns on an issue of law (here issue of Federal law)" (Emphasis added).

40) Subdivision 9.130(a)(5) grants a **right of review** of orders on motions seeking relief from a previous court order on the grounds of mistake, **fraud, satisfaction of judgment, or other grounds** listed in Florida Rule of Civil Procedure 1.540. Subdivision 9.130(a)(5) is intended to authorize appeals from orders entered on motions for relief from judgment that are specifically contemplated by a specific rule of procedure (e.g., the current version of Florida Rule of Civil Procedure 1.540). See complete Committee Notes to the Rule 9.130 Amendments.

41) Farias/Carrillo filing multiple post-judgment motions including the Emergency Quiet Title Motion, Emergency Response in Opposition to the Motion for Writ of Possession; and, Motion to Stay the Motion for a Writ of Possession seeking to set aside the Final Judgment of Foreclosure because the transaction is rescinded **on August 13, 2009**, the judgment is void-avoidable; the judgment was satisfied; the debt is discharged **on April 20, 2012**; and, U.S. Bank lacks of law capacity to file the post judgment procedure and to be the subject property's purchaser as provided by the paragraph 4 of the Judgment. "Plaintiff must be the owner and holder **of the note and mortgage**". Edason v. Cent. Farmers Trust Co., 129 So. 698, 700 (Fla. 1930), **IB at 27**; all pursuant to the Rule 1.540(b)(4) and (b) (5)

of the Fla. R. C. P.; the Rules 59, 60 and 61 of the Federal Rules of Civil Procedure; the Article X, Section 4 of the Florida Constitution; and, the U.S. Constitution. The Quiet Title Motion was not ruled by trial court (Exhibit 26) (See lower court's docket).

42) This is a case extremely rare and complex, Farias/Carrillo respectfully require to this Honorable Court review this case which is of great public importance and will have a great effect on the administration of justice throughout the Florida state. The Committee Notes 1977 Amendment shows that:

"This rule replaces former rule 4.2 and substantially alters current practice. The advisory committee was aware that the common law writ of certiorari is available at any time and did not intend to abolish that writ. However, because that writ provides a remedy only if the petitioner

meets the heavy burden of **showing that a clear departure from the essential requirements of law has resulted in otherwise irreparable harm (Writ of Possession)**, it is extremely rare that erroneous interlocutory rulings can be corrected by resort to common law certiorari. It is anticipated that because the most urgent interlocutory orders are appealable under this rule, there will be very few cases in which common law certiorari will provide relief. See *Taylor v. Board of Pub. Instruction*, 131 So.2d 504 (Fla. 1st DCA 1961)[Rule 9.030(b)(2)].

42) The lower court did not entry a Compulsory Counterclaim's Final Judgment. The recoupment claim has been replaced by the compulsory counterclaim. In Maynard v. Household Finance Corp. III, 861 So. 2d 1204 (Fla. 2d DCA 2003). See also Neil v. S. Fla. Auto Painters, Inc., 397 So. 2d 1160, 1164 (Fla. 3d DCA 1981).

A “Counterclaim” is a cause of action that seeks affirmative relief while an affirmative defense defeats the Plaintiff’s cause of action by a denial or confession and avoidance. See Schupler v. Easterm Mortgage Co., 160 Fla. 72, 33 So. 2d 586 (1948), Lovett v. Lovett, 93 Fla. 611, 612 So. 768 (1927).

43) In accordance with the Rules 1.420(a)(2) and 1.420(c) of Fla. R. C. P.; and, the **Federal Rules of Civil Procedure, Rule 41(2)** show that:

“Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper. **If a defendant has pleaded a counterclaim** before being served with the plaintiff’s motion to dismiss, the action may be dismissed over the defendant’s objection **ONLY IF THE COUNTER CLAIM CAN REMAIN PENDING FOR**

INDEPENDENT ADJUDICATION. Unless the order states otherwise, a dismissal under this paragraph (2) is WITH-OUT PREJUDICE" (Emphasis added).

44) The 3DCA denied without opinion the Farias/Carrillo appeal against the Final Judgment of Foreclosure, Case #3D11-3188 consolidated to the Case #3D12-151; and, the Supreme Court of Florida denied discretionary jurisdiction because the 3DCA's decision was without opinion on January 02, 2014 (Exhibit 13); BUT, the U.S. Supreme Court's opinion in Jesinoskis case was entered on January 13, 2015 (Exhibit 18). Therefore, this Court may relief those reversible errors in complying to your oath of comply and respect the Federal Constitution; and, U.S. laws.

WHEREFORE, FARIAS/CARRILLO respectfully request to this Honorable Court reversal and amend the Order denying the Motion for Rehearing En Banc pursuant to the Rule 9.331 of Fla. R. App. Procedure; to grant a Declaratory of Rescission, remedies of rescission and damages; and, any other relief as this Honorable Court consist just and appropriate.

NOTICE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was provided via U.S. Mail to GREENBERG TRAURIG, P.A. Kimberly S. Mello, Esq., at 101 E. Kennedy Blvd., Ste. 1900 Tampa, FL 33602, Counsel for Appellee, U.S. Bank National Association, as Trustee; and, to OneWest Bank, F.S.

B., at 777 South Flagler Drive, Ste 300 East, West
Palm Beach, FL 33401: this January 25, 2018.

**CERIFICATE OF COMPLAINCE WITH FONT
STANDAR**

We hereby certify, pursuant to Florida Rules of Appellate Procedure 9.210(a)(2), that the size and style used in this motion is Times New Roman, 14 point.

/s/

/s/

JAVIER A. CARRILLO MAYRA E. FARIAS

89 NW 1st Street

11011 SW 160 Street,

Miami, FL 33128.

Miami FL 33157

(786) 712-4846

Appendix A.5

THIRD DISTRICT COURT OF APPEAL
State of Florida

Opinion filed January 10, 2018.

Not final until disposition of timely filed motion for
rehearing

No. 3D17-1281

Lower Tribunal No. 09-6638

Javier A. Carrillo and Mayra E. Farias,
Appellants.

vs,

U.S. Bank National Association, et al.,
Appellees.

An Appeal under Florida Rule of Appellate
Procedure 9.315(a) from a non-final order from the
Circuit Court for Miami-Dade County, Monica
Gordo, Judge.

Javier A. Carrillo and Mayra E. Farias, in
proper persons.

Greenberg Traurig, and Kimberly S. Mello and
Vitaliy Kats (Tampa), for appellee U.S. Bank
National Association, as Trustee.

Before ROTHENBERG, C.J., and EMAS and
LOGUE, JJ.

PER CURIAM

Affirmed.

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Appendix A.6

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT
JUNE 16, 2017 CASE NO.: 3D17-1281

JAVIER A. CARRILLO AND MAYRA E.

FARIAS, Appellant(s)/Petitioner(s),

vs. L.T. NO.: 09-6638

U.S. BANK NATIONAL ASSOCIATION,

et al., Appellee(s)/Respondent(s),

Upon consideration, appellants' suggestion pursuant to the Florida Rule of Appellate Procedure 9.125 is hereby denied. ROTHENBERG, EMAS and LOGUE, JJ., concur.

A True copy

/s/ Mary Cay Blanks. Seal: Clerk, District Court of Appeal, State of Florida. Third District.

Cc: Clarfield, Okon, Salomone Greenberg Traurig,
& Pincus, P.L. P.A.

Javier A. Carrillo

Mayra E. Farias

Appendix A.7

IN THE THIRD DISTRICT COURT OF APPEAL OF
FLORIDA

JAVIER A. CARRILLO, MAYRA E. FARIAS:

Appellants,

CASE NO: 3D17-1281.

vs. LOWER TRIBUNAL No. 09-6638

U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR THE LEHMAN XS TRUST,
MORTGAGE PASS-THROUGH CERTIFICATES
SERIES 2006-16N; and, ONE WEST BANK, F.S.B.:

Appellee (s), /

**APPELLANTS' SUGGESTION PURSUANT TO
THE RULE 9.125**

COMES NOW, JAVIER A. CARRILLO (hereinafter
“CARRILLO”) and MAYRA ELIZABETH JIMENEZ

a/k/a MAYRA E. FARIAS (hereinafter "FARIAS")
(hereinafter collectively "FARIAS/CARRILLO)
acting as litigants PRO SE; file this Appellants'
suggestion pursuant to the Rule 9.125 of the Fla. R.
App. P., Notice of Appeal was filed on June 5, 2017;
for which, this **3DCA** may make such
certification on its own motion or on
suggestion by a party; so:

(1) The appeal requires immediate resolution by the
Florida Supreme Court pursuant to Jesinoski v.
Countrywide Home Loans, Inc., 135 S. Ct, 790
(January 13, 2015) because the nature of the
appealed order is on Purchaser/co-Plaintiff's Motion
for an Order directing Clerk to issue a Writ of
Possession properly viewed as an appealable, non-
final order determining the right to immediate posse

ssion of property [Rule 9.130 (a) (3) (C) (ii)]. When Farias/Carrillo exercised their right to rescind under the Truth in Lending Act (TILA), 15 U.S.C. §1635(i) and Reg. Z (12 C.F.R. §226.23(h) in the **paragraph 78 of the Compulsory CounterClaim** [Count 1: Truth in Lending Act (Failure to Provide Disclosures), Count 2 Truth in Lending Act (Rescission); Common allegations and First Affirmative Defense] timely served and filed on August 13, 2009, within three years of their loan's consummation on August 22, 2006 to refinance their principal-primary dwelling of Farias/Carrillo's family members from Countrywide Home Loans to Respondent, Farias/Carrillo used the funds to pay off multiples consumers debts. The tolerance for disclosure were also violated here because the Negative Amortization and its effects

were not included on the Finance charges under stated by \$169,925.93 nor on the Annual Percentage Rate (APR) undersated by 4.155% [15 U.S.C. §1635 (i)(2) & Reg Z(h)(2). Farias/Carrillo requested that the Court declare the mortgage transaction rescinded; and Farias/Carrillo are not liable for any finance or other charge, and any security interest given by them, including any such interest arising by operation of law, **became void upon such a rescission** [§1635(b) & Reg Z(d)]. “**Within 20 days** after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and **SHALL TAKE ANY ACTION NECESSARY OR APPROPRIATE TO REFLECT THE TERMINATION OF ANY SECURITY INTEREST CREATED UNDER**

THE TRANSACTION ... If the creditor does **not** take possession of the property **within 20 days** after tender by the obligor, **ownership of the property vests in the obligor without obligation on his part to pay for it...**" 15 U.S.C. §1635(b), 12 C.F.R. §1026.15(d)(2), 1026.23(d)(2)(Id.). Sherzer v. Homestar Mortg. Servs., 707 F. 3d 255, 264-265 (3d Cir. 2013). [All emphasis added]. U.S. Bankruptcy Court also **discharged the subject debt on April 20, 2012** [Take judicial notice the court pursuant to §§90.202(5), (11), (12) and/or (13), and 90.203, Fla. Evidence Code of the Case #12-11159-AJC at www.flsb.uscourts.gov of the U.S. Southern District of Florida); and, the paragraph 4 of the Final Judgment of Foreclosure shows that **One West Bank, is the holder-owner of the lien**

in the subject property, **and NOT** U.S. Bank whom has never served to OneWest Bank of the post judgment proceedings; and, U.S. Bank is **only** the holder-owner of the discharged debt as provided by the paragraph 2 of the Final Judgment of Foreclosure. U.S. Bank was not permitted to contact a Farias/Carrillo by mail, or otherwise, to file **or continue this lawsuit**, or take any other action to collect a discharged debt from debtors. A creditor who violates that order can be required to pay damages (Section 727 of title 11, United States Code). A creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor(s)'s property after the bankruptcy; but, the lien in this case became void with the Notice of Intention to Rescind on August 13,2009

pursuant to the binding precedent in Jesinoskis case; the debt was discharge by the U.S. Bankrupcty Court; and, U.S. Bank is not owner-holder of the lien as provided by the paragraph 4 of the Final Judg
ment of Foreclosure.

(2) The appeal is of great public importance and will have a great effect on the proper administration of justice throughout the state. The Brief for the United States as Amicus Curiae supporting Petitioners in Jesinoskis established that the obligor also may exercise the right of rescission through notice given to the creditor in the context of an ongoing judicial foreclosure case. Following the events in this case, U.S. Congress transferred the authority to promul
gate rules implementing TILA to the Consumer Finance Protection Bureau (CFPB). See Dodd-Frank

Wall Street Reform and Consumer Protection Act, §§1061(b)(1), 1100H, 124 Stat. 2036, 2107, 2113. The Bureau, exercising this authority, held that “In the view of the Bureau, the interpretation of TILA adopted by the majority of courts, erroneously restricts consumers’ right of rescission” (including but not limited to the First, Sixth, Eighth, and Tenth Circuits (see Jesinoskis’ Questions Presented); the Trial Court and the related Case No: 3D11-3188 consolidated to the Case No: 3D12-151 and the Case No: 3D15-2334, all disposed without opinion by the 3DCA; and, the Supreme Court of Florida denied discretionary jurisdiction because the 3DCA’s decisions were without opinion, Cases No: SC12-2012, SC13-2460 and SC16-1780). CFPB argued that:

“rescission of the loan agreement occurs when a valid notice of rescission is sent, not when a court enters an order enforcing the obligor’s rights,” and that ANY **SUBSEQUENT LEGAL ACTION SIMPLY DETERMINES WHETHER A VALID RESCISSION HAD OCCURRED AND THE RESPECTIVE OBLIGATION OF THE PARTES.**

Sherzer v. Homestar Mortgage Services, Inc., et al, 707 F. 3d 255 (3d Cir. 2013).

The unanimous opinion in Jesinoskis is deciding this point; in which, the U.S. Supreme Court ruled that:

“The clear import of §1635(a) is that a borrower need only provide written notice to a lender in order to exercise his right to rescind. To the extent §1635(b) **alters the traditional process for unwinding such a unilaterally rescinded trans-**

action, this is simply a case in
which statutory law modifies com
mon-law practice.” (Emphasis added).

(3) Farias/Carrillo express a belief, based on a reasoned and studied judgment, that this appeal requires immediate resolution by the Florida Supreme Court and (a) is of great public importance, and (b) will have a great effect on the administration of justice throughout the state.

NOTICE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was provided via U.S. Mail to Clarfield, Okon & Salomone, P.L. Attorney for Purchaser-co-Plaintiff, U.S. Bank National Association, Etc., at 500 S. Australian Avenue, Suite 730, West Palm Beach, Florida 33401 and/or to the Fax: 561-713-14

01; to the Judge Monica Gordo at 73 West Flagler Street, Room 626, Miami, Florida 33130; and, a courtesy copy to Greenberg Traurig, P.A., known Counsel for co-Plaintiff, OneWest Bank, F.S.B., at 777 South Flagler Drive, Ste 300 East, West Palm Beach, FL 33401: this June 13, 2017.

/s/

JAVIER A. CARRILLO
89 NW 1st Street,
Miami, FL 33128.
(786) 712-4846

/s/

MAYRA E. FARIAS
11011 SW 160 Street
Miami FL 33157

Appendix A.8

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY,
FLORIDA

U.S. BANK NATIONAL / CASE No.: 09-6638CA01

ASSOCIATION, etc; and/

ONE WEST BANK, FSB/ NOTICE OF APPEAL

Plaintiff(s) / OF NON-FINAL

vs. / ORDER

JAVIER A. CARRILLO, /

MAYRA E. FARIAS /

Defendants /

NOTICE IS GIVEN that: **JAVIER A. CARRILLO**

(hereinafter “CARRILLO”) and MAYRA ELIZABE-

TH JIMENEZ a/k/a **MAYRA E. FARIAS** (hereinafter “FARIAS”) (hereinafter collectively “FARIAS/CARRILLO”) Defendants/Appellants acting as litigants **PRO SE**; appeal to the **Third District Court of Appeal** the Order of this Court rendered on **MAY 18, 2017**. [see Fla R. App. P. [March 23, 2017]: 9.030(b)(1)(B); 9.030(b)(2) (A); 9.030(b)(3) & (4); 9.040(c) & (d); 9.125; and, 9.130; the Articles I, Section 9; V Section 4(b); and, X Section 4 of the Florida Constitution; the Articles I, II, III, IV, VI, the Fifth and the Fourteenth Amendments of the U.S. Constitution; the articles 8; 17(2); 28; 30 of the Universal Declaration of Human Rights; article 10 of American Convention on Human Rights; the paragraphs 2 & 4 of the Final Judgment of Foreclosure entered by this Trial Court on December

12, 2011; the Section 727 of Title 11, United States Code; and, Jesinoski v. Countrywide Home Loans, Inc., 135 S Ct. 790 (2015)]

The nature of the order is on Purchaser-Plaintiff's Motion for an Order directing Clerk to Issue a Writ of Possession properly viewed as an appealable, non-final order determining the right to immediate possession of property (Writ of Possession); and, Order denying Defendants' Motion to Stay Writ of Possession [**9.130(a)(3)(c)(ii)**] (**Certified copies are here attached.**)

I.) Farias/Carrillo are submitting two additional copies of this Notice of Appeal of Non-Final Order and the certified copies herein attached.

NOTICE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was provided via U.S. Mail to Clarfield, Okon & Salomone, P.L. Attorney for Purchaser-Plaintiff at 500 S. Australian Avenue, Suite 730, West Palm Beach, Florida 33401 and/or to the Fax: 561-713-1401; to the Judge Monica Gordo at 73 West Flagler St, Room 626, Miami, Florida 33130: this 05 day of June, 2017.

/s/

JAVIER A. CARRILLO

89 NW 1st Street,

Miami, FL 33128-1814.

/s/

MAYRA E. FARIAS

11011 SW 160 Street,

Miami FL 33157.

Appendix A.9

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY,
FLORIDA

CASE NO.: 09-6638 CA 02

INDYMAC FEDERAL BANK, FSB, SUCCESSOR
IN INTEREST TO INDYMAC BANK, F.S.B.
TRUST SERIES 2006-6. Plaintiff,
vs.

MAYRA E. FARIAS, JAVIER CARRILLO, KNOWS
SPOUSE OF MAYRA FARIAS, ET. AL.

Defendants. _____ /

THE FARIAS/CARRILLO AMENDED ANSWER,
AFFIRMATIVE DEFENSES AND COUNTER
CLAIM

NOW INTO COURT, through undersigned counsel, MAYRA E. FARIAS and JAVIER CARRILLO, her Husband, the Defendants herein (Hereinafter "Farias/Carrillo"), and file this their Amended Answer, Affirmative Defenses and Counterclaim to the Complaint filed by Plaintiff, INDYMAC FEDERAL BANK, FSB, SUCCESSOR IN INTEREST TO INDYMAC BANK, F.S.B. (Hereafter "Indymac"), alleging as grounds therefor as follows; to wit,

AMENDED ANSWER- COUNT I- FORECLOSE

1. Farias/Carrillo admit this paragraph for jurisdiction only, but expressly, directly and explicitly deny any right to bring this action and strict proof is demanded thereon.

2. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶2 of the Complaint; it is therefore denied.
3. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶3 of the Complaint; it is therefore denied.
4. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶4 of the Complaint; it is therefore denied.
5. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶5 of the Complaint; it is therefore denied.

Any allegations of the Complaint Count I not expressly addressed herein are expressly, directly and explicitly denied and strict proof is demanded thereon.

DEMAND FOR JURY TRIAL

Farias/Carrillo hereby demand trial by jury as to all issues so triable thereof.

WHEREFORE, Farias/Carrillo pray that this Honorable Court dismiss this action in toto, ordering that Indymac take nothing by this action; award Farias/Carrillo twice the finance charge in connection with this transaction, but not less than \$200 nor more than \$2,000, as provided under 15 U.S.C. §1640(a) & (e) for any initial errors for each Reg Z 226.19 error, each Reg Z 226.20(a) error, and each Reg Z 226.20(c) error, and at each rate change;

award actual damages in an amount to be established at trial, for the initial disclosure errors, and at each rate change and each obligation to disclose under Reg Z 226.19, Reg Z 226.20(a) and Reg Z 226.20(c), and interest on all the amounts, and award costs and reasonable attorney fees as required by 15 U.S.C. 1640(a)&(e), Fla. Ch 57.105, and the mortgage and note, and such other relief as this Court deems just and proper.

AMENDED ANSWER- COUNT II- RESTA

BLISHMENT OF LOST NOTE

6. Farias/Carrillo admit this paragraph for jurisdiction only, but expressly, directly and explicitly deny any right to bring this action and strict proof is demanded thereon.

7. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶7 of the Complaint; it is therefore denied.
8. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶8 of the Complaint; it is therefore denied.
9. Admitted.
10. Denied.
11. Denied.
12. Denied.
13. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶13 of the Complaint; it is therefore denied.

14. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶14 of the Complaint; it is therefore denied.

15. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶15 of the Complaint; it is therefore denied.

16. Farias/Carrillo are without sufficient information to form a belief as to the trust of the allegation contained in ¶16 of the Complaint; it is therefore denied.

Any allegations of the Complaint Count II not expressly addressed herein are expressly, directly and explicitly denied and strict proof is demanded thereon.

DEMAND FOR JURY TRIAL

Farias/Carrillo hereby demand trial by jury as to all issues so triable thereof.

WHEREFORE, Farias/Carrillo pray that this Honorable Court dismiss this action in toto, ordering that Indymac take nothing by this action; award Farias/Carrillo twice the finance charge in connection with this transaction, but not less than \$200 nor more than \$2,000, as provided under 15 U.S.C. §1640(a) & (e) for any initial errors for each Reg Z 226.19 error, each Reg Z 226.20(a) error, and each Reg Z 226.20(c) error, and at each rate change; award actual damages in an amount to be established at trial, for the initial disclosure errors, and at each rate change and each obligation to disclose under Reg Z 226.19, Reg Z 226.20(a); and,

Reg Z 226.20(c), and interest on all the amounts, and award costs and reasonable attorney fees as required by 15 U.S.C. 1640(a)&(e), Fla. Ch 57.105, and the mortgage and note, and such other relief as this Court deems just and proper.

AFFIRMATIVE DEFENSES TO COMPLAINT

NOW INTO COURT, through undersigned counsel, come MAYRA E. FARIAS and JAVIER CARRILLO, her husband, the Defendants herein (Hereinafter "Farias/Carrillo"), and file this their Affirmative Defenses to the Complaint filed by Plaintiff, INDYMAC FEDERAL BANK, FSB, SUCCESSOR IN INTEREST TO INDYMAC BANK, F.S.B., (Here after Indymac Bank, F.S.B.), alleging as follows; to wit,

COMMON ALLEGATIONS

17. Farias/Carrillo were first introduced to Mortgage Electronic Registration Systems Inc., as nominee (Hereinafter “MERS”) and Indymac Bank, F.S.B. (Hereinafter Indymac Bank, F.S.B.”) as a creditor within the meaning of the Federal Truth in Lending Act 15 U.S.C. §1601 et. seq. (Hereafter “TIL”) and 12 C.F.R. 226.1 et, seq. (Hereafter “Reg Z”) on or before August 22, 2006.

18. On August 22, 2006, MERS, as nominee and Indymac Bank, F.S.B., as a TIL creditor, extended to Farias/Carrillo consumer credit secured by Farias/Carrillo’s primary residence, the same property subject to this foreclosure, and governed by TIL and Reg Z.

19. Farias/Carrillo used the funds from the transaction extended by MERS/Indymac Bank, F.S.B. to refinance a home secured credit primarily for personal family or household use.

20. At said closing, the creditor MERS/Indymac Bank, F.S.B. failed to provided to Farias/Carrillo a Truth in Lending Disclosure Statement.

21. In the alternative, the Truth in Lending Disclosure Statement failed to comply with the disclosure requirements of the Federal Truth in Lending Act.

22. The Truth in Lending Disclosure errors alleged herein are apparent on the face of the disclosure statement, and or the face of the documents assigned and or can otherwise be determined to be inaccurate or incomplete by a comparison among the disclosure

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statement, any itemization of the amount financed, the note, or any other disclosure of disbursement; and or the disclosure statement does not use the terms or format required to be used, within the meaning of 15 U.S.C. §1641.

23. The exhibits attached to Plaintiff's Complaint are inconsistent with Plaintiff's allegations as to ownership of the subject promissory note and mortgage.

24. There is no attachment to the Complaint that establishes that authority was transferred from MERS to Plaintiff, INDYMAC FEDERAL BANK, FSB, SUCCESSOR IN INTERETS TO INDYMAC BANK, F.S.B.

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25. Farias/Carrillo have retained the undersigned to represent them and agreed to pay him a reasonable fee for his services.

FIRST AFFIRMATIVE DEFENSE

26. Farias/Carrillo readapt, re-allege, and reaffirm the material allegations of Paragraph 18 through 26 and further alleges as follows; to wit,

27. At all times material hereto, the August 22, 2006, transaction was governed by the Federal Truth in Lending Act 15 U.S.C. Sec. 1601 et. seq. (TILA) and subject to damage claims under §1640.

28. MERS, and or Indymac Bank, F.S.B. engaged in the business of extending consumer credit in Miami-Dade County, Florida.

29. At all times material hereto, MERS, and or Indymac Bank, F.S.B., in the ordinary course of business regularly extended or offered to extend consumer credit for which a finance charge is or may be imposed by a written agreement or payable in more than four [4] installments.
30. On or about August 22, 2006, Farias/Carrillo entered into a consumer credit transaction with MERS, and or Indymac Bank, F.S.B. in which the extended consumer credit transaction was subject to a finance charge and was initially payable to MERS, and or Indymac Bank, F.S.B.
31. Indymac attached a copy of the promissory note similar to the note evidencing the transaction to its Complaint, and Farias/Carrillo incorporates herein by reference.

32. As part of the consumer credit transaction, MERS, and or Indymac Bank, F.S.B. retained a security interest in Farias/ Carrillo property as described in Indymac's complaint. The security interest is similar to the mortgage attached to Indymac's Complaint, which is incorporated herein. The above described property is used as the principal dwelling of Farias/Carrillo family members and was so at the time of the loan and all modifications thereto.

33. Indymac attached a copy of a mortgage similar to the mortgage referred to above, to its Complaint which is incorporated herein by reference.

34. The failure to properly disclose prior to consummation of the transaction is a violation of TIL, which violation occurred here.

35. In the course of the consumer credit transaction, Indymac Bank, F.S.B. and or MERS failed to deliver all material disclosures required by TILA and Regulation Z including the following:

- a. Failing to clearly and accurately disclose the amount financed using that term in violation in Reg. Z 226.18(b) and §1638(a)(2)(A).
- b. Failing to clearly and accurately disclose the finance charge using that term in violation of Reg. Z 226.4, 226.18 and §1638(a)(3).
- c. Failing to clearly and accurately disclose the annual percentage rate [including any variable feature disclosure] using that term in violation of Reg. Z 226.18(e) and §1638(a)(4).
- d. Failing to properly disclose the number, amounts, and timing of payments scheduled to repay the obli-

gation, in violation of Reg. Z 226.18(g) and §1638 (a)(6).

e. Failing to clearly and accurately disclose the total of payments using that term in violation of Reg. Z 226.18(h) and §1638(a)(5).

f. The failing to properly and/or clearly disclose any variable feature leads to a new transaction, a new limitation and a new claim for damages and rescission at each rate change and/or each addition of each undisclosed variable feature.

36. In addition and or the alternative, the Truth in Lending Disclosure violated TIL as follows:

a. Indymac Bank, F.S.B. violated the variable rate disclosures of Reg. Z 226.19(a) and (b), which are and part of the annual percentage rate disclosures under Reg. Z 226.18(f) and Reg. Z 226.19(b), by failing to ti-

mely provide the early variable disclosures to Farias/Carrillo, as required by Reg. Z 226.19(a) and Reg. Z 226.23(b).

b. Indymac Bank, F.S.B.'s disclosure statement, violated Reg. Z 226.18(f), TIL's variable disclosure obligation, and Reg. Z 226.18(g) and 15 U.S.C. §1638(a)(6) TIL's "payment schedule" disclosure.

c. Indymac Bank, F.S.B. violated Reg. 226.19(a) and (b) by failing to timely provide any of the early variable disclosures required by Reg. Z 226.19(a).

d. The variable rate disclosures are a part of the annual percentage rate disclosures under Reg. Z 226.18(f), Reg. Z 226.19(b).

37. As a result of the afore described violations of TIL, and Reg. Z pursuant to §1640(a) & (e), Indymac is liable to Farias/Carrillo for the following:

- a. twice the finance charge in connection with this transaction but not less than \$200.00 for the initial errors, for any inaccurate variable disclosure at each rate change;
- b. actual damages in an amount to be determinate at trial for the initial errors, any of the variable errors at each rate change, and any improper response to rescission; and
- c. reasonable costs and attorney fees.

DEMAND FOR JURY TRIAL

Farias/Carrillo hereby demand trial by jury as to all issues so triable thereof.

WHEREFORE, Farias/Carrillo pray that this Honorable Court dismiss this action in toto, ordering that Indymac take nothing by this action; award Farias/Carrillo twice the finance charge in connecti-

on with this transaction, but not less than \$200 nor more than \$2,000, as provided under 15 U.S.C. §1640(a) & (e) for any initial errors for each Reg. Z 226.19 error, each Reg. Z 226.20(a) error, and each Reg. Z 226.20(c) error, and at each rate change; award actual damages in an amount to be established at trial, for the initial disclosure errors, and at each rate change and each obligation to disclose under Reg. Z 226.19, Reg Z 226.20(a) and Reg Z 226.20(c), and interest on all the amounts, and award costs and reasonable attorney fees as provided by 15 U.S.C. 1640(a)&(e), Fla. Ch 57.105, and the mortgage and note, and such other relief as this Court deems just and proper.

SECOND AFFIRMATIVE DEFENSE

38. Farias/Carrillo readapt, re-allege, and reaffirm the material allegations of Paragraph 18 through 26 and further alleges as follows; to wit,

39. Indymac and or MERS and/or its assignor failed to comply with the conditions and terms of the mortgage and note and/or 12 U.S.C. 2601, et seq (RESPA), with respect to the proper computation, collection and application of Farias/Carrillo mortgage payments and payments as required under the note ¶3, 4 and 6, and the mortgage ¶1 through 3, 5, 7, 8, and 10.

40. Alternately, Indymac and or MERS and/or its assignor has collected payments, but failed to properly credited Farias/Carrillo account, and/or collected mortgage payments and did not properly credit or post the payments to Farias/Carrillo accou-

nt in violation of the note ¶4 and 6, and the mortga
ge ¶1 through 10.

41. Farias/Carrillo made payments to Indymac and
or MERS and/or the assignor or servicer during the
term of the loan that Indymac and or MERS and/or
assignor or servicer did not properly post to
Farias/Carrillo account as required by the note ¶3, 4
and 6, and the mortgage ¶1 through 10.

42. Therefore, Farias/Carrillo are entitled to an
accounting of all moneys they paid during the term
of the loan and all moneys collected by Indymac and
or MERS or the assignor or servicer under the
mortgage and note and all money Indymac and or
MERS and or their assignor paid out on his account
because of the non-compliance with the note ¶3, 4
and 6, and the mortgage ¶1 through 10.

43. As a result of the improperly collecting and posting of payments to Farias/Carrillo account and improper payments of moneys that Indymac and or MERS and or its assignor paid out on Farias/Carrillo account, Indymac and or MERS or its assignor is stopped or has waived its right to claim a default, and or is otherwise before the Court with unclean hands and cannot foreclose.

WHEREFORE, Farias/Carrillo pray that this Honorable Court take jurisdiction of this case; order an accounting under the mortgage and note of all money collected and paid out by Indymac and or MERS and its assignors, restore and/or return any and all overpayments made by Farias/Carrillo and or improperly paid out by Indymac and or MERS and their assignors, dismiss Indymac and or MERS' com-

plaint with prejudice, decline to reestablish the note, and or decline to enforce the note as pled, and award costs and reasonable attorney fees as provided by Fla. Ch. §57, the mortgage and note, and such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Farias/Carrillo hereby demand trial by jury as to all issues so triable thereof.

THIRD AFFIRMATIVE FEDENSE

44. Farias/Carrillo readapt, re-allege, and reaffirm the material allegations of Paragraphs 18 through 26 and further as follows; to wit,

45. The mortgage Indymac and or MERS seeks to foreclose is illegal under Florida and/or Federal law, due to the improper demand for payments from Fari-

as/Carrillo in violation of the note ¶3, 4 and 6, and the mortgage ¶1 through 10. Thus, Indymac and or MERS is stopped or has waived its right to foreclose, and is otherwise before the Court with unclear hands.

46. In the alternative, the mortgage Indymac and or MERS seeks to foreclose is illegal under Florida and/or Federal law due to the improper collection and payment of fees and advances under the mortgage and note, thus, Indymac and or MERS is stopped or has waived its right to foreclose, and is otherwise before the Court with unclean hands.

WHEREFORE, Farias/Carrillo pray that this Honorable Court take jurisdiction of this case; order an accounting under the mortgage and note of all money collected and paid out by Indymac and or ME-

RS and its assignors, restore and/or return any and all overpayments made by Farias/Carrillo and or improperly paid out by Indymac and or MERS and their assignors, dismiss Indymac's complaint with prejudice, decline to reestablish the note, and or decline to enforce the note as pled, and award costs and reasonable attorney fees as provided by Fla. Ch. §57, the mortgage and note, and such other relief as this Court deems just and proper.

DEMAN FOR JURY TRIAL

Farias/Carrillo hereby demand trial by jury as to all issues so triable thereof.

FOURTH AFFIRMATIVE DEFENSE

47. Farias/Carrillo readapt, re-allege, and reaffirm the material allegations of Paragraphs 18 through 26 and further as follows; to wit,

48. Indymac does not properly hold, and or possess, and or did not properly acquire the right to reestablish and or then enforce the mortgage and note. Thus, Indymac is not the proper party plaintiff to bring an action to reestablish and or enforce and or foreclose the mortgage and note.

49. In the alternative, Indymac lacks standing to reestablish and or enforce and or foreclose the mortgage and note.

50. In the alternative, since Indymac did not properly acquire the note and or mortgage that it seeks to reestablish and or enforce and or foreclose under Florida and/or Federal law.

51. In the alternative, Indymac never acquired the note and or mortgage and or never had possession of the note and or mortgage, and or did not have such possession when they were lost, and or never properly acquired the note and or mortgage under the Uniform Commercial Code, nor the right to reestablish and enforce the note and or mortgage that it seeks to reestablish and or enforce and or foreclose under Florida and/or Federal law.

52. In the alternative, Indymac has failed to join indispensable parties, to wit, the party who owns the mortgage and note and or did so when the mortgage and note were lost.

WHEREFORE, Farias/Carrillo pray that this Honorable Court take jurisdiction of this case; dismiss Indymac's complaint with prejudice, decline

to enforce the mortgage and note, and award costs and reasonable attorney fees as provided by Fla. Ch. §57, the mortgage and note, and such other relief as this Court deems just and proper.

DEMAN FOR JURY TRIAL

Farias/Carrillo hereby demand trial by jury as to all issues so triable thereof.

FIFTH AFFIRMATIVE DEFENSE

53. When exhibits are inconsistent with the Plaintiff's allegations of material facts as to the real party in interest, such allegations cancel each other out. Plaintiff failed to establish the connection between the Plaintiff and the Defendant. Therefore, relief sought by the Plaintiff should be denied. See Fladell v. Palm Beach County Canvassing Board, 772

So. 2d 1240 (Fla. 2000); Greenwald v. Triple D. Properties, Inc., 424 So. 2d 185, 187 (Fla. 4th DCA 1983); Costa Bella Development Corp. v. Costa Development Corp., 441 So. 2d 1114 (Fla. 3rd DCA 1983).

SEXTH AFFIRMATIVE DEFENSE

54. The Plaintiff's Complaint fails to contain sufficient facts to maintain its action or request for the deficiency judgment sought under the Promissory Note. The Plaintiff is not entitled to maintain this action in which it seeks to foreclose on a note which the Plaintiff does not hold. See Your Construction Center, Inc. v. Gross, 316 So. 2d 596 (Fla. 4th DCA 1975). Therefore, relief sought by Plaintiff should be denied.

SEVENTH AFFIRMATIVE DEFENSE

55. Farias/Carrillo readapt, re-allege, and reaffirm the material allegations of Paragraphs 18 through 26 and further as follows; to wit,

56. Indymac and or MERS did not properly accelerate the mortgage it seeks to foreclose under Florida and/or Federal law.

57. Indymac and or MERS failed to properly accelerate the mortgage and note by failing action to foreclose as required by the mortgage Paragraph 22, and or and 12 C.F.R. §203.500-§203.681.

Therefore, Plaintiff failed to comply with all conditions precedent to bring this action, and or is estopped or has waived its right to foreclose based on its failure to properly accelerate according to the terms of the mortgage, and is otherwise before the Court with unclean hands.

EIGHTH AFFIRMATIVE DEFENSE

58. Plaintiff has failed to establish that “proper consideration” was paid to allow the equity interest of foreclosure of mortgage to vest upon the Plaintiff. Therefore, relief sought by Plaintiff should be denied. See WM Specialty Mortgage LLC v. Salomon, 874 So. 2d 680 (Fl. 4th DCA 2004).

COMPULSORY COUNTER CLAIM

COUNT 1: TRUTH IN LENDING ACT

(Failure to Provide Disclosures)

59. At all times material hereto, the August 22, 2006, transaction was governed by the Federal Truth in Lending Act 15 U.S.C. Sec. 1601 et. seq. (TILA) and subject to damage claims under §1640.

60. MERS, and or Indymac Bank, F.S.B. engaged in the business of extending consumer credit in Miami-Dade County, Florida.

61. At all times material hereto, MERS, and or Indymac Bank, F.S.B., in the ordinary course of business regularly extended or offered to extend consumer credit for which a finance charge is or may be imposed by a written agreement or payable in more than four [4] installments.

62. On or about August 22, Farias/Carrillo entered into a consumer credit transaction with MERS, and or Indymac Bank, F.S.B. in which the extended consumer credit transaction was subject to a finance charge and was initially payable to MERS, and or Indymac Bank, F.S.B.

63. Indymac attached a copy of the promissory note similar to the note evidencing the transaction to its Complaint, and Farias/Carrillo incorporate herein by reference.

64. As part of the consumer credit transaction, MERS, and or Indymac Bank, F.S.B. retained a security interest in Farias/Carrillo primary residence as described in Indymac's Complaint. The security interest is similar to the mortgage attached to Indymac's Complaint, which is incorporated herein.

65. Indymac attached a copy of a mortgage similar to the mortgage referred to above, to its Complaint which is incorporated herein by reference.

66. The failure to properly disclose prior to consummation of the transaction is a violation of TIL, which violation occurred here.

67. In the course of the consumer credit transaction, Indymac Bank, F.S.B. and or MERS failed to deliver all material disclosures required by TILA and Regulation Z including the following:

- a. Failing to clearly and accurately disclose the amount financed using that term in violation in Reg. Z 226.18(b) and §1638(a)(2)(A).
- b. Failing to clearly and accurately disclose the finance charge using that term in violation in Reg. Z 226.4, 226.18 and §1638(a)(3).
- c. Failing to clearly and accurately disclose the annual percentage rate [including any variable fea-

ture disclosure] using that term in violation in Reg. Z 226.18(e) and §1638(a)(4).

d. Failing to properly disclose the number, amounts, and timing of payments scheduled to repay the obligation, in violation in Reg. Z 226.18(g) and §1638(a)(6).

e. Failing to clearly and accurately disclose the total of payments using that term in violation in Reg. Z 226.18(h) and §1638(a)(5).

f. the failure to properly and/or clearly disclose any variable feature leads to a new transaction, a new limitation and a new claim for damages and rescission at each rate change and/or each addition of each undisclosed variable feature.

68. In addition and or the alternative, the Truth in Lending Disclosure violated TIL as follows:

- a. Indymac Bank, F.S.B. violated the variable rate disclosures of Reg. Z 226.19(a) and (b), which are and part of the annual percentage rate disclosures under Reg. Z 226.18(f) and Reg. Z 226.19(b), by failing to timely provide the early variable disclosures to Farias/Carrillo, as required by Reg. Z 226.19(a) and Reg. Z 226.23(b).
- b. Indymac Bank, F.S.B.'s disclosure statement, violated Reg. Z 226.18(f), TIL's variable disclosure obligation, and Reg. Z 226.18(g) and 15 U.S.C. §1638(a)(6) TIL's "payment schedule" disclosure.
- c. Indymac Bank, F.S.B.'s violated Reg. 226.19(a) and (b) by failing to timely provide any of the early variable disclosures required by Reg. Z 226.19(a).

d. The variable rate disclosures are a part of the annual percentage rate disclosures under Reg. Z 226.18(f), Reg. Z 226.19(b).

69. As a result of the afore described violations of TIL, and Reg. Z pursuant to §1640(a) & (e), Indymac is liable to Farias/Carrillo for the following:

a. twice the finance charge in connection with this transaction but not less than \$200.00 for the initial errors, for any inaccurate variable disclosure at each rate change;

b. actual damages in an amount to be determinate at trial for the initial errors, any of the variable errors at each rate change, and any improper response to rescission; and

c. reasonable costs and attorney fees.

COUNT 2

TRUTH IN LENDING ACT

(Rescission)

70. This consumer credit transaction was subject to Farias/Carrillo right of rescission as described by 15 U.S.C. §1635 and Regulation Z §226.23 (12 C.F.R. §226.23).

71. In the course of this consumer credit transaction, Indymac violated 15 U.S.C. §1635(a) and Regulation Z § 226.23(b) by failing to deliver to the Plaintiff two copies of a notice of the right to rescind that:

- a. Identified the transaction.
- b. Clearly and conspicuously disclosed the security interest in the Plaintiff's home.
- c. Clearly and conspicuously disclosed the Plaintiff's right to rescind the transaction.

- d. Clearly and conspicuously disclosed how to exercise the right to rescind the transaction, with a form for that purpose, designating the address of the Defendant Creditor's place of business.
- e. Clearly and conspicuously disclosed the effects of rescission.
- f. Clearly and conspicuously disclosed the date the rescission period expired.

72. The disclosure statement issued in conjunction with this consumer credit transaction, and attached as DEFENDANT'S EXHIBIT A, violated the requirements of Truth in Lending and Regulation Z in the following and other respects:

73. By failing to include in the finance charges certain charges imposed by Indymac payable by Farias/Carrillo incident to the extension of credit as

required by 15 U.S.C. §1605 and Regulation Z §226.4, thus improperly disclosing the finance charge in violation of 15 U.S.C. §1638(a)(3) and Regulation Z §226.18(d). Such amounts include, but are not limited to:

a. Index (Margin) used to calculate Finance Charges and Annual Percentage Rate does not correspond to the correct twelve month treasury average rate.

74. By calculating the annual percentage rate (APR) based upon improperly calculated and disclosed finance charges and amount financed, 15 U.S.C. §1606, Regulation Z §226.22. Indymac overstated the

disclosed annual percentage rate in violation of 15
U.S.C. §1638(a)(4) and Regulation Z §226.18(c).

75. The disclosures improperly made by Indymac, are material disclosures as defined in the Truth in Lending Act, 15 U.S.C. § 1602(u), Regulation Z, §226.23 n. 48.

76. The finance charge and APR were over-disclosed by more than the tolerance levels set forth in 15 U.S.C. §1605.

77. By reason of those material violations of 15 U.S.C. §1638, Plaintiff has a right of rescission for three years from the date of consummation of the pursuant to 15 U.S.C. §1635(f).

78. Because Farias/Carrillo were never given the proper right of rescission notice, they do not have the proper mechanism to send a notice of rescission. Ser-

vice of this counter claim on Indymac, through under signed counsel as an authorized agent, shall serve as proper notice of the right to rescission.

79. As a result of the aforesaid violations of the Act and Regulation Z, pursuant to 15 U.S.C. §§ 1635(a), 1640(a), and 1641(c), Defendants are liable to Plaintiff for:

- a. Rescission of this transaction.
- b. Termination of any security interest in Farias/ Carrillo's property created under the transaction.
- c. Return of any money or property given by Farias/ Carrillo to anyone in connection with this transaction.
- d. Statutory damages of \$2,000 for each disclosure violation.
- f. Forfeiture of return of loan proceeds.

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- g. Actual damages in an amount to be determinate at trial.
- h. A reasonable attorney fee.

/s/

Sergio Cruz

I HEREBY CERTIFY that a true and accurate copy of the above has been furnished by U.S. mail this _____ day of August, 2009, to Ron G. Rice, Jr., Kahane & Associates, P.A., 8201 Peters Road, Suite 3000, Plantation, Florida 33324.

LAW OFFICES OF SERGIO CRUZ, PLLC.

245 S.E. 1st Street, Suite 214

Miami, FL 33131

305-459-3120 Telephone

305-356-7910 Facsimile

E-mail: sergiocruzesq@gmail.com

BY: _____ /s/ _____

SERGIO CRUZ, Attorney at Law

134a

Counsel for Mayra E. Farias & Javier Carrillo
Florida Bar Number: 21543

135a

Appendix A.10

Supreme Court of the United States

Office of the Clerk

Washington, DC 20543-0001

June 5, 2018

Scott S. Harris

Clerk of the Court

(202) 479-3011

Mr. Javier A. Carrillo

89 N.W. 1st Street

Miami, FL 33128

Re: Javier A. Carrillo, et al.

v. US. Bank National Association; et al

Application No. 17A1338

Dear Mr. Carrillo:

The application for an extension of time within
which to file a petition for a writ of certiorari in -

the above-entitled case has been presented to Justice Thomas, who on June 5, 2018, extended the time to and including August 4, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by /s/

Clayton Higgins

Case Analyst

NOTIFICATION LIST

Mr. Javier A. Carrillo Clerk, District Court
89 N.W. 1st Street of Appeal of Florida,
Miami, FL 33128 Third District
2001 S.W. 117th Avenue
Miami, FL 33175-1716