APPENDIX

No. _____

In The

Supreme Court of the United States

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PAUL EDWARDS,

v. Petitioner,

MCMILLEN CAPITAL, LLC

Respondent,

_____ Δ _____

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

The District Court No: 3:18-cv-346 (SRU)

March 29, 2021 (doc. [65]) Ruling and Order

granting McMillen's doc. [52] Motion to dismiss

and doc [66] judgement date 3-30-2021.

UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

PAUL EDWARDS, Plaintiff,

v.

MCMILLEN CAPITAL, LLC, Defendant.

No. 3:18-cv-346 (SRU) RULING AND ORDER ON MOTION TO DISMISS.

Litigation between the parties in this action, stemming from a dispute over the terms and purpose

of a 2012 loan transaction, has been ongoing since 2015. Following lengthy proceedings in state court that resulted in dismissal for failure to prosecute, Paul Edwards, proceeding pro se, filed the instant complaint in February 2018. In that complaint and the subsequent amended complaint, Edwards raises substantially the same claims that he raised in state court. Specifically, Edwards contends that terms of a loan extended to him by McMillen Capital, LLC were improperly structured as a commercial (rather than consumer) transaction and that those terms violated the federal Truth in Lending Act (TILA) (15 U.S.C. §§ 1601, et seq.), the Connecticut Truth in Lending Act (Conn. Gen. Stat. § 36a-675, et seq.) and the Connecticut Unfair Trade Practices Act (CUTPA) (Conn. Gen. Stat. § 42-110a et seq.). He additionally brings claims of negligence, negligent infliction of

emotional distress and breach of the implied covenant of good faith and fair dealing. The action was dismissed in 2018 as barred under the Rooker-Feldman doctrine, and Edwards timely appealed. After the Second Circuit vacated the dismissal and remanded the case, McMillen Capital again moved for dismissal of all claims. For the following reasons, the motion to dismiss is granted.

I. Factual Background The dispute in this case centers on a loan transaction that took place in April 2012, nearly nine years ago. Am. Compl. Doc. No. 8 at 4. In March of that year, Edwards entered into a real estate purchase contract with Fannie Mae for a property located at 7 New Lane, Cromwell, Connecticut. See id; see also (Case 3:18-cv-00346-SRU Document 65 Filed 03/29/21

Page 1 of 24 2) Pl.'s Ex. G, Doc. No. 60-7. To finance the purchase of the home, Edwards obtained a loan from McMillen Capital secured by a mortgage on the property and evinced by a note. See Am. Compl. Doc. No. 8 at 23, Pl.'s Ex. J, Doc. No. 60-10. The terms of the mortgage note specifically provided that the loan was a commercial transaction. See id. The note (as well as the loan commitment letter) additionally provided, however, that Edwards was obligated to occupy the property within 60 days of executing the note and must continue to occupy the property for at least one year. See id; see also Def.'s Exhibit G, Doc. No. 53. Edwards also confirmed his intention to "owner occupy" the property to McMillen Capital prior to the execution of the mortgage note. See Pl.'s Ex. H, doc. No. 60-8. Relying on those documents, Edwards contends that McMillen Capital was aware of his

intention to use the loan to purchase his primary residence and therefore violated various provisions of federal and state law by structuring the terms of the loan as a commercial rather than consumer transaction. McMillen Capital moves for dismissal on the grounds that Edwards' claims are barred by res judicata and collateral estoppel, as well as by the relevant statutes of limitations. McMillen Capital additionally contends that Edwards has failed to state a claim for negligence, breach of the implied covenant of good faith and fair dealing, NIED or a violation of CUTPA. For the following reasons, the motion to dismiss is GRANTED. II.

II. Procedural History The history of litigation

in state court between the parties is relatively lengthy. Relevant here, Edwards filed a complaint with the

Connecticut Banking Commission regarding the terms of the loan in December 2013; he then filed a complaint in Middlesex Superior Court on June 24, 2015. See Exhibit D Doc. No. 60-4. He amended the complaint in October of 2015 and revised it twice (on January 20, 2016 and again on February 29, 2016). Id. Following that second revision, McMillen Capital filed a motion to strike the complaint in its entirety, which was granted by Judge Aurigemma on November 4, 2016.1 Id.

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1 The order granting the motion to strike purports to address a complaint filed on January 8, 2015. However, the first complaint in state court was not filed until June 2015. Although it is not entirely clear, I assume Judge Aurigemma's order addresses the complaint filed February 29, 2016 (the revised amended complaint filed prior to the motion to strike).

(Case 3:18-cv-00346-SRU Document 65 Filed 03/29/21 Page 2 of 24 3).

Edwards timely filed a substitute complaint, which McMillen also moved to strike. Id. Judge Domnarski granted that motion on June 7, 2017. Id. Edwards filed a second substitute complaint on June 19, 2017. Id. On July 17, 2017 McMillen filed a request to revise that second substitute complaint, requesting that Edwards delete the complaint in its entirety because it was duplicative of the previously struck complaint. Id. Edwards filed an objection to the request to revise, which was overruled by Judge Domnarski on August 28, 2017. Id. Edwards then filed a third substitute complaint on September 12, and a motion for a continuance to extend the date to close the pleadings, which was denied. Id. On September 18, Edwards filed a motion to restore the second substitute complaint to

the docket and to withdraw the third substitute complaint. The court does not appear to have acted on that motion. Id. On September 20, 2017 the action was dismissed for failure to prosecute on the grounds that Edwards had failed to timely close the pleadings. See Pl.'s Exhibit C Doc. No. 60-3. Edwards filed a motion to reopen the judgment of dismissal, which was denied. Id. On February 27, 2018, Edwards filed the original complaint in the case at bar. He amended the complaint on March 20, 2018. See Compl. Doc. No. 1; see also Am. Compl. Doc. No 8. In the amended complaint, at issue here, Edwards alleges five separate claims related to the 2012 loan transaction, including: (1) violations of TILA and the Connecticut TILA; (2) violations of CUTPA; (3) negligence; (4) negligent infliction of emotional distress and; (5) breach of the implied covenant of good faith and fair

dealing. On May 4, 2018 McMillen Capital moved to dismiss the amended complaint, arguing that the claims were barred under the doctrines of res judicata, collateral estoppel and Rooker-Feldman. See First Mot. to Dismiss, Doc. No. 14 at 1. In the alternative, McMillen Capital argued that the claims were legally insufficient and barred by various statutes of limitations. Id. On October 10, 2019 following a hearing, I granted the motion to dismiss on the grounds that the claims were barred under the Rooker-Feldman doctrine. See Min. Entry Doc. No. 37; see also Trans. of Mot. Hrg., Doc. No 47. Edwards timely appealed the dismissal. See Not. of Appeal, Doc. No. 42. The Second Circuit vacated the dismissal and remanded the case, holding that despite the state court's careful

consideration of Edwards' claims and the similarity between those claims and the claims raised in the amended complaint, the action was not barred under the Rooker-Feldman doctrine. See Edwards v. McMillen Capital, LLC, 952 F.3d 32 (2d Cir. 2020). The Court focused specifically on the fact that the action was ultimately not dismissed on the merits, but instead was dismissed for failure to prosecute. Because the action had not been finally decided on the merits by the state court, consideration in federal court of the same claims was not precluded under the Rooker-Feldman doctrine. Id. McMillen Capital subsequently filed this second motion to dismiss, arguing that the claims are barred by res judicata and collateral estoppel. See generally Mem. in Supp. of

Mot. to Dismiss, Doc. No. 53 ("Def's. Mem."). In the alternative, McMillen Capital contends that the claims should be dismissed as legally insufficient and barred by the relevant statutes of limitations. Id. Edwards maintains that his claims are not barred by res judicata or collateral estoppel because the dismissal for failure to prosecute was not a judgment on the merits. See Mem. in Opp. to Sec. Mot. to Dismiss ("Pl.'s Mem."), Doc. No. 60 at 10, 13, 19. Edwards additionally maintains that his claims are both timely and adequately pleaded. III. Standard of Review A motion to dismiss for failure to state a claim under Rule 12(b)(6) is designed "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, 748 F.2d 774, 779 (2d Cir. 1984)

(quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980)). A court considering a motion under Rule 12(b)(6) must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiffs, and decide whether it is plausible that plaintiffs have a valid claim for relief. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007); Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996). Although a plaintiff bears the burden of establishing plausibility at the pleading stage, the standard is "not akin to a probability requirement." Iqbal, 556 U.S. at 678. Instead, the well-pleaded facts must "permit the court to infer more than the mere possibility of misconduct" in order to establish a right to relief. Id. at 679.

A court deciding a Rule 12(b)(6) motion is additionally limited to considering facts alleged in the complaint, and generally may not look to evidence outside the pleadings. "When matters outside the pleadings are presented in response to a 12(b)(6) motion, a district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment." Friedl v. City of New York, 210 F.3d 79, 83 (2d Cir. 2000) (internal citations omitted). Under established precedent in this Circuit, a court may additionally consider "documents attached to the complaint as an exhibit or incorporated in it by reference", "matters of which judicial notice may be taken", and "documents either in plaintiffs' possession or of which plaintiffs

had knowledge and relied on in bringing suit" without converting the motion to one for summary judgment. Brass v. Am. Film Techs., Inc., 987 F.2d 142, 150 (2d Cir. 1993). A court may additionally consider "documents used by [a] defendant" so long as a plaintiff has "actual notice of all the information in the movant's papers and has relied on upon those documents in framing the complaint." Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 48 (2d Cir. 1991). Here, McMillen Capital attaches as exhibits to its motion the original complaint copies of the various complaints that Edwards filed in Superior Court (along with exhibits he submitted), the Superior Court orders striking the complaints, the mortgage note and the loan commitment letter. See Def.'s Ex. AG, Doc. No. 51. Edwards attaches to his memorandum in opposition: the Second Circuit opinion; the transcript

of the prior hearing in this action; the notice of dismissal for failure to close the pleadings from Superior Court; a printout of the docket entries in the Superior Court proceedings; a copy of Judge Domnarski's order striking the substitute complaint in Superior Court; documents from the Connecticut Banking Commission's investigation; the Fannie Mae Real Estate Purchase addendum; copies of emails between an attorney for McMillen Capital and Edwards regarding the loan transaction; the loan commitment letter and; the mortgage note. See Pl.'s Ex. A-J. I will consider all of the documents submitted, because each is specifically referenced in the complaint and is integral to Edwards' stated claims. Furthermore, I will take judicial notice of the state-court proceedings, which are public record, and the fact that Edwards raised certain claims in those

proceedings. See Beauvoir v. Israel, 794 F.3d 244, (Case 3:18-cv-00346-SRU Document 65 Filed 03/29/21 Page 5 of 24 6)

248 n.4 (2d Cir. 2015) (a court may take judicial notice of separate litigation between parties including "the fact that the state-court complaint contained certain statements, albeit not for the truth of the matters asserted.") (internal citations omitted); see also Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388 (2d Cir. 1992) (same). IV. Discussion

1. Res Judicata McMillen Capital contends that

the claims raised in this action are identical to the claims raised, considered on the merits and ultimately stricken in Superior Court. Accordingly, McMillen argues that the claims are barred under the doctrine

of res judicata. See Def.'s Mem. Doc. No. 53. Analysis of that argument begins with the full faith and credit clause of 28 U.S.C. § 1738, which requires "federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982). Accordingly, Connecticut law governs the effect of previous judgments in this case. Under Connecticut law, "[a] valid, final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties...upon the same claim or demand." Weiss v. Weiss, 297 Conn. 446, 459 (2010) (internal citations and quotation marks omitted). In order for res judicata to bar a claim, four requirements must be met: (1) The judgment in the original action was

rendered on the merits by a court of competent jurisdiction; (2) The identities of the parties are the same; (3) The parties had an adequate opportunity to litigate the matter fully; (4) The same claim, demand or cause of action is at issue. See Tirozzi v. Shelby Ins. Co., 50 Conn. App. 680, 686 (1998). Edwards first contends that the claims raised in this action are markedly different from the claims decided in state court and are therefore not barred by res judicata. That claim is unavailing. Connecticut courts have adopted a fairly broad test to determine whether a claim is substantially the same as one previously raised, and a claim will be barred where it relates "to all or any part of the transaction, or series of connected transactions, out of which the [previous] action arose." Pond v. Town of N. Branford, 2013 (Case 3:18-cv-00346-SRU Document 65 Filed 03/29/21 Page 6 of 24

7) U.S. Dist. LEXIS 30304 at *11-12 (D. Conn. Mar. 6, 2013); see also Powell v. Infinity Ins. Co., 282 Conn. 594, 604 (2007) ("[w]hat factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation"). Because the claims raised in this action arise out of the same loan transaction that formed the basis of Edwards' state court claims and are, in fact, nearly identical to the claims raised in various iterations of Edwards' state court complaint, they constitute the "same claim" for purposes of res judicata. Although his claims were considered and rejected on the merits in state court, Edwards nonetheless correctly argues that his claims were not finally adjudicated on the merits in state court. Despite the fact that the claims at issue in the

case at bar are nearly identical those raised and carefully considered in Judge Domnarski's June 7, 2017 order striking Edwards' substitute complaint, Edwards was then permitted to file a second substitute complaint. See Edwards v. McMillen Capital, LLC, MMXCV15-5008533-S at Doc. No. 150. Although McMillen Capital's subsequent request to delete that substitute complaint in its entirety was granted, no judgment was entered. Id. at Doc. No. 158.10. Instead, Edwards filed a third substitute complaint. Id. at Doc. No. 161. The action was then dismissed for failure to prosecute.2 See Pl.'s Ex. C., Doc. No. 60-3. Ordinarily, after a complaint is deleted3 "for the reason that it is identical in substance to a prior [stricken] complaint" a court may enter judgment (on motion of a defendant) without giving a plaintiff a chance to revise the complaint because

"there is no revision which the plaintiff may make." Royce v. Westport, 183 Conn. 177, 181 (1981); see also Lund v. Milford Hosp., Inc., 326 Conn. 846, 850 (2017) ("it is proper for a court to dispose of the substance of a complaint merely repetitive of one to which a [motion to strike] had earlier been sustained"). Here, however, Edwards filed yet another substitute complaint (the third substitute complaint); he then complaint and but then moved to reinstate the second substitute complaint. The Superior Court does not

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2 It is not entirely clear which complaint was dismissed for failure to prosecute, because Edwards filed a third substitute

3.Under Connecticut law, a defendant that seeks a revision on the grounds that a complaint is substantially similar to one previously stricken may request that the repetitive claims be "deleted." See, e.g., Parker v. Ginsburg Dev. CT, L.L.C., 85 Conn. App. 777, 781 (2004) ("a defendant who claims that an amendment to a complaint which replaces a complaint that previously was struck for legal insufficiency is essentially the same, has two options. The options are either to request that the plaintiff revise the complaint by deleting it, or alternatively to move to strike it.").

appear to have acted on the motion to reinstate, which was pending at the time the action was dismissed. In its objection to Edwards' motion to open the judgment of dismissal, McMillen argued that there "was no operative complaint" at the time of dismissal. See Edwards v. McMillen Capital, LLC, MMX-CV15-5008533-S at Doc. No. 171. moved to restore the second substitute complaint to the docket. 4 See Edwards v. McMillen Capital, LLC, MMX-CV15-5008533-S at Doc. No. 161. Accordingly, judgment cannot rest on the complaint that was stricken on the merits, because that complaint was replaced; only then was the action dismissed for failure to prosecute. See Royce, 183 Conn. at 182 ("The [stricken] pleading, superseded by the substitute pleading, is not revived

by the order granting the request to revise, and judgment cannot rest on that superseded pleading alone."); see also Lund, 326 Conn. at 850 ("when an amended pleading is filed, it operates as a waiver of the original pleading."). Under Connecticut law, dismissal for failure to prosecute does not constitute an adjudication on the merits for purposes of res judicata. See Lacasse v. Burns, 214 Conn. 464, 473 (1990) ("a dismissal entered pursuant to § 251 [now 14-3] is not an adjudication on the merits that can be treated as res judicata"); see also Milgrim v. Deluca, 195 Conn. 191, 194 (1985) (same). Because the ultimate dismissal of the action was not, under Connecticut law, a final judgment on the merits, res judicata does not operate as a bar to my consideration of Edwards' claims here.

2. Collateral Estoppel McMillen Capital

additionally contends that Edwards' claims are barred under the doctrine of collateral estoppel, which "prevents a party from relitigating an issue that has been determined in a prior

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4. In my view, had judgment properly been entered for McMillen Capital after Judge Domnarski granted the request to delete the second substitute complaint in its entirety, McMillen Capital would have a much stronger argument that Edwards' claims had been finally considered on the merits. In that situation, the request to revise is akin to a motion to strike. See Melfi v. City of Danbury, 70 Conn. App. 679, 684 (2002) ("although a motion to strike and a request to revise generally serve different functions, either may be used when the amended complaint merely restates the original cause of action that was previously stricken...[i]f the plaintiff here has in fact merely restated the original cause of action, the defendant would prevail on either pleading."); see also Tirozzi v. Shelby Ins. Co., 50 Conn. App. 680, 686 (1998) (motion to strike treated as adjudication on the merits for purposes of res judicata analysis). Because a ruling striking a complaint may be treated as an adjudication on the merits for purposes of res judicata, it is arguable that a request to delete a complaint in its entirety should be treated similarly when it is granted for the reason that a substitute complaint merely repleads previously stricken claims, as was the situation here.

suit." Virgo v. Lyons, 209 Conn. 497, 501 (1988). For collateral estoppel to operate to bar adjudication of a particular issue, the issue must previously have been: (1) fully and fairly litigated; (2) actually decided; and (3) necessary to the judgment in the first action. Sadler v. Lantz, 2010 U.S. Dist. LEXIS 86956, at *6-7 (D. Conn. Aug. 20, 2010). "An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined." State v. Joyner, 255 Conn. 477, 490 (2001). McMillen Capital contends that collateral estoppel operates to bar subsequent litigation of the claims raised in the amended complaint because those same issues were fully and fairly litigated by the Superior

Court's rulings on two separate motions to strike. As discussed above, however, the action was ultimately dismissed for failure to prosecute. Accordingly, the issues raised in the amended complaint cannot be said to have been fully litigated or actually decided, nor were they necessary to the previous judgment. See, e.g., Scott v. Scott, 190 Conn. 784, 787-88 (1983) (collateral estoppel did not apply where prior action had been dismissed for failure to prosecute); Testa v. Santopietro, 1999 Conn. Super. LEXIS 3142, at *4 (Super. Ct. Nov. 17, 1999) (collateral estoppel did not apply to claims dismissed for failure to prosecute because "no issues were determined in the previous action"). The doctrine of collateral estoppel therefore does not apply here. 3. Statute of Limitations In the alternative, McMillen Capital

moves for dismissal on the grounds that each of Edwards' claims is barred by the applicable statute of limitations. Ordinarily, a defendant may not raise affirmative defenses in a pre-answer motion to dismiss. Where "the running of the statute is apparent from the face of the complaint," however, the defense is properly raised and considered in a motion to dismiss. Collin v. Securi Int'l, 322 F. Supp. 2d 170, 172 (D. Conn. 2004); see also Ghartey v. St. John's Queens Hosp., 869 F.2d 160, 162 (2d Cir. 1989). Because the dates of the alleged violations clearly are not in dispute and are clear from the face of the complaint, the defense is properly raised here.

A. TILA

TILA, originally enacted as part of the Consumer Credit Protection Act of 1968, is designed "to promote the informed use of consumer credit by requiring disclosures about its terms and cost." Cheshire Mortg. Serv. v. Montes, 223 Conn. 80, 97 (1992).5 TILA imposes mandatory disclosure requirements on certain credit and loan transactions and additionally creates a private right of action for damages for violations of its provisions. Strubel v. Comenity Bank, 842 F.3d 181, 186 (2d Cir. 2016). Private claims under TILA are subject to a fairly strict statute of limitations; any action for damages must be brought within one year of "the occurrence of the violation." 15 U.S.C. § 1640(e). In 1994, Congress passed the Home Ownership and Equity Protection Act (HOEPA), an

amendment to TILA that regulates certain high-cost mortgage transactions "secured by the consumer's principal dwelling, other than a reverse mortgage transaction." See 15 U.S.C. §§ 1602, 1639. Actions under certain provisions of HOEPA (sections 1639, 1639B, or 1639C) may be brought within three years of the date of the "occurrence of the violation." 6 15 U.S.C. § 1640(e); see also Gray v. Capstone Fin., 2020 U.S. Dist. LEXIS 207866, at *19 (N.D.N.Y. Sept. 22, 2020). The Connecticut legislature has enacted the Connecticut Truth in Lending Act, codified at Conn. Gen. Stat. § 36a-675, et seq., which is generally coextensive with TILA. "General Statutes §§ 36a-677(c) and 36a-678(b) provide that Connecticut's TILA is subject to the federal TILA...to avoid duplication in administration and enforcement of statutes." Bank of New York v. Conway, 50 Conn. Supp. 189, 197-98

(2006). The Connecticut TILA incorporates the federal statute of limitations, specifying that an action must be brought within the "time frames established in 15 U.S.C. [§] 1640(e)." Conn. Gen. Stat. § 36a683(b).

5.The Consumer Finance Protection Bureau is statutorily empowered to prescribe regulations to carry out the underlying goals of TILA; those regulations are codified at 12 C.F.R. Part 1026. Strubel v. Comenity Bank, 842 F.3d 181, 186 (2d Cir. 2016).

6. I note that some courts have held that a one-year statute of limitations applies to HOEPA claims for damages. Others have looked to the plain language of the statute and concluded that for actions brought under HOEPA, a three-year statute of limitations is applicable. For purpose of this order only, I assume the three-year statute applies. Compare Gray, 2020 U.S. Dist. LEXIS 207866, at *1 (concluding that a three-year statute of limitations applies) with Deswal v. United States Nat'l Ass'n, 2014 U.S. Dist. LEXIS 66416, at *4 (E.D.N.Y. May 14, 2014) (HOEPA has a one-year statute of limitations).

For purposes of determining when the statute of limitations begins to run under TILA, courts in this Circuit have interpreted the phrase "occurrence of the violation" differently depending upon whether the transaction at issue is an "open-end" or "closed-end" transaction. "A closed-end credit transaction...includes a completed loan such as a mortgage or car loan. By contrast, an open-end credit transaction is one in which the creditor reasonably contemplates repeated transactions." McAnaney v. Astoria Fin. Corp., 2008 U.S. Dist. LEXIS 5535, at *11 (E.D.N.Y. Jan. 25, 2008) (internal citations omitted). For closed-end transactions, the date of the occurrence of the violation is the date a party enters into a loan agreement or, in some circumstances, when funds

under a loan agreement are transmitted. See Baskin v. G. Fox & Co., 550 F. Supp. 64, 66 (D. Conn. 1982); see also Figueroa v. SBC Bank USA, 2017 U.S. Dist. LEXIS 46298, at *14 (N.D.N.Y. Mar. 29, 2017). For open-end transactions, some courts have applied the "discovery rule," holding that the statute of limitations begins to run on the date a party discovered, or reasonably should have discovered, the alleged violation. See Figueroa, 2017 U.S. Dist. LEXIS 46298 at *14. Others have determined that the statute of limitations begins to run on the date that a finance charge was imposed. Follman v. World Fin. Network Nat'l Bank, 971 F. Supp. 2d 298, 301 (E.D.N.Y. 2013) ("when a TILA claim arises out of the imposition of a finance charge in [an open-end credit plan], courts have typically held that the statute of limitations runs from the date on which the finance charge is first

imposed"). Additionally, both the Connecticut and federal TILA recognize an exception to the one-year statute of limitations for borrowers exercising rescission rights. See Conn. Gen. Stat. § 36a-683(e); see also 15 U.S.C. § 1635(a)-(f). Under section 1635, an "obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction." 15 U.S.C. § 1635(a). Section 1635 additionally imposes upon a creditor a duty to "conspicuously disclose" that right when the transaction is consummated. Id. "If the creditor fails completely to provide a rescission notice to the consumer, the consumer has an extended period of three years after the consummation date in which to rescind a consumer credit transaction." Bank of New York, 50 Conn. Supp. at 197-98. (Case 3:18-cv-00346-SRU Document 65 Filed 03/29/21 Page 11 of 24

12) TILA (and, by extension, HOEPA) are only applicable to consumer credit transactions and therefore do not apply to transactions involving credit extended for "business, commercial, or agricultural purposes." 15 U.S.C. § 1603; Mauro v. Countrywide Home Loans, Inc., 727 F. Supp. 2d 145, 153 (E.D.N.Y. 2010). Because the Second Circuit has not articulated a standard for determining when a loan is made for a "business purpose", courts determining whether TILA applies to a particular transaction must conduct a fact-specific inquiry to determine the primary purpose of a loan. Mauro, 727 F. Supp. 2d at 153; Krishtul v. VSLP United, LLC, 2014 U.S. Dist. LEXIS 32033, at *25 (E.D.N.Y. Mar. 11, 2014). It is not clear from the face of the complaint that TILA applies to the loan transaction at issue in the case at bar; the purpose of the loan is at the heart of the dispute between the

parties. Assuming, however, that the loan was subject to the restrictions imposed by TILA, both parties agree that the mortgage note was executed on April 30, 2012 and that Edwards did not file his complaint in Superior Court until June 24, 2015. See Def.'s Mem, Doc. No. 53 at 15; Am. Compl. Doc. No. 8. Additionally, if as Edwards argues, the claims raised in federal court are markedly different than those raised in state court, the claims would have been filed more than six years after the original transaction took place. Accordingly, McMillen Capital contends that even if TILA applies to govern the terms of the loan, all claims are clearly barred by the one-year statute of limitations provided by section 1640(e). Edwards argues that the claims are not time-barred because (i) a three-year statute of limitations applies to the claims; (ii) the discovery rule should apply to toll the

statute of limitations; (iii) the statute of limitations should be equitably tolled and; (iv) the right of rescission did not attach until September 2013. See generally Pl.'s Mem. Doc. No. 60. I consider each of those arguments below.

i. HOEPA Edwards contends that although the mortgage note describes the loan transaction as a "commercial transaction," it was in fact a high-cost consumer mortgage transaction subject to the restrictions of HOEPA.7 See Am. Compl. Doc. No. 8 at 37; Pl.'s Mem, Doc. No. 60 at 29; see also 15

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7. Although Edwards does not cite to specific provisions of HOEPA in his Amended Complaint, he contends that the mortgage qualified as a "high-cost mortgage" subject to the substantive provisions of TILA. He additionally cites to

U.S.C. § 1602(bb) (defining "high cost mortgage). Because he brings claims under sections 1639 and 1639b-c of HOEPA, he contends that a three-year statute of limitations should apply. Id. As an initial matter, Edwards alleges no facts in support of the claim that the loan transaction falls under the provisions of HOEPA, which only applies to particular consumer credit transactions secured by a consumer's principal residence. 15 U.S.C. §§ 1602(bb)(1), 1639. However, even assuming that HOEPA would apply, the three-year statute of limitations would still bar such a claim because the loan transaction at issue occurred in April 2012. Edwards argues that the loan is an open-end transaction to which the discovery rule should apply and that the statute of limitations should

therefore be tolled until March 2014. See Def.'s Mem. Doc. No. 60 at 28. Because the loan at issue was a mortgage loan, however, it does not constitute the type of "openend" transaction to courts have applied the discovery rule. 8 Kelmetis v. Fannie Mae, 2017 U.S. Dist. LEXIS 11169, at *15 (N.D.N.Y. Jan. 27, 2017). Moreover, even if Edwards could establish that the loan was an open-end transaction, the discovery rule applies only in situations where "a plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted." SaintJean v. Emigrant Mortg. Co., 50 F. Supp. 3d 300, 314 (E.D.N.Y. 2014). Here, Edwards sets forth no facts in support of the claim that he was somehow unable to discover the allegedly violative terms of the loan at the time of the transaction. See Am. Compl. Doc. No. 8 at 38. He merely states that he became aware in

December 2013 that the mortgage note defined the loan as a commercial transaction. See id. Accordingly, even assuming that HOEPA governs the loan and that the discovery rule would apply, Edwards has not established that he was unable to learn of the alleged violations in April 2012. The claim is therefore

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specific provisions of HOEPA in his memorandum in opposition to the motion to dismiss. Accordingly, I assume that he is referring to HOEPA in the complaint when he alleges that McMillen Capital violated provisions of TILA relating to high-cost mortgage transactions. See, e.g., Erickson v. Pardus, 551 U.S. 89, 94 (2007) (when a party proceeds pro se, the plaintiff's pleadings should be held "to less stringent standards than formal pleadings drafted by lawyers").

8 HOEPA generally covers closed-end transactions but is also applicable certain open-end transactions, such as home-equity lines of credit. Gustavia Home, LLC v. Rice, 2016 U.S. Dist. LEXIS 157212, at *11 (E.D.N.Y. Nov. 10, 2016).

time-barred. See, e.g., McAnaney, 2008 U.S. Dist. LEXIS 5535, at *28 (where original rider to loan specified later-disputed fees, discovery rule was inapplicable).

ii. Equitable Tolling Edwards' claim that the statute of limitations should be equitably tolled is similarly unavailing. Although he states that McMillen Capital fraudulently concealed the TILA violations from him in an effort to hinder and delay his ability to file a claim, he offers no facts to support that contention. See Am. Compl. Doc. No. 8 at 38. Accordingly, he has not alleged "affirmative acts of concealment by the defendant over and above any alleged non-disclosure that forms the basis" of his

claims as is required in order to warrant equitable tolling for alleged violations of TILA. Gorbaty v. Wells Fargo Bank, 2012 U.S. Dist. LEXIS 55284, at *27 (E.D.N.Y. Apr. 18, 2012). iii. Right of Rescission Finally, Edwards argues that the statute of limitations should be tolled until September 13, 2012 because the original loan transaction was a residential mortgage transaction that was exempt from certain required disclosures under TILA (including notice of the right of rescission). See Am. Compl. Doc. No. 8 at 54; see also Pl.'s Mem., Doc. No. 60 at 23. Edwards maintains that because the loan was a "combined purpose loan", each advance on the loan was treated as a separate transaction and the right of rescission did not attach on April 30, 2012; instead, the right attached only when he received the second advance on the loan, on September 13, 2012. See Pl.'s Mem., Doc.

No. 60 at 23 n.10. Because McMillen Capital failed to provide him with certain disclosures (including notice of his right to rescind the transaction) within three days of that second advancement, he had until September 13, 2015 to rescind the loan, and his complaint was timely filed. Id. at 23. Initially, it is not clear that any part of this loan was subject to the right of rescission, which applies only to a "consumer credit transaction...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." 15 U.S.C. § 1635(a). Even assuming that Edwards had a right to rescind this transaction, however, the three-year extended statute of limitations (Case 3:18-cv-00346-SRU Document 65 Filed 03/29/21 Page 14 of 24 15) period applies only to

actions seeking rescission, not actions seeking money damages for violations of disclosure requirements. See 15 U.S.C. § 1635(g); see also Williams v. Aries Fin., LLC, 2009 U.S. Dist. LEXIS 107812, at *17 (E.D.N.Y. Nov. 18, 2009); Iroanyah v. Bank of Am., N.A., 851 F. Supp. 2d 1115, 1121-22 (N.D. Ill. 2012) (collecting cases for the proposition that damages actions for violations of section 1635 are subject to a one-year statute of limitations). Because Edwards never attempted to pursue the equitable remedy of rescission and chose instead to file an action for damages, the three-year period for exercising rescission rights is inapplicable to his claims. See Nat'l City Mortg. Co. v. Lederman, 2011 Conn. Super. LEXIS 505, at *27 (Super. Ct. Feb. 25, 2011) ("the defendants have not taken the steps necessary to rescind the transaction so the three-year limitations

period does not apply"). B. CUTPA CUTPA prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). To state a claim for a violation of CUTPA, a plaintiff must establish that "(1) the defendant was acting in trade or commerce; (2) that the defendant engaged in unfair or deceptive acts; and (3) that such unfair or deceptive acts caused the plaintiff to suffer an ascertainable loss." Tanasi v. CitiMortgage, Inc., 257 F. Supp. 3d 232, 275 (D. Conn. 2017). "Connecticut courts have held that CUTPA applies to unfair or deceptive conduct by mortgage companies and other holders of mortgage notes." Rodrigues v. J.P. Morgan Chase Bank, 2009 U.S. Dist. LEXIS 102502 at *26 (D. Conn. Nov. 3, 2009). Actions under CUTPA must be brought within three years of the occurrence of a violation.

Conn. Gen. Stat. § 42-110g(f). However, Connecticut courts have applied the "continuing course of conduct doctrine" to toll certain statutes of limitations where a plaintiff establishes that a defendant "committed an initial wrong upon the plaintiff", and there is "evidence of the breach of a duty that remained in existence after commission of the original wrong." 9 Watts v. Chittenden, 301 Conn. 575, 585 (2011) (internal

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9 Whether the continuing course of conduct doctrine applies to claims under CUTPA remains an unsettled area of law. See Flannery v. Singer Asset Fin. Co., LLC, 312 Conn. 286, 298 (2014) (declining to reach question of whether

citations omitted). The Connecticut Supreme Court has held that later wrongful conduct of a defendant related to the prior wrong constitutes a breach of the duty. Flannery v. Singer Asset Fin. Co., LLC, 312 Conn. 286, 312-13 (2014). "Such later wrongful conduct may include acts of omission as well as affirmative acts of misconduct." Id. Edwards contends that that the statute of limitations should be tolled because: (1) McMillen Capital breached a duty owed under TILA by failing to issue certain disclosures under TILA in September 2013; (2) sought to foreclose on his home through December 2013 and; (3) made misrepresentations to the Banking Commission through April of 2015. See Am. Compl. Doc. No. 8 at 55, 60; Pl.'s Mem. Doc. No. 60 at 43-44. Connecticut

courts have recognized that the continuing course of conduct doctrine may be applicable where a fiduciary relationship exists between parties. Tunick v. Tunick, 201 Conn. App. 512, 537 (2020). "The gravamen of the continuing course of conduct doctrine is that a duty continues after the original wrong is committed." Golden v. Johnson Memorial Hospital, Inc., 66 Conn. App. 518, 525, cert. denied, 259 Conn. 902 (2001). A traditional borrower-lender relationship, however, does not create a fiduciary relationship absent facts indicating the existence of some type of special relationship or reliance between the parties. Southbridge Assocs., L.L.C. v. Garofalo, 53 Conn. App. 11, 19 (1999). Here, Edwards has not alleged that the relationship was anything more than a borrower-lender relationship and has not alleged the existence of "a continuing special relationship" following the

initial mortgage transaction. Flannery, 312 Conn. at 321. Additionally, although Edwards contends that a duty was imposed by virtue of the disclosure requirements of TILA, courts have declined to imply a fiduciary duty from those requirements alone. See Iannuzzi v. Am. Mortg. Network, Inc., 727 F. Supp. 2d 125, 138 (E.D.N.Y. 2010) (rejecting argument that TILA disclosure requirements created fiduciary duty); Lee v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 37268, at *18 (N.D. Cal. Mar. 18, 2013) (rejecting claim

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continuing course of conduct should apply because doctrine was inapplicable given particular facts alleged). I do not address the issue here because I conclude it does not apply under the circumstances of this case.

that TILA disclosure requirement created fiduciary duty). Edwards has therefore not adequately alleged that any continuing duty existed to warrant tolling the statute of limitations for his claims under CUTPA. Edwards additionally argues that McMillen Capital committed later wrongful conduct related to the initial violation. He contends that after improperly structuring the loan to put him at an increased risk of default, McMillen Capital tried to force him to sell his primary residence rather than foreclosing on the property in order to collect on the terms of the note. See Am. Compl. Doc. No. 8 at 55, 57. Those allegations merely restate the claim that the terms of the note itself were in violation of various federal and state laws, rather than alleging "a series of acts or

omissions" that would make it impossible to pinpoint the date of the alleged wrong such that the continuing course of conduct doctrine should apply. Navin v. Essex Sav. Bank, 82 Conn. App. 255, 263 (2004). With regard to the allegations regarding the Banking Commission's investigation, Edwards merely states that McMillen made "misrepresentations" to the Banking Commission by stating that the purpose of the loan was commercial. See Am. Compl. Doc. No. 8 at 19. Because the loan documents specified that the loan was commercial, that statement alone is insufficient to establish later wrongful conduct related to the underlying wrong. Accordingly, the claim under CUTPA is time-barred.

C. Connecticut General Statutes § 52-577 McMillen Capital moves for dismissal on the grounds that negligence, NIED and breach of the implied covenant

of good faith and fair dealing claims are barred by Conn. Gen. Stat. § 52-577, which provides that a tort claim must be brought within three years of the date of the "act or omission complained of." 10 McMillen notes that the loan transaction at issue here took place in April of 2012, more than six years prior to the filing of this action. See Def.'s Mem. Doc. No. 53 at 12. Accordingly, McMillen argues that each of those causes of action is time-barred.

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10. McMillen Capital appears to additionally argue that the three-year statute of limitations applicable to tort actions bars Edwards' claims under CUTPA and TILA. However, those statutes are clearly governed by independent statutes of limitations. See 15 U.S.C. § 1640(e); Conn. Gen. Stat. § 42-110g(f).

Edwards attempts to rely on Connecticut General Statutes § 52-592 to argue that the case was timely filed because it was brought within a year of dismissal in state court. That section provides, in relevant part: "if any action, commenced within the time limited by law, has failed one or more times to be tried on its merits...for any matter of form" a plaintiff may commence a new action on the same claim within one year.11 Conn. Gen. Stat. § 52-592. Connecticut courts have repeatedly held that section 52-592 "is remedial in nature and, therefore, warrants a broad construction." Ruddock v. Burrowes, 243 Conn. 569, 575 (1998). "[I]t is the policy of the law to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court. The

design of the rules of practice is both to facilitate business and to advance justice... [c]onsequently, § 52-592 (a) should be so construed as to advance the remedy rather than to retard it." Id. at 582-83; see also Santorso v. Bristol Hosp., 308 Conn. 338, 355 (2013) ("the accidental failure of suit statute...is a savings statute that is intended to promote the strong policy favoring the adjudication of cases on their merits rather than the disposal of them on the grounds enumerated in § 52- 592(a)"). Disciplinary dismissals, including dismissal for failure to close the pleadings, are not categorically excluded from the protections of the statute. Skinner v. Doelger, 99 Conn. App. 540, 554 (2007). Whether the statute should apply in a particular case of disciplinary dismissal entails a factspecific inquiry into the circumstances of the dismissal, and a plaintiff must be "afforded an

opportunity to make a factual showing that the prior dismissal was a matter of form in the sense that the plaintiff's noncompliance with a court order occurred in circumstances such as mistake, inadvertence or excusable neglect." Ruddock, 243 Conn. at 577. Courts have additionally considered the extent to which a plaintiff's conduct caused "delay or inconvenience to the court or to opposing parties." Worth v. Comm'r of Transp.,

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11. It is not clear that Edwards' claims for negligence or NIED were ever timely filed. The loan transaction at issue took place in April 2012 and Edwards brought his state court action in June 2015. However, McMillen does not raise that issue, so I do not address it here.

135 Conn. App. 506, 522 (2012). "Even in the disciplinary context, only egregious conduct will bar recourse to § 52-592." Plante v. Charlotte Hungerford Hosp., 300 Conn. 33, 51 (2011). Similarly, courts have broadly construed the phrase "cause of action" under section 52-592. "It is well settled that a cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief." Daoust v. McWilliams, 49 Conn. App. 715, 721 (1998) (quoting Gallo v. G. Fox & Co., 148 Conn. 327, 330 (1961)); see also Rogozinski v. Am. Food Serv. Equip. Corp., 34 Conn. App. 732, 739 (1994) ("Even though a single group of facts may give rise to rights for several different kinds of relief, it is still a single cause of

action.") (internal citations omitted). Claims arising out of the same event or occurrence are therefore deemed the same cause of action for purposes of section 52-592. Daoust, 49 Conn. App. at 722. Here, Edwards argues that the dismissal in the state court action was the result of mistake or inadvertence and appears to indicate that the error was due in part to his status as a pro se litigant. He notes that prior to the dismissal for failure to close the pleadings, he requested multiple continuances of the deadline and indicated to the court that he was unable to close the pleadings before McMillen Capital had filed a response to his third amended complaint. He additionally points to caselaw supporting the proposition that filing a false certificate of closed pleadings may result in dismissal of an action with prejudice. See, e.g., Bongiovanni v. Saxon, 99 Conn.

App. 221, 223 (2007). He states that he was therefore "very fearful of closing the pleadings before they were joined." See Pl.'s Mem. Doc. No. 60 at 34. McMillen Capital, however, contends that Edwards' repeated repleading of legally insufficient claims five separate times constitutes a pattern of non-compliance so egregious that section 52-592 does not apply to save the claims. I note initially that although it is the "established policy of the Connecticut courts to be solicitous of pro se litigants" that solicitude cannot "interfere with the rights of other parties." Worth, 135 Conn. App. 506, 530 n.6 (2012). Moreover, the purpose of section 52-592 is to permit an action to be adjudicated on the merits; here, Edwards' claims have been carefully considered and dismissed for failure to adequately state a claim in two separate orders.

Because the action was ultimately dismissed for failure

to prosecute, however, Edwards is not barred from taking advantage of the provisions of section 52-592. Additionally, despite his repeated attempts to comply with the Superior Court's orders to properly revise the complaint and timely close the pleadings, Edwards' conduct likely does not rise to the level of egregiousness that would bar recourse to section 52-592. A careful review of the state court record establishes that Edwards filed multiple requests to continue the deadline to close the pleadings expressing confusion with regard to whether the pleadings could be closed before McMillen Capital

filed a response to his third substitute complaint. See Docs. No. 160.00, 162.00. Prior to the deadline for closing the pleadings, he additionally filed a motion for "order of notice" requesting an explanation with regard to whether the pleadings could be closed before they had properly been joined. See Doc. No. 165.00. The court denied his motions for continuance without explanation. Those repeated attempts to modify and clarify the court's order distinguish his conduct from the type of egregiousness cited by Connecticut courts in holding that section 52-592 does not apply to save a particular action. See, e.g., Worth, 135 Conn. App. at 520 (pro se plaintiff's repeated failure to comply with order without seeking modification, including failure to comply even after nonsuit was entered, coupled with failure to provide explanation for behavior sufficiently egregious to bar recourse to section 52-

592); Gillum v. Yale Univ., 62 Conn. App. 775, 787 (2001) (pattern of delay including history of dismissals for failure to prosecute over nine-year period constituted egregious conduct); Pepitone v. Serman, 69 Conn. App. 614, 619-20 (2002) (savings statute did not apply where plaintiff had failed twice before to adequately prosecute action leading to dismissal and failed to offer any explanation for conduct over the course of a nine-year period). Here, in light of Edwards' repeated attempts to clarify or extend the deadline to close the pleadings, his conduct does not rise to the level of egregious or dilatory conduct that has been found sufficient bar recourse to section 52-592. Although Edwards has had his claims considered twice on the merits, he is correct that the dismissal was ultimately for what is considered a matter of form for purposes of section 52-592. Moreover, Connecticut

courts have repeatedly emphasized that section 52-592 is to be broadly construed, and additionally that parties proceeding pro se must be afforded wide latitude.

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Accordingly, to the extent that he raises claims in this action arising out of the same cause of action at issue in state court, those claims are not barred as untimely. 4. Failure to State a Claim McMillen Capital argues in the alternative that even if Edwards may avail himself of the savings statute, he has failed to state a cognizable claim for negligence, NIED and breach of the implied covenant of good faith and fair dealing. I agree with McMillen Capital. A. Negligence To state a claim for negligence under Connecticut law, a plaintiff

must adequately plead the familiar elements of duty, breach, causation, and actual injury. Radesky v. First Am. Title Ins. Co., 2003 U.S. Dist. LEXIS 15969, at *15 (D. Conn. Aug. 29, 2003). McMillen Capital contends that Edwards has failed to state a cognizable claim for negligence because he has not established that he was owed a duty of care. See Def.'s Mem., Doc. No. 53 at 16. Edwards contends that a duty arose "pursuant to the loan commitment agreement" and "pursuant to public policy, common law, state and federal law, TILA and statutory law." See Am. Compl. Doc. No. 8 at 31. As discussed above, Connecticut courts have held that the mere existence of a borrower-lender relationship does not create a fiduciary duty. See Southbridge, 53 Conn. App. 11 at 19. Unless a borrower-lender relationship is "characterized by a unique degree of trust and

confidence" no fiduciary duty will be implied. Iacurci v. Sax, 313 Conn. 786, 800 (2014). Here, as Judge Aurigemma noted when considering Edwards' negligence claim in Superior Court, Edwards has alleged no facts to indicate that there was anything more than a traditional borrower-lender relationship between the parties, nor has he alleged facts indicating that a unique degree of trust and confidence existed. 12 See Am. Compl. Doc. No. 8 at 32; Doc. No. 138.00. Accordingly, he has failed to adequately allege that McMillen Capital owed him a duty of care, much less that the duty was breached by virtue of the alleged improper loan terms.

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12. Judge Domnarski subsequently relied on that analysis in granting the motion to strike on June 7, 2017. See Doc. No. 145.10.

Edwards additionally contends that McMillen Capital breached certain "legal duties." Pl.'s Mem. Doc. No. 60 at 36. Under certain circumstances, "[s]tatutes and regulations can establish a duty of care that can form the basis of a negligence action." Tanasi, 257 F. Supp. 3d at 273. "Statutory negligence is actionable upon satisfaction of two conditions: (1) the plaintiff must be a member of the class protected by the statute; and (2) the injury must be of the type the statute was intended to prevent." Small v. S. Norwalk Sav. Bank, 205 Conn. 751, 760 (1988). Here, Edwards does not adequately allege either that he was a member of the class protected by the statute or that the injury suffered was of the type the statute was designed to protect. Because Edwards has not alleged any facts to suggest

that McMillen Capital owed him a duty of care or that the circumstances of this transaction form a basis for a claim of statutory negligence, he has failed to state a cognizable claim of negligence. See also Bentley v. Greensky Trade Credit, LLC, 156 F. Supp. 3d 274, 290 (D. Conn. 2015) ("[plaintiff] has failed to allege plausibly that her injury is of the kind that TILA was designed to prevent. Because [plaintiff] has failed to plead facts consistent with the existence of a duty, the Court finds that her negligence claim is futile").

B. Negligent Infliction of Emotional Distress To

state a claim for NIED under Connecticut law, a plaintiff must allege that: (1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe

enough that it might result in illness or bodily harm; and (4) the defendant's conduct was the cause of the plaintiff's distress. Carrol v. Allstate Ins. Co., 262 Conn. 433, 444 (2003). A plaintiff must allege not only that general harm was foreseeable, but specifically that the defendant's conduct was likely to cause "emotional distress likely to lead to illness or bodily harm." Olson v. Bristol-Burlington Health District, 87 Conn. App. 1, 5 (2005). Edwards makes conclusory allegations that, by denying him the benefits of more favorable loan terms and threatening to foreclose on his home, as well as making misrepresentations to the Banking Commission, McMillen Capital caused him to experience emotional distress. See generally Am. Compl. Doc. No. 8. The allegations contained in the Amended Complaint are very similar to those raised and stricken by Judge Aurigemma, whose reasoning I

find persuasive. There, as here, Edwards has merely (Case 3:18-cv-00346-SRU Document 65 Filed 03/29/21 Page 22 of 24 23)

restated the elements of a cause of action for NIED without alleging any facts in support of his claim. See Am. Compl. Doc. No. 8 at 42. Conclusory statements that McMillen Capital threatened to exercise its foreclosure rights do not, without more, establish that McMillen Capital's conduct created an unreasonable risk of causing him severe emotional distress, or that such distress was foreseeable.

C. Breach of the Implied Covenant of Good Faith and Fair Dealing Under Connecticut law, the "duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship...[i]n other words, every contract carries an implied duty

requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement." De La Concha of Hartford, Inc. v. Aetna Life Ins. Co., 269 Conn. 424, 432 (2004). Claims for violations of the implied covenant, however, may not be predicated on the "terms and purpose of the contract." Id. at 433. Instead, a claim under this breach of contract theory presupposes that the contract terms are agreed upon and that "what is in dispute is a party's discretionary application or interpretation of a contract term." Id. (internal citations omitted). Accordingly, to state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege "acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract." Id. (quoting Alexandru v.

Strong, 81 Conn. App. 68, 80-81, cert. denied, 268 Conn. 906 (2004)). Here, Edward maintains that McMillen Capital "denied the Plaintiff from receiving the benefits of loan terms that are consistent with and not contrary to Public Policy, Common Law, State & Federal Law, TILA and Statutory Law." See Am. Compl. Doc. No. 8 at 17; Pl.'s Mem. Doc. No. 60 at 48. However, he does not contend that he reasonably expected that the interest rate, default or balloon payment would be different than the terms set out in the agreement. Because he does not allege that any of McMillen's actions denied him benefits he reasonably expected to receive under the terms of the note, but instead argues that the terms of the agreement itself were improperly structured in violation of state and federal law, he has failed to state a cognizable claim for breach of the implied covenant of good faith and

fair dealing. (Case 3:18-cv-00346-SRU Document 65 Filed 03/29/21 Page 23 of 24 24)

V. Conclusion For the foregoing reasons, the motion to dismiss (doc. no. 52) is GRANTED. The clerk is directed to enter judgment in favor of the defendants and close the case. SO ORDERED. Dated at Bridgeport, Connecticut, this 29th day of March 2021. /s/ STEFAN R. UNDERHILL Stefan R. Underhill

APPENDIX B
The Court of Appeals for The Second Circuit
Nov. 17, 2022 (doc. [71]) Summary Order
(affirming The District Court's doc. [66]
Judgment).

21-1024-cv. Edwards v. McMillen Cap., LLC

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST

SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of November, two thousand twenty-two.

PRESENT: ROBERT D. SACK, RICHARD C. WESLEY, JOSEPH F. BIANCO, Circuit Judges.

Paul Edwards,

Plaintiff-Appellant,

v. 21-1024-cv

McMillen Capital, LLC,

Defendant-Appellee.

FOR PLAINTIFF-APPELLANT: Paul Edwards, pro se, Cromwell, CT.

FOR DEFENDANT-APPELLEE: Ander S. Knott, Knott & Knott, LLC, Cheshire, CT.

Appeal from a judgment of the United States District Court for the District of Connecticut (Underhill, J.).

Case 21-1024, Document 71-1, 11/17/2022, 3421299, Page1 of 10 2.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED. Appellant Paul Edwards, proceeding pro se, appeals the district court's judgment dismissing his claims. Based on alleged misconduct connected to a 2012 mortgage loan, Edwards sued defendant McMillen Capital, LLC, ("McMillen") in February 2018, asserting that McMillen violated the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f ("federal TILA"), the Connecticut Truth in Lending Act, Conn. Gen. Stat. §§ 36a-675–36a-686 ("Connecticut TILA), and the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §§ 42-110a–42-110q ("CUTPA"). He also brought

state law negligence, negligent infliction of emotional distress, and breach of the implied covenant of good faith and fair dealing claims. The district court granted McMillen's motion to dismiss the amended complaint, under Federal Rule of Civil Procedure 12(b)(6), on the grounds that Edwards's federal and Connecticut TILA and CUTPA claims were untimely, and his remaining causes of action did not state a claim for relief. We assume the parties' familiarity with the underlying facts and procedural history—which we already addressed in our prior precedential opinion, see Edwards v. McMillen Capital, LLC, 952 F.3d 32, 33–35 (2d Cir. 2020) (per curiam)— as well as the issues now on appeal, which we discuss only as necessary to explain our decision to affirm.

I. Timeliness of Edwards's TILA and CUPTA

Claims On an appeal from a Rule 12(b)(6) dismissal, this Court reviews a district court's "legal conclusions, including its interpretation and application of a statute of limitations . . . de novo." City of Pontiac Gen. Emps. Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 173 (2d Cir. 2011). "Although the statute of limitations is ordinarily an affirmative defense that must be raised in the answer, a

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statute of limitations defense may be decided on a Rule 12(b)(6) motion if the defense appears on the face of the complaint." Ellul v. Congregation of Christian Bros., 774 F.3d 791, 798 n.12 (2d Cir. 2014). Moreover, "[w]hen a district court determines that equitable tolling is inappropriate, we review the legal premises

for that conclusion de novo, the factual bases for clear error, and the ultimate decision for abuse of discretion." DeSuze v. Ammon, 990 F.3d 264, 268 (2d Cir. 2021).

A. Federal and Connecticut TILA

Edwards's federal and Connecticut TILA claims are time barred. Federal TILA aims to protect consumers "by assuring a meaningful disclosure of credit terms." Strubel v. Comenity Bank, 842 F.3d 181, 186 (2d Cir. 2016) (internal quotation marks and citation omitted). Under the federal law, many claims must be brought within "one year from the date of the occurrence of the violation," although certain actions are subject to a three-year statute of limitations. See 15 U.S.C. § 1640(e). Connecticut TILA's statute of limitations is the same as the federal limitations period. Conn. Gen.

Stat. § 36a-683(b). Even under the longer three-year limitations period, Edwards's claims were brought too late. The mortgage was executed on April 30, 2012, and Edwards filed his earliest lawsuit in state court on June 24, 2015, three years and two months later. This suit was not filed until February 2018—significantly later still. Therefore, the federal and Connecticut TILA claims are barred by the statute of limitations. Edwards contends that these claims are nevertheless timely because of the "discovery rule," which allows the statute of limitations to commence on the date the plaintiff discovered, or reasonably could have discovered, the alleged violation. Edwards does not challenge the district court's determination that the discovery rule applies only to open-end transactions and not closedCase 21-1024, Document 71-1, 11/17/2022, 3421299, Page3 of 10 4 end

transactions. See, e.g., Latouche v. Wells Fargo Home Mortg. Inc., 752 F. App'x 11, 13 (2d Cir. 2018) (summary order) ("While this Court has not spoken directly on the issue, among lower courts in this circuit, [i]t is well-settled law that in closed-end credit transactions, like [a mortgage loan], the date of the occurrence of violation is no later than the date the plaintiff enters the loan agreement or, possibly, when defendant performs by transmitting the funds to plaintiffs." (internal quotation marks and citation omitted)). Instead, Edwards argues that the district court erred in concluding that his loan agreement was a closed-end transaction. We find his argument unpersuasive. The district court correctly held that, because the alleged loan transaction at issue did not contemplate future disbursals or repeated transactions, it was a closed-end transaction to which

the discovery rule does not apply. These claims fare no better under the rescission-based statute of limitations. If a creditor fails to "conspicuously disclose" rescission rights, a consumer has three years to rescind the transaction. See 15 U.S.C. §§ 1635(a), (f); Conn. Gen. Stat. § 36a-683(e). The three-year extension is measured from the "date of consummation of the transaction." 15 U.S.C. § 1635(f). This is defined as "the time that a consumer becomes contractually obligated on a credit transaction, a matter decided by reference to state law." Smith v. Wells Fargo Bank, N.A., 666 F. App'x 84, 86 (2d Cir. 2016) (summary order) (internal quotation marks and citation omitted) (finding under Connecticut law that the date of consummation was, at latest, plaintiff's transmittal of the executed documents to the lender). Here, Edwards was contractually obligated when he

executed the mortgage documents on April 30, 2012. Therefore, his claims would still be untimely under the rescission-based statute of limitations. Finally, the district court correctly determined that there was no basis for equitably tolling

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the statute of limitations. Equitable tolling is appropriate on a rare occasion where "extraordinary circumstances prevented a party from timely performing a required act, and . . . the party acted with reasonable diligence throughout the period he [sought] to toll." Walker v. Jastremski, 430 F.3d 560, 564 (2d Cir. 2005) (internal quotation marks and citation omitted). Here, Edwards does not allege any "extraordinary circumstances" warranting equitable

tolling, and reasonable diligence by Edwards would have revealed the alleged violation when he signed the mortgage note in April 2012. Accordingly, the federal and Connecticut TILA claims were properly dismissed as time barred.

B. CUTPA

The CUTPA claim is also time barred. CUTPA prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). A plaintiff may not bring a CUTPA claim "more than three years after the occurrence of a violation." Conn. Gen. Stat. § 42-110g(f). Edwards's claim, stemming from the 2012 loan transaction, is clearly beyond this three-year period. Moreover, the continuing course of conduct doctrine does not

toll the statute of limitations here. State law claims are governed by state tolling rules, see Schermerhorn v. Metro. Transp. Auth., 156 F.3d 351, 354 (2d Cir. 1998) (per curiam), and Connecticut courts apply the continuing course of conduct doctrine only where a defendant: "(1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty," Witt v. St. Vincent's Med. Ctr., 252 Conn. 363, 370 (2000). A continuing duty exists where there is "evidence of either a special relationship between the Case 21-1024, Document 71-1, 11/17/2022, 3421299, Page5 of 10 6 parties . . . or some later wrongful conduct of a defendant related to the prior act [or omission]." Fichera v. Mine Hill Corp., 207 Conn. 204, 210 (1988). Here, there are no allegations that suggest Edwards and McMillen were

in a special fiduciary relationship beyond a standard borrower-lender arrangement. See Southbridge Assocs., LLC v. Garofalo, 53 Conn. App. 11, 19 (1999) (holding that, because a "lender has the right to further its own interest in a mortgage transaction and is not under a duty to represent the customer's interest," no fiduciary relationship exists in a borrower-lender relationship). Moreover, although Edwards seeks to rely on McMillen's alleged ongoing failure to make the requisite TILA disclosures after advancements of the loan, that allegation of continuing omission does not constitute additional misconduct from the time of the loan that would trigger application of this doctrine. See Flannery v. Singer Asset Fin. Co., 312 Conn. 286, 312–13 (2014) (concluding that continuing course of conduct doctrine did not apply where plaintiff "has not alleged or

pointed to any evidence of any duty owed by, or further misconduct [or a new omission] on the part of, the defendant following [the principal] sale"). In sum, the district court correctly determined that no exceptions to the limitation period apply that would render the CUPTA claim timely, and thus properly dismissed the CUPTA claim.

II. Remaining State Law Claims

The district court granted McMillan's motion to dismiss the remaining state law claims— for negligence, negligent infliction of emotional distress, and breach of the implied covenant of good faith and fair dealing—concluding that McMillan failed to state plausible claims upon which

relief could be granted. We agree.1 As noted above, we review a district court's dismissal under Rule 12(b)(6) de novo. See Nicosia v. Amazon.com, Inc., 834 F.3d 220, 230 (2d Cir. 2016). To avoid dismissal, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In making this plausibility assessment under Rule 12(b)(6), we may consider "facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings[,] and matters of which judicial notice may be taken . . ."2 Samuels v. Air Transp. Loc. 504, 992 F.2d 12, 15 (2d Cir. 1993). In addition, "[w]e liberally construe pleadings and briefs submitted by pro se litigants, reading such submissions to raise the

strongest arguments they suggest." McLeod v. Jewish Guild for the Blind, 864 F.3d 154, 156 (2d Cir. 2017) (per curiam) (internal quotation marks and citation omitted). Our substantive analysis of a state-law claim is governed by the decisions of a state's highest court, although we also "look to the rulings of the state's lower courts as providing important data points for understanding state law." Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp., 22 F.4th 103, 120 (2d Cir. 2021), cert. denied, 142 S. Ct. 2852 (2022).

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First, the amended complaint did not state a claim for negligence because it failed to plausibly allege

the existence of a duty of care based upon the mortgage agreement. See Grenier v. Comm'r Transp., 306 Conn. 523, 538–39 (2012). In the alternative, Edwards argues that a duty of care arises from the doctrine of statutory negligence—Connecticut's term for negligence per se. See Webb v. Czyr Const. Co., 172 Conn. 88, 93 n.3 (1976). "Two elements must coexist" before a plaintiff can

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1. McMillan argues, in the alternative, that these remaining state claims are also untimely. The district court rejected that argument and determined that, although Edwards brought the claims outside the state's three-year statute of limitations for tort actions, he could avail himself of Connecticut's savings statute to the extent these claims arose out of the same causes of action asserted in his prior state court proceeding. See Conn. Gen. Stat. § 52-592. Because we conclude that the district court properly dismissed these remaining state causes of action for failure to state a plausible claim, we need not address McMillan's alternative argument on timeliness.

2 Here, Edwards referenced many documents in his amended complaint, including the mortgage note and loan commitment letter, and thus the district court properly considered those documents in ruling on the Rule 12(b)(6) motion.

recover on the ground of statutory negligence: (1) "a plaintiff must be within the class of persons for whose benefit and protection the statute in question was enacted"; and (2) "a plaintiff must prove that the violation of the statute . . . was a proximate cause of his injuries." Coughlin v. Peters, 153 Conn. 99, 101 (1965). Edwards asserts that he can establish statutory negligence because he is a consumer protected under several statutes that aim to prevent the injury he suffered (i.e., McMillen's "fraudulent scheme"), such as the Connecticut TILA and CUPTA. However, as discussed above, we have already concluded these statutory claims are untimely, and Edwards cannot re-cast these same claims as statutory negligence claims under Connecticut law to circumvent the limitations period established by those statutes. To the extent Edwards relies upon a list of

other statutes to assert a statutory negligence claim, he has failed to set forth any allegations that plausibly establish how he was within the class of persons protected by the particular statute or how a violation of that statute proximately caused his injuries. Thus, the negligence claim was properly dismissed. Second, the amended complaint failed to state a claim for negligent infliction of emotional distress, which requires a plaintiff to show that: "(1) the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress; (2) the plaintiff's distress was foreseeable; (3) the emotional distress was severe enough that it might result in illness or bodily

harm; and (4) the defendant's conduct was the cause of the plaintiff's distress." Carrol v. Allstate Ins, 262 Conn. 433, 444 (2003). In addition, a plaintiff must allege that the defendant owed the plaintiff a duty to prevent the plaintiff from experiencing the alleged emotional distress. See Perodeau v. Hartford, 259 Conn. 729, 754 (2002). Here, the conclusory allegations in the amended complaint about McMillen threatening to exercise its foreclosure rights neither support the plausible existence of duty that would give rise to a claim for negligent infliction of emotional distress, nor do they plausibly support the other elements of such a claim. See Twombly, 550 U.S. at 555 (emphasizing that, in assessing plausibility under Rule 12(b)(6), we "are not bound to accept as true a legal conclusion couched as a factual allegation" (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)));

accord Iqbal, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Accordingly, the district court correctly dismissed the claim for negligent infliction of emotional distress. Finally, the amended complaint did not state a claim for breach of the implied covenant of good faith and fair dealing. This covenant aims to fulfill the reasonable expectations of the parties and ensure that "neither party [will] do anything that will injure the right of the other to receive the benefits of the agreement." De La Concha of Hartford, Inc. v. Aetna Life Ins., 269 Conn. 424, 432 (2004) (internal quotation marks and citation omitted). Here, although Edwards does assert that McMillen denied him the fruits of the agreement, he fails to explain how McMillen improperly denied him the benefits of the contract he signed when the

complained-of terms were clear and explicit. See id. at 441 (rejecting plaintiff's contention that the defendant violated the implied covenant where the defendant refused to renew the plaintiff's lease because the "defendant was not responsible either for the plaintiff's failure to pay rent or for its failure to attain [a minimum]

gross annual revenue" and thus, the defendant "was entitled, under the express provisions of the

lease, to decline the renewal . . . for those reasons."). To hold otherwise would "achieve a result contrary to the clearly expressed terms of [the] contract." Magnan v. Anaconda Indus., Inc., 193 Conn. 558, 567 (1984). In short, the district court properly dismissed the

claim for the breach of the implied covenant of good faith and fair dealing. * * * We have considered Edwards's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT: Catherine O'Hagan Wolfe, Clerk of Court.

APPENDIX C

28 U.S. Code § 1332 - Diversity of citizenship; amount in controversy; costs

(a)The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court

may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business,

APPENDIX D

28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX E

28 U.S. Code § 1291 - Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

APPENDIX F

15 U.S. Code § 1602 - Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) BUREAU.— The term "Bureau" means the Bureau of Consumer Financial Protection.

(c) The term "Board" refers to the Board of Governors of the Federal Reserve System.

(d) The term "organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(e) The term "person" means a natural person or an organization.

(f) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(g) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the preceding sentence,... ....Any person who originates 2 or more mortgages referred to in subsection (aa) in any 12-month period or any person who originates 1 or more such mortgages through a mortgage broker shall be considered to be a creditor for purposes of this subchapter. The term "creditor" includes a private educational lender (as that term is defined in section 1650 of this title) for purposes of this subchapter.

(i) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes.

(j) The terms "open end credit plan" and "open end consumer credit plan" mean a plan under which the creditor reasonably contemplates repeated

transactions, which prescribes the terms of such transactions, and which provides for a finance charge which may be computed from time to time on the outstanding unpaid balance. A credit plan or open end consumer credit plan which is an open end credit plan or open end consumer credit plan within the meaning of the preceding sentence is an open end credit plan or open end consumer credit plan even if credit information is verified from time to time.

(t) The term "agricultural purposes" includes the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products, including but not limited to the acquisition of farmland, real property with a farm residence, and personal property and services used primarily in farming.

(u) The term "agricultural products" includes agricultural, horticultural, viticultural, and dairy products, livestock, wildlife, poultry, bees, forest products, fish and shellfish, and any products thereof, including processed and manufactured products, and any and all products raised or produced on farms and any processed or manufactured products thereof.

(v) The term "material disclosures" means the disclosure, as required by this subchapter, of the annual percentage rate, the method of determining the finance charge and the balance upon which a finance charge will be imposed, the amount of the finance charge, the amount to be financed, the total of payments, the number and amount of

payments, the due dates or periods of payments scheduled to repay the indebtedness, and the disclosures required by section 1639(a) of this title.

(w) The term "dwelling" means a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives.

(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.

(z) Any reference to any requirement imposed under this subchapter or any provision thereof includes reference to the regulations of the Bureau under this subchapter or the provision thereof in question.

(aa) The disclosure of an amount or percentage which is greater than the amount or percentage required to be disclosed under this subchapter does not in itself constitute a violation of this subchapter.

(bb) HIGH-COST MORTGAGE.— (1)DEFINITION.—

(A) In general.—The term "high-cost mortgage", and a mortgage referred to in this subsection, means a consumer credit transaction that is secured by the consumer's principal dwelling, other than a reverse mortgage transaction, if—

(i) in the case of a credit transaction secured—

(I) by a first mortgage on the consumer's principal dwelling, the annual percentage rate at consummation of the transaction will exceed by more than 6.5 percentage points (8.5 percentage points, if the dwelling is personal property and the transaction is for less than $50,000) the average prime offer rate, as defined in section 1639c(b)(2)(B) of this title, for a comparable transaction; or

(dd) DEFINITIONS RELATING TO MORTGAGE ORIGINATION AND RESIDENTIAL MORTGAGE LOANS.—

(1) COMMISSION.—

Unless otherwise specified, the term "Commission" means the Federal Trade Commission.

(4) OTHER DEFINITIONS RELATING TO MORTGAGE ORIGINATOR.—

For purposes of this subsection, a person "assists a consumer in obtaining or applying to obtain a residential mortgage loan" by, among other things, advising on residential mortgage loan terms (including rates, fees, and other costs), preparing residential mortgage loan packages, or collecting information on behalf of the consumer with regard to a residential mortgage loan.

(5) RESIDENTIAL MORTGAGE LOAN.—

The term "residential mortgage loan" means any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes

a dwelling, other than a consumer credit transaction under an open end credit plan or, for purposes of sections 1639b and 1639c of this title and section 1638(a) (16), (17), (18), and (19) of this title, and sections 1638(f) and 1640(k) of this title, and any regulations promulgated thereunder, an extension of credit relating to a plan described in section 101(53D) of title 11.

(6) SECRETARY.—

The term "Secretary", when used in connection with any transaction or person involved with a residential mortgage loan, means the Secretary of Housing and Urban Development.

(7) SERVICER.—

The term "servicer" has the same meaning as in section 2605(i)(2) of title 12.

APPENDIX G

15 U.S. Code § 1603 – Exempted transactions

This subchapter does not apply to the following:

(1) Credit transactions involving extensions

of credit primarily for business, commercial, or agricultural purposes, or to government or governmental agencies or instrumentalities, or to organizations.

(2) Transactions in securities or commodities accounts by a broker-dealer registered with the Securities and Exchange Commission.

(3) Credit transactions, other than those in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling of the consumer and other than private education loans (as that term is defined in section 1650(a) of this title), in which the total amount financed exceeds $50,000.[1]

(4) Transactions under public utility tariffs, if the Bureau determines that a State regulatory body regulates the charges for the public utility services involved, the charges for delayed payment, and any discount allowed for early payment.

(5) Transactions for which the Bureau, by rule, determines that coverage under this subchapter is not necessary to carry out the purposes of this subchapter.

(6) Repealed. Pub. L. 96–221, title VI, § 603(c)(3), Mar. 31, 1980, 94 Stat. 169.

(7) Loans made, insured, or guaranteed pursuant to a program authorized by title IV of the Higher Education Act of 1965 [20 U.S.C. 1070 et seq.].

APPENDIX H

15 U.S. Code § 1604 - Disclosure guidelines

(a)PROMULGATION, CONTENTS, ETC., OF REGULATIONS

The Bureau shall prescribe regulations to carry out the purposes of this subchapter. Except with respect to the provisions of section 1639 of this title that apply to a mortgage referred to in section 1602(aa) [1] of this title, such regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

(b) MODEL DISCLOSURE FORMS AND CLAUSES; PUBLICATION, CRITERIA, COMPLIANCE, ETC.

The Bureau shall publish a single, integrated disclosure for mortgage loan transactions (including real estate settlement cost statements) which includes the disclosure requirements of this subchapter in conjunction with the disclosure requirements of the Real Estate Settlement Procedures Act of 1974 [12 U.S.C. 2601 et seq.] that, taken together, may apply to a transaction that is subject to both or either provisions of law. The purpose of such model disclosure shall be to facilitate compliance with the disclosure requirements of this subchapter and the Real Estate Settlement Procedures Act of 1974, and to aid the borrower or lessee in understanding the transaction by utilizing readily understandable language to simplify the technical nature of the disclosures. In devising such forms, the Bureau shall consider the use by creditors or lessors of data processing or similar automated equipment. Nothing

in this subchapter may be construed to require a creditor or lessor to use any such model form or clause prescribed by the Bureau under this section. A creditor or lessor shall be deemed to be in compliance with the disclosure provisions of this subchapter with respect to other than numerical disclosures if the creditor or lessor (1) uses any appropriate model form or clause as published by the Bureau, or (2) uses any such model form or clause and changes it by (A) deleting any information which is not required by this subchapter, or (B) rearranging the format, if in making such deletion or rearranging the format, the creditor or lessor does not affect the substance, clarity, or meaningful sequence of the disclosure.

(c) PROCEDURES APPLICABLE FOR ADOPTION OF MODEL FORMS AND CLAUSES

Model disclosure forms and clauses shall be adopted by the Bureau after notice duly given in the Federal Register and an opportunity for public comment in accordance with section 553 of title 5.

(d) EFFECTIVE DATES OF REGULATIONS CONTAINING NEW DISCLOSURE REQUIREMENTS

Any regulation of the Bureau, or any amendment or interpretation thereof, requiring any disclosure which differs from the disclosures previously required by this part, part D, or part E or by any regulation of the Bureau promulgated thereunder shall have an effective date of that October 1 which follows by at least six months the date of promulgation, except that the Bureau may at its discretion take interim action

by regulation, amendment, or interpretation to lengthen the period of time permitted for creditors or lessors to adjust their forms to accommodate new requirements or shorten the length of time for creditors or lessors to make such adjustments when it makes a specific finding that such action is necessary to comply with the findings of a court or to prevent unfair or deceptive disclosure practices. Notwithstanding the previous sentence, any creditor or lessor may comply with any such newly promulgated disclosure requirements prior to the effective date of the requirements.

APPENDIX I

15 U.S. Code § 1611 - Criminal liability for willful and knowing violation

Whoever willfully and knowingly (1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this subchapter or any regulation issued thereunder, (2) uses any chart or table authorized by the Bureau under section 1606 of this title in such a manner as to consistently understate the annual percentage rate determined under section 1606(a)(1)(A) of this title, or (3) otherwise fails to comply with any requirement imposed under this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

APPENDIX J

15 U.S. Code § 1635 - 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.

(b) RETURN OF MONEY OR PROPERTY FOLLOWING RESCISSION

When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) REBUTTABLE PRESUMPTION OF DELIVERY OF REQUIRED DISCLOSURES

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be

given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(e) 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;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(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.

(g) ADDITIONAL RELIEF

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

(h) LIMITATION ON RESCISSION

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Bureau, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

(i) RESCISSION RIGHTS IN FORECLOSURE

(1) IN GENERAL Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if—

(3) RIGHT OF RECOUPMENT UNDER STATE LAW

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

(4) APPLICABILITY

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

APPENDIX K

BOARD OF GOVERNORS OF THE FEDERAL RESERVE BOARD 12 CFR Part 1026 (Regulation Z)

12 CFR § 1026.15 (f) 1. Right of rescission. Official interpretation of 15 (f) 1.

Residential mortgage transaction. Although residential mortgage transactions would seldom be made on bona fide open-end credit plans (under which repeated transactions must be reasonably contemplated), an advance on an open-end plan could

be for a down payment for the purchase of a dwelling that would then secure the remainder of the line. In such a case, only the particular advance for the down payment would be exempt from the rescission right.

COMDINED PUROPOSE TRANSACTION. See The BOARD OF GOVERNORS OF THE FEDERAL RESERVE BOARD 12 CFR Part 1026 (Regulation Z) *Subpart A. General* § *Supplement I at* 1026.23 (f) (3) Right of Rescission **Effective Date**:7/18/2015.

Combined-purpose transaction. A loan to acquire a principal dwelling and make improvements to that dwelling is exempt if treated as one transaction. If, on the other hand, the loan for the acquisition of the principal dwelling and the subsequent advances for improvements are treated as more than one transaction, then only the transaction that finances the acquisition of that dwelling is exempt from the Right of Rescission.

12 CFR Part § 1026.23 Right of rescission.

a (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.

A 5. **Addition of a security interest.** Under § 1026.23(a), the addition of a security interest in a consumer's principal dwelling to an existing obligation is rescindable even if the existing obligation is not satisfied and replaced by a new obligation, and even if the existing obligation was previously exempt under § 1026.3(b). The right of rescission applies only to the added security interest, however, and not to the original obligation. In those situations, only the § 1026.23(b) notice need be delivered, not new material disclosures; the rescission period will begin to run from the delivery of the notice.

APPENDIX L

15 U.S. Code § 1639 - Requirements for certain mortgages

(a)DISCLOSURES

(1)SPECIFIC DISCLOSURES In addition to other disclosures required under this subchapter, for each mortgage referred to in section 1602(aa) [1] of this title, the creditor shall provide the following disclosures in conspicuous type size:

(A) "You are not required to complete this agreement merely because you have received these disclosures or have signed a loan application.".

(B) "If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.".

(2)ANNUAL PERCENTAGE RATE In addition to the disclosures required under paragraph (1), the creditor shall disclose—

(A) in the case of a credit transaction with a fixed rate of interest, the annual percentage rate and the amount of the regular monthly payment; or

(B) in the case of any other credit transaction, the annual percentage rate of the loan, the amount of the regular monthly payment, a statement that the interest rate and monthly payment may increase, and the amount of the maximum monthly payment, based on the maximum interest rate allowed pursuant to section 3806 of title 12.

(b) TIME OF DISCLOSURES

(1) IN GENERAL The disclosures required by this section shall be given not less than 3 business days prior to consummation of the transaction.

(2) NEW DISCLOSURES REQUIRED

(A) In general After providing the disclosures required by this section, a creditor may not change the terms of the extension of credit if such changes make the

disclosures inaccurate, unless new disclosures are provided that meet the requirements of this section.

(c) NO PREPAYMENT PENALTY

(1) IN GENERAL [2] (A)Limitation on terms

A mortgage referred to in section 1602(aa) [1] of this title may not contain terms under which a consumer must pay a prepayment penalty for paying all or part of the principal before the date on which the principal is due.

(B) Construction For purposes of this subsection, any method of computing a refund of unearned scheduled interest is a prepayment penalty if it is less favorable to the consumer than the actuarial method (as that term is defined in section 1615(d) of this title).

(d) LIMITATIONS AFTER DEFAULT

A mortgage referred to in section 1602(aa) [1] of this title may not provide for an interest rate applicable after default that is higher than the interest rate that applies before default. If the date of maturity of a mortgage referred to in subsection [3] 1602(aa) [1] of this title is accelerated due to default and the consumer is entitled to a rebate of interest, that rebate shall be computed by any method that is not less favorable than the actuarial method (as that term is defined in section 1615(d) of this title).

(e) NO BALLOON PAYMENTS

No high-cost mortgage may contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This subsection shall not apply when the payment schedule is adjusted to the seasonal or irregular income of the consumer.

(g) NO PREPAID PAYMENTS

A mortgage referred to in section 1602(aa)[1] of this title may not include terms under which more than 2 periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the consumer.

(h) PROHIBITION ON EXTENDING CREDIT WITHOUT REGARD TO PAYMENT ABILITY OF CONSUMER

A creditor shall not engage in a pattern or practice of extending credit to consumers under mortgages referred to in section 1602(aa)[1] of this title based on the consumers' collateral without regard to the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment.

(j) RECOMMENDED DEFAULT

No creditor shall recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a high-cost mortgage that refinances all or any portion of such existing loan or debt.

(k) LATE FEES

(1) IN GENERAL. No creditor may impose a late payment charge or fee in connection with a high-cost mortgage—

(A) in an amount in excess of 4 percent of the amount of the payment past due;

(B) unless the loan documents specifically authorize the charge or fee;

(C) before the end of the 15-day period beginning on the date the payment is due, or in the case of a loan on which interest on each installment is paid in advance, before the end of the 30-day period beginning on the date the payment is due; or

(D) more than once with respect to a single late payment.

(n) CONSEQUENCE OF FAILURE TO COMPLY

Any mortgage that contains a provision prohibited by this section shall be deemed a failure to deliver the material disclosures required under this subchapter, for the purpose of section 1635 of this title.

(o)"AFFILIATE" DEFINED

For purposes of this section, the term "affiliate" has the same meaning as in section 1841(k) of title 12.

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(2) PROHIBITIONS The Bureau, by regulation or order, shall prohibit acts or practices in connection with—

(A) mortgage loans that the Bureau finds to be unfair, deceptive, or designed to evade the provisions of this section; and

(B) refinancing of mortgage loans that the Bureau finds to be associated with abusive lending practices, or that are otherwise not in the interest of the borrower.

(u) PRE-LOAN COUNSELING

(1) IN GENERAL

A creditor may not extend credit to a consumer under a high-cost mortgage without first receiving certification from a counselor that is approved by the Secretary of Housing and Urban Development, or at the discretion of the Secretary, a State housing finance authority, that the consumer has received counseling on the advisability of the mortgage. Such counselor shall not be employed by the creditor or an affiliate of the creditor or be affiliated with the creditor.

(2) DISCLOSURES REQUIRED PRIOR TO COUNSELING

No counselor may certify that a consumer has received counseling on the advisability of the high-cost mortgage unless the counselor can verify that the consumer has received each statement required (in connection with such loan) by this section or the Real Estate Settlement Procedures Act of 1974 [12 U.S.C. 2601 et seq.] with respect to the transaction.

(v) CORRECTIONS AND UNINTENTIONAL VIOLATIONS. A creditor or assignee in a high-cost mortgage who,

when acting in good faith, fails to comply with any requirement under this section will not be deemed to have violated such requirement if the creditor or assignee establishes that either—

(1) within 30 days of the loan closing and prior to the institution of any action, the consumer is notified of or discovers the violation, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the consumer—

(A) make the loan satisfy the requirements of this part; or

(B) in the case of a high-cost mortgage, change the terms of the loan in a manner beneficial to the consumer so that the loan will no longer be a high-cost mortgage; or (2) within 60 days of the creditor's discovery or receipt of notification of an unintentional violation or bona fide error and prior to the institution of any action, the consumer is notified of the compliance failure, appropriate restitution is made, and whatever adjustments are necessary are made to the loan to either, at the choice of the consumer—

(A) make the loan satisfy the requirements of this part; or

(B) in the case of a high-cost mortgage, change the terms of the loan in a manner beneficial so that the loan will no longer be a high-cost mortgage.

APPENDIX M

15 U.S. Code § 1639c - Minimum standards for residential mortgage loans

(a) ABILITY TO REPAY

(1) IN GENERAL In accordance with regulations prescribed by the Bureau, no creditor may make a residential mortgage loan unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments.

(3) BASIS FOR DETERMINATION

A determination under this subsection of a consumer's ability to repay a residential mortgage loan shall include consideration of the consumer's credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than the consumer's equity in the dwelling or real property that

secures repayment of the loan. A creditor shall determine the ability of the consumer to repay using a payment schedule that fully amortizes the loan over the term of the loan.

(4) INCOME VERIFICATION. A creditor making a residential mortgage loan shall verify amounts of income or assets that such creditor relies on to determine repayment ability, including expected income or assets, by reviewing the consumer's Internal Revenue Service Form W–2, tax returns, payroll receipts, financial institution records, or other third-party documents that provide reasonably reliable evidence of the consumer's income or assets. In order to safeguard against fraudulent reporting, any consideration of a consumer's income history in making a determination under this subsection shall include the verification of such income by the use of—

(A) Internal Revenue Service transcripts of tax returns; or

(B) a method that quickly and effectively verifies income documentation by a third party subject to rules prescribed by the Bureau.

(6) NONSTANDARD LOANS

(A) Variable rate loans that defer repayment of any principal or interest

For purposes of determining, under this subsection, a consumer's ability to repay a variable rate residential mortgage loan that allows or requires the consumer to defer the repayment of any principal or interest, the creditor shall use a fully amortizing repayment schedule.

(B) Interest-only loans

For purposes of determining, under this subsection, a consumer's ability to repay a residential mortgage loan that permits or requires the payment of interest only, the creditor shall use the payment amount required to amortize the loan by its final maturity.

(9) SEASONAL INCOME

If documented income, including income from a small business, is a repayment source for a residential mortgage loan, a creditor may consider the seasonality and irregularity of such income in the underwriting of and scheduling of payments for such credit.

b) PRESUMPTION OF ABILITY TO REPAY

(1) IN GENERAL Any creditor with respect to any residential mortgage loan, and any assignee of such loan subject to liability under this subchapter, may presume that the loan has met the requirements of subsection (a), if the loan is a qualified mortgage.

(2) DEFINITIONS For purposes of this subsection, the following definitions shall apply:

(A) Qualified mortgage. The term "qualified mortgage" means any residential mortgage loan—

(i) for which the regular periodic payments for the loan may not— (I) result in an increase of the principal balance; or (II) except as provided in subparagraph (E), allow the consumer to defer repayment of principal; (ii) except as provided in subparagraph (E), the terms of which do not result in a balloon payment, where a "balloon payment" is a scheduled payment that is more than twice as large as the average of earlier scheduled payments;

(iii) for which the income and financial resources relied upon to qualify the obligors on the loan are verified and documented;

(iv) in the case of a fixed rate loan, for which the underwriting process is based on a payment schedule that fully amortizes the loan over the loan term and takes into account all applicable taxes, insurance, and assessments;

(vi) that complies with any guidelines or regulations established by the Bureau relating to ratios of total monthly debt to monthly income or alternative measures of ability to pay regular expenses after payment of total monthly debt, taking into account the income levels of the borrower and such other factors as the Bureau may determine relevant and consistent with the purposes described in paragraph (3)(B)(i);

(B) Average prime offer rate

The term "average prime offer rate" means the average prime offer rate for a comparable transaction as of the date on which the interest rate for the transaction is set, as published by the Bureau..[2]

(E) Balloon loans. The Bureau may, by regulation, provide that the term "qualified mortgage" includes a balloon loan—

(i) that meets all of the criteria for a qualified mortgage under subparagraph (A) (except clauses (i)(II), (ii), (iv), and (v) of such subparagraph);

(ii) for which the creditor makes a determination that the consumer is able to make all scheduled payments, except the balloon payment, out of income or assets other than the collateral;

(iii) for which the underwriting is based on a payment schedule that fully amortizes the loan over a period of not more than 30 years and takes into account all applicable taxes, insurance, and assessments;

APPENDIX N

15 U.S. Code § 1640 - Civil liability

(a) INDIVIDUAL OR CLASS ACTION FOR DAMAGES; AMOUNT OF AWARD; FACTORS DETERMINING AMOUNT OF AWARD. Except as otherwise provided in this section, any creditor who fails to comply with any requirement

imposed under this part, including any requirement under section 1635 of this title, subsection (f) or (g) of section 1641 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

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

(2) (A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $200 nor greater than $2,000, (iii) in the case of an individual action relating to an open end consumer credit plan that is not secured by real property or a dwelling, twice the amount of any finance charge in connection with the transaction, with a minimum of $500 and a maximum of $5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures; [1] or (iv) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $400 or greater than $4,000; or

(4) in the case of a failure to comply with any requirement under section 1639 of this title,

paragraph (1) or (2) of section 1639b(c) of this title, or section 1639c(a) of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

(b) CORRECTION OF ERRORS

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) UNINTENTIONAL VIOLATIONS; BONA FIDE ERRORS

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the

maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

(e) JURISDICTION OF COURTS; LIMITATIONS ON ACTIONS; STATE ATTORNEY GENERAL ENFORCEMENT. Except as provided in the subsequent sentence, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation or, in the case of a violation involving a private education loan (as that term is defined in section 1650(a) of this title), 1 year from the date on which the first regular payment of principal is due under the loan. Any action under this section with respect to any violation of section 1639, 1639b, or 1639c of this title may be brought in any United States district court, or in any other court of competent jurisdiction, before the end of the 3-year period beginning on the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639, 1639b,

1639c, 1639d, 1639e, 1639f, 1639g, or 1639h of this title may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs.

(g) RECOVERY FOR MULTIPLE FAILURES TO DISCLOSE

The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

(h) OFFSET FROM AMOUNT OWED TO CREDITOR OR ASSIGNEE; RIGHTS OF DEFAULTING CONSUMER

A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from

asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this subchapter.

(k) DEFENSE TO FORECLOSURE

(1) IN GENERAL

Notwithstanding any other provision of law, when a creditor, assignee, or other holder of a residential mortgage loan or anyone acting on behalf of such creditor, assignee, or holder, initiates a judicial or nonjudicial foreclosure of the residential mortgage loan, or any other action to collect the debt in connection with such loan, a consumer may assert a violation by a creditor of paragraph (1) or (2) of section 1639b(c) of this title, or of section 1639c (a) of this title, as a matter of defense by recoupment or set off without regard for the time limit on a private action for damages under subsection (e).

(2) AMOUNT OF RECOUPMENT OR SETOFF

(A) In general

The amount of recoupment or set-off under paragraph (1) shall equal the amount to which the consumer would be entitled under subsection (a) for damages for a valid claim brought in an original action against the creditor, plus the costs to the consumer of the action, including a reasonable attorney's fee.

(B) Special rule

Where such judgment is rendered after the expiration of the applicable time limit on a private action for damages under subsection (e), the amount of recoupment or set-off under paragraph (1) derived from damages under subsection (a)(4) shall not exceed the amount to which the consumer would have been entitled under subsection (a)(4) for damages computed up to the day preceding the expiration of the applicable time limit.

APPENDIX O

Sec. 36a-675. (Formerly Sec. 36-416). Short title: Connecticut Truth-in-Lending Act. Sections 36a-675 to 36a-686, inclusive, shall be known and may be cited as the "Connecticut Truth-in-Lending Act".

Sec. 36a-676. (Formerly Sec. 36-393). Definitions. (a) As used in part II of chapter 668, the Connecticut Truth-in-Lending Act, sections 36a-770 to 36a-788, inclusive, 42-100b and 42-100c, unless the context otherwise requires:

(1) "Consumer Credit Protection Act" means 15 USC Chapter 41, Subchapter I, as from time to time amended, and includes regulations adopted by the Federal Reserve Board or the Bureau of Consumer Financial Protection pursuant to said act;

(2) "Creditor" means "creditor" as defined in 15 USC 1602, as amended from time to time, but does not include any department or agency of the United States; and

(3) "Lessor" means "lessor" as defined in 15 USC 1667, as amended from time to time, but does not include any department or agency of the United States.

(b) Any word or phrase in the Connecticut Truth-in-Lending Act that is not defined in said act but is defined in the Consumer Credit Protection Act has the meaning set forth in the Consumer Credit Protection Act.

Sec. 36a-676. (Formerly Sec. 36-393). Definitions. (a) As used in part II of chapter 668, the Connecticut Truth-in-Lending Act, sections 36a-770 to 36a-788, inclusive, 42-100b and 42-100c, unless the context otherwise requires:

(1) "Consumer Credit Protection Act" means 15 USC Chapter 41, Subchapter I, as from time to time amended, and includes regulations adopted by the Federal Reserve Board or the Bureau of Consumer Financial Protection pursuant to said act;

(2) "Creditor" means "creditor" as defined in 15 USC 1602, as amended from time to time, but does not include any department or agency of the United States; and

(3) "Lessor" means "lessor" as defined in 15 USC 1667, as amended from time to time, but does not include any department or agency of the United States.

(b) Any word or phrase in the Connecticut Truth-in-Lending Act that is not defined in said act but is defined in the Consumer Credit Protection Act has the meaning set forth in the Consumer Credit Protection Act.

APPENDIX P

C.G.S. 36a-677 -78

Sec. 36a-677. (Formerly Sec. 36-393a). State policy. (a) It is the policy of this state to (1) enhance economic stabilization and strengthen competition among the various businesses engaged in the extension of consumer credit or in the leasing of consumer goods and to serve the interests of consumers of credit and leased goods by requiring meaningful disclosure of credit and lease terms so that prospective debtors and lessees have the opportunity to compare more readily the various credit and lease terms available to them and the opportunity to avoid the uninformed use of credit and leases, and (2) protect consumers against inaccurate and unfair credit billing practices.

(b) It is also the policy of this state to provide that the commissioner administer and enforce the requirements for such disclosures of credit and lease terms for transactions in this state.

(c) It is also the policy of this state to avoid duplication between the federal government and the government of this state in the administration and enforcement of statutes which are designed to accomplish an identical purpose, and therefore to obtain an exemption from the Consumer Credit Protection Act by subjecting various classes of credit and lease transactions in this state to requirements which are substantially similar to those imposed under said federal act.

Sec. 36a-678. (Formerly Sec. 36-393b). Compliance with Consumer Credit Protection Act. Exempt transactions. (a) Except as otherwise provided in the Connecticut Truth-in-Lending Act or regulations adopted by the commissioner, each person shall comply with all provisions of the Consumer Credit Protection Act that apply to such person, including the delivery of integrated disclosures required by 12 USC 5301 et seq. and implemented through regulations adopted by the Bureau of Consumer Financial Protection.

(b) Any transaction that is exempt from the provisions of the Consumer Credit Protection Act, pursuant to 15 USC 1603, as amended from time to time, or by regulation promulgated pursuant to 15 USC 1604, as amended from time to time, is exempt from the provisions of the Connecticut Truth-in-Lending Act.

(c) Notwithstanding subsection (b) of this section, each person shall comply with all provisions of the Real Estate Settlement Procedures Act of 1974 (12

USC Chapter 27), as amended from time to time, and the regulations promulgated thereunder that apply to such person.

APPENDIX Q

Sec. 36a-681. (Formerly Sec. 36-399). Penalty. Any person who wilfully and knowingly (1) gives false or inaccurate information or fails to provide information which such person is required to disclose under the provisions of sections 36a-567, 36a-568 and the Connecticut Truth-in-Lending Act, subdivision (13) of subsection (c) of section 36a-770, and sections 36a-771, 36a-774, 36a-777 and 36a-786, or any regulation adopted thereunder, (2) uses any chart or table authorized by the Federal Reserve Board or the Bureau of Consumer Financial Protection under 15 USC 1606, as amended from time to time, in such manner as to consistently understate the annual percentage rate determined under said sections, or (3) otherwise fails to comply with any requirement imposed under said sections shall be fined not more than five thousand dollars or imprisoned not more than one year or both.

APPENDIX R

Sec. 36a-715. (Formerly Sec. 36-442m). Definitions. As used in sections 36a-715 to 36a-719*l*, inclusive, unless the context otherwise requires:

(3) "Mortgage servicer" (A) means any person, wherever located, who, for such person or on behalf of the holder of a residential mortgage loan, receives payments of principal and interest in connection with a residential mortgage loan, records such payments on such person's books and records and performs such other administrative functions as may be necessary to properly carry out the mortgage holder's obligations under the mortgage agreement including, when applicable, the receipt of funds from the mortgagor to be held in escrow for payment of real estate taxes and insurance premiums and the distribution of such funds to the taxing authority and insurance company, and (B) includes a person who makes payments to borrowers pursuant to the terms of a home equity conversion mortgage or reverse mortgage.

(4) "Mortgagee" means the grantee of a residential mortgage, provided if the residential mortgage has been assigned of record, "mortgagee" means the last person to whom the residential mortgage has been assigned of record.

(5) "Mortgagor" means any person obligated to repay a residential mortgage loan.

(6) "Residential mortgage loan" means any loan primarily for personal, family or household use that is secured by a mortgage, deed of trust or other equivalent consensual security interest on a dwelling, as defined in Section 103 of the Consumer Credit Protection Act, 15 USC 1602, located in this state, or real property located in this state upon which is constructed or intended to be constructed a dwelling.

APPENDIX S

Sec. 36a-719h. Prohibited acts. Duty to establish, enforce and maintain policies and procedures for compliance. (a) No mortgage servicer shall, directly or indirectly:

(1) Employ any scheme, device or artifice to defraud or mislead mortgagors or mortgagees or to defraud any person;

(2) Engage in any unfair or deceptive practice toward any person or misrepresent or omit any material information in connection with the servicing of the residential mortgage loan, including, but not limited to, misrepresenting the amount, nature or terms of any fee or payment due or claimed to be due on a residential mortgage loan, the terms and conditions of the servicing agreement or the mortgagor's obligations under the residential mortgage loan;

18) Negligently make any false statement or knowingly and willfully make any omission of a material fact in connection with any information or reports filed with a governmental agency or the system or in connection with any investigation conducted by the commissioner or another governmental agency; or

APPENDIX T

Sec. 36a-746. Short title: Connecticut Abusive Home Loan Lending Practices Act. Sections 36a-746 to 36a-746g, inclusive, shall be known and may be cited as the "Connecticut Abusive Home Loan Lending Practices Act".

APPENDIX U

Sec. 36a-746a. Definitions. As used in this section and sections 36a-746b to 36a-746g, inclusive:

(1) "APR" means the annual percentage rate for the loan calculated according to the provisions of the federal Truth-in-Lending Act, 15 USC Section 1601 et seq., as amended from time to time, and the regulations promulgated thereunder. For purposes of this subdivision, any variable rate calculation shall use an index value in effect within forty-five days prior to consummation;

(2) "Broker" means a person who, for a fee, commission or other valuable consideration, negotiates, solicits, arranges, places or finds a high cost home loan that is to be made by a lender;

(3) "Consummation" means the time that a borrower becomes contractually obligated on a loan or extension of credit;

(4) "High cost home loan" means any loan or extension of credit, including an open-end line of credit but excluding a reverse mortgage transaction, as defined in 12 CFR 1026.33, as amended from time to time:

(A) In which the borrower is a natural person;

(B) The proceeds of which are to be used primarily for personal, family or household purposes;

(C) In which the loan is secured by a mortgage upon any interest in one-to-four family residential property, as defined in section 36a-485, located in this state that is, or, when the loan is made, is intended to be used or occupied by the borrower as a principal residence; and

(D) In which the APR applicable to the transaction determined in accordance with 12 CFR 1026.32(a)(3), as amended from time to time, will exceed the average prime offer rate, as defined in 12 CFR 1026.35(a)(2) as amended from time to time, by more than the number of percentage points specified in 12 CFR 1026.32(a)(1)(i), as amended from time to time;

(6) "Lender" means any person who originates one or more high cost home loans; and

APPENDIX V

C.G.S. Sec. 37-4, 37-5,37-6, 37-8,39-3

Sec. 37-4. Loans at greater rate than twelve per cent prohibited. No person and no firm or corporation or agent thereof, other than a pawnbroker as provided in section 21-44, shall, as guarantor or otherwise, directly or indirectly, loan money to any person and, directly or indirectly, charge, demand, accept or make any agreement to receive therefor interest at a rate greater than twelve per cent per annum.

Sec. 37-5. Notes not to be accepted for greater amounts than loaned. No person and no firm or corporation, or agent thereof, shall, with intent to evade the

provisions of section 37-4, accept a note or notes for a greater amount than that actually loaned.

Sec. 37-7. Penalty. Any person who, individually, or as a member of any firm, or as an officer of any corporation, or as an agent of any firm or corporation, violates any provision of section 37-4, 37-5 or 37-6 shall be fined not more than one thousand dollars or imprisoned not more than six months or both.

Sec. 37-8. Actions not to be brought on prohibited loans. No action shall be brought to recover principal or interest, or any part thereof, on any loan prohibited by sections 37-4, 37-5 and 37-6, or upon any cause arising from the negotiation of such loan.

Sec. 37-9. Loans to which prohibitions do not apply. The provisions of sections 37-4, 37-5 and 37-6 shall not affect: (3) any bona fide mortgage of real property for a sum in excess of five thousand dollars; (4) (A) any loan, carrying an annual interest rate of not more than the deposit index, as determined under section 36a-26, for the calendar year in which the loan is made plus seventeen per cent, made to a foreign or domestic corporation, statutory trust, limited liability company, general, limited or limited liability partnership or association organized for a profit or any individual, provided such corporation, trust, company, partnership, association or individual is engaged primarily in commercial, manufacturing, industrial or nonconsumer pursuits and provided further that the funds received by such corporation, trust, company, partnership, association or individual are utilized in such entity's business or investment activities and are not utilized for consumer purposes and provided further that the original indebtedness to be repaid is in excess of ten thousand dollars but less than or equal to two hundred fifty thousand dollars, or, in the case of one or more advances of money of less than ten thousand dollars made pursuant to a revolving loan agreement or similar agreement or a loan agreement

providing for the making of advances to the borrower from time to time up to an aggregate maximum amount, the total principal amount of all loans owing by the borrower to the lender at the time of any such advance is in excess of ten thousand dollars but less than or equal to two hundred fifty thousand dollars, or (B) any loan made to a foreign or domestic corporation, statutory trust, limited liability company, general, limited or limited liability partnership or association organized for a profit or any individual, provided such corporation, trust, company, partnership, association or individual is engaged primarily in commercial, manufacturing, industrial or nonconsumer pursuits and provided further that the funds received by such corporation, trust, company, partnership, association or individual are utilized in such entity's business or investment activities and are not utilized for consumer purposes and provided further that the original indebtedness to be repaid is in excess of two hundred fifty thousand dollars, or, in the case of one or more advances of money of less than two hundred fifty thousand dollars made pursuant to a revolving loan agreement or similar agreement or a loan agreement providing for the making of advances to the borrower from time to time up to an aggregate maximum amount, the total principal amount of all loans owing by the borrower to the lender at the time of any such advance is in excess of two hundred fifty thousand dollars;

APPENDIX W

Sec. 42-110g. Action for damages. Class actions. Costs and fees. Equitable relief. Jury trial. (a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or

employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

(f) An action under this section may not be brought more than three years after the occurrence of a violation of this chapter.

APPENDIX X

Sec. 52-592. Accidental failure of suit; allowance of new action. (a) If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment.

Appendix Y-EE are excerpts of evidence to demonstrate that the loan transaction was a open-end, combined purpose high-cost mortgage, consumer loan transaction were the lender contemplated future credit release transaction to make repairs to Edwards new primary residence which makes the intended use of the loan proceeds for personal family and household purposes.

APPENDIX Y

The One Year Interest Only Balloon Mortgage Note states,

2. Payments: a. The maximum principal amount of this loan is $135,500.00. You will pay interest at the rate of 25% of the borrowed amount. The term of your loan is 12 months. You will have one balloon payment at the end of one year of the amount borrowed (principal balance) plus 25% of the amount borrowed (interest).

3. Late Payment: In the event Holder does not receive the full payment of principal and interest due under the terms of this Note by May 30, 2013 (TIME BEING OF THE ESSENCE), Borrower shall pay Holder upon demand a late charge equal thirty (30) percent per annum on all sums borrowed including any sums for attorney's fees and collection costs. For example purposes only, if Borrower borrows $100,000.00 under this Note, $25,000.00 would be due at the end of the one year term, and if Borrower not pay off the loan within 1 year and 30 days, interest would begin to accrue at 30% per annum on top of all sums borrowed, including the guaranteed 25% from the original first

year, so it would be 30% per annum on top of $125,000.00. The late fee would be calculated on a per diem basis. See Appellant Appendix in support of his Brief on second appeal to USCA for the Second Circuit case # 2104 page 187 provision 2 & 3.

APPENDIX Z

The Fannie Mae, the Real Estate Purchase Addendum states,

"Use of Property. The purchaser does intend to use and occupy the property as purchaser's primary residence." See Appellant Appendix in support of his Brief on second appeal to USCA for the Second Circuit case # 2104 page 128 provision # 4

APPENDIX AA

The owner occupant Rider to the Real Estate Purchase Addendum states (among other things),

"that this is to certify that consistent with the representation made by me in the Real Estate Purchase Addendum, (section 4, use of property) I will occupy, establish and use the above-referenced properly as my primary residence, continue to occupy the property as my primary residence for at least one year unless extenuating circumstances arise which are beyond my control." See Appellant Appendix in support of his Brief on second appeal to USCA for the Second Circuit case # 2104 page 125

APPENDIX BB

The loan commitment agreement that states in part that McMillen Capital, LLC is,

"Pleased To inform you (hereinafter "Borrower) that it has approved your request for a first mortgage loan on your property described above (7 New Lane Cromwell CT 06416)". (See amended complaint pages 5 at ¶ 20).

It also states "Owner Occupied borrower must owner occupy this property within 60 days of closing and must hold on to the property for a period of 1 (one) year from closing. Borrower will sign a waiver and acceptance of this condition at closing." (See amended complaint pages 5 at ¶ 18). See Appellant Appendix in support of his Brief on second appeal to USCA for the Second Circuit case # 2104, page 145 1st paragraph & 148 provision # 4

APPENDIX CC

THE OPEN.END MORTGAGE DEED (Securing Mortgage Note) states,

"WHEREAS, with respect to the Mortgage Loan, this is an OPEN END MORTGAGE" and Grantee shall have all protections to which the holder of an OPEN END MORTGAGE is entitled under Connecticut law, including, without limitation, Section 49-2(c) of the Connecticut General Statutes;"

"AND IT IS MUTUALLY AGREED THAT,

Pursuant to the terms of said Loan, the Grantee may from time to time prior to the release of this Mortgage

make future advances to the Grantor. Such future advances, with interest thereon as set forth in the Mortgage Note, shall be secured by this Mortgage if (i) such future advances are evidenced by the Mortgage Note signed by the Grantor, or (ii) such future advances are recorded on the books and records of the Grantee. At no time shall the outstanding principal amount advanced pursuant to the Mortgage Loan and secured by this Mortgage exceed the aggregate amount of $135,500, nor shall the maturity of future advances secured hereby extend beyond the time of repayment of said Note." See Appellant Appendix in support of his Brief on second appeal to USCA for the Second Circuit case # 2104 page 193 4th Where As clause and page 205 (e).

10. "Restrictions on Sale and Use of Property. Etc. Grantor shall OWNER OCCUPY the premises within 60 days of signing the Note attached hereto and said occupancy shall continue for one year".

APPENDIX DD

Gilman's email to Edwards which on April 15, 2012 where-in he asked Edwards the following question,

" I saw the contract Paul, but in one of your emails, it wasn't clear if you understood that you had to occupy, not just own for one year."

Edwards responded by saying "The answer to your question is YES." See Appellant Appendix in support of his Brief on second appeal to USCA for the Second Circuit case # 2104, page 139.

APPENDIX EE

Change of Address and ORGAN/TISSUE DONOR STATUS B-58 REV. 1-2012. STATE OF CONNECTICUT DEPARTMENT OF MOTOR VEHICLES. New mailing address: 7 NEW LANE CROMWELL CT 06416. Paul Edwards 6-13-2012. See Appellant Appendix in support of his Brief on second appeal to USCA for the Second Circuit case # 2104, page 164.