No. 19-

IN THE

Supreme Court of the United States

GALE ZAMORE,

Petitioner,

v.

DEUTSCHE BANK NATIONAL TRUST CO., INDIVIDUALLY, AND AS TRUSTEE FOR JP MORGAN MORTGAGE ACQUISITION TRUST 2007-CH5 ASSET BACKED PASS-THROUGH CERTIFICATES SERIES 2007-CH5,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: July 24, 2019

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QUESTIONS PRESENTED

QUESTION 1:

In *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), this Court held that federal courts have jurisdiction to consider claims even if the result would be inconsistent with a state court's prior decision. Although Petitioner filed an independent claim based on her statutory rights in 15 U.S.C. §1635, jurisdiction was nevertheless declined. Can the Eleventh Circuit ignore *Exxon Mobil* and apply its own now discarded standard in *Amos v. Glynn County Bd. of Tax Assessors,* 347 F.3d 1249 (11th Cir. 2003).

QUESTION 2:

In *Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) this Court held that when determining claim preclusion based on state claims, the federal courts must apply state law. Here, the lower court applied federal law, rather than state law, to find that the complaint was barred under *res judicata*. Can the lower court disregard the well-established rule and dismiss the complaint based on federal *res judicata* principles?

QUESTION 3:

This Court held in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 790 (2015) that a TILA rescission is a completed event upon the sending of a timely notice of rescission under 15 U.S.C. §1635. Thus, there is no (and there can be no) statute of limitation applied to this already completed event. Petitioner timely sent the

notice of TILA rescission. Can the lower court disregard *Jesinoski* and apply a doctrine which converts the event of rescission into a claim of recession which can then be denied?

PARTIES TO THE PROCEEDINGS

Petitioner, Gail Zamore, is a homeowner who executed a mortgage and note to a party claimed to be a predecessor of Respondent. Zamore was the Plaintiff/Appellant before the Eleventh Circuit Court of Appeal.

Respondent, Deutsche Bank National Trust Co., individually, and as Trustee for JP Morgan Mortgage Acquisition Trust 2007-CH5 Asset Backed Pass-Through Certificates Series 2007-CH5 ("the Bank"), claims to be an assignee of Zamore's home loan and was the Defendant/Appellee before the Eleventh Circuit Court of Appeal.

RELATED CASES

Eleventh Circuit Court of Appeals

Gale Zamore v. Deutsche Bank National Trust Co., individually, and as Trustee for JP Morgan Mortgage Acquisition Trust 2007-CH5 Asset Backed Pass-Through Certificates Series 2007-CH5, No. 18-13635, order affirming lower court opinion dated March 25, 2019.

United States District Court for the Southern District of Florida

Gale Zamore v. Deutsche Bank National Trust Co., individually, and as Trustee for JP Morgan Mortgage Acquisition Trust 2007-CH5 Asset Backed Pass-Through Certificates Series 2007-CH5 and Select Portfolio Servicing, Inc., No. 17-80272-CIV, order dismissing the action dated July 26, 2018 and Final Judgment dated July 26, 2018.

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STATEMENT OF JURISDICTION

On March 25, 2019, the Eleventh Circuit Court of Appeals issued the Order that Petitioner requests this Court to review. This Court has jurisdiction pursuant to 28 U.S.C. §1254. On June 18, 2019, this Court granted Petitioner an extension to file the Petition for Writ of Certiorari pursuant to 15 U.S.C §2101, on or before July 24, 2019.

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1635

(a) Disclosure of obligor's right to rescind

> Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until

midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so….

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. 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 has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the

location of the property or at the residence of the obligor, at the option of the obligor. 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. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

...

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion

> of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

15 U.S.C. § 1640

> **(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement**
>
> Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation

INTRODUCTION

Fundamentally this petition addresses the question of this court's authority and the effect of lower court defiance with Supreme Court decisions with which a lower court disagrees. In this case, the legal issues are: (a) the application of Rooker Feldman, (b) claim preclusion under the principle of *res judicata*, and (c) the effect of TILA rescission under 15 U.S.C. §1635, all of which have been conclusively decided by this Court in *Exxon Mobil*, *Semtek Intern. Inc.*, and *Jesinoski*. The issue of lower court defiance on these issues is particularly manifest in the Eleventh Circuit.

STATEMENT OF THE CASE

Jurisdiction of the lower courts

The District Court had subject matter jurisdiction over this action pursuant to diversity jurisdiction, 28

U.S.C. § 1332(a), since Plaintiff/Petitioner resides in Florida and Defendant/Respondent resides in California. Additional jurisdiction exists pursuant to 15 U.S.C. §1635 for Truth in Lending Act ("TILA") claims raised in the Complaint and pursuant to 28 U.S.C. §2201 which allows the District Court to determine declaratory actions, such as the one brought in this case. Upon dismissal of this action and the entry of a final judgment in the District Court on June 26, 2018, the Eleventh Circuit Court of Appeal obtained jurisdiction – pursuant to 28 U.S.C. §1291 – to review the final order disposing of all Plaintiff's claims upon the timely filed Notice of Appeal on August 27, 2018.

Proceedings leading to this appeal

The Complaint filed in the district court sought declaratory judgment establishing that Plaintiff/Petitioner's rescission of her home loan was effected in 2009 upon the mailing of her timely letter of intent to rescind. [L.C. Apx. 177-178].[1]

The loan at issue was refinanced by Chase Bank USA, N.A. on January 20, 2007. [L.C. Apx. 153-176]. The closing date of the transaction was January 30, 2007.

Thereafter, the loan was assigned to the Defendant/Respondent, Deutsche Bank National Trust Co., individually, and as Trustee for JP Morgan Mortgage Acquisition Trust 2007-CH5 Asset Backed Pass-Through Certificates Series 2007-CH5 ("the Bank"), on August 4, 2009.

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1. An Appendix containing all pertinent court documents was filed in the lower court and is referred herein as L.C. Apx.

Foreclosure Action

On August 5, 2009, the Bank filed a foreclosure action against Zamore in Palm Beach County Florida in case number 50-2009-CA-027593. On October 22, 2009, Zamore sent her rescission letter to the Bank, which was filed in the foreclosure action on November 10, 2009. [L.C. Apx.177-178]. Upon receipt of the rescission letter, the Bank took no responsive action and continued with the foreclosure case. Zamore did ***not*** raise rescission as an affirmative defense in the foreclosure action. [L.C. Apx. 15-25]. On May 29, 2013, the state court entered a Final Judgment of Foreclosure in the Bank's favor. [L.C. Apx. 27-30].

On July 10, 2013, Zamore filed a Motion to Vacate which raised rescission as its basis but did not provide any procedural grounds for the motion. [L.C. Apx. 32-36]. A hearing was held on May 23, 2014 and the transcript of the hearing reveals that the reason the Motion to vacate was denied was *because rescission was not raised in the answer and affirmative defenses.* [L.C. Apx. 45-73]. The Motion was ultimately denied without opinion. [L.C. Apx. 38 & 75-80]. Zamore appealed the final judgment – on grounds other than rescission – but the final judgment was per curium affirmed on April 12, 2016. [L.C. Apx. 90].

Quiet Title Action

Before the Motion to Vacate was denied in the foreclosure action, Zamore brought a *pro se* quiet title action against Defendant on July 7, 2014. [L.C. Apx. 97-106]. The complaint asserted nine "counts" claiming the Bank lacked an interest in the loan documents due to

securitization issues, fraud, and other claims. Only the last count raised rescission. [L.C. Apx. 104-105]. The complaint was later amended, *pro se*, to assert only facts. The issue of rescission, while mentioned in two sentences, was ***not*** a cause of action raised in the amended complaint. [L.C. Apx. 108-118]. The Bank filed a Motion to Dismiss the Second Amended Complaint on the asserted basis of res judicata and a failure to state a cause of action. [L.C. Apx. 120-123]. The Bank's motion did not address the merits of any allegations. On October 13, 2015, the trial court entered a Second Amended Order granting the Motion to dismiss ***without stating a basis*** for the dismissal. [L.C. Apx. 125-126]. Zamore appealed the dismissal, which ultimately resulted in a per curium affirmance. [L.C. Apx. 133].

Current Action

On March 3, 2017, Zamore filed this action against the Respondent in the Southern District of Florida. [L.C. Apx. 140-178]. The Complaint alleged two causes of action. Count I was for a declaratory judgment pursuant to TILA, on the basis that subject Mortgage and Note had *already* been rescinded pursuant to 15 U.S.C. §1635(b). Count II alleged that Respondent was liable for damages. Zamore did not seeking review of the dismissal of Count II.

On June 9, 2017 the Bank filed its motion to dismiss the complaint, attaching an uncertified copy of the Final Judgment in the state foreclosure action and the *lis pendens* filed in the state court action. On June 26, 2018, the district court entered an Order of Dismissal and a Final Judgment. [Apx. 7a]. The dismissal was premised on the trial court's erroneous finding that: 1) Rooker-

Feldman prevented the court from exercising jurisdiction, 2) res judicata barred the action, and 3) that the one-year statute of limitations found in 15 U.S.C. 1640(e) barred the TILA rescission. On August 27, 2018, Zamore filed her notice of appeal seeking review only of the dismissal of Count I.

On March 25, 2019, the Eleventh Circuit Court of Appeal Affirmed the District Court's dismissal of the action based on lack of jurisdiction pursuant to the Rooker-Feldman Doctrine. [Apx. 1a]. Petitioner now files this Petition for Writ of Certiorari for the reasons stated below.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit continues to deny jurisdiction by applying an outdated "inextricably intertwined" test *without* applying the *Exxon Mobil* test.

Over 14 years ago, this Court issued *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) to clear up and narrow the application of the Rooker-Feldman doctrine. The Court acknowledged that the doctrine has been "[v]ariously interpreted in the lower courts, the doctrine has sometimes been construed to extend far beyond the contours of the *Rooker* **and** *Feldman* **cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738."** *Id.* at 283 (2005).

In *Exxon Mobil*, this court reversed a lower federal court's order dismissing an action for lack of subject-matter jurisdiction because it was "inextricably intertwined" with a state court judgment. *Exxon Mobil*, 544 U.S. 280. In reversing, this Court held that Rooker-Feldman only applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284. To be even more clear, this Court further held that a district court is ***not*** barred "from exercising subject-matter jurisdiction *simply because a party attempts to litigate in federal court a matter previously litigated in state court*." *Id.* at 293 (emphasis added). Instead, the test is: "[i]f a federal plaintiff "present[s] *some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party* ..., then there ***is*** jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Id.* (emphasis added). In other words, if a federal action passes this test, then it is ***not*** inextricably intertwined with a state action.

The majority of the Circuit Courts have correctly followed *Exxon Mobil*. For example, the Seventh Circuit correctly held that "*Exxon Mobil* shows that the *Rooker–Feldman* doctrine asks what injury the plaintiff asks the federal court to redress, not whether the injury is 'intertwined' with something else." *Iqbal v. Patel*, 780 F.3d 728, 730 (7th Cir. 2015).

The Second, Third, and Fifth Circuits have adopted a four-part test based on *Exxon Mobil* which states that a case is "inextricably intertwined" ***only if*** [1] the

federal plaintiff lost in state court, [2] the federal plaintiff complains of injuries caused by a state court judgment [3] federal plaintiff invited a federal district court to review and reject the state court judgment and [4] the state court judgment was rendered before the federal action was filed. *Hoblock v. Albany County Bd. of Elections,* 422 F.3d 77, 85 (2d Cir. 2005); *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 167 (3d Cir. 2010); *Houston v. Venneta Queen*, 606 Fed. Appx. 725, 730 (5th Cir. 2015).

Likewise, the Fourth, Sixth, Tenth, and Ninth Circuits have also held that a federal claim is "inextricably intertwined" with a state judgment ***only if*** the requirements of *Exxon Mobil* are satisfied. *Davani v. Virginia Dept. of Transp.,* 434 F.3d 712 (4th Cir. 2006); *McCormick v. Braverman*, 451 F.3d 382 (6th Cir. 2006); *Bolden v. City of Topeka, Kan.*, 441 F.3d 1129, 1145 (10th Cir. 2006); *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1030 (9th Cir. 2005).

But the Eleventh Circuit continues – defiantly – to deny jurisdiction based on its own – more inclusive– *Amos* test which has been officially abrogated by the Eleventh Circuit ***yet continued to be applied*** under the guise of *Exxon Mobil*. Contrary to *Exxon Mobil*, the Amos test questions whether:

> (1) the party in federal court is the same as the party in state court;
>
> (2) the prior state court ruling was a final or conclusive judgment on the merits;

> (3) the party seeking relief in federal court had a reasonable opportunity to raise its federal claims in the state court proceeding; and
>
> (4) the issue before the federal court was either adjudicated by the state court or was inextricably intertwined with the state court's judgment….

Amos v. Glynn County Bd. of Tax Assessors, 347 F.3d 1249, Fn. 11 (11th Cir. 2003)(internal citations omitted). Although not explicitly stated, it is apparent that the lower court here applied the *Amos* test in reaching its decision. The parties never disputed issues one and two (of the *Amos* test), so the Eleventh Circuit did not need to address them.

However, it did address issues three and four of the *Amos* test, holding that the Court lacked jurisdiction because the federal claim was inextricably intertwined with a state court judgment and because Petitioner had an "opportunity to raise that claim" in the state court. This is the wrong test. While *Exxon Mobil* was mentioned, the court did not appreciate the impact *Exxon Mobil* had on the "inextricably intertwined test."

Merely "describing a federal claim as 'inextricably intertwined' with a state-court judgment only states a conclusion." *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 86 (2d Cir. 2005). "[T]he phrase "inextricably intertwined" has no independent content. It is simply a descriptive label attached to claims that meet the requirements outlined in *Exxon Mobil*." *Id.* at 87.

Thus, the Eleventh Circuit should have applied the four-part test set out in *Exxon Mobil* to determine if Petitioner's claim was inextricably intertwined. Had the correct test been applied, Rooker-Feldman would ***not*** have barred Petitioner's action because her Complaint does ***not*** seek review of a state court judgment nor does it invite the federal court to overrule said judgment. Instead, it raises an independent federal claim seeking declaratory relief to acknowledge the already effective rescission. While a determination of the federal action may ultimately deny a legal conclusion that the state court has reached, this Court has expressly held that the federal court ***still has jurisdiction*** to address the claim. *Exxon Mobil*, 544 U.S. 280.

Failure to accept review of this Petition will result in the continued expansion of Rooker-Feldman by the Eleventh Circuit, an issue that this Court has previously determined to be significantly important as it overrides Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and supersedes the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738.

II. The lower court improperly applied federal *res judicata* law to dismiss the action.[2]

The district court decided this issue in contradiction to binding precedent from this Court which establishes that

2. The Eleventh Circuit did not pass upon this issue in its decision to affirm the district court. However, the United States Supreme Court has the power to decide even questions not raised or resolved by the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Here, this issue *was* resolved by the lower district court and thus this Court can decide the issue.

state *res judicata* law, rather than federal *res judicata* law applies. *See Semtek Intern. Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996).

Florida law requires four elements "for res judicata to be applicable to a case: '(1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the actions; and (4) identity of the quality or capacity of the persons for or against whom the claim is made.'" *Tyson v. Viacom, Inc.*, 890 So. 2d 1205, 1209 (Fla. 4th DCA 2005). In the current action, when applying the correct jurisdiction's law, *res judicata* is inapplicable as the first and second elements are not met.

III. State and Federal lower courts continue to apply a statute of limitation to a TILA rescission although no statute of limitations can apply for the simple reason that rescission is a completed event, not a claim. Additionally, despite this Court's unanimous decision in *Jesinoski*, the lower courts continue to require suit in order to effect a recession even though the statute calls for rescission *by operation of law*. [3]

Although this Court has already held that a TILA rescission pursuant to 15 U.S.C. §1635 is effected upon the mere sending of a rescission letter and requires no court action, the lower state and federal courts – especially the Florida Courts – continue to disregard effective rescission based on a one-year statute of limitations which does not apply to these rescissions.

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3. *Supra* Fn 2.

The Truth in Lending Act (TILA) provides special rescission rights for loans secured by a borrower's principal dwelling. 15 U.S.C. §1635(a). Section 1635(a) allows a borrower to rescind the loan within three business days of the consummation of the transaction. Section 1635(f) extends a borrower's right of rescission from three days to a maximum of three years if a material violation of the TILA occurs. 15 U.S.C §1635(f).[4]

The lender, upon receipt of the rescission letter has two options: 1) it can begin the unwinding process by returning borrower's down payment, which then triggers the borrower's obligation to return the property, or 2) it can file suit to contest the rescission. 15 U.S.C 1635(b).

Thus, as held by this Court, the act of sending a rescission letter triggers the automatic rescission of the loan by operation of law. *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015). In *Jesinoski*, this Court unambiguously held that:

> The language [of §1635(a)] leaves no doubt that **rescission *is* effected when the borrower notifies the creditor of his intention to rescind**. It follows that, so long as the borrower

4. In her Complaint, Zamore alleged a violation which triggered the three-year provision of §1635(f). The refinancing of the loan on January 30, 2007 is what started the three-year clock. Zamore's rescission letter was properly and timely sent October 22, 2009. None of this is at issue.

Instead, the District Court's dismissal was based on the erroneous finding that the statute of limitations barred the TILA rescission claim.

> notifies within three years after the transaction is consummated, his rescission is timely. **The statute does ***not*** also require him to sue within three years.**

Id. at 792 (emphasis added).

Despite this, the lower courts throughout the nation continue to erroneously impose a one-year statute of limitations – found in §1640(e) – to already effected rescissions. *See Cook v. Am. Home Mortgage Corp.*, 16-CV-81733, 2017 WL 1386347 (S.D. Fla. Apr. 17, 2017); *Bernstein v. Wells Fargo Bank, N.A.*, 693 Fed. Appx. 848 (11th Cir. 2017); *Hennington v. JPMorgan Chase Bank, N.A.*, 117CV03853MLBCMS, 2018 WL 4474642 (N.D. Ga. Apr. 10, 2018); *Jacques v. Chase Bank USA, N.A.*, CV 15-548-RGA, 2016 WL 423770, at *9 (D. Del. Feb. 3, 2016), *aff'd,* 668 Fed. Appx. 437 (3d Cir. 2016).

These Courts insist on a doctrine that interprets 15 U.S.C. §1635 to mean that there is a separate TILA *rescission action* or claim created by the plain language of §1635, which is then subject to a statute of limitations. But Petitioner did not seek to enforce the duties required by Respondent after notice of rescission was received. Instead, she sought a declaration of her rights under a statute which establishes that the event of the TILA rescission was completed.

This TILA rescission action is different from a *TILA damages action* under §1640(e), which includes the one-year statute of limitations. Stated another way, while claims ***for damages*** brought pursuant to §1635 violations are subject to a one-year statute of limitations, neither

§1635 nor §1640 addresses the statute of limitations for ***other types of claims***, such as rescission.

Some courts have acknowledged this difference, holding that "[a] debtor may seek both civil damages and rescission in the same action. *See* 15 U.S.C. §§ 1635(g), 1640(g)." *Gaytan v. Bank of New York Mellon*, CV1602421BROJEMX, 2017 WL 914707, at *4 (C.D. Cal. Mar. 6, 2017); *Paatalo v. JPMorgan Chase Bank*, 146 F. Supp. 3d 1239 (D. Or. 2015). But even courts that have acknowledged that TILA rescission does ***not*** contain a statute of limitations have judicially imposed a statute of limitations. *Hoang v. Bank of Am., N.A.*, 910 F.3d 1096 (9th Cir. 2018)(imposing the state's six-years contract statute of limitations.); *U.S. Bank Nat'l Ass'n v. Gerber*, 380 F. Supp. 3d 429, 438 (M.D. Pa. 2018)(imposing a one-year statute of limitations).

While *Jesinoski* is clear that rescission happens by operation of law, because *Jesinoski* did not specifically address the statute of limitations for bringing declaratory actions ***on already effective rescission***, the lower courts have used that distinction to refuse to acknowledge TILA rescissions, either outright or by judicially imposing a statute of limitations. The lack of clarity on this issue is creating divergent case law throughout the nation, making this issue ripe for the Court's review.

CONCLUSION

For these reasons states above, the petition should be granted.

DATED: July 24, 2019

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MARCH 25, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13635
Non-Argument Calendar

D.C. Docket No. 9:17-cv-80272-KAM

GALE ZAMORE,

Plaintiff - Appellant,

versus

DEUTSCHE BANK NATIONAL TRUST COMPANY, INDIVIDUALLY, AND AS TRUSTEE FOR JP MORGAN MORTGAGE ACQUISITION TRUST 2007-CH5 ASSET BACKED PASS-THROUGH CERTIFICATES SERIES 2007-CH5, SELECT PORTFOLIO SERVICING, INC.,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

March 25, 2019, Decided

Before ROSENBAUM, JILL PRYOR, and ANDERSON, Circuit Judges.

Appendix A

PER CURIAM:

Plaintiff Gale Zamore[1] filed a lawsuit against Defendants Deutsche Bank National Trust Company ("Deutsche Bank") and Select Portfolio Servicing, Inc. ("Select Portfolio"), seeking a declaration that her mortgage loan had been rescinded under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635. Based on a prior foreclosure action between the parties that resulted in a final judgment, the district court dismissed the lawsuit for lack of jurisdiction under the *Rooker-Feldman*[2] doctrine, which prevents federal courts from reviewing final state-court decisions. After careful review, we affirm.

I.

Zamore refinanced a mortgage loan in January 2007, and at that time, executed a promissory note in the amount of $246,000, which was secured by a mortgage in favor of the lender, Chase Bank USA, N.A. The note was later assigned to Deutsche Bank, which in August 2009 commenced foreclosure proceedings in state court. Around two months later, Zamore sent Deutsche Bank a notice that she was exercising her right to rescind the mortgage transaction under the TILA. Although the

1. We note that, based on the underlying mortgage documents in this case, the plaintiff's first name appears to be spelled "Gail," not "Gale." The plaintiff's counseled filings, however, appear undecided on the matter, switching back and forth between the two spellings.

2. *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923); *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1986).

notice was docketed in the state-court case, Zamore did not raise rescission as an affirmative defense, and it was not otherwise addressed by the state court. The state court entered a final judgment of foreclosure on May 29, 2013.

Zamore sought relief from the judgment in state court. She filed a motion to vacate the judgment, raising the issue of rescission. That motion was denied, and the denial was affirmed on appeal. It appears that Zamore also filed a *pro se* quiet-title action in July 2014, raising various claims. Her complaint was dismissed in October 2015, and the dismissal was affirmed on appeal.

In 2017, Zamore filed this action against Deutsche Bank and Select Portfolio. The complaint alleges two causes of action. Count I is a request for declaratory relief in the form of an order declaring that the mortgage loan had been rescinded as of 2009 pursuant to 15 U.S.C. § 1635(b). Count II alleges that the defendants are liable for damages based on the rescission.

Two weeks after filing suit, Zamore filed a motion for a temporary restraining order "to enjoin Deutsche's continued possession of the property, to return possession of the property to Petitioner, and to enjoin the Defendant from continuing to place the property on the market for sale or from selling the property pending the outcome of this action."

The defendants moved to dismiss the complaint on several grounds, including that Zamore's claims were

barred by the *Rooker-Feldman* doctrine. The district court agreed that *Rooker-Feldman* barred the action, stating that Zamore's purpose in filing the lawsuit was "to challenge the validity of the foreclosure proceedings, including the Final Judgment." The court further noted that Zamore had raised her rescission-based arguments in state court. Zamore now appeals.

II.

We review *de novo* the application of the *Rooker-Feldman* doctrine. *Lozman v. City of Riviera Beach, Fla.*, 713 F.3d 1066, 1069-70 (11th Cir. 2013). Broadly speaking, the *Rooker-Feldman* doctrine prevents federal district courts from reviewing state-court decisions. *Nicholson v. Shafe*, 558 F.3d 1266, 1270 (11th Cir. 2009). More precisely, it applies to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005).

Although *Rooker-Feldman* is a narrow doctrine, "a state court loser cannot avoid *Rooker-Feldman*'s bar by cleverly cloaking her pleadings in the cloth of a different claim." *May v. Morgan Cty., Ga.*, 878 F.3d 1001, 1004 (11th Cir. 2017). Even after *Exxon Mobil*, we have continued to apply the doctrine "both to federal claims raised in the state court and to those 'inextricably intertwined' with the state court's judgment." *Id.* at 1005 (quoting *Casale v. Tillman*, 558 F.3d 1258, 1260-61 (11th Cir. 2009)). "A claim is inextricably intertwined if it would effectively nullify

the state court judgment, or [if] it succeeds only to the extent that the state court wrongly decided the issues." *Casale*, 558 F.3d at 1260 (quotation marks omitted). The doctrine does not apply, however, where a party did not have a "reasonable opportunity" to raise her claim in the state proceeding. *Id.*

Here, the district court did not err by dismissing Zamore's complaint for lack of jurisdiction because the claims raised were "inextricably intertwined" with the state foreclosure judgment. The foreclosure judgment recognized that Zamore's debt to Deutsche Bank was valid and that Deutsche Bank was entitled to foreclose the property in question. Granting Zamore's current request for declaratory relief, in the form of an order stating that her mortgage loan was rescinded as of 2009, "would effectively nullify the state court judgment" granting foreclosure based on the validity of the debt. *Casale*, 558 F.3d at 1260. It is, therefore, barred by *Rooker-Feldman*.

Zamore's arguments to avoid the application of *Rooker-Feldman* are unpersuasive. She notes that rescission under the TILA was not raised or decided in the state foreclosure proceeding, but nothing in the record indicates that Zamore lacked a reasonable opportunity to raise that claim. *See id.* She was aware of such a claim as of October 2009, well before the judgment in May 2013, and she does not suggest that the state court could or would not have considered the claim. In fact, Zamore attempted to raise these arguments to the state courts, but it appears she did so too late. Arguments that were not offered to or were rejected by the state courts are not excepted from *Rooker-Feldman*'s grasp. *See id.* at 1261.

Zamore also contends that *Rooker-Feldman* does not apply because she did not expressly challenge the foreclosure judgment or request an order invalidating that judgment. But "[t]hough the federal case may not be styled as an appeal of a state court judgment, *Rooker-Feldman* is not so easily bypassed." *May*, 878 F.3d at 1005. And for the reasons explained above, the relief that Zamore did request—a declaration that the mortgage loan had been rescinded as of 2009—would effectively invalidate the foreclosure judgment. So Zamore's current claim, however phrased, is "inextricably intertwined" with the state court's judgment. *See id.* ("A claim that at its heart challenges the state court decision itself—and not the statute or law which underlies that decision—falls within the doctrine because it 'complain[s] of injuries caused by state-court judgments' and 'invite[s] . . . review and rejection of those judgments.'" (quoting *Exxon Mobil*, 544 U.S. at 284)).

For these reasons, the district court did not err in dismissing Zamore's complaint under the *Rooker-Feldman* doctrine. We therefore do not address the district court's alternative grounds for dismissal.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED JULY 26, 2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-80272-CIV-MARRA

GALE ZAMORE,

Plaintiff,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, INDIVIDUALLY AND AS TRUSTEE FOR JP MORGAN MORTGAGE ACQUISITION TRUST 2007-CH5 ASSET BACKED PASS-THROUGH CERTIFICATES SERIES 2007-CH5 AND SELECT PORTFOLIO SERVICING, INC.,

Defendants.

July 26, 2018, Decided;
July 26, 2018,
Entered on Docket

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss Plaintiff's Complaint [DE 10]. The Court has carefully considered the entire Court file and is otherwise fully advised in the premises. No reply was filed.

Appendix B

INTRODUCTION

This case arises out of allegations that Defendants[1] violated the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), through its implementing regulations, 12 C.F.R. § 226 *et seq.* ("Regulation Z").[2]

The Complaint alleges two causes of action. Count I is an action for "declaratory judgment" pursuant to TILA, on the basis that the subject mortgage, attached as Exhibit A to the Complaint (the "Mortgage"), has been rescinded pursuant to 15 U.S.C. § 1635(b) of TILA, through a Notice of Rescission, attached as Exhibit C to the Complaint. Count II alleges that Defendants are also liable for damages based on Plaintiff's rescission of the Mortgage.

Defendants argue that this Court lacks subject matter jurisdiction over Plaintiff's claims because the action is barred by the Rooker-Feldman doctrine; that the action is barred by *res judicata* due to the prior foreclosure action between the parties resulting in a final judgment; that this entire action is barred by the statute of limitations under TILA, and finally, that the claims against SPS must be dismissed because Plaintiff fails to allege facts establishing that SPS is a "creditor" under TILA.

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1. Deutsche Bank National Trust Co., individually, and as Trustee for JP Morgan Mortgage Acquisition Trust 2007-CH5 Asset Backed Pass-Through Certificates Series 2007-CH5 (the "Trust") and Select Portfolio Servicing, Inc. ("SPS") (together, "Defendants").

2. The Complaint also references unspecified violations of "RESPA" (¶ 2(c)), but no such claims are alleged in the Complaint.

Appendix B

BACKGROUND

Plaintiff's Complaint alleges that the Mortgage and Note, attached to the Complaint as Exhibits A and B respectively, are "terminated, released, void, and invalid" due to the Notice of Rescission dated November 10, 2009. Compl. ¶ 49, Ex. C. The Mortgage at issue has already been foreclosed in a prior state court foreclosure case between the Trust and Plaintiff: Palm Beach County Case *No.* 50-2009-CA-027593 (the "Foreclosure Action").[3] On May 19, 2013, the state court entered a Final Judgment of Foreclosure entered in favor of the Trust (the "Final Judgment"), which is attached to the Motion to Dismiss as Exhibit A.[4] Accordingly, the Mortgage

3. Plaintiff references the prior Foreclosure Action in her Complaint by, among other things, attaching as Exhibit C the Notice of Rescission she filed in that prior Foreclosure Action.

4. This Court is free to take judicial notice of public records without converting a motion to dismiss into a motion for summary judgment. *Universal Express, Inc. v. U.S. S.E.C.*, 177 F.App'x 52, 53-54 (11th Cir. 2006). In considering a motion to dismiss, this Court may, and does in this case, take judicial notice of the public record filings in the Foreclosure Action that is referenced in the Complaint. *See, e.g., Krauser v. Evollution IP Holdings, Inc.*, 975 F. Supp. 2d 1247, 1251-52 (S.D. Fla. 2013) (Marra, J.) (taking judicial notice of pleadings and documents in previously filed action for purposes of evaluating motion to dismiss based on *res judicata*); *Myrtyl v. Nationstar Mortg. LLC*, Case No. 15-CIV-61206, 2015 U.S. Dist. LEXIS 87199, 2015 WL 4077376, at *1 (S.D. Fla. July 6, 2015) (citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999)); *Mavrovich v. Vanderpool*, 427 F. Supp. 2d 1084 (D. Kan. 2006) ("Because plaintiff made reference in his Complaint to the previous cases in which he litigated this controversy, the Court will

that Plaintiff seeks to "void" has already merged into the Final Judgment, which is specifically referenced and attacked in Plaintiff's Complaint. *See, e.g.*, Compl. ¶ 4 (alleging that the Foreclosure Action "resulted in an irregular and wrongful forced foreclosure sale and writ of possession"), ¶ 5 ("Defendants are attempting to enforce contractual obligations in a foreclosure and the consumer is in an affirmative or defensive position asserting a rescission claim"), ¶ 65 ("Defendants have proceeded to . . . unlawfully initiate and continue a state foreclosure proceeding by posting a sale date and taking possession of the property through eviction.").

Because the Mortgage has already been foreclosed, the purpose of this case is to challenge the validity of the foreclosure proceedings, including the Final Judgment. Indeed, upon filing this case, Plaintiff also filed a Notice of Lis Pendens in the Foreclosure Action, stating the following:

> 1. YOU ARE HEREBY NOTIFIED that on March, 03, 2017 a Complaint for Rescission, Emergency Restraining Order, Damages,

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reference the documents and orders pertaining to his state litigation in analyzing whether his claims are barred by *res judicata*.").

All references to documents filed in the Foreclosure Act are taken from the Palm Beach County Circuit Court public record. The case docket may be accessed at https://applications.mypalmbeachclerk.com and searching the court record by entering case no. 2009CA027593 for the Foreclosure Action, or case no. 2014CA 008272 for the Quiet Title Action, and entering Plaintiff's last name (Zamore).

Appendix B

> Judicial Notice, Statutory Relief and Jury Trial was filed with The United States District Court, Southern District of Florida, Case No 9:17CV80272, by the Defendant, GAIL ZAMORE, *which seeks to set aside, invalidate or challenge the Final Judgment of Foreclosure entered on May 29, 2013* recorded in book 26062 on page 1573, in the Official Records of Palm Beach County, Florida, and all post-judgment orders in this action.
>
> 2. The property subject to the Complaint for Rescission, Emergency Restraining Order, Damages, Judicial Notice, Statutory Relief and Jury Trial is that certain parcel, lot or unit, lying in Palm Beach County, Florida, as set forth in said Final Judgment of Foreclosure and particularly described as follows: [setting forth the legal description and address of the subject property].

See Foreclosure Action DE 188; DE 10, Exhibit ("Ex.") B (emphasis added).

Then, on March 19, 2017, Plaintiff filed in this case a motion for a temporary restraining order, requesting that this Court enjoin the ongoing enforcement of the state court Foreclosure Judgment, the continuing execution of the state court writ of possession, and the continued possession and marketing for sale of the property by the Trust.[5] The following day, on March 20, 2017, this Court

5. Pursuant to the Foreclosure Judgment, the foreclosure sale took place on July 3, 2013, and the Trust was the successful bidder

entered an Order, *sua sponte*, denying that motion, explaining:

> The Anti-Injunction Act, 28 U.S.C. § 2283 states, "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Plaintiff's motion requests the precise type of injunctive relief in violation of this statute.

DE 8 at 1.

This is also not the first time Plaintiff has raised these alleged TILA violations against the Trust. Plaintiff filed her Notice of Rescission in the Foreclosure Action on November 10, 2009. Compl. Ex. C. On July 10, 2013, Plaintiff filed a "Motion to Vacate Sale Held on July 03, 2013, Grounded that Mortgage Has Been Rescinded," which contained nearly identical arguments as Plaintiff makes in the instant Complaint. ("Motion to Vacate") Foreclosure Action, DE 62. That motion elaborated on the

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at the sale. Foreclosure Action, DE 59. Although Plaintiff continued to oppose the foreclosure proceedings, a Certificate of Sale was issued to the Trust on July 3, 2013 (*id.*), a Certificate of Title was issued in favor of the Trust on November 13, 2014 (DE 129), and a Writ of Possession was issued to the Trust on March 1, 2017 (DE 183), prompting the immediate filing of this Complaint in an effort to avoid dispossession from the property and cloud the Trust's title to the property.

alleged TILA violations and argued that ". . . the Court erred when it granted Plaintiff's Motion for Summary Judgment despite the Rescission . . ." Foreclosure Action, DE 62, ¶ 11. That motion was denied on July 17, 2013, in an order that specifically referenced Plaintiff's claim for rescission. Foreclosure Action, DE 65.

Then there was a hearing on Plaintiff's Motion to Vacate on May 23, 2014. Foreclosure Action, DE 160. The transcript reveals that Plaintiff's rescission claim was never asserted as an affirmative defense in the Answer, and the Motion to Vacate was denied because "the defense was waived and any errors [were] just subsumed in the judgment." *Id.* at 16, 24, 25. Plaintiff then appealed to the Fourth District Court of Appeal. The decision of the Circuit Court was per curiam affirmed in *Zamore v. Deutsche Bank Nat. Trust. Co.*, 210 So. 3d 1295 (Table), 2016 WL 1614392 (Fla. Dist. Ct. App. 2016). Accordingly, that decision is now final.

This is also not the first lawsuit that Plaintiff has filed against the Trust based on alleged TILA violations. On July 7, 2014, Plaintiff filed a Verified Complaint to Quiet Title in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Case No. 50-2014-CA 008272 ("Quiet Title Action") DE 5. Plaintiff's Second Amended Complaint, filed February 10, 2015, was based, in part, on the same alleged TILA violations at issue here. Quiet Title Action, DE 41, ¶¶ 14-17. The Circuit Court granted Defendants' Motion to Dismiss on June 23, 2015. Quiet Title Action, DE 63. That dismissal order was then appealed to the Fourth District Court of Appeal and per

curiam affirmed in *Zamore v. Deutsche Bank Nat. Trust. Co.*, 205 So. 3d 611 (Table), 2016 WL 6826528 (Fla. Dist. Ct. App. Nov. 17, 2016). That dismissal is now final.

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Wilchombe v. Tee Vee Toons, Inc.*, 555 F.3d 949, 958 (11th Cir. 2009) (citing *Twombly*, 550 U.S. at 555). Moreover, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . ." *Twombly*, 550 U.S. at 555.

DISCUSSION

A. The Rooker-Feldman Doctrine

The United States Supreme Court has made it clear that federal courts are not empowered to overrule legitimate decisions made by state courts. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 68

L. Ed. 362 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462,476-82, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) ("Rooker-Feldman"). Rooker-Feldman limits the subject matter jurisdiction of federal district courts and courts of appeal over certain matters related to previous state court litigation. *Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001). Specifically, Rooker-Feldman "precludes lower federal court jurisdiction over claims seeking review of state court judgments . . . no matter how erroneous or unconstitutional the state court judgment may be." *Brokaw v. Weaver*, 305 F.3d 660, 664 (7th Cir. 2002) (citing *Remer v. Burlington Area Sch. Dist.*, 205 F.3d 990, 996 (7th Cir. 2000)).

The Eleventh Circuit has "delineat[ed] the boundaries of the Rooker-Feldman Doctrine [to include]: 'cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" *Nicholson v. Shafe*, 558 F.3d 1266, 1274 (11th Cir. 2009) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)).

Rooker-Feldman applies even when the claim was not argued in state court. *Liedel v. Juvenile Court of Madison Cnty.*, 891 F.2d 1542, 1545 (11th Cir. 1990). Although the Eleventh Circuit has recognized an exception to Rooker-Feldman when the party did not have a "reasonable opportunity" to raise their federal claims in state court, that exception only applies when the plaintiff did not have notice and, as a result, did not participate in the

state court proceedings that he seeks to collaterally attack in federal court. *Wood v. Orange Cnty.*, 715 F.2d 1543, 1547-48 (11th Cir. 1983) (finding that because of the lack of notice and the inability to participate in the state proceedings, the plaintiffs did not have a "reasonable opportunity" to assert their claims and therefore, their claims were not "inextricably intertwined"). Such an exception is not applicable here as the record abundantly shows that Plaintiff's claim of rescission was presented and rejected during the state court proceeding. As discussed at length in the Background section of this Order, the subject of the instant Complaint was raised and rejected on multiple occasions by the state court in both the Foreclosure Action and in the Quiet Title Action. For this reason, this Court is without jurisdiction to reconsider the foreclosure court's ruling denying Plaintiff's motion to enforce her rescission as to the Trust.[6] Moreover, even if this Court had jurisdiction over the Trust, there are two other reasons why the Complaint in this matter should be dismissed.

B. Defendant SPS

Defendant SPS, the loan servicer for the Mortgage, cannot be sued under TILA because it is not a "creditor." Only creditors and assignees are subject to liability under TILA. *See* 15 U.S.C. §§ 1640, 1641(a); *Ward v. Security*

6. Since the other defendant in this matter, SPS, was not a named defendant in any of the prior state court lawsuits, the Rooker-Feldman doctrine does not apply to SPS. However, the Court concludes that SPS is due to be dismissed with prejudice as it is not a creditor under TILA. *See* 15 U.S.C. §§ 1640, 1641(a).

Atlantic Mortg. Electronic Registration Systems, Inc., 858 F. Supp. 2d 561, 566-67 (E.D. N.C. 2012).

A creditor under TILA is the person to whom the debt is initially payable on the face of the evidence of indebtedness. 15 U.S.C. § 1602(g). An assignee of the debt may also be held liable under TILA if the violation is apparent on the face of the disclosure statement. 15 U.S.C. § 1641. However, a servicer of a consumer obligation is expressly not liable under TILA, unless the servicer is also the owner of the obligation. 15 U.S.C. § 1641(f)(1).

Under TILA, a servicer is the entity responsible for receiving any scheduled periodic payments from a borrower pursuant to the terms of the loan. 15 U.S.C. §1641(f)(3); 12 U.S.C. § 2605(i)(2). Defendants are correct that SPS does not qualify as a creditor as defined by 15 U.S.C. § 1602(g) and 12 C.F.R. § 226.2(a)(17), as the Complaint contains no allegations or inference that SPS was the entity to whom the debt was originally payable. Not only does Plaintiff fail to allege that SPS is the initial owner of the Mortgage, or a later assignee[7] of the Mortgage, but Plaintiff affirmatively alleges and recognizes that "Defendant SPS is a mortgage servicing company headquartered in the State of Utah." Comp. ¶ 9.

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7. TILA expressly provides that a servicer—a person responsible for receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, 15 U.S.C. § 1641(f)(3); 12 U.S.C. § 2605(i)(2)-(3)—is not to be treated as an assignee "unless the servicer is or was the owner of the obligation." 15 U.S.C. § 1641(f)(1). Plaintiff's Complaint contains no factual allegations as to SPS's former or present ownership of Plaintiff's loan.

The Mortgage is clear that "Lender is Chase Bank USA, N.A." Compl., Ex. A at 1. The Mortgage was then assigned to the Trust. *See* Compl. Ex. A (Foreclosure Judgment); Compl. ¶ 8. SPS clearly was never a "creditor." Because SPS is a loan servicer, and not a "creditor" or "assignee" under TILA, the claims against SPS must be dismissed with prejudice.

C. Res Judicata

Regarding res judicata, the Eleventh Circuit has held that,

> [a]s a general rule, res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding. A party asserting res judicata bears the burden of showing these elements: (1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action. Only if all four of those requirements are met do we consider whether the claim in the new suit was or could have been raised in the prior action; if the answer is yes, res judicata applies.

Dormescar v. U.S. Atty. Gen., 690 F.3d 1258, 1268 (11th Cir. 2012) (citations, quotations, and notes omitted); *see also Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 892-93 (11th Cir. 2013) (comparing complaints from two separate

cases to determine whether the same facts were involved for purposes of res judicata and ultimately affirming district court's dismissal under Rule 12(b)(6)); *Krauser v. Evollution IP Holdings, Inc.*, 975 F. Supp. 2d 1247, 1252-53 (S.D. Fla. 2013) (Marra, J.).

The Foreclosure Judgment was a final judgment on the merits rendered by the Fifteenth Judicial Circuit of Florida, and both cases arise out of the same nucleus of operative facts. Indeed, this action attempts to invalidate the same Mortgage and Final Judgment that were the subject of the prior Foreclosure Action. Since the claim against SPS is being dismissed, there is mutuality of the parties between Plaintiff and the Trust. Accordingly, all of the elements of res judicata are present as between Plaintiff and the Trust. If the Court had jurisdiction to entertain this case against the Trust, res judicata would bar prosecution it against the Trust. *See* 46 Am. Jur. 2d Judgments § 556 (2018).

D. Statute of Limitations

In *Cook v. American Home Mortgage Corp.*, *No.* 16-CV-81733-MIDDLEBROOKS, 2017 U.S. Dist. LEXIS 58209, 2017 WL 1386347 at *3 (S.D. Fla. Apr. 17, 2017), this Court closely analyzed the statute of limitations applicable to claims for rescission and damages under TILA. In *Cook*, the mortgage transaction occurred on October 3, 2006, and the borrower mailed a notice of rescission to the creditor on October 2, 2009 — just within the three year period for providing notice of the claimed rescission. *See Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct.

790, 190 L. Ed. 2d 650 (2015). Then, seven years later in 2016, the borrower filed a lawsuit based on the claimed rescission and contended that the statute of limitations did not bar the claim because he mailed the notice of rescission within the initial three year period. The Court rejected the borrower's argument, finding it contrary to the strict statute of limitations built into TILA:

> Defendants argue that those claims are foreclosed by TILA's statute of limitations. TILA establishes a window of "one year from the date of the occurrence of the violation" for a potential plaintiff to bring suit. 15 U.S.C. § 1640(e). Plaintiff's Complaint and Response cite *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S.Ct. 790, 190 L. Ed. 2d 650 (2015), for the proposition that a borrower has three years from the date the transaction occurred to timely rescind a credit transaction. But at most, *Jesinoski* moved back by three years the date that a violation under TILA accrued. The accrual period is not the same as the statute of limitations period. An action under TILA must still be filed within one year of a violation's occurrence. Since Plaintiff mailed a notice of rescission on October 2, 2009, Defendants' violation arguably occurred as late as October 23, 2009—the day the 20 day window for a lender to respond to a rescission notice closed, 15 U.S.C. § 1635(b). Even under that scenario, Plaintiff needed to file a complaint by October 23, 2010 to satisfy TILA's statute of limitations.

> He did not do so. Accordingly, his TILA claim, and therefore also his DJA [Declaratory Judgment Act] action, is time-barred.

Cook, 2017 U.S. Dist. LEXIS 58209, 2017 WL 1386347 at *3; *see also, e.g., Fendon v. Bank of America, N.A.*, *No.* 16C3531, 2017 U.S. Dist. LEXIS 33236, 2017 WL 914782, at *4 (N.D. Ill. Mar. 8, 2017) ("The fact that a consumer provides a timely notice of rescission does not mean that he has an indefinite period in which he can sue to enforce his rescission right... The court agrees with other courts in this district who have concluded that TILA's one-year limitations period for damages actions applies to suits seeking enforcement of rescission."); *Taylor v. Wells Fargo Bank, N.A.*, 85 F. Supp. 3d 63, 77 n.5 (D.D.C. Mar. 25, 2016) ("Even assuming Plaintiff exercised his right to rescission within the statutory three-year period, Plaintiff would have had to file his TILA rescission claim in district court by January 7, 2011, at the latest in order for his claim not to be time-barred under the statute of limitations set forth in 15 U.S.C. § 1640(e)".).

The same outcome would be required here. The Mortgage transaction at issue occurred on January 30, 2007. Compl. Ex. A. The Notice of Rescission was sent on October 22, 2009, Compl. Ex. C, meaning that the twenty day window for the Trust to respond would have ended on November 11, 2009, the date of the alleged violation under TILA. Accordingly, Plaintiff was permitted to file these claims up until November 11, 2010, 15 U.S.C. § 1640(e), which was more than six years before this case was filed. As such, Plaintiff's Complaint — alleging the same types

of claims for rescission and damages that were at issue in *Cook* — would be barred by the statute of limitations.

CONCLUSION

Plaintiff's Complaint must be dismissed in its entirety, for multiple independent reasons. First, the claims against SPS must be dismissed because Plaintiff has not alleged any facts establishing that SPS could be held liable under TILA. As for the claims against the Trust, this Court lacks subject matter jurisdiction to review the state court Final Judgment under the Rooker-Feldman doctrine, which is exactly what Plaintiff is requesting from this Court. Even if the Court had subject matter jurisdiction of the claims against the Trust, res judicata would bar Plaintiff from re-litigating these TILA claims. Finally, the Court would find that Plaintiff's claims must also be dismissed because they are barred by the statute of limitations, having been filed more than six years after the limitations period expired.

Although leave to amend the pleadings should be freely granted when justice so requires, a court may deny a motion to amend if such amendment would be futile. *Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 (11th Cir. 2010); *Kean v. Board of Trustees of the Three Rivers Regional Library System*, 321 F.R.D. 448 (S.D. Ga. 2017). Any proposed amendment in this case would be futile because it would fail as a matter of law as discussed above. Moreover, no request to amend has been made. *See Wagner v. Daewoo Heavy Industries America Corp.*, 314 F.3d 541, 542 (11th Cir. 2002)("A district court is not required to grant a plaintiff leave to amend his complaint

sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.").

In accordance with the conclusions and rulings made herein, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss Plaintiff's Complaint [DE 10] is granted in its entirety. Plaintiff's Complaint is dismissed with prejudice. In accordance with Fed. R. Civ. P. 58, final judgment will be entered by separate order. Any pending motions are denied as moot. This case is closed.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 26th day of July, 2018.

/s/ Kenneth A. Marra
KENNETH A. MARRA
United States District Judge