No. _____

In the
Supreme Court of the United States

TIMOTHY BARNES,
Petitioner,

v.

CHASE HOME FINANCE, LLC; CHASE BANK USA, N.A., a subsidiary of JP Morgan Chase & Co.; IBM LENDER BUSINESS PROCESS SERVICES, INC.; and FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Respondents.

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

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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[FILED AUGUST 14, 2019]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35616

D.C. No. 3:11-cv-00142-PK

OPINION

TIMOTHY BARNES,

Plaintiff-Appellant,

v.

CHASE HOME FINANCE, LLC, a Delaware corporation; CHASE BANK USA, N.A., a subsidiary of JP Morgan Chase & Co., a Delaware corporation; IBM LENDER BUSINESS PROCESS SERVICES, INC., a Delaware corporation; FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants-Appellees.

Appeal from the United States District Court
For the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted July 9, 2019
Seattle, Washington

Filed August 14, 2019

Before: Paul J. Watford and Eric D. Miller, Circuit Judges, and Barbara Jacobs Rothstein,* District Judge.

Opinion by Judge Rothstein

SUMMARY**

Truth in Lending Act

The panel affirmed the district court's grant of summary judgment in favor of the defendants in an action brought under the Truth in Lending Act.

The panel held that, on remand following a prior appeal, the district court properly considered defendants' new argument that plaintiff had no right of rescission under TILA because his loan was a residential mortgage transaction under 15 U.S.C. § 1635(e)(1). The panel held that the argument was not waived because a defendant need not raise every possible argument in a motion for summary judgment and may make a different argument on remand if a grant of summary judgment in its favor is reversed on appeal. In addition, neither the law of the case nor the mandate in the prior appeal barred the district court from addressing defendants' new argument.

The panel affirmed the district court's conclusion that plaintiff's loan was a residential mortgage

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* The Honorable Barbara Jacobs Rothstein, United States District Judge for the Western District of Washington, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

transaction to which the right of rescission under TILA does not apply. A residential mortgage transaction is defined as "a transaction in which a mortgage . . . is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." Plaintiff previously had quitclaimed his interest in the property at issue to his then-wife, and he obtained the mortgage loan and took title to the property in compliance with a divorce judgment. The panel held that the statutory definition of a residential mortgage transaction includes both an initial acquisition and a reacquisition of a property. Assuming without deciding that plaintiff gained an interest in the property by operation of state law upon the filing of the marital dissolution petition, the panel held that he did not "acquire" this interest for purposes of TILA's residential mortgage transaction provision. The panel rejected plaintiff's arguments that (1) the language used in the loan documents showed that he already owned an interest in the property before he took out the loan, and (2) he took out the mortgage to comply with the divorce judgment, and not to finance his acquisition of the property.

COUNSEL

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Lance E. Olsen (argued), McCarthy Holthus LLP, Seattle, Washington; John M. Thomas, McCarthy Holthus LLP, Portland, Oregon, for Defendants-Appellees IBM Lender Business Process Services Inc., and Federal National Mortgage Association.

OPINION

ROTHSTEIN, Senior District Judge:

Timothy Barnes appeals the district court's grant of summary judgment in favor of defendants in his action under the Truth in Lending Act ("TILA"), seeking rescission of a mortgage as well as damages and declaratory and injunctive relief. In a prior appeal, we held that Barnes gave proper, timely notice of rescission under TILA, and we vacated the district court's judgment and remanded for further proceedings. *Barnes v. Chase Home Fin., LLC*, 701 F. App'x 673, 674–75 (9th Cir. 2017) (unpublished memorandum disposition). On remand, the district court granted summary judgment on a different ground, concluding that Barnes had no right of rescission under TILA because his loan was a residential mortgage transaction under 15 U.S.C. § 1635(e)(1).

We conclude that the district court properly considered defendants' new argument on remand and properly granted summary judgment because Barnes obtained the mortgage in order to reacquire a residential property in which his prior ownership interest had been extinguished; thus, the right of rescission did not apply. We therefore affirm the district court's judgment.

FACTUAL BACKGROUND

Timothy Barnes and his now ex-wife obtained title to the property in question in 1990. In 1997, the wife transferred title to the property to Barnes by quitclaim deed. In 2003, Barnes quitclaimed the property back to his wife. She then encumbered the property with a series of deeds of trust, listing her as the sole borrower.

The couple divorced in 2007. The divorce judgment, dated September 12, 2007, provided for a money judgment of $100,000.00 to be entered in favor of the wife and against Barnes. The divorce judgment further provided as follows:

> **The Family Residence** Husband is awarded the real property located at . . . Greenwood Road . . . free of all right, title and interest of Wife thereto, and subject to the encumbrance of record owing thereon which Husband shall pay, indemnify and hold Wife harmless therefrom. Husband shall immediately refinance the mortgage owing on said property in order to remove Wife's name from said financial obligation. Wife shall cooperate in signing any documents necessary in order to accomplish this purpose. Title to said property shall not transfer until the money judgment provided in paragraph 5.11 is paid in full and Wife shall be required to submit an executed Bargain and Sale Deed to any escrow which Husband establishes for the payment of said judgment.

On November 15, 2007, Barnes obtained the loan at issue, signing a balloon note with defendant Chase Bank USA, N.A. ("CBUSA") for $378,250.00. On the same date, he executed a deed of trust securing the note on the property. According to a

statement of First American Title Insurance Company of Oregon, Barnes used $254,438.92 of the loan funds to pay off his ex-wife's outstanding loan balance, and he paid $100,000.00 to her to satisfy the money judgment provided for in the divorce judgment. The ex-wife conveyed title to the property to Barnes via a Statutory Special Warranty Deed, signed on November 16 and recorded on November 20, 2007. Barnes married his current spouse in September 2008, and they reside on the property.

PROCEDURAL HISTORY

Barnes, appearing pro se, filed suit against Chase Home Finance, LLC ("CHF"); CBUSA; IBM Lender Business Process Services, Inc. ("LBPS"); and Federal National Mortgage Association ("Fannie Mae"), seeking rescission of the November 2007 mortgage loan and other relief. The district court dismissed Barnes's claim for rescission as time-barred, and it granted summary judgment on his claims for declaratory and injunctive relief and damages. We vacated the district court's judgment and remanded, holding that Barnes's letter to CHF, a loan servicer, gave proper, timely notice of rescission to his creditor, CBUSA, within three years of the loan transaction under 15 U.S.C. § 1635(a) and (f).

On remand, the district court granted summary judgment in favor of defendants, holding that Barnes had no statutory right under TILA to rescind the 2007 mortgage, and no statutory right of disclosure of any such right of rescission, because the loan was secured by Barnes's residence and thus was a residential mortgage transaction. The district court concluded that, although Barnes had a partial interest in the property from 1990 to 1997 and was

the sole owner from 1997 to 2003, his interest in the property was fully extinguished in 2003 when he conveyed the entirety of his interest to his wife via quitclaim deed. The district court further found that, "pursuant to his obligations under the 2007 Dissolution of Marriage, Barnes entered into the 2007 Balloon Note loan transaction specifically in order to acquire ownership interest in the property (for the second time)." "The 2007 Balloon Note was secured by the property . . . , and the property was thereafter Barnes' place of residence . . . . The necessary implication is that the 2007 Balloon Note was a residential mortgage transaction as to which TILA provides no statutory right of rescission." The district court held that, under the plain language of 15 § 1602(x), in which the word "construction," but not the word "acquisition," is modified by the term "initial," Barnes's prior ownership interest in the property did not preclude characterization of the 2007 loan as a residential mortgage transaction. The district court concluded that the Official Staff Interpretations to Regulation Z, 12 C.F.R. Pt. 226, Supp. I, Subpt. A § 226.2(a)(24)–(5)(i) & (ii), was not to the contrary because it applied only to a situation in which a borrower increases an existing ownership interest using loan proceeds. *See* 12 C.F.R. Pt. 226, Supp. I, Subpt. A § 226.2(a)(24)–(5)(i) (the term residential mortgage transaction "does not include a transaction involving a consumer's principal dwelling if the consumer had previously purchased and acquired some interest to the dwelling, even though the consumer had not acquired full legal title"). The district court rejected Barnes's arguments that, pursuant to the September 2007 divorce judgment, he enjoyed some degree of interest

in the property prior to entering into the 2007 Balloon Note; that the 2007 Balloon Note was not a residential mortgage transaction because the loan documents refer to the transaction as a refinancing and refer to Barnes as the titleholder of the property; and that the Chase defendants were estopped from denying that he enjoyed a statutory right of rescission because they provided him with notice of his right to rescind.

DISCUSSION

Standard of Review

"We review the grant of summary judgment de novo, viewing the evidence and drawing all reasonable inferences in the light most favorable to the non-moving party." *Edwards v. Wells Fargo & Co.*, 606 F.3d 555, 557 (9th Cir. 2010). "Summary judgment is proper if the pleadings and other evidence before the court 'show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56).

Scope of District Court's Authority on Remand

Barnes argues that the issue whether his loan was a residential mortgage transaction, to which the right of rescission did not apply, was not properly before the district court on remand because defendants waived the issue by failing to raise it until after the prior appeal, and because defendants' argument was barred by law of the case and this court's mandate in the prior appeal. We disagree. The issue was not waived as a defendant need not raise every possible argument in a motion for summary judgment and may make a different

argument on remand if a grant of summary judgment in its favor is reversed on appeal. *See* Fed. R. Civ. P. 56(a) (providing that a party may move for partial summary judgment); *Biel v. St. James Sch.*, 911 F.3d 603, 611 n.6 (9th Cir. 2019) (reversing grant of summary judgment to defendant on the basis of the ministerial exception to employment laws, including the Americans with Disabilities Act, and noting that, on remand, defendant could make a different argument).

Further, neither law of the case nor the mandate on appeal barred the district court from addressing defendants' residential mortgage transaction argument. *See Rocky Mtn. Farmers Union v. Corey*, 913 F.3d 940, 951 (9th Cir. 2019) (law of the case doctrine); *Edgerly v. City & Cty. of S.F.*, 713 F.3d 976, 985 (9th Cir. 2013) (rule of mandate). In Barnes's prior appeal, we held that Barnes's letter to CHF provided sufficient notice to CBUSA that he was exercising his right to rescind, and the district court therefore erred in dismissing Barnes's claims for rescission and failure to effect rescission on the ground of improper notice. *Barnes*, 701 F. App'x at 674–75. In so holding, we did not rule that Barnes had an otherwise valid right to rescind. As the district court concluded on remand, it was not law of the case, under our decision in the prior appeal, that the remedy of rescission necessarily remained available to Barnes as a matter of law, and we "neither expressly nor impliedly found that Barnes had a right of rescission to exercise in the first instance." Rather, both the district court's prior analysis and this court's analysis "were premised on the assumption that Barnes enjoyed such a right of rescission, and it remain[ed] an open legal question

whether that assumption was accurate under the applicable circumstances."

Grant of Summary Judgment

The parties agree TILA provides that the right of rescission does not apply to a "residential mortgage transaction." 15 U.S.C. § 1635(e)(1); 12 C.F.R. § 226.23(f)(1); *see Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1029 n.7 (9th Cir. 2014); *see also Dunn v. Bank of Am., N.A.*, 844 F.3d 1002, 1005 (8th Cir. 2017) (applying § 1635(e)(1)). What the parties dispute is whether Barnes's mortgage transaction is a residential mortgage as to which there is no right of rescission, or whether Barnes had a prior interest in the property that made the transaction a refinance as to which a right of rescission was available. A "residential mortgage transaction" is defined as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(x).

A. The District Court Properly Construed the Statutory and Regulatory Text to Include in the Definition of a Residential Mortgage Transaction a Transaction in Which a Consumer Reacquires a Property.

The district court did not improperly construe TILA's right of rescission against Barnes in ruling that § 1602(x)'s definition of a residential mortgage transaction includes both an initial acquisition and a reacquisition of a property. As the district court

concluded, the statutory and regulatory text is unambiguous. *See Comcast of Sacramento I, LLC v. Sacramento Metro. Cable Television Comm'n*, 923 F.3d 1163, 1171 (9th Cir. 2019) (inquiry into meaning of unambiguous statutory text is limited to the text itself). In § 1602(x), the word "initial" modifies only the word "construction." 15 U.S.C. § 1602(x) (defining residential mortgage transaction as transaction in which mortgage is created "to finance the acquisition or initial construction of such dwelling"). Thus, under the plain language of the statute, a residential mortgage transaction is one in which the mortgage is created to finance either (1) the initial construction of the dwelling or (2) any acquisition or reacquisition of the dwelling. *See In re Bestrom*, 114 F.3d 741, 744–46 (8th Cir. 1997) (holding that TILA right of rescission did not apply where purchaser reacquired property after foreclosure sale).

The district court also correctly concluded that the language of the Official Staff Interpretations to Regulation Z—providing that a residential mortgage transaction does not include a transaction where a borrower had previously acquired an interest in a property—unambiguously refers to a situation in which the borrower increases an existing ownership interest using loan proceeds, rather than a situation in which the borrower reacquires a property in which he had given up all ownership interest. 12 C.F.R. Pt. 226, Supp. I, Subpt. A § 226.2(a)(24)–(5)(i) (the term residential mortgage transaction "does not include a transaction involving a consumer's principal dwelling if the consumer had previously purchased and acquired some interest to the dwelling, even though the consumer had not

acquired full legal title"). As the district court reasoned, the examples provided in the Official Staff Interpretation support this interpretation. *See* 12 C.F.R. Pt. 226, Supp. I, Subpt. A § 226.2(a)(24)–(5)(ii) (there is not a residential mortgage transaction when the borrower finances a balloon payment due under a land sale contract or when an extension of credit is made to a joint owner to buy out another joint owner's interest).

Accordingly, the Official Staff Interpretation does not contradict the conclusion that a borrower who obtains a mortgage to reacquire a residential property in which he has retained no interest is conducting a residential mortgage transaction to which the TILA right of rescission does not apply. The "refinance" ordered by Barnes's divorce judgment was not the kind of mortgage addressed by the regulation—a loan taken out by someone who already owns the property—rather, it was a "refinance" to pay off Barnes's ex-wife's outstanding mortgage so as to make it possible for him to acquire the property in his own right.

B. The District Court Correctly Concluded That Barnes Reacquired the Property in 2007 Because Barnes Did Not Previously Purchase and Acquire an Interest in the Property.

Barnes argues that the 2003 quitclaim deed does not establish his subsequent lack of any ownership interest in the property because, once in divorce court, the property took on communal attributes. While Oregon is a separate property state in which "a spouse may hold property solely in his or her own name," *Nay v. Dep't of Human Servs.*, 385 P.3d 1001,

1011 (Or. 2016) (citing Or. Const., Art. XV, § 5), Barnes contends that in an Oregon marital dissolution proceeding, marital assets are defined as property obtained during the marriage by either spouse, and "there is a rebuttable presumption that both parties contributed equally to the acquisition of those assets," *id.* at 1012 (citing Or. Rev. Stat. § 107.105(1)(f)). Oregon law further provides as follows: "Subsequent to the filing of a petition for . . . dissolution of marriage . . . , the rights of the parties in the marital assets shall be considered a species of co- ownership, and a transfer of marital assets under a judgment of dissolution of marriage . . . shall be considered a partitioning of jointly owned property." Or. Rev. Stat. § 107.105(1)(f)(E); *see Matter of Marriage of Johnson*, 380 P.3d 983, 993 (Or. Ct. App. 2016) (spouses ought to be entitled to approve or disapprove disposition of marital assets held as "a species of co-ownership"). Thus, according to Barnes, upon the filing of the petition for the dissolution of the marriage of Barnes and his ex-wife, at some time prior to September 2007, Barnes acquired a "species of co- ownership" in the property, a marital asset that he had quitclaimed to his then-wife in 2003.

Assuming without deciding that this is correct, and Barnes gained an interest in the property by operation of Oregon law upon the filing of the marital dissolution petition, we nevertheless conclude that Barnes did not "acquire" this interest for purposes of TILA's "residential mortgage transaction" provision. *See* 15 U.S.C. § 1602(x) (defining residential mortgage transaction as transaction in which mortgage is created "to finance the acquisition or initial construction of such dwelling"). The Official Staff Interpretations

recognize that some types of prior interests may change the substance of an acquisition to something more akin to a refinance, but that exception applies only where the prior interest was "previously purchased and acquired" before the transaction at issue. 12 C.F.R. Pt. 226, Supp. I, Subpt. A 226.2(a)924)–(5)(i) (emphasis added). Barnes does not dispute that he did not "purchase" any interest that might have arisen by operation of Oregon dissolution proceedings.

Barnes also argues that the language used in the loan documents shows that he already owned an interest in the property before he took out the loan in November 2007. He cites the deed of trust, in which he convenanted that he was "lawfully seised" of the property. He also cites the loan application and closing instructions, in which CBUSA characterized the loan as a "refinance" and referred to Barnes as "Titleholder." As the district court concluded, however, the lender's characterization of the transaction is not determinative; the loan was not a refinance where the borrower changed from the ex-wife to Barnes, and Barnes did not acquire title until November 16, 2007, the day after he signed the loan. *See Slenk v. Transworld Sys., Inc.*, 236 F.3d 1072, 1075 (9th Cir. 2001) (looking to substance over form in classifying a loan for purposes of the Fair Debt Collection Practices Act). Further, as defendants argue, their provision of a notice of a three-day right of rescission did not create the three-year right of rescission on which Barnes seeks to rely. *See* 12 C.F.R. Pt. 226, Supp. I, Subpt. A § 226.3-(3)(a)(1) ("the fact that disclosures are made . . . is not controlling on the question of whether the transaction was exempt").

C. The District Court Correctly Concluded That Barnes Took out the Mortgage to Finance his Reacquisition of the Property.

Barnes argues that the purpose of the loan was not to finance his acquisition of the property under § 1602(x), but rather to comply with the divorce judgment, which ordered him to pay $100,000.00 to his ex-wife to pay off her outstanding loan balance of $254,438.92. But most importantly, by means of these same payments he also obtained title to the property. Our analysis turns on the objective nature of the transaction, not Barnes's subjective intent in entering into it. As defendants point out, the divorce judgment awarded Barnes the property conditioned on his payment of the property division judgment and his ex-wife's outstanding loan balance, and he obtained the loan in order to carry out those conditions. *See* 12 C.F.R. Pt. 226, Supp. I, Subpt. A § 226.2(a)(24)–(6) (addressing multiple-purpose transactions).

CONCLUSION

We affirm the district court's grant of summary judgement in favor of defendants.

AFFIRMED.

[FILED JUNE 29, 2018]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

No. 3:1l-cv-00142-PK

OPINION AND ORDER

TIMOTHY BARNES,

Plaintiff,

v.

CHASE HOME FINANCE, LLC, CHASE BANK USA, N.A., IBM LENDER BUSINESS PROCESS SERVICES, INC., JOHN AND JANE DOES 1-10, and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants.

MOSMAN, J.,

On April 12, 2018, Magistrate Judge Paul Papak issued his Findings and Recommendation (F&R) [218], recommending that Mr. Barnes's Motion for Summary Judgment [175] be denied; that the Chase Defendants' Motion for Summary Judgment [193] and Fannie Mae and LBPS's Motion for Summary

Judgment [199] should be granted; and that judgment should be entered. Plaintiff objected [223]. The Chase Defendants responded [224], and Fannie Mae and LBPS joined that response [225].

DISCUSSION

The magistrate judge makes only recommendations to the court, to which any party may file written objections. The court is not bound by the recommendations of the magistrate judge, but retains responsibility for making the final determination. The court is generally required to make a de novo determination regarding those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. § 636(b)(l)(C). However, the court is not required to review, de novo or under any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the F&R to which no objections are addressed. *See Thomas v. Arn*, 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). While the level of scrutiny under which I am required to review the F&R depends on whether or not objections have been filed, in either case, I am free to accept, reject, or modify any part of the F&R. 28 U.S.C. § 636(b)(l)(C).

Upon review, I agree with Judge Papak's recommendation and I ADOPT the F&R [218] in full. Mr. Barnes's Motion for Summary Judgment [175] is DENIED, and the Chase Defendants' Motion for Summary Judgment [193] and Fannie Mae's and LBPS's Motion for Summary Judgment [199] are GRANTED.

IT IS SO ORDERED.

DATED this 29 day of June, 2018.

MICHAEL W. MOSMAN
Chief United States District Judge

[FILED APRIL 12, 2018]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

CV 11-142-PK
FINDINGS AND RECOMMENDATION

TIMOTHY BARNES,

Plaintiff,

v.

CHASE HOME FINANCE, LLC, CHASE BANK USA, N.A., IBM LENDER BUSINESS PROCESS SERVICES, INC., JOHN AND JANE DOES 1-10, and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants.

PAPAK, Magistrate Judge:

Plaintiff *pro se* Timothy Barnes filed this action against defendants Chase Home Finance, LLC ("CHF" or "JPMCB"[1]), Chase

[1] Following a corporate restructuring, CHF no longer exists as a discrete corporate entity, and the successor entity to CHF is JP Morgan Chase Bank, N.A..

Bank USA, N.A. ("CBUSA" and, collectively with CHF, the "Chase defendants"), IBM Lender Business Process Services, Inc. ("LBPS"), and ten fictitiously named "Doe" defendants on February 4, 2011. By and through his complaint as originally filed, Barnes alleged these defendants' liability under the Truth in Lending Act ("TILA") and its implementing Regulation Z in connection with their responses (or failures to respond) to Barnes' notice of his intention to exercise his asserted right of rescission as to a mortgage loan he took out on his home more than two years but fewer than three years following the date the mortgage transaction closed. On June 10, 2011, I construed Barnes' complaint as alleging claims for (i) rescission of the mortgage loan, (ii) declaratory judgment that Barnes' notice of intent to rescind was valid when issued and that defendants have no valid security interest in the subject property, (iii) statutory and actual damages in connection with defendants' failure to provide adequate notice of his right to rescind at or around the time the loan documents were signed, (iv)

statutory and actual damages in connection with the Chase defendants' failure to effect rescission of the mortgage loan following their receipt of his notice of intent to exercise the rescission right, and (v) injunctive relief to enjoin the defendants from initiating or prosecuting non-judicial foreclosure proceedings on the property, from recording any deeds or mortgages regarding the property, or from taking any steps to deprive him of his ownership fights in the property.

Also on June 10, 2011, on motions to dismiss filed by the Chase defendants and LBPS, I recommended that the court dismiss Barnes' rescission claim for lack of subject-matter jurisdiction and dismiss Barnes' remaining claims for failure to state a claim. On October' 18, 2011, disagreeing with my analysis of the jurisprudence interpreting the provisions of Regulation Z, Judge Brown adopted my recommendations of June 10, 2011, only insofar as I recommended that the court dismiss Barnes' construed claim for statutory and actual damages arising out of defendants' purported failure to provide

adequate notice of Barnes' right to rescind at or around the time the loan documents were signed, and otherwise denied the defendants' motions to dismiss with instructions that I consider certain issues left unresolved in the my findings and recommendation, specifically the Chase defendants' arguments for dismissal of Barnes' rescission claim and LBPS' arguments for dismissal to the extent premised on the theory that LBPS was not an assignee of Barnes' loan and therefore not subject to TILA liability.

On November 3, 2011, the Chase defendants voluntarily withdrew their motion to dismiss. Effective November 16, 2011, Barnes amended his complaint, adding the Federal National Mortgage Association ("Fannie Mae") as an additional defendant and removing his prayer for statutory damages in connection with the defendants' purported failure to provide adequate notice of Barnes' right to rescind at or around the time the loan documents were signed. On December 8, 2011, I recommended that LBPS' motion to dismiss be denied to the

extent premised on the grounds not addressed in my recommendations of June 10, 2011. Effective February 10, 2012, Barnes amended his complaint for the second time, adding documents tending to support some of his allegations as exhibits thereto. On March 6, 2012, Judge Brown adopted my recommendation that LBPS' then-pending motion to dismiss be denied.

On March 19, 2012, I recommended for the second time that Barnes' claim for rescission be dismissed, this time on the basis of intervening Ninth Circuit case law establishing that that claim was time-barred. On June 20, 2012, Judge Brown adopted my recommendation, and dismissed Barnes' claim for rescission with prejudice.

On April 10, 2013, I recommended that the court grant summary judgment in defendants' favor as to Barnes' remaining claims (that is, as to all of Barnes' pied and constructive claims other than his claim for statutory and actual damages arising out of defendants' failure to provide adequate notice of his right to rescind, which was dismissed effective October 18, 2011,

and his claim for rescission, which was dismissed with prejudice effective June 20, 2012). Judge Brown adopted that recommendation on July 8, 2013. On August 6, 2013, Barnes appealed this court's judgment, including within the scope of his appeal this court's orders effecting dismissal of certain of his claims prior to entry of summary judgment. The Ninth Circuit's mandate issued in connection with Barnes' appeal on September 5, 2017. The circuit court vacated this court's "grant of summary judgment on Barnes's claims for rescission and failure to effect rescission" and remanded Barnes' action for further proceedings.

Now before the court are Barnes' motion (#175) for summary judgment, the Chase defendants' motion (#193) for summary judgment and Fannie Mae's and LBPS' motion (#199) for summary judgment (by and through which Fannie Mae and LBPS join in the Chase defendants' motion). I have considered the motions and all of the pleadings and papers on file. For the reasons set forth below, Barnes' motion (#175) for

summary judgment should be denied, and the Chase defendants' motion (#193) and Fannie Mae's and LBPS' motion (#199) for summary judgment should both be granted.

LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not proper if material factual issues exist for trial. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 318, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1261 (1996). The substantive law governing a claim or defense determines whether a fact is material. *See Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998).

In evaluating a motion for summary judgment, the district courts of the United

States must draw all reasonable inferences in favor of the nonmoving party, and may neither make credibility determinations nor perform any weighing of the evidence. *See, e.g., Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). On cross-motions for summary judgment, the court must consider each motion separately to determine whether either party has met its burden with the facts construed in the light most favorable to the other. *See* Fed. R. Civ. P. 56; *see also, e.g., Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). A court may not grant summary judgment where the court finds unresolved issues of material fact, even where the parties allege the absence of any material disputed facts. *See id.*

FACTUAL BACKGROUND

I. The Parties

Plaintiff Timothy Barnes is the owner and resident of a residential property located at 590 South Greenwood Road in Independence, Oregon (the "property").

Defendant CHF is a Delaware corporation with its principal place of business in New Jersey. Defendant CBUSA was at material times a Delaware corporation with its principal place of business in Delaware, and its successor in interest is JP Morgan Chase Bank, N.A.. CBUSA was the “lender” on the note at issue in this action. CHF appears to have been the original "servicer" of that note on CBUSA's behalf The parties all agree that CBUSA was the entity to whom Barnes was required to send his notice of intent to rescind in order to effect his right of rescission during the period when that right was inforce and exercisable.

Defendant LBPS is a Delaware corporation with its principal place of business in North Carolina. It appears that LBPS became the servicer of the note at issue in this action on or around October 1, 2010.

Defendant Fannie Mae became the "creditor" of the note at issue in this action effective November 16, 2010, by way of assignment from CBUSA.

II. History of the Parties' Dispute

In 1990, Barnes and his wife Kara Barnes ("Kara"), from whom he is now divorced, entered a contract to purchase the property in Independence, Oregon, that is at the center of the patties' dispute. See Declaration (#194) of Kaley L. Fendall ("Fendall Decl."), Exh. A ("1990 Real Property Sale Contract"). In 1993, the sellers conveyed the property to Barnes and Kara via statutory special warranty deed. *See* Fendall Decl., Exh. B ("1993 Statutory Special Warranty Deed"). In 1997, Kara conveyed her interest in the property to Baines via quitclaim deed. *See* Fendall Decl., Exh. C ("1997 Quitclaim Deed"). In 2003, Barnes conveyed his entire interest in the property back to Kara via another quitclaim deed. *See* Fendall Decl., Exh. D ("2003 Quitclaim Deed").

Seven days after Baines' interest in the property was extinguished by quitclaim deed, leaving Kara as the sole owner of the property, Kara encumbered the property with a deed of trust in favor of Merit Financial, Inc., identifying her as the sole

mortgagor and securing a note in the amount of $250,781. Fendall Decl., Exh. E ("Merit Deed of Trust"). Subsequently, in 2005, Kara encumbered the property with a second deed of trust, this one in favor of M&T Mortgage Corporation and securing a note in the amount of $251,000, again identifying Kara as the sole mortgagor. Fendall Decl., Exh. F ("M&T Deed of Trust I"). In 2006, Kara encumbered the property with a third deed of trust, again in favor of M&T Mortgage Corporation, again identifying Kara as the sole mortgagor, and securing a note in the amount of $255,000. Fendall Decl., Exh. G ("M&T Deed of Trust II").

Barnes later testified under oath that the property described in the 2003 Quitclaim Deed - the same property as that described in the 1990 Real Property Sale Contract, the 1993 Statutory Special Warranty Deed, and the 1997 Quitclaim Deed, *see* 1990 Real Property Sale Contract, 1993 Statutory Special Warranty Deed, 1997 Quitclaim Deed, 2003 Quitclaim Deed - is the property at issue in this action, and that (impliedly by

operation of the 2003 Quitclaim Deed) he lacked any title in that property at the time he entered into the loan transaction with CBUSA that underlies his claims herein. See Fendall Decl., Exh. J (Deposition of Timothy Barnes ("Barnes Depo.")), 35:20 - 36:10.

Barnes and Kara divorced in September 2007. *See* Fendall Decl., Exh. I ("2007 Dissolution of Marriage"). In connection with the divorce, Barnes was awarded title to the property "free of all right, title and interest of [Kara] thereto." *Id.*, ¶ 5.8. Pursuant to the divorce decree, Barnes was required to pay all encumbrances of record on the property and to indemnify Kara and hold her harmless in connection with such encumbrances. *See id.* In addition, Barnes was required to "immediately refinance the mortgage owing on said property in order to remove [Kara]'s name from said financial obligation." *Id.* The decree provided that title in the property would be transferred from Kara to Barnes after Barnes paid Kara the amount of $100,000, which amount was characterized as a "property division judgment." *See id.; see also id.*, if ¶ 5.11.

On or around November 15, 2007, Barnes closed a loan transaction with CBUSA secured by the property. *See* Declaration (#195) of Nina Zakharevych ("Zakharevych Decl."), Exh. A (collectively with Second Amended Complaint {#95), Exh. E, "2007 Balloon Note"). The loan transaction was memorialized by and through the 2007 Balloon Note in the amount of $378,250, which bears the date November 14, 2007, but was signed by Barnes as the sole borrower on November 15, 2007. *See id.* Also on November 15, 2007, Barnes executed a deed of trust identifying the property as security for the 2007 Balloon Note loan for CBUSA's benefit. *See* Zakharevych Decl., Exh. B (collectively with Second Amended Complaint (#95), Exh. D, "2007 Deed of Trust"). At closing, according to Barnes' allegations, CBUSA's closing agent First American Title Company of Oregon provided Barnes with two unsigned copies of a Notice of Right to Cancel. *See* Second Amended Complaint (#95), Exh. G ("Unsigned Notice of Right to Cancel"). Each of the copies of the Unsigned Notice of Right to Cancel stated

that the loan closed on November 14, 2007. *See id.* Specifically, each copy Barnes allegedly received at closing stated as follows:

> You have a legal right under federal law to cancel this transaction, without cost, within three (3) business days from whichever of the following events occurs last:
>
> (1) The date of the transaction, which is November 14. 2007; or
>
> (2) The date you received your Truth-In-Lending disclosures; or
>
> (3) The date you received this notice of your right to cancel.
>
> * * *
>
> You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. . . .
>
> If you cancel by mail or telegram, you must send the notice no later than midnight of November 17. 2007 (or

> midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered . . . no later than that time.

Id. (underlining original). Other than the specifically recited dates appearing in the two underlined sections, the language of this notice is in all material respects identical to that of the model form notice of the right to rescission provided by the Federal Reserve Board. *See* 12 C.F.R. 226, Appx. H-8.

Also on November 15, 2007, Barnes signed a notice of assignment, sale or transfer of servicing rights in acknowledgment that he had received notice that the tight to service the 2007 Balloon Note loan had been transferred from CBUSA to CHF. *See* Zakharevych Decl., Exh. D ("November 2007 Servicing Rights Transfer Notice").

One day later, on November 16, 2007, Kara conveyed to Barnes her interest in the property via statutory special warranty deed,

which deed was recorded November 20, 2007. *See* Fendall Decl., Exh. H ("2007 Statutory Special Warranty Deed").

Barnes married his current wife, Denise Barnes ("Denise"), in September 2008. *See* Affidavit (#205) of Denise Baines ("Denise Aff."), ¶ 3. Barnes and Denise currently reside in the Independence, Oregon, property, as their primary residence and have done so since their marriage. *See id.*

In June 2010, Barnes requested copies of all his loan documents from First American Title. In response to Barnes' request, First American Title provided Barnes with copies of the same Notice of Right to Cancel copies of which were provided to Barnes at closing, but bearing interlineations and initials purporting to be Barnes' own, as well as a signature purporting to be Barnes'. *See* Zakharevych Decl., Exh. C ("Signed Notice of Right to Cancel"). The copies of the notice of right to cancel Barnes received from the title company are interlineated as follows: next to the printed date "November 14, 2007" (the purported date of the mortgage loan

transaction) the date "11-15-07" and the initials "TB" are handwritten; in addition, the printed date "November 17, 2007" is lined through, with the handwritten number "18" appearing, likewise lined through, above the printed number "17," and with the handwritten date "11-19-07" and the handwritten initials "TB" appearing next to it. *Id.* It is the Chase defendants' position that two copies of the Signed Notice of Right to Cancel were provided to Barnes, and signed and interlineated by him, on November 15, 2007, in connection with the closing of the loan. It is Barnes' position that he was not provided with any copies of the Signed Notice of Right to Cancel at any time prior to June 2010, and that he neither interlineated nor signed the notice at any time.

On August 4, 2010, Barnes mailed copies of a notice of his intent to rescind the loan transaction of November 15, 2007, to CHF and to CBUSA, at those entities' addresses of record. *See* Plaintiffs Memorandum (#130) in Support of Summary Judgment ("Plaintiffs Summary Judgment Memorandum I"), Exh.

A ("August 2010 Notice of Intent to Rescind"). It is undisputed that the copy of the notice sent to CHF was received by CHF, and that the copy of the notice sent to CBUSA was returned to Barnes unreceived and unopened by the addressee. Barnes never received any response from either CHF or CBUSA regarding his notice of intent to rescind. Barnes thereafter made payments to CHF in connection with the loan on August 11 and September 13, 2010. *See* Zakharevych Decl., Exh. F ("CHF Mortgage Loan History"). At the time Barnes sent the Chase defendants notice of his intent to rescind the loan, the outstanding principal balance of the loan was $375,481.30. *See* Zakharevych Decl., Exh. G ("August 2010 Mortgage Loan Statement").

In September 2010, Barnes received notice from CHF that the right to service the 2007 Balloon Note loan would be transferred from CHF to LBPS effective October l, 2010. *See* Zakharevych Decl., Exh. E ("September 2010 Servicing Rights Transfer Notice"). Barnes mailed notice of his intent to rescind the loan to LBPS on October 23, 2010. *See* Plaintiff's

Summary Judgment Memorandum I, Exh. F ("October 2010 Notice of Intent to Rescind").

On November 16, 2010, CBUSA assigned the Deed of Trust to the MERS System, solely as nominee for Fannie Mae. *See* Declaration (#138) of Clay Brangham ("Brangham Decl.), Exh. 3 ("2010 Corporate Assignment of Deed of Trust"). On December 2, 2010, the November 16, 2007, assignment of the Deed of Trust from CBUSA to the MERS System (solely as nominee for Fannie Mae) was recorded. *See id.*

On January 21, 2011, LPBS wrote to Barnes to advise him of LBPS' position that his right to rescission had expired, and to invite him to clarify his concerns with particularity. *See* Plaintiff's Summary Judgment Memorandum I, Exh. G ("January 2011 LBPS Letter"). LBPS' letter also advised Barnes that "[t]he owner of [his] loan [wa]s [at that time] Federal National Mortgage Association (Fannie Mae)," and that "LBPS [wa]s servicing [his] loan on behalf of Fannie Mae." *Id.*

Barnes filed this action on February 4, 2011.

III. Disposition of Barnes' Appeal

As noted above, this court entered final judgment dismissing this action on July 8, 2013. Baines filed notice of appeal from this court's judgment and from its orders disposing of his claims on August 6, 2013. The Ninth Circuit's mandate issued in connection with Barnes' appeal on September 5, 2017.

The Ninth Circuit's Memorandum (#172) setting forth the appeals court's grounds for its unpublished disposition of Baines' appeal provides problematic guidance as to which specific claims, theories of relief, and legal questions remain at issue in this action following remand to this court. The memorandum opinion consists of an introductory paragraph followed by three brief enumerated sections setting forth the appeals court's legal reasoning. Notwithstanding that this court did not issue summary judgment in connection with Barnes' claim for rescission or claim for statutory damages arising out of defendants' failure to effect rescission, but rather

dismissed both those claims before any defendant moved for summary judgment in this action, the introductory paragraph setting forth the Ninth Circuit's disposition of Barnes' appeal states that "[b]ecause notice of rescission was properly given, we vacate the grant of summary judgment on Barnes's claims for rescission and failure to effect rescission and remand for further proceedings." Memorandum (#172) at 2-3.

By and through the first enumerated set of paragraphs setting forth the appeals court's legal reasoning, the Ninth Circuit determined that Barnes' notice of August 4, 2010, constituted "sufficient notice to CBUSA that he was exercising his right to rescind." *Id.* at 4. In support of that determination, the appeals court noted that under specified TILA provisions borrowers "may rescind a loan within three years of the loan transaction if the creditor fails to provide specific disclosures required by TILA," *id.* at 3, and that CBUSA's disclosures to Barnes were not sufficient to satisfy those TILA disclosure obligations due to the fact that

"the address it did provide [to Barnes] was not successfully receiving mail when Barnes sent his notice there," *id.* at 4, but neither determined nor suggested that, under TILA, Barnes in fact had the right of rescission that would give rise to CBUSA's affirmative obligation to provide him with non-defective disclosures in connection with such right. *See id.* at 3-4.

By and through the second enumerated set of paragraphs setting forth the appeals court's legal reasoning, the Ninth Circuit determined that failure to effect rescission within 20 days after Barnes sent the notices of August 4, 2010, was actionable under 15 U.S.C. § 1640(a), with the result that "Barnes's claim for damages, a declaratory judgment, and injunctive relief for failure to effect rescission following timely notice of intent to rescind" had been improperly dismissed by this court. *Id.* at 4-5. The court did not find or suggest any grounds that could support the conclusion that the remedy of rescission itself, as opposed to damages for failure to effect rescission, remained

available to Barnes notwithstanding Ninth Circuit case law establishing that the remedy of rescission was time-barred. *See id.*

By and through the third enumerated paragraph setting forth its legal reasoning, the Ninth Circuit determined that, in light of its foredescribed determinations, there existed open questions of material fact sufficient to preclude grant of summary judgment as to the servicer liability of CHF and LBPS for failure to provide contact information of the owner of the mortgage loan upon Barnes' request. *See id.* at 5.

In light of the foregoing, there is an apparent ambiguity as to whether the Ninth Circuit intended to vacate this court's dismissal of Barnes' claim by and through which he seeks to effect rescission of the mortgage loan (as opposed to his claim for damages arising out of defendants' failure to effect rescission of the loan). Nothing in the appeals court's reasoning suggests in any degree that either this court's dismissal of the claim for rescission or the Ninth Circuit's disposition in *McOmie-Gray v. Bank of Am.*

Home Loans, 667 F.3d 1325, 1326 (9th Cir. 2012) ("15 U.S.C. § 1635(f) is a three-year statute of repose, requiring dismissal of a claim for rescission brought more than three years after the consummation of the loan secured by the first trust deed, regardless of when the borrower sends notice of rescission"). *see also Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1164 {9th Cir.2002) (same); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998) ("[Section] 1635(£) completely extinguishes the right of rescission at the end of the 3-year period"), was wrongly decided. In light of the Ninth Circuit's express language effecting vacatur of "the grant of summary judgment on Barnes 1s claims for rescission and :failure to effect rescission," it appears clear that all of this court's dispositions of Barnes' claims have been vacated, including disposition of his claim for rescission, but in light of the absence of any legal analysis suggesting that dismissal of the rescission claim was improvident I do not find that it is the law of this case that the remedy of rescission necessarily remains available to Barnes as a

matter of law (even on the assumption that he enjoyed a right to rescind the loan transaction herein at any material time). That remains an open question of law for this court's consideration.

Moreover, although the Ninth Circuit made the determination that Barnes' notices of August 4, 2010, constituted adequate notice of intent to rescind under TILA, it neither expressly nor impliedly found that Barnes had a light of rescission to exercise in the first instance. As noted above, the Ninth Circuit expressly found that under 15 U.S.C. § 1635(£) and 12 C.F.R. § 226.23(a)(3) borrowers may rescind a loan transaction "within three years" after it is consummated in the event the lender fails to provide required disclosures. *See id.* at 3. However, Section 1635(f) and Section 226.23(a)(3) each address only the time period within which the right of rescission must be exercised, and do not address the circumstances under which the subject right of rescission arises. *See* 15 U.S.C. § 1635(f). 12 C.F.R. § 226.23(a)(3). The Ninth Circuit's discussion

and citations therefore do not suggest in any way that the court considered or decided the underlying question whether Barnes had a right to rescind in the first instance, and I therefore do not find that it is the law of this case that at any material time Barnes necessarily possessed a right to rescind the loan transaction of November 15, 2007. *See, e.g., United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (the doctrine of the law of the case is inapplicable to "issues an appellate court did not address") (citations omitted). The Ninth Circuit's analysis and disposition, like those of this court, were premised on the assumption that Barnes enjoyed such a right of rescission, and it remains an open legal question whether that assumption was accurate under the applicable circumstances.

Finally, although the introductory paragraph summarizing the Ninth Circuit's disposition of Barnes' appeal states only that the court" vacate[d] the grant of summary judgment on Barnes's claims for rescission and failure to effect rescission and remand[ed] for further proceedings,"

Memorandum (#172) at 2-3, the appeals court held that Barnes' claims for declaratory judgment and injunctive relief had been improperly dismissed, *see id.* at 4-5, and that summary judgment had been improvidently entered as to the servicer liability of CHF and LBPS for failure to provide contact information of the owner of the mortgage loan upon Barnes' request (although, as discussed below, Barnes has not alleged a claim for such servicer liability and this court therefore did not enter summary judgment as to any such claim), *see id.* at 5. It therefore appears that the Ninth Circuit's vacatur of this court's judgment included within its scope all of this court's dispositions of Barnes' claims.

ANALYSIS

I. Legal Framework Governing Barnes' Claims

The Truth in Lending Act was enacted in 1968 as Title I of the federal Consumer Credit Protection Act. TILA's stated purpose is:

> to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 160l(a) (2000).

TILA requires lenders in consumer credit transactions to make clear disclosure of the key terms of the proposed transactions. *See* 15 U.S.C. § 1601 *et seq*. TILA provides remedies to consumers in the form of statutory and actual damages including for minor or "technical" violations of TILA. *See Jackson v. Grant*, 890 F.2d 118, 120 (9th Ch. 1989); *see also* 15 U.S.C. § 1640. A plaintiff may recover statutory damages for violation of TILA's disclosure requirements whether or not the plaintiff suffered cognizable actual damages. *See So. Discount Co. of Ga. v. Whitley (In re Whitley)*, 772 F.2d 815, 817 (11th Cir. 1985) (statutory damages must be imposed regardless of whether actual

damages resulted from the violation). If the creditor is liable for damages, then the plaintiff may also be awarded reasonable attorney's fees and costs incurred in connection with bringing an action under TILA. *See* 15 U.S.C. § 1640 (a)(3). TILA provides a one year statute of limitations for such civil damages claims. *See* 15 U.S.C. § 1635(f).

15 U.S.C. § 1635 governs the TILA right to rescind certain loan transactions after they have been consummated. *See* 15 U.S.C. § 1635. Pursuant to 15 U.S.C. § 1635(e), however, Section 1635, and the right of rescission provided for in Section 1635(a) thereof: is expressly inapplicable to "a residential mortgage transaction" as defined in section 1602 of Title 15. 15 § 1635(2). 15 U.S.C. § 1602 defines "residential mortgage transaction" as "a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to

finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(x).

As to consumer credit transactions in which a security interest will be retained or acquired in the borrower's principal dwelling in connection with which Section 1635 is by its terms applicable, among the various disclosures required of lenders in consumer credit transactions, TILA (together with its implementing regulations, referred to collectively as "Regulation Z") requires written disclosure of a consumer's right to rescind any transaction secured by the consumer's principal dwelling within three days following either the consummation of the transaction or delivery of rescission forms and other material disclosures. *See* 15 U.S.C. § 1635(a); 12 C.F.R. 226.23(a)(3). Regarding the required rescission notice, Regulation Z specifically provides that:

> a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind . . . .The notice shall be on a separate document that identifies the transaction and shall

clearly and conspicuously disclose the following:

(i.) The retention or acquisition of a security interest in the consumer's principal dwelling.

(ii) The consumer's right to rescind the transaction.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv.) The effects of rescission, as described in paragraph (d) of this section.

(v.) The date the rescission period expires.

12 C.F.R. 226.23(b)(1). A written acknowledgment by the consumer of receipt of the notice of the right to rescind, if any is obtained, "does no more than create a rebuttable presumption of delivery thereof." 15 U.S.C. § 1635(c).

Ordinarily, "[t]he consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the [rescission] notice [], or delivery of all material disclosures, whichever occurs last." 12 C.F.R. 226.23(a)(3). However, "if the required notice of the right to rescind is not delivered, the light to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first." *Id.* Timely provision of a materially defective notice of the right to rescind is treated as failure to provide the required notice. *See, e.g., Palmer v. Champion Mortg.*, 465 F.3d 24, 27 (1st Cir. 2006), *citing Barnes v. Fleet Nat'l Bank*, 370 F.3d 164, 174 (1st Cir. 2004); *see also, e.g. Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 704 (9th Cir. 1986) (failure to fill in expiration date on rescission form, although a purely technical TILA violation, still entitles consumer to rescind loan for up to three years), *citing Williamson v. Lafferty*, 698 F.2d 767, 768-69 (5th Cir. 1983). Pursuant to Section 1635(f),

subject to certain exceptions even the extended right of rescission necessarily expires "three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first. . . ." 15 U.S.C. § 1635(f).

It is the law of this case that if the printed dates on a notice of the right to rescind are inaccurate, such inaccuracy renders the notice materially defective, regardless of whether the inaccuracy does not prevent the notice from putting the average consumer on notice of the correct last date on which the rescission right may be exercised. It is further the law of this case that if a creditor fails to receive a consumer's notice of intent to rescind after such notice is mailed to the address provided by and through notice of the right to rescind, the notice was materially defective when provided to the consumer.

Unlike TILA's one-year limitations period for civil damages claims, as discussed above the three-year time limit provided for under Section 1635(f) for rescission of consumer loan transactions is an absolute statute of repose. *See McOmie-Gray*, 667 F.3d at 1326;

Miguel, 309 F.3d at 1164; *Beach*, 523 U.S. at 412 ("[Section] 1635(f) completely extinguishes the right of rescission at the end of the 3-year period").

Regarding the consumer's exercise of the right of rescission, 12 C.F.R. § 226.23 provides as follows:

> To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of written communication. **Notice is considered given when mailed**, when filed for telegraphic transmission or. If sent by other means, when delivered to the creditor's designated place of business.

12 C.F.R. 226.23(a)(2) (emphasis supplied). "When a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge." 12 C.F.R. 226.23(d)(1). A creditor is required to "return any money or property that has been given to anyone in

connection with the transaction [to be rescinded] and [to] take any action necessary to reflect the termination of the security interest" "[w]ithin 20 calendar days after receipt of a [consumer's] notice of rescission." 12 C.F.R. 226.23(d)(2).

Regarding the identity of the party to whom intent to rescind must be mailed, *Miguel v. Country Funding Corp.*, 309 F.3d 1161 (9th Cir. 2002), is instructive. In *Miguel*, the Ninth Circuit was presented with a TILA claimant who was entitled to a three-year period within which to rescind her home mortgage loan. In the last month preceding expiration of the three-year period, the claimant attempted to exercise her right of rescission, but sent her notice of rescission to the wrong party (specifically, to the loan servicing agent rather than to the mortgage holder). On the last day of the three-year period, the claimant filed suit against the servicing agent, seeking rescission. The court found that notice of intent to rescind mailed to the servicing agent was inadequate to effect the consumer's rescission right, reasoning as follows:

Miguel argues that she should have been allotted an additional year in which to file suit after the expiration of the three-year period afforded by the statute. While Miguel is correct that 15 U.S.C. § 1640(e) provides the borrower one year from the refusal of cancellation to file suit [for civil damages], that is not the issue before us. Rather, the issue is whether her cancellation was effective even though it was not received by the Bank - the creditor - within the three-year statute of repose. We hold that it was not. **While the Bank's servicing agent, Countrywide, received notice of cancellation within the relevant three-year period, no authority supports the proposition that notice to Countrywide should suffice for notice to the Bank, and Miguel has presented no evidence that the Bank received notice of cancellation within the three-year limitation period prescribed by the statute. Therefore, her right**

to cancellation was extinguished as against the Bank

Miguel, 309 F.3d at 1165 (emphasis supplied).

II. Barnes' Right to Rescind the 2007 Balloon Note Loan Under TILA

As noted above, the TILA right of rescission is inapplicable to residential mortgage transactions, or transactions in which a borrower executes a mortgage loan secured by the borrower 's residence in order to finance the acquisition of that residence. *See* 15 U.S.C. §§ 1635(e), 1602(x). In four unpublished dispositions, the Ninth Circuit has affirmed dismissal of claims premised on TILA violations in connection with the TILA right to rescission where the underlying loan transaction was a residential mortgage transaction and therefore was not subject to Section 1635(a) rescission in the first instance, *see Oliva v. Nat'l City Mortg. Co.*, 490 F. App'x 904, 905 (9th Cir. 2012) (unpublished disposition), *Hadley v. BNC Mortg., Inc.*, 466 F. App'x 612, 612 (9th Cir.

2012) (unpublished disposition), *Smith v. GMAC Mortg. Co.*, 444 F. App'x 977, 977 (9th Cir. 2011) (unpublished disposition), *Sitanggang v. Countrywide Home Loans, Inc.*, 419 F. App'x 756, 757 (9th Cir. 2011) (unpublished disposition), and has once observed in dicta, with specific reference to the TILA right of rescission, that "TILA does not apply to residential mortgages used to finance the initial acquisition or construction of a dwelling," *Merrill v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1029 n.7 (9th Cir. 2014), *citing* 5 U.S.C. §§ 1635(e)(1) & 1602(x), but does not appear otherwise to have addressed the application of Section 1635(e) in a published opinion. The Eighth Circuit, however, has expressly affirmed that there is no right of rescission under TILA in connection with loans secured by the borrower's dwelling where the loan is taken in order to finance acquisition of the dwelling, *see Dunn v. Bank of Am. N.A.*, 844 F.3d 1002, 1005 (8th Cir. 2017), and on that basis has affirmed dismissal of TILA claims premised on the existence of a right to rescission where the loan transaction

documents indicated that acquisition of the borrowers' dwelling was effected in connection with the loan the borrowers sought to rescind, *see id.* at 1006. The District Courts of the Ninth Circuit have routinely so applied Section 1635(e). *See, e.g., Moore v. Ditech Fin., LLC*, Case No. 2:16-cv-1602-APG-GWF, 2017 U.S. Dist. LEXIS 87140, *5 (D. Nev. June 7, 2017); *Jackson v. Nationstar Mortg. LLC*, Case No. 5:17-cv-00044-CAS (KKx), 2017 U.S. Dist. LEXIS 73826 *8 (C.D. Cal. May 15, 2017); *Rodriguez v. Nationstar Mortg., LLC*, case No. 2:16-cv-02180-KJD-CWH, 2017 U.S. Dist. LEXIS 59718, *6 (D. Nev. Apr. 18, 2017).

In connection with the motions now before the court, the parties have for the first time in the long history of this action provided this court with the evidence required to make the determination that the 2007 Balloon Note loan was a residential mortgage transaction in connection with which TILA provides no statutory right of rescission. Although the evidence establishes that Barnes had a partial interest in the property from 1990

through 1997 (*see* 1990 Real Property Sale Contract, 1993 Statutory Special Warranty Deed, 1997 Quitclaim Deed), and was the sole owner of the property from 1997 through 2003 (*see* 1997 Quitclaim Deed, 2003 Quitclaim Deed), the evidence further establishes that Barnes' interest in the property was fully extinguished in 2003 when Barnes conveyed the entirety of his interest in the property to Karen (see 2003 Quitclaim Deed, Barnes Depo., 35:20 -36:10). The evidence likewise establishes that, pursuant to his obligations under the 2007 Dissolution of Marriage, Barnes entered into the 2007 Balloon Note loan transaction specifically in order to acquire ownership interest in the property (for the second time). *See* 2007 Dissolution of Marriage, 2007 Balloon Note, 2007 Statutory Special Warranty Deed. Again, immediately prior to the 2007 Balloon Note loan transaction, Barnes lacked any ownership interest in the property, and by and through the 2007 Balloon Note loan transaction Barnes paid off the encumbrances on the property and tendered $100,000 to Kara in satisfaction of

the conditions precedent of Kara's conveyance to Barnes of her ownership interest in the property under the 2007 Dissolution of Marriage. The 2007 Balloon Note was secured by the property (*see* 2007 Balloon Note, 2007 Deed of Trust), and the property was thereafter Barnes' place of residence (*see* Denise Aff., ¶ 3). The necessary implication is that the 2007 Balloon Note was a residential mortgage transaction as to which TILA provides no statutory right of rescission. *See* 15 U.S.C. §§ 1635(e), 1602(x).

Nothing in the plain language of Sections 1635(e) or 1602(x) suggests in any way that Barnes' prior (but extinguished) ownership interest in the property requires modification of the foregoing analysis. Under Section 1635(e), a borrower has no statutory right to rescind an executed loan secured by the borrower's principal dwelling if the loan proceeds are used to "finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602(x); *see also* 15 U.S.C. § 1635(e). If Congress had intended to exclude from the residential mortgage transaction exception to

the right of rescission loan transactions in which a party re-acquires a previous ownership interest in a dwelling, it would have modified both "acquisition" and "construction" by the term "initial," rather than only modifying "construction" by that term. Under the plain language of the statute as it was actually drafted, where a borrower who lacks title in his dwelling at the time a loan transaction is consummated uses the proceeds of the loan to acquire title to the dwelling, the loan is a residential mortgage transaction as to which TILA provides for no right of rescission. *See* 15 U.S.C. §§ 1635{e), 1602(x).

At least one court of this circuit has so held. In *Tanuvasa v. FDIC*, Case No. CV 09-02795 DDP (AGRx), 2010 U.S. Dist. LEXIS 148790 (C.D. Cal. Jan. 29, 2010), the District Court for the Central District of California was presented with facts analogous to those before this court. The *Tanuvasa* plaintiff had resided in her dwelling for eight years prior to entering into the loan transaction she later sought to rescind. *See Tanuvasa*, 2010 U.S.

Dist. LEXIS 148790 at *7-8. For the first seven of those eight years, the plaintiff had an ownership interest in the dwelling, but approximately one year before entering into the loan transaction, the plaintiff had arranged for a family friend to acquire title in the dwelling in order to help the plaintiff during a time of financial stress. *See id.* The plaintiff entered into the loan transaction in order to finance the reacquisition of title in the dwelling from her family friend. *See id.* The *Tanuvasu* court reasoned and held as follows:

> The recorded loan documents reveal that Plaintiff acquired title to the 13236 Rutgers Avenue Property by way of a Grant Deed from Kevin Lee Wilson. . . . The Grant Deed was recorded on December 11, 2006, the same date that the Deed of Trust (in connection with the Loan) was recorded. . . . **That Plaintiff may have been a previous owner of the 13236 Rutgers Avenue Property is of no consequence.** In 2006, she

> obtained a loan from WaMu in order to acquire title to the property from a third party. As such, the transaction was a "residential mortgage transaction" within the meaning of 15 U.S.C. § 1602([x]). TILA does not provide a right to rescind in connection with residential mortgage transactions of this kind. *See* 15 U.S.C. § 1635(e)(l). Accordingly, Plaintiffs TILA rescission claim is dismissed with prejudice.

Tanuvasa, 2010 U.S. Dist. LEXIS 148790 at *89 (emphasis supplied; citations to the court record omitted).

Plaintiff seeks to rely on the Official Staff Interpretation to Regulation Z for the proposition that a loan transaction is not a residential mortgage transaction "if the consumer had previously purchased and acquired some interest to the dwelling, even though the consumer had not acquired full legal title." 12 C.F.R. § 226 Supp. I at § 226.2(a)(24)(5)(i). However, both the plain language of the interpretation and the examples provided as illustrations of the

interpretation ("the financing of a balloon payment due under a land sale contract and an extension of credit made to a joint owner of property to buy out the other joint owner's interest," 12 C.F.R. § 226 Supp. I at § 226.2(a)(24)(5)(ii)), establish that the interpretation is applicable to situations in which a borrower increases an existing ownership interest using loan proceeds, and not to situations in which a borrower reacquires a previously extinguished ownership interest. *See* 12 C.F.R. § 226 Supp. I at § 226.2(a)(24)(5)(i).(ii).

Plaintiff further argues that, pursuant to the 2007 Dissolution of Marriage, he enjoyed some cognizable degree of interest in the property, even if not a legal ownership interest, prior to entering into the 2007 Balloon Note loan. I disagree. Under the plain language of the 2007 Dissolution of Marriage, title to the property was not to be conveyed to Barnes by Kara until after Barnes had satisfied the encumbrances on the property and tendered $100,000 to Kara as a money judgment. *See* 2007 Dissolution of

Marriage, ¶¶ 5.8, 5.11. Prior to such satisfaction and tender, the 2007 Dissolution of Marriage did not convey any degree of ownership interest in the property to Barnes. *See id.* The Official Staff Interpretation of Regulation Z therefore provides no grounds for disturbing the foregoing Section 1635(e) analysis.

In the alternative, Barnes argues that the 2007 Balloon Note loan transaction was not a residential mortgage transaction for TlLA purposes because the loan documents refer to the transaction as a refinancing and refer to Barnes as the titleholder of the property. Again, I disagree. Nothing in the plain language of Sections 1635(e) or 1602(x) suggests that a lender's characterization of a loan transaction or of the parties thereto could materially impact the question whether, as a matter of statutory law, TILA provides a right of rescission in connection with the transaction. *See* 15 U.S.C. §§ 1635(e), 1602(x). Under Barnes' interpretation, lenders would have the authority to abrogate borrowers' statutory

rights by the simple expedient of changing the language used to characterize loan transactions, an outcome for which there is no support in the text of the statute. I therefore find that the characterization of the loan transaction as a refinancing and the reference to Barnes as titleholder of the property are immaterial to the court's Section 1635(e) analysis.

In the further alternative, Barnes argues that because the Chase defendants provided Barnes with notice of his right to rescind the 2007 Balloon Note loan transaction in connection with execution of the loan agreement, they are in effect estopped from denying that Barnes enjoyed a statutory right of rescission. Once again, I disagree. The Official Staff Interpretation of Regulation Z expressly states that:

> A creditor must determine in each case if the transaction is primarily for an exempt purpose. If some question exists as to the primary purpose for a credit extension, the creditor is, of course, free to make the disclosures,

> and the fact that disclosures are made under such circumstances is not controlling on the question of whether the transaction was exempt.

12 C.F.R. § 226 Supp. I at § 226.3(1)(3(a))(l). Itis clear that the Chase defendants' provision to Baines of notice of his right to rescind did not create a statutory right of rescission not provided for by the statute itself. Moreover, this court need not determine whether provision of notice of the tight to rescind created a contractual; as opposed to statutory, rescission right, because on the arguendo assumption that provision of the notice created such a contractual right, the right would necessarily have been limited to the three-day period described in the notice Barnes received, and would not have been extensible to three years under TILA for failure to provide adequate disclosures required by statute, since the TILA disclosure and rescission rules are without bearing on borrowers' contractual rights. The Chase defendants' provision to Barnes of statutorily superfluous notice of

right to rescind therefore could not have created the three-year right of rescission requisite to the viability of Barnes' rescission-related claims.

For all of the foregoing reasons, I find that the 2007 Balloon Note loan transaction was a residential mortgage transaction as to which Barnes enjoyed no statuto1y right of rescission and no statutory right of disclosure of any such right of rescission, and that in consequence Barnes' various notices of his intent to rescind that transaction were without material effect on any party's rights or obligations in connection with the 2007 Balloon Note loan.[2]

III. Disposition of Barnes' Claims

It follows directly from the foregoing analysis and findings that Barnes' actual or constructive claims for rescission of the 2007

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[2] In light of the foregoing findings, the court need not address defendants' alternative argument that Barnes is not entitled to seek rescission of the 2007 Balloon Note loan transaction because he is unable to tender back the proceeds of the loan.

Balloon Note loan, for statutory and actual damages in connection with defendants' failure to provide adequate notice of his right to rescind in connection with execution of the 2007 Balloon Note, and for statutory and actual damages in connection with the Chase defendants' failure to effect rescission of the 2007 Balloon Note loan following Baines' notice of intent to rescind are without merit, and that defendants are entitled to summary judgment as to those claims.

In addition it is clear from the allegations and prayer for relief of Baines' second amended complaint that Barnes' claim for declaratory relief and constructive claim for injunctive relief are necessarily dependent on the validity of Barnes' position that he is entitled to rescission of the 2007 Balloon Note loan. As to his claim for declaratory judgment, Barnes specifically prays for this court's declaration that Barnes' notice of intent to rescind "[wa]s valid, and a termination of any security interest in Plaintiffs Property created under the [2007 Balloon Note] Transaction." Because for the

reasons set forth above, Barnes' notice of intent to rescind was without legal effect, Barnes is not entitled to the requested declaration as a matter of law, and defendants are therefore entitled to summary judgment as to Barnes' claim for declaratory relief.

As to Barnes' constructive claim for injunctive relief, Barnes' sole alleged and asserted ground for entitlement to the requested injunction to "[e]njoin Defendants during the pendency of this action, and permanently thereafter, from instituting, prosecuting, or maintaining a non-judicial foreclosure proceeding on Plaintiffs Property, from recording any deeds or mortgages regarding the Property or from otherwise taking any steps to deprive Plaintiff of ownership of the Property" is that defendants' security interest in the property was extinguished by operation of Barnes' notice of intent to rescind. Because for the reasons set forth above, Barnes' notice of intent to rescind was without legal effect, Barnes is not entitled to the requested

injunctive relief, and defendants are therefore entitled to summary judgment as to his constructive claim for such relief.

Finally, as noted above, the Ninth Circuit opined that summary judgment had been improvidently entered as to the servicer liability of CHF and LBPS for failure to provide contact information of the owner of the mortgage loan upon Barnes' request. *See* Memorandum (#172) at S. However, Baines does not allege a claim for such liability, and makes no allegations and requests no relief that could support construction of such a claim. *See* Second Amended Complaint, *passim*. In the absence of any suggestion in the record that Barnes intended to allege such a claim, I decline to find that such a claim is at issue in this action following remand from the Ninth Circuit.

Because defendants are entitled to summary judgment as to all of Barnes' claims at issue in this action, Barnes' motion (#175) for summary judgment should be denied, and the Chase defendants' motion (#193) and Fannie Mae's and LBPS1 motion

(#199) for summary judgment should both be granted.

CONCLUSION

For the reasons set forth above, Barnes' motion (#175) for summary judgment should be denied, and the Chase defendants' motion (#193) and Fannie Mae's and LBPS' motion (#199) for summary judgment should both be granted. A final judgment should be prepared.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due fourteen (14) days from service of the Findings and Recommendation. If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

If objections are filed, then a response is due fourteen (14) days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

NOTICE

A party's failure to timely file objections to any of these findings will be considered a waiver of that party's right to *de novo* consideration of the factual issues addressed herein and will constitute a waiver of the party's right to review of the findings of fact in any order or judgment entered by a district judge. These Findings and Recommendation are not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(l) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment.

Dated this 12th day of April, 2018

Honorable Paul Papak
United States Magistrate Judge

[FILED AUGUST 10, 2017]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-35716

D.C. No. 3:11-cv-00142-PK

MEMORANDUM*

TIMOTHY BARNES,

Plaintiff-Appellant,

v.

CHASE HOME FINANCE, LLC, a Delaware corporation; CHASE BANK USA, N.A., a subsidiary of JP Morgan Chase & Co., a Delaware corporation; IBM LENDER BUSINESS PROCESS SERVICES, INC., a Delaware corporation; FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon

Anna J. Brown, District Judge, Presiding

Argued and Submitted May 10, 2017
Portland, Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: BYBEE and HURWITZ, Circuit Judges, and RAKOFF,** District Judge.

Timothy Barnes mailed a notice that he was exercising his right to rescind his mortgage to his creditor, Chase Bank USA, N.A. (CBUSA), and the loan servicers to which he had been making monthly payments, Chase Home Finance, LLC (CHF) and later IBM Lender Business Process Services, Inc.(LBPS). For reasons that are unclear from the record, the letter to the creditor was returned to Barnes undelivered. The loan was not rescinded, and Barnes brought suit for rescission and violation of the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, and its requirements regarding rescission procedures against CBUSA, CHF, and LBPS.[1] The district court granted the defendants' motion for summary judgment. Because notice of rescission was properly given, we vacate the grant of summary judgment on Barnes' s claims for rescission and failure to effect rescission and remand for further proceedings. [2]

** The Honorable Jed S. Rakoff, Senior United States District Judge for the Southern District of New York, sitting by designation.

[1] The Federal National Mortgage Association (Fannie Mae) was later added as a defendant in an amended complaint.

[2] Fannie Mae became a creditor after the three-year statute of repose date passed. Any claim against CBUSA can be brought against Fannie Mae as an assignee of CBUSA's interest, and should not have been be dismissed. *See* 15 U.S.C. § 1641(c) ("Any consumer who has the right to rescind a transaction under section 1635 of this title may rescind the transaction as against any assignee of the obligation.").

1. A borrower may rescind a loan within three years of the loan transaction if the creditor fails to provide specific disclosures required by TILA. *See* 15 U.S.C. § 1635(f); 12 C.F.R. § 226.23(a)(3). To exercise that right, a borrower must "notify[] the creditor, in accordance with regulations of the Bureau, of his intention to do so." 15 U.S.C. § 1635(a); *see also Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 792 (2015) ("[R]escission is effected when the borrower notifies the creditor of his intention to rescind."). TILA's core implementing regulation, known as Regulation Z, outlines further details on how the borrower is to exercise the right to rescind. *See* 12 C.F.R. § 226(a). Specifically, Consumer Financial Protection Bureau (CFPB) Official Staff Commentary to Regulation Z provides: "Where the creditor fails to provide the consumer with a designated address for sending the notification of rescission, delivery of the notification to the person or address to which the consumer has been directed to send payments constitutes delivery to the creditor or assignee." 12 C.F.R. § 226, Supp. I, para. 23(a)(2); Truth in Lending, 69 Fed. Reg. 16,769-03, 16,771 (Mar. 31, 2004).

Barnes attempted to notify both the creditor, CBUSA, and the servicer, CHF, of his intent to rescind by mailing letters to the addresses they had provided him. CBUSA "fail[ed] to provide [Barnes] with a designated address for sending the notification of rescission" because the address it did provide was not successfully receiving mail when Barnes sent his notice there. *See* 12 C.F.R. § 226, Supp. I, paras. 15(a)(2), 23(a)(2). The only remaining action for Barnes to take, per Regulation Z and the CFPB Official Staff Commentary, was to

notify the servicer, which he had already done. Barnes's letter to CHF therefore provided sufficient notice to CBUSA that he was exercising his right to rescind.

2. There remain disputed issues of fact warranting reversal of summary judgment for the claims against the defendants for failure to effect rescission in accordance with TILA's requirements. Because the rescission notice was timely provided, failure to comply with the requirements in 15 U.S.C. § 1635(b) within 20 days is actionable under 15 U.S.C. § 1640(a). Barnes's claim for damages, a declaratory judgment, and injunctive relief for failure to effect rescission following timely notice of intent to rescind against CBUSA and Fannie Mae were thus improperly dismissed on summary judgment by the district court.

Barnes also argues that CHR and LBPS are liable for failure to rescind based on the theory that they are assignees. Due to the lack of clarity in the record on the relationship between the lenders and the servicers, Barnes has established a genuine dispute as to material fact on this question sufficient to survive summary judgment.

3. Barnes argues that the servicers, CHF and LBPS, are liable under 15 U.S.C. § 1640(a) for failure to provide requested information about the creditor under § 1641(t)(2) ("Upon written request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation."). Barnes requested information about the name, address, and telephone number of the creditor from

CHF and LBPA, and the record is not clear whether he actually received it. Because Barnes has raised a genuine issue of material fact regarding compliance with TILA, the district court erred in granting summary judgment on this issue.

VACATED AND REMANDED.

[FILED OCTOBER 28, 2019]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35616

D.C. No. 3:11-cv-00142-PK
District of Oregon, Portland

ORDER

TIMOTHY BARNES,

Plaintiff-Appellant,

v.

CHASE HOME FINANCE, LLC, a Delaware corporation; CHASE BANK USA, N.A., a subsidiary of JP Morgan Chase & Co., a Delaware corporation; IBM LENDER BUSINESS PROCESS SERVICES, INC., a Delaware corporation; FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants-Appellees.

Before: WATFORD and MILLER, Circuit Judges, and ROTHSTEIN,* District Judge.

The panel unanimously votes to deny the petition for panel rehearing. Judges Watford and Miller vote to deny the petition for rehearing en banc, and Judge Rothstein so recommends. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc, filed October 2, 2019, is DENIED.

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* The Honorable Barbara Jacobs Rothstein, United States District Judge for the Western District of Washington, sitting by designation.

Relevant Portions of Federal Statutory Provisions Involved, The Federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*

15 U.S.C. § 1601(a) provides:

Congressional findings and declaration of purpose

(a) Informed use of credit

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1602 provides, in pertinent part:

Definitions and rules of construction

. . .

(x) The term "residential mortgage transaction" means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.

15 U.S.C. § 1635 provides, in pertinent part:

Right of rescission as to certain transactions

(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. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

…

(e)(1) **Exempted transactions; reapplication of provisions**

This section does not apply to--

(1) a residential mortgage transaction as defined in section 1602(w)[1] of this title

...

(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.

Relevant Portions of Federal Regulations Involved:

"Regulation Z," 12 C.F.R. § 1026, *et seq*.

§ 1026.2 Definitions and rules of construction.

(a) *Definitions.* For purposes of this part, the following definitions apply:

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[1] Redesignated section 1602(x) of this title.

(11) *Consumer* means a cardholder or natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§1026.15 and 1026.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest. For purposes of §§1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41, the term includes a confirmed successor in interest.

(24) *Residential mortgage transaction* means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in the consumer's principal dwelling to finance the acquisition or initial construction of that dwelling.

(b) *Rules of construction.* For purposes of this part, the following rules of construction apply:

(3) Unless defined in this part, the words used have the meanings given to them by state law or contract.

§ 1026.23(a)(1) Right of rescission.

(a) **Consumer's right to rescind.** (1) In a credit transaction in which a security interest is or will be retained or acquired in a consumer's principal dwelling, each consumer whose ownership interest is or will be subject to the security interest shall have the right to rescind the transaction, except for transactions described in paragraph (f) of this section. For purposes of this section, the addition to an

existing obligation of a security interest in a consumer's principal dwelling is a transaction. The right of rescission applies only to the addition of the security interest and not the existing obligation. The creditor shall deliver the notice required by paragraph (b) of this section but need not deliver new material disclosures. Delivery of the required notice shall begin the rescission period.

...

(b)(1) **Notice of right to rescind**. In a transaction subject to rescission, a creditor shall deliver two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice shall be on a separate document that identifies the transaction and shall clearly and conspicuously disclose the following:

(i) The retention or acquisition of a security interest in the consumer's principal dwelling.

(ii) The consumer's right to rescind the transaction.

(iii) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business.

(iv) The effects of rescission, as described in paragraph (d) of this section.

(v) The date the rescission period expires.

Relevant Portions of the Consumer Financial Protection

Bureau's *Official Interpretations* to Regulation Z

12 C.F.R. § 1026, Supplement I

12 C.F.R. § 1026 Supp. I, 1026.2(a)(24)-5.i and ii

5. **Acquisition.**

i. A residential mortgage transaction finances the acquisition of a consumer's principal dwelling. The term does not include a transaction involving a consumer's principal dwelling if the consumer had previously purchased and acquired some interest to the dwelling, even though the consumer had not acquired full legal title.

ii. Examples of new transactions involving a previously acquired dwelling include the financing of a balloon payment due under a land sale contract and an extension of credit made to a joint owner of property to buy out the other joint owner's interest. In these instances, disclosures are not required under § 1026.18(q) (assumability policies). However, the rescission rules of §§ 1026.15 and 1026.23 do apply to these new transactions.

Relevant Portions of Oregon's Property Partition Statute,

Or. Rev. Stat. § 107.105

107.105. Contents of decree; care and custody of children; spousal support; disposition of property; creation of trust; name change; judgment for money; tax implications; appeal; supplemental proceedings for partition of property

(f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. In determining the division of property under this paragraph, the following apply:

…

(E) Subsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of co-ownership, and a transfer of marital assets under a judgment of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property.