

No. \_\_\_\_\_

---

---

In the  
**Supreme Court of the United States**

---

---

ROCKY FUJIO TAKUSHI, Individually and as Trustee  
of the Albert G. Takushi Revocable Living Trust Dated  
April 11, 2007,

*Petitioner,*

vs.

BAC HOME LOANS SERVICING, LP,  
a Texas Limited Partnership,

*Respondent.*

---

---

**On Petition For Writ Of Certiorari To The United  
States Court of Appeals for the Ninth Circuit**

---

---

**PETITION FOR WRIT OF CERTIORARI**

---

---

GARY VICTOR DUBIN  
*Counsel of Record*

FREDERICK J. ARENSMEYER  
DUBIN LAW OFFICES  
55 Merchant Street, Suite 3100  
Honolulu, Hawaii 96813  
Telephone: (808) 537-2300  
Facsimile: (808) 523-7733  
E-Mail: [gdubin@dubinlaw.net](mailto:gdubin@dubinlaw.net)  
*Attorneys for Petitioner*

---

---

## QUESTIONS PRESENTED

Whereas, the Ninth Circuit Court of Appeals affirmed the Hawaii District Court's decision denying rescission as a matter of law based upon its reading of language in this Court's decision in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), interpreting Section 1635(f) of Title 15, the Ninth Circuit concluding that a borrower in order to rescind a mortgage based upon Truth-in-Lending Act (TILA) violations must bring suit within three years of loan consummation and that a notice of cancellation alone served within three years is not enough;

And whereas, there is a serious split in the Circuits as to the interpretation of the relevant language contained in this Court's *Beach* decision -- the Eighth and Tenth Circuits agreeing with the Ninth Circuit, whereas the Third and Fourth Circuits completely disagree;

1. Resolving the recent conflict between the Third, Fourth, Eighth, Ninth and Tenth Circuit Courts of Appeals over the interpretation of this Court's 1998 Opinion in *Beach*, pursuant to Section 1635(f) of Title 15 must a borrower seeking to rescind a mortgage loan based upon TILA violations bring suit within three years of loan consummation?

2. If so, should such a restrictive interpretation of Section 1635(f) of Title 15 be limited to prospective application only as a new rule, since most borrowers and their attorneys otherwise relied to their detriment upon a contrary interpretation of the relevant language contained in this Court's 1998 *Beach* decision?

**TABLE OF CONTENTS**

**I. JURISDICTIONAL STATEMENT. . . . . 1**

**II. AUTHORITATIVE PROVISIONS. . . . . 1**

**III. CONCISE STATEMENT OF THE CASE . . . . 3**

**IV. LEGAL ARGUMENT SUPPORTING WRIT ... 8**

**V. CONCLUSION . . . . . 10**

**APPENDIX . . . . . A-1 – A-60**

## TABLE OF AUTHORITIES

CASES	page
<u>Beach v. Ocwen Federal Bank</u> , 523 U.S. 410 (1998)..... <i>et. seq.</i>	
<u>Ford Motor Company v. Milhollin</u> , 444 U.S. 555 (1980).....	6
<u>Gilbert v. Residential Funding LLC</u> , 678 F.3d 271 (2012).....	4
<u>Hartman v. Smith</u> , 2013 WL 4407058 (8th Cir. 2013).....	4
<u>James B. Bean Distilling Co. v. Georgia</u> , 501 U.S. 529 (1991).....	9
<u>Keiran v. Home Capital, Inc.</u> , 720 F.3d 721 (8th Cir. 2013).....	4
<u>McOmie-Gray v. Bank of America Home Loans</u> , 667 F.3d 1325, 1329 (9th Cir. 2012).....	3
<u>Miguel v. Country Funding Corp.</u> , 309 F.3d 1161 (9th Cir. 2002).....	8
<u>Rosenfield v. HSBC Bank, USA</u> , 681 F.3d 1172 (10th Cir. 2012).....	4
<u>Sherzer v. Homestar Mortgage Services</u> , 707 F.3d 255 (3rd Cir. 2013).....	3
<u>Williams v. Rickard</u> , 2010 WL 2640102.....	8

## INDEX TO APPENDIX

- A. District Court Order Granting In Part And Denying In Part Defendant BAC Home Loans Servicing, LP's Motion To Dismiss Plaintiff's Complaint, Dated July 1, 2011.....A-1**
- B. District Court Order Denying Plaintiff's Motion For Reconsideration, August 31, 2011.. A-22**
- C. District Court Judgment In A Civil Case, Dated December 28, 2011.....A-51**
- D. Circuit Court Memorandum Opinion Affirming Hawaii District Court Judgment, Dated October 16, 2013.....A-53**
- E. Section 1635 Of Title 15 Of U.S. Code.....A-55**

## PETITION FOR WRIT OF CERTIORARI

### I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail on or before January 14, 2014, within ninety days of the Memorandum decision of the Court of Appeals for the Ninth Circuit entered on October 16, 2013 affirming the decision of the District Court for the District of Hawaii, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(a) and 13(1).

The jurisdiction of the District Court was based upon 28 U.S.C. §§ 1331, 1367, 1441 and 1446 (federal question jurisdiction) and the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*

### II. AUTHORITATIVE PROVISIONS

The decisions being challenged concern the interpretation of Section 1635(f) of Title 15, the text of which Section is set forth in Appendix "E" to this Petition.

### III. CONCISE STATEMENT OF THE CASE

On May 24, 2010, Takushi sent a letter through his undersigned counsel cancelling the subject September 19, 2007 mortgage loan within three years of loan consummation based upon alleged TILA and UDAP violations (A-3).

BAC responded by letter dated June 8, 2010, denying rescission and instead proceeded to sell the property at a nonjudicial auction held on July 12, 2010, recorded on July 15, 2010, again within three years of loan consummation (A-4).

On February 9, 2011, Takushi filed a Complaint in State Court seeking rescission, which BAC removed to District Court on March 23, 2011 (A-5).

On July 1, 2011, the District Court dismissed Takushi's TILA rescission claim on the basis that he failed to file his lawsuit within three years of loan consummation, and that a nonjudicial sale occurred after his letter of cancellation and before the expiration of the extended three year period (A-16).

The District Court declined as a result to consider other issues in his Complaint, resting its dismissal on a pure question of law as to the proper interpretation of Section 1635(f) of Title 15, holding that this Court in the Beach case had already decided that issue, limiting the extended TILA rescission period to three years as a statute of repose and not a statute of limitations that might be extended based on statutory and equitable tolling considerations (A-15).

Takushi appealed, and in a Memorandum Opinion the Ninth Circuit on October 16, 2013 affirmed without a hearing, on the basis of its interpretation of what it believed to be this Court's interpretation of Section 1635(f) in Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998) (A-53-54):

The district court properly dismissed Takushi's Truth in Lending Act (TILA) claim because it is time barred. Under TILA, a borrower seeking to rescind a mortgage loan must bring suit within three years of consummation of the loan (with one exception not relevant here). 15 U.S.C. § 1635(f). Takushi's loan closed on September 21, 2007, but he did not file suit until

February 9, 2011. That Takushi sent a notice of rescission within the three-year period is irrelevant under our decision in *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012).

#### IV. LEGAL ARGUMENT SUPPORTING WRIT

This Petition therefore presents to this Court a pure question of law: Pursuant to Section 1635(f) of Title 15, must a borrower seeking to rescind a mortgage loan based upon TILA violations bring suit within three years of loan consummation?

This issue, central to TILA's disclosure requirements, has recently been examined by the Third and Fourth Circuit Courts of Appeals, which have reviewed this Court's decision in Beach and have held completely opposite to and specifically rejecting the reasoning and conclusion of the Ninth Circuit Court of Appeals in McOmie-Gray v. Bank of America Home Loans, 667 F.3d 1325, 1329 (9th Cir. 2012).

In Sherzer v. Homestar Mortgage Services, 707 F.3d 255, 258 (3rd Cir. 2013), the Third Circuit held:

In our opinion, the text of § 1635 and its implementing regulation (Regulation Z) supports the view that to timely rescind a loan agreement, an obligor need only send a valid notice of rescission. *Beach* is consistent with this view, as it does not address *how* an obligor must exercise his right of rescission within the three-year period. (emphasis in original)

Similarly, the Fourth Circuit held in Gilbert v. Residential Funding LLC, 678 F.3d 271, 277 (2012):

Taking the plain language of these texts [15 U.S.C. § 1635(f) and 12 C.F.R. § 1026.23(a)(2) (Regulation Z)], and assuming that the words say what they mean and mean what they say, we come to the conclusion that the Gilberts exercised their right to rescind with the April 2009, letter. Simply stated, neither 15 U.S.C. § 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them.

Meanwhile, the Eighth and Tenth Circuit Courts of Appeals have agreed with the Ninth Circuit Court of Appeals, specifically disagreeing with the Third and Fourth Circuit Courts of Appeals.

In Hartman v. Smith, 2013 WL 4407058 \*7, \*8 (8th Cir. 2013), the Eighth Circuit Court of Appeals affirmed *en banc* its earlier ruling in Keiran v. Home Capital, Inc., 720 F.3d 721, 728-729 (8th Cir. 2013), specifically agreeing with the Ninth and Tenth Circuit Court of Appeals:

[w]e hold that “the giving of notice is a *necessary* predicate act to the ultimate exercise of the right.” *id.* Giving notice, as the means by which one comes to “have the right to rescind,” is not sufficient, in itself, to complete the exercise of that right. *See* 15 U.S.C. § 1635(a). (emphasis in original)

The Tenth Circuit Court of Appeals in Rosenfield v. HSBC Bank, USA, 681 F.3d 1172, 1182

(10th Cir. 2012), relying as its sole authority on its interpretation of this Court's decision in *Beach*, held:

[w]e believe that *Beach* is dispositive of the instant question. There, as discussed, the Supreme Court held that § 1635(f) “govern[s] the life of the underlying right [of rescission under TILA],” 523 U.S. at 417, 118 S.Ct. 1408. Because of “Congress’s [sic] manifest intent . . . that the Act permit no federal right to rescind, defensively *or otherwise*, after the 3-year period of § 1635(f) has run,” *id.* at 419, 118 S.Ct. 1408 (emphasis added), we must hold that the mere invocation of the right to rescission via a written letter, without more, is not enough to preserve a court’s ability to effectuate (or recognize) a rescission claim after the three-year period has run.

The language and reasoning of this Court in *Beach*, however, if anything supports the view of the Third and Fourth Circuits, for in *Beach*, this Court held that the Section 1635 rescission right was clearly intended by Congress to be an “election” instead, given to borrowers during which time period they could exercise their rescission rights, which, like any option, would however expire at the end of the rescission period if not exercised in the manner provided by Section 1635(a) and Regulation Z, *supra*; see 523 U.S. at 417:

[T]he subsection [Section 1635(f)] says nothing in terms of bringing an action but instead provides

that the 'right of rescission [under the Act] shall expire' at the end of the time period. It talks not of a suit's commencement but of a right's duration.

Moreover, Federal Reserve Board regulations, in turn, specifically provide that the notice of cancellation shall be effective "when the right to rescind is exercised" if and when sent, before the end of the rescission period, "by mail, telegram, or other means of written communication," Regulation Z, Section 226.15(a)(2) (open end credit transaction), and Section 226.23(a)(2) (closed end credit transaction).

And this Court has consistently held that the Board's regulations are entitled to deference, Ford Motor Company v. Milhollin, 444 U.S. 555, 565-568 (1980):

[C]aution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute. And deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive for several reasons. . . .

Furthermore, Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law. . . .

That statutory provision signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative. Moreover, language in the legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation.

\*\*\*  
Finally, wholly apart from jurisprudential considerations or congressional intent, deference to the Federal Reserve is compelled by necessity; a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views.

The United States Consumer Protection Bureau, furthermore, has supported the position of the Board in numerous other appeals, now argued by Takushi here.

Regulation Z prescribes no requirement that a lawsuit be filed within the rescission period – whether within three days or three years as the case may be – but instead gives the creditor twenty days to agree to cancel the security interest, or the underlying mortgage is deemed “void” if a violation is subsequently proven, *id.*, Section 226.15(d) and Section 226.23(d) (unambiguously described by Board of Governors of the Federal Reserve System as the “effects of rescission”).

Besides misconstruing this Court's Beach decision, Section 1635(f) and Regulation Z, an

additional major flaw in the Ninth Circuit Court's Memorandum decision below was its misconstruing of its own earlier panel decision in Miguel v. Country Funding Corp., 309 F.3d 1161, 1164 (9th Cir. 2002), when in fact Miguel never considered nor addressed whether a lawsuit requesting rescission based on TILA violations needed to be filed within three years.

The undersigned counsel of record here was trial counsel for Miguel, and argued the case before the Ninth Circuit Miguel merits panel in San Francisco, and the issue here was never even mentioned there, the Miguel decision on appeal being tied to a totally different issue, holding that a TILA rescission letter must be sent to the holder of the mortgage and not to the servicing agent, since corrected by amendment to Regulation Z, another overreaching by the Ninth Circuit Court of Appeals.

Even more perplexing, Members of the District Court Bench in Hawaii themselves prior to Takushi, far from agreeing with the Ninth Circuit Court of Appeals, had actually been interpreting Miguel in a manner completely inconsistent with the Ninth Circuit Court of Appeals' new view of Miguel, as seen in the 2010 Opinion of Hawaii Chief District Judge Susan Mollway in Williams v. Rickard, 2010 WL 2640102 \*6:

TILA provides a borrower one year to file suit from the date of a lender's improper refusal to rescind. *See Miguel v. Country Funding Corp.*, 309 F.3d 1161,1164 (9th Cir. 2002) (noting in dicta that "that [sic] 15 U.S.C. § 1640(e) provides the borrower one year from the refusal of cancellation to file suit").

And in truth that is what was really decided in Miguel, if anything, that a TILA cancellation during the extended three-year rescission period allows borrowers one additional year thereafter pursuant to § 1640 to file in Court for rescission twenty-one additional days after cancellation where the mortgagee wrongfully refuses cancellation.

Moreover, the fact that even federal judges in addition to practitioners and hence their clients have been confused regarding this issue underscores the necessity at the very least of avoiding making any such "new rule" retroactive as the Ninth Circuit Court of Appeals here has unfairly done.

This Court has repeatedly opposed retroactive application in such circumstances, James B. Bean Distilling Co. v. Georgia, 501 U.S. 529, 534 (1991) ("It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct.").

Research discloses that this is the first TILA rescission case that has argued at a minimum the need for prospective application.

Moreover, the present situation doubly implicates equal protection of the law.

Not only has the reasonable reliance of Takushi and his experienced counsel been otherwise ignored.

But citizens of one State, given the same TILA facts, are presently being treated entirely differently

with respect to the ownership of their homes, often their most important asset in which they have invested their life savings, advantaged or disadvantaged by indiscriminant differential and inconsistent application of identical language contained in the same federal consumer protection statute based upon the interpretation of the same words in this Court's 1998 Opinion in Beach.

## V. CONCLUSION

This Petition clearly presents on an emergency basis an extraordinarily important question of federal law.

And given the existing split among five Circuit Courts of Appeals, this is a challenge to the enforcement, respectability and fairness of Congressional consumer protection legislation and equal protection of the law, inadvertently generated by your decision in Beach, that now only this Court can effectively disentangle and remedy.

Respectfully submitted,

*/s/ Gary Victor Dubin*

---

GARY VICTOR DUBIN

*Counsel of Record*

FREDERICK J. ARENSMEYER

*Attorneys for Petitioner*

Honolulu, Hawaii  
January 14, 2014

# APPENDIX

A. DISTRICT COURT ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT BAC HOME LOANS SERVICING, LP'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, DATED JULY 1, 2011.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

ROCKY FUJIO	)	CIVIL NO. 11-00189
TAKUSHI, Individually	)	LEK-KSC
and as Trustee of the	)	
Albert G. Takushi	)	ORDER GRANTING IN
Revocable Living Trust	)	PART AND DENYING
Dated April 11, 2007,	)	IN PART
	)	DEFENDANT BAC
Plaintiff,	)	HOME LOANS
	)	SERVICING, LP'S
v.	)	MOTION TO DISMISS
BAC HOME LOANS	)	PLAINTIFF'S
SERVICING, LP, et al.,	)	COMPLAINT, DATED
	)	JULY 1, 2011
Defendants.	)	

Before the Court is Defendant BAC Home Loans Servicing, LP's ("BAC") Motion to Dismiss Plaintiff's Complaint ("Motion"), filed March 30, 2011. Plaintiff Rocky Fujio Takushi ("Plaintiff"), individually and as trustee of the Albert G. Takushi Revocable Living Trust Dated April 11, 2007 ("Trust"), filed his memorandum in opposition on May 23, 2011. BAC filed its reply on May 27, 2011. This matter came on for hearing on June 13, 2011. Andrew Lautenbach, Esq., appeared on behalf of BAC, and Gary Dubin, Esq.,

appeared on behalf of Plaintiff. After careful consideration of the Motion, supporting and opposing memoranda, and the arguments of counsel, BAC's Motion is HEREBY GRANTED for the reasons set forth below.

## BACKGROUND

### I. Factual History

On an unspecified date in April 2007, Plaintiff's parents, Albert Goro Takushi and Shirley Motoko Takushi, conveyed to Plaintiff, individually and as trustee of the Trust, real property located at 98-1868 Nahele Street, Aiea, Hawai'i 96701 ("the Property"). [Complaint at ] ¶ 7;<sup>1</sup> Warranty Deed (to Trust) ("Warranty Deed") at 1.<sup>2</sup>]

On or about September 19, 2007, Plaintiff's father obtained a refinance loan from MortgageIT, Inc. ("MortgageIT") for \$230,000 and entered into a mortgage agreement ("Mortgage") with MortgageIT regarding the Property.<sup>3</sup> [Id. at ¶ 9; Mortgage at 2.]

---

<sup>1</sup> The Complaint is attached to BAC's Notice of Removal as Exhibit 1 to the Declaration of Brandi J. Buehn. [Dkt.no. 1-2.]

<sup>2</sup> The Warranty Deed is attached to BAC's Motion as Exhibit B to the Declaration of Brandi J. Buehn. [Dkt.no. 6-4.]

<sup>3</sup> The Mortgage is attached to BAC's Motion as Exhibit A to the Declaration of Brandi J. Buehn. [Dkt.no. 6-3.]

On September 21, 2007, Plaintiff allegedly conveyed the Property back to his father through a Warranty Deed. [Complaint at ¶ 10; Warranty Deed at 1.] The Mortgage was recorded on September 27, 2007 in the Land Court, State of Hawai'i, as document number 3660910 on certificate of title number 878,571. [Complaint at ¶ 9; Mortgage at 1.] The Warranty Deed, however, was not recorded until September 9, 2008. [Warranty Deed at 1.] On September 29, 2007, Plaintiff's father died. [Complaint at 12.]

On December 31, 2009, BAC recorded a Notice of Mortgagee's Intention to Foreclose Under Power of Sale ("Foreclosure Notice") in the Bureau of Conveyances, State of Hawai'i, as document number 2009-198743.<sup>4</sup> [Foreclosure Notice at 1.] BAC served both Plaintiff and Plaintiff's father with the Foreclosure Notice on an unspecified date. [Complaint at ¶ 15.]

On May 24, 2010, Plaintiff's lawyer, Gary Dubin, sent a letter to BAC ("Dubin Letter") stating, *inter alia*, that Plaintiff sought to exercise his right to rescind the loan transaction entered into by his father.<sup>5</sup> [Dubin Letter at 1.]

The letter accused BAC of:

(1) unfair and deceptive acts and practices, (2) fraudulent acts in the inducement, including misrepresentations throughout said loan transaction as to confusing, ambiguous, and contradictory loan

disclosures and excessive closing costs, and (3) TILA violations, including but not limited to the failure to provide two completed copies of the notice of right to cancel at closing or at any other time.

[Id.] The letter demanded that BAC “cease and desist from proceeding with any wrongful foreclosure proceedings, including your wrongful nonjudicial foreclosure auction noticed for today at noon...” [Id. at 2.] In a letter dated June 8, 2010, BAC allegedly denied Plaintiff’s request for rescission. [Complaint at ... ¶ 18.]

On July 12, 2010, BAC foreclosed on the Property and purchased it at auction. [Id. at ¶ 20 (citing Mortgagee’s Affidavit of Foreclosure Under Power of Sale (“Foreclosure Affidavit”), recorded 7/15/10 as doc. no. 3979799)] On January 21, 2011

---

<sup>4</sup> The Foreclosure Notice is attached to Plaintiff’s memorandum in opposition at Exhibit 5. [Dkt. no. 15-5.] In contrast to the recording date and document number listed on the Foreclosure Notice, Plaintiff claims that BAC recorded said notice on January 15, 2010 as document number 2010-006928. [Complaint at ¶14; Mem. in Opp. at 3.]

<sup>5</sup> The Dubin Letter is attached to Plaintiff’s Complaint as Exhibit A.

Defendant Aloha Asset Servicing, LLC (Aloha Asset Servicing") filed a Complaint for Ejectment in the District Court for the First Circuit, State of Hawai'i, claiming to be the owner of the Property.<sup>6</sup> [Id. at ¶ 21.]

## II. Procedural History

On February 9, 2011, Plaintiff filed his two-count Complaint in the District Court for the First Circuit seeking: (1) declaratory judgment as to the title of the Property ("Count I"); and (2) rescission and cancellation under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et. seq.* ("Count II"). [Id. at p. 6.] Pursuant to 28 U.S.C. §§ 1331, 1367, 1441, and 1446, BAC timely removed the case to this district court on March 23, 2011. [Notice of Removal at 2.]

### A. Motion

In its Motion, BAC argues that the Court should dismiss the Complaint with prejudice because Plaintiff fails to state a claim upon which relief can be granted.

As an initial matter, BAC argues that Plaintiff lacks standing to assert a TILA claim because he is neither the borrower nor the mortgagor under the Mortgage. [Mem. in Supp. of Motion at 4 (citing Nash v. Long Beach Mortg. Co., 158 Fed. Appx. 843 (9th Cir. 2005); In re Crevier,

---

<sup>6</sup> It is not clear from the existing record how Aloha Asset Servicing obtained the Property.

820 F.2d 1553 (9th Cir. 1987)).] BAC contends that, in Nash, “[t]he Ninth Circuit affirmed dismissal of the plaintiff’s TILA claims on the grounds that the plaintiff was ‘neither the borrower nor the owner of the property at the time of the contested transactions.’” [Id. at 4-5 (quoting Nash, 158 Fed. Appx. at 843 (emphasis omitted)).] BAC argues that Plaintiff, similar to the plaintiff in Nash, asserts violations regarding property that solely belonged to his father at the time of the contested transactions.

Additionally, BAC argues that Plaintiff does not have standing because of his role as trustee of the Trust. According to BAC, a trustee of a trust holding title to property does not have standing to assert a TILA claim. [Id. at 5 (citing Pico v. Bank of Am., Civil No. 10-00583 SOM/KSC, Order Vacating Order Granting Plaintiff’s Motion to Proceed in Forma Pauperis and Denying Plaintiff’s Request for Appointment of Counsel (ECF No. 18); Order to Show Cause Why Complaint Should Not Be Dismissed, filed 11/12/2010 (dkt. no. 26); id., Order Dismissing Action, filed 12/21/2010 (dkt. no. 41) (finding that the plaintiff in that matter lacked standing to pursue TILA claims where she was not the borrower or the mortgagor under the subject transaction, even though she was trustee of the trust that purportedly held title to the subject property)).]

Finally, BAC argues that Plaintiff’s claim for declaratory relief fails for three reasons. First, BAC argues that declaratory relief is inapplicable in this case because it “is a remedy, not an independent cause of action[.]” [Mem. in Supp. of Motion at 11 (emphasis and some citations omitted) (citing Morongo Band of Mission Indians

v. Cal. State Bd. of Equalization, 849 F.2d 1197, 1201 (9<sup>th</sup> Cir 1988.)] Second, BAC argues that, “because declaratory relief operates prospectively, and not for the redress of past wrongs, Plaintiff’s request for declaratory relief based on alleged violations of TILA during loan consummation is inappropriate.” [Id. at 12 (some citations omitted) (citing Seattle Audubon Soc. v. Moseley, 80 F.3d 1401, 1405 (9<sup>th</sup> Cir. 1996)).] Third, BAC argues that, since declaratory relief requires an “actual controversy relating to the legal rights and duties of the respective parties” and Plaintiff failed to allege facts sufficient to support his TILA claim, the Court must also dismiss Plaintiff’s claim for declaratory relief. [Id. at 12-13 (citing Phillips v. Bank of Am., Civil No. 10-00551 JMS-KSC, 2011 WL 240813, at \*4 (D. Hawai’i Jan. 21, 2011)).]

A. Memorandum in Opposition

Plaintiff refutes BAC’s lack of standing argument and contends that he has standing as both an heir and a successor-in-interest to the Property. [Mem. in Opp. at 6 (citation omitted).] Plaintiff contends that the right to rescind under TILA survives the original consumer’s death, and that both the decedent’s estate and the successors-in-interest to the decedent-borrower’s property may bring rescission claims after the death. [Id. at 6-7 (some citations omitted) (citing James v. Horne Construction Company of Mobile, Inc., 621 F.2d 727, 729-730 (5<sup>th</sup> Cir. 1980) (“we find that a Truth-in-Lending Act action under § 1635 survives the death of the plaintiff”); Smith v. Fidelity Consumer Discount Co., 898 F.2d 896, 902-903 (3<sup>rd</sup> Cir. 1990) (right of rescission invoked after borrower’s death held to survive in favor of decedent’s heirs - son and daughter-in-law-

although found not applicable in that case)).] Plaintiff does not address BAC's declaratory relief arguments in his memorandum.

### B. Reply

In its reply, BAC contends that Plaintiff exclusively relies on authority outside of the Ninth Circuit to support his argument that heirs and successors-in-interest have standing to bring TILA claims. BAC argues that, since Plaintiff fails to refute its claim that he lacks standing under Ninth Circuit authority, the Court should dismiss Plaintiff's Complaint with prejudice. [Reply at 3-4.] BAC also argues that Plaintiff conceded that his claim for declaratory relief is improper by not addressing BAC's argument in his memorandum in opposition. [Id. at 12.]

### STANDARD

Federal Rule of Civil Procedure 12(b) (6) permits a motion to dismiss a claim for "failure to state a claim upon which relief can be granted[.]"

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955 (2007)); see also Weber v. Dep't of Veterans Affairs, 521 F.3d 1061, 1065 (9<sup>th</sup> Cir. 2008). This tenet – that the court must accept as true all of the allegations contained in the complaint – "is inapplicable to legal conclusions." Iqbal, 129 S. Ct. at 1949. Accordingly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory

statements, do not suffice.” Id. (citing Twombly, 550 U.S. at 555, 127 S.Ct. 1955). Rather, “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556, 127 S. Ct. 1955). Factual allegations that only permit the court to infer “the mere possibility of misconduct” do not show that the pleader is entitled to relief. Id. at 1950 (citation omitted).

“Dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment.” Harris v. Amgen, Inc., 573 F.3d 728, 737 (9th Cir. 2009) (citations and quotation marks omitted).

## DISCUSSION

### I. TILA Claim for Rescission

As a threshold matter, BAC contends that Plaintiff lacks standing to assert a TILA claim for rescission because he is neither the borrower nor the mortgagor under the Mortgage. BAC argues that neither Plaintiff’s role as trustee of the Trust nor his alleged status as an heir or successor-in-interest to the Property support a finding of standing.

Plaintiff argues that he has standing to assert his TILA claim for rescission as both an heir and a successor-in-interest to the Property. According to Plaintiff, the right of rescission survives the original consumer’s death and may be brought by either the decedent’s estate or successors-in-interest to a given property.

As recently explained by this district court in Santiago v. Bismark Mortgage Co.:

Article III standing exists only when the plaintiff has suffered an injury-in-fact, i.e., an "invasion of a legally protected interest" that is "concrete and particularized." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). It is well-settled that a plaintiff who is not a party to a mortgage loan cannot assert a claim against the lender for asserted violations of RESPA stemming from the loan settlement process. See, e.g., Thomas v. Guild Mortg. Co., No. CV 09-2687-PHX-MHM, 2011 WL 676902, at \*4 (D. Ariz. Feb. 23, 2011) (granting summary judgment on RESPA and TILA claims for lack of standing because the plaintiff was not a party to the mortgage, citing cases); Cleveland v. Deutsche Bank Nat'l Trust Co., No. 08cv0802 JM (NLS), 2009 WL 250017 (S.D. Cal. Feb. 2, 2009) (dismissing TILA, RESPA, fraud, and other claims of a plaintiff whose wife took out a mortgage, reasoning that "someone who is not a party to [a] contract has no standing to enforce the contract or to recover extra-contract damages for wrongful withholding of

benefits to the contracting party”).

Similarly, to have standing to bring a claim under TILA, a plaintiff must have been deprived of a statutory right to disclosures that existed at the time of the contested transaction. See DeMando v. Morris, 206 F.3d 1300, 1303 (9th Cir. 2000); Crevier v. Welfare & Pension Fund for Local 701 (In re Crevier), 820 F.2d 1553, 1555-56 (9th Cir. 1987); see, e.g., Thomas, 2011 WL 676902, at \*4.

Civil No. 10-00467 SOM/KSC, 2011 WL 839762, at \*4-5 (D. Hawai'i Mar. 4, 2011) (alteration in original).

In Pico, this district court was presented with one of the same questions presently before this Court: whether a trustee who was not a party to a mortgage loan transaction can make TILA claims on behalf of a decedent-borrower. The court in Pico found that, where a trustee-plaintiff is “not a borrower or mortgagee on the loan at issue[,]... she cannot assert [TILA] claims on behalf of [the borrower], regardless of whether she is his trustee or ‘attorney in fact.’” Civil No. 10-00583 SOM/KSC, Order Dismissing Action, at 3. As further explained by the court in Pico:

Pico herself does not have standing to sue under TILA because she is not the borrower or mortgagee on the loan... [i]t

appears that only [the borrower] has standing to sue because he alone entered into the mortgage transaction. As a trustee, Pico is not injured by the mortgage foreclosure and thus lacks standing. See also Nash v. Long Beach Mortg. Co., 158 Fed. Appx. 843 (9th Cir. 2005) (affirming district court's dismissal for lack of standing because plaintiff was neither the borrower nor the owner of the property at the time of the contested transaction); In re Crevier, 820 F.2d 1553 (9th Cir. 1987) (finding that property ownership or a right to convey is needed to state a claim under TILA).

Id., Order Vacating Order Granting Plaintiff's Motion to Proceed in Forma Pauperis and Denying Plaintiff's Request for Appointment of Counsel (ECF No. 18); Order to Show Cause Why Complaint Should Not Be Dismissed, at 3-4.

While the Court is unaware of any case in the Ninth Circuit or this district court that has considered whether an heir or successor-in-interest has standing to pursue TILA claims on behalf of a decedent-borrower, at least one district court in the Ninth Circuit has dismissed such a claim due to a lack of standing. In White v. Deutsche Bank National Trust Co., No. 09 CV 1807 JLS (JMA), 2010 WL 3420766 (S.D. Cal. Aug. 30, 2010), the United States District Court for the Southern District of California had to determine whether children that inherited real property intestate had

standing to bring TILA claims on behalf of the decedent-borrower. While the court found that the children-plaintiffs had constitutional standing to bring their suit, the court concluded that the plaintiffs “have not adequately established standing to pursue a cause of action for violation of TILA.” White, 2010 WL 3420766, at \*3. As explained by the court:

Plaintiffs are not a party to the loan contract; only [decedent] entered into the loan transaction and was a borrower pursuant to the loan. There is no allegation in the complaint that credit was extended to Plaintiffs, nor were Plaintiffs the owners of the property encumbered by the loan. As such, Plaintiffs are not “obligors” or “consumers” sufficient to establish a right to rescind or for damages under TILA. See 15 U.S.C. § 1635(a); also Wilson v. JPMorgan Chase Bank, NA, 2010 WL 2574032, at \*6 (E. D. Cal. June 25, 2010) (citing Johnson v. First Fed. Bank of Cal., 2008 WL 2705090, at \*5 (N.D. Cal. Jul. 8, 2008)). The Court finds no authority for the proposition that Plaintiffs who are not a party to the loan may sue Defendants for a violation of TILA.

Id. (footnote and some citations omitted). As a result, the court in White dismissed the plaintiffs’ TILA claim with prejudice. Id. at \*4.

In contrast to the district court's finding in White, the Fifth Circuit held in James v. Home Construction Co. of Mobile, Inc. that a TILA action for rescission survives the death of the borrower. 621 F.2d 727, 729-30 (5th Cir. 1980) (footnote omitted). In James, a woman entered into a contract with a construction company for improvements and repairs on her home. Approximately three years later, the woman died and her plaintiff-son, who made several payments on contract after his mother's death, requested rescission and cancellation of his mother's contract from the construction company. The plaintiff-son then filed suit seeking rescission under TILA. James, 621 F.2d at 728. The Fifth Circuit found that, while "the rule has been that actions for penalties do not survive the death of the plaintiff[.]" TILA's rescission remedy was "remedial" rather than "penal". Id. at 730 (citations omitted). As a result, the Fifth Circuit permitted the plaintiff-son to proceed with his TILA action against the construction company. Id. at 731.

The Third Circuit made a similar finding in Smith v. Fidelity Consumer Discount Co., 898 F.2d 896 (3d Cir. 1990). In Smith, a man entered into a

---

<sup>7</sup> The Smith case originally involved five plaintiffs and three distinct loan transactions. Only two of the plaintiffs, the successors-in-interest to the decedent's home, and one of the loan transactions, the October 31, 1984 loan from Fidelity to decedent, are relevant to the instant Motion.

loan transaction with Fidelity Consumer Discount Corporation ("Fidelity") to purchase a car, offering his home as a security for said loan. 898 F.2d at 902. Approximately one year after the October 31, 1984 transaction, the man died and his son and daughter-in-law, as successors-in-interest to the man's home, requested rescission of said loan. When Fidelity denied their request for rescission, they filed suit seeking rescission and statutory damages under TILA. The district court awarded plaintiffs both rescission and statutory damages, and Fidelity appealed. *Id.* While the Third Circuit reversed and remanded the district court's finding that the plaintiffs were entitled to summary judgment, *id.* at 907, the court addressed the parties' arguments regarding rescission and damages on the merits and did not raise the issue of standing, *see id.* at 902-07. In fact, the Third Circuit expressly stated that the plaintiffs' TILA rescission claim was timely because they filed within three years of the of the October 31, 1984 transaction. *Id.* at 903. Further, the Third Circuit noted that, if the plaintiffs were correct in their assertion that they were entitled to rescind the instant transaction, then Fidelity is liable for statutory damages based on the [plaintiffs'] timely claim that Fidelity wrongfully denied their request to rescind the transaction." *Id.* It could therefore be said that the Third Circuit recognized, by implication, that successors-in-interest to property have standing to bring timely TILA actions.

The Court declines to decide the issue of Plaintiff's standing in the instant case because, even assuming, *arguendo*, that Plaintiff has standing as a trustee, heir, or successor-in-interest to bring his TILA claim, rescission is unavailable because the Property has already been sold. *See* 15 U.S.C. §

1635(f) (“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...”); see also 12 C.F.R. § 226.23(a) (3) (“If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer’s interest in the property, or upon sale of the property, whichever occurs first.”). As explained by this Court in Rodenhurst v. Bank of America:

Even an involuntary sale of the subject property terminates a borrower’s right to rescind. According to the Official Staff Commentary to Regulation Z, [a] sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind.”

--- F. Supp. 2d ---, Civil No. 10-00167 LEK-BMK, 2011 WL 768674, at \*7 (D. Hawai‘i Feb. 23, 2011) (alteration in original) (quoting Official Staff Commentary to Reg. Z, 12 C.F.R. § 226.23(a)(3)).

In the instant case, the Property was sold at a foreclosure auction on July 12, 2010, over six months before Plaintiff filed this lawsuit. [Complaint at ¶20 (citation omitted).] The Court therefore FINDS that, even if Plaintiff has standing to bring his claim for rescission under TILA, Count II fails to state a claim upon which relief can be granted.<sup>8</sup> Since Plaintiff’s claim for rescission cannot be saved by any amendment[.]” Harris v.

Amgen, Inc., 573 F.3d 728, 737 (9<sup>th</sup> Cir. 2009) (citations and quotation marks omitted), the Court GRANTS BAC's Motion as to Count II and DISMISSES Count II WITH PREJUDICE.

## II. Declaratory Relief

Count I seeks a “declaratory judgment from this Court declaring that Plaintiff, either individually or as Trustee, is presently the owner of title to the subject property, and declaring that any titles held by Defendants BAC and [Aloha Asset Servicing] are void as being improperly transferred and improperly recorded.” [Complaint at pg. 6.]

BAC opposes Plaintiff's claim for declaratory relief. BAC argues that, because declaratory relief is not an independent cause of action and cannot be premised on an invalid TILA claim, the Court must

---

<sup>9</sup> The Court notes that, where a borrower timely notified the lender that he was exercising his right to rescind but did not file his civil action within the three-year statute of repose, there may be an independent TILA claim for damages based on the attempt to rescind the loan. Peyton v. Option One Mortg. Corp., Civil No. 10-00186 SOM/KSC, 2011 WL 1327028, at \*5 (D.Hawai'i Mar. 31, 2011). Plaintiff's Complaint, however, does not allege such a claim, and the Court does not express an opinion as to whether Plaintiff could allege such a claim.

dismiss Plaintiff's claim for declaratory relief.

The Court construes Count I as a claim for relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. Section 2201(a) provides, in pertinent part:

In a case of actual controversy within its jurisdiction... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

As explained by the Ninth Circuit in Seattle Audubon Society v. Moseley, a declaratory judgment under § 2201 is a means of adjudicating “rights and obligations” in cases “involving an actual controversy that has not reached a stage at which either party may seek a coercive remedy and in cases where a party who could sue for coercive relief has not yet done so.” 80 F.3d 1401, 1405 (9th Cir. 1996) (citations omitted). Since a declaratory judgment is not a corrective action, it should not be used to remedy past wrongs. See, e.g., Marzan v. Bank of Am., -- F. Supp. 2d ---, Civil No. 10-00581 JMS/BMK, 2011 WL 915574, at \*3 (D. Hawai'i Mar. 10, 2011) (“[B]ecause Plaintiffs’ claims are based on allegations regarding Defendants’ past wrongs, a claim under the Declaratory Relief Act is

improper and in essence duplicates Plaintiffs' other causes of action." (citations omitted)); Mangindin v. Wash. Mut. Bank, 637 F. Supp. 2d 700, 707-08 (N.D. Cal. 2009) ("[T]he Court finds that the declaratory relief Plaintiffs seek is entirely commensurate with the relief sought through their other causes of action. Thus, Plaintiffs' declaratory relief claim is duplicative and unnecessary."). Rather, the purpose of a declaratory judgment is to set forth a declaration of present and future rights. Societe de Conditionnement en Aluminium v. Hunter Eng'g Co., 655 F.2d 938, 943 (9th Cir. 1981) ("[The Declaratory Judgment Act] brings to the present a litigable controversy, which otherwise might only by (sic) tried in the future."); Edeier v. DHI Mortg. Co., No. C 09-1302 PJH, 2009 WL 1684714, at \*11 (N.D. Cal. June 12, 2009) ("The purpose of a declaratory judgment is to set controversies at rest before they cause harm to the plaintiff, not to remedy harms that have already occurred." (citations omitted)).

To the extent that Plaintiffs claim for declaratory relief alleges that BAC's title to the Property is "void as being improperly transferred and improperly recorded[.]" [Complaint at pg. 6.] Plaintiff fails to state a claim upon which relief can be granted. A claim for declaratory relief based on allegations of past wrongs is improper under the Declaratory Relief Act. See Marzan, 2011 WL 915574, at \*3 (citations omitted). Since this portion of Count I cannot be "saved by any amendment[.]" Harris, 573 F.3d at 737 (citations and quotation marks omitted), the Court GRANTS BAC's Motion as to Count I insofar as the Court DISMISSES WITH PREJUDICE Count I's request for declaratory relief based on BAC's alleged past

wrongs.

To the extent that Plaintiff's claim for declaratory relief seeks to establish that he "is presently the owner of title to the subject property," [Complaint at pg. 6,] Plaintiff still fails to state a claim upon which relief may be granted. The Court has rejected Plaintiff's claim for rescission under TILA, and Plaintiff presents no evidence that he is otherwise entitled to a judgment that he is the present owner of the Property. Although Plaintiff cannot save his declaratory relief claim based on TILA rescission by amendment, see Harris, 573 F.3d at 737 (citations and quotation marks omitted), it is arguably possible for Plaintiff to allege another basis to support a declaration that he is entitled to the Property. The Court therefore GRANTS BAC's Motion as to Count I insofar as the Court DISMISSES WITHOUT PREJUDICE Count I's request for declaratory relief as to Plaintiff's present ownership rights to the Property.

#### CONCLUSION

On the basis of the foregoing, BAC's Motion to Dismiss Plaintiff's Complaint, filed March 30, 2011, is HEREBY GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED insofar as:

1. Count II is DISMISSED WITH PREJUDICE; and
2. the portion of Count I concerning BAC's alleged past wrongs is DISMISSED WITH PREJUDICE.

The Motion is DENIED insofar as the portion of Count I concerning Plaintiff's present ownership rights to the Property is DISMISSED WITHOUT PREJUDICE.

Plaintiff has until July 12, 2011 to file an amended complaint in accordance with this order. The Court CAUTIONS Plaintiff that, if he fails to file his amended complaint by July 12, 2011, this Court will amend this order to dismiss all of Plaintiff's Claims with prejudice.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, July 1, 2011.

/s/ Leslie E. Kobayashi  
Leslie E. Kobayashi  
United States District Judge

B. DISTRICT COURT ORDER DENYING  
PLAINTIFF'S MOTION FOR  
RECONSIDERATION, AUGUST 31, 2011.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

ROCKY FUJIO	)	CIVIL NO. 11-00189
TAKUSHI, Individually	)	LEK-KSC
and as Trustee of the	)	
Albert G. Takushi	)	DISTRICT COURT
Revocable Living Trust	)	ORDER DENYING
Dated April 11, 2007,	)	PLAINTIFF'S MOTION
	)	FOR
Plaintiff,	)	RECONSIDERATION,
	)	AUGUST 31, 2011
v.	)	
BAC HOME LOANS	)	
SERVICING, LP, et al.,	)	
	)	
Defendants.	)	

On July 1, 2011, this Court issued its Order Granting in Part and Denying in Part Defendant BAC Home Loans Servicing, LP's Motion to Dismiss Plaintiff's Complaint ("Order"). On July 12, 2011, Plaintiff Rocky Fujio Takushi ("Plaintiff"), individually and as trustee of the Albert G. Takushi Revocable Living Trust Dated April 11, 2007 ("Trust"), filed a motion seeking reconsideration of the Order ("Motion").

Defendants BAC Home Loans Servicing, LP ("BAC") and Aloha Asset Servicing, LLC ("Aloha

Asset Servicing") (collectively, "Defendants") each filed a memorandum in opposition on July 26, 2011. Plaintiff filed his reply on August 9, 2011. The Court finds this matter suitable for disposition without a hearing pursuant to Rule LR7.2(d) of the Local Rules of Practice of the United States District Court for the District of Hawai'i ("Local Rules"). After careful consideration of the Motion, supporting and opposing memoranda, and the relevant legal authority, Plaintiff's Motion is **HEREBY DENIED** for the reasons set forth below.

#### BACKGROUND

The parties and the Court are familiar with the factual and procedural background of this case. The Court therefore will only discuss the background that is relevant to the instant motion.

On or about September 19, 2007, Plaintiff's ~~father~~ obtained a refinance loan from MortgageIT, Inc. for \$230,000 and entered into a mortgage agreement ("Mortgage") with MortgageIT, Inc. regarding real property located at 98-1868 Nahele Street, Aiea, Hawai'i 96701 ("the Property").<sup>1</sup> [Complaint at ¶ 9; Mortgage at 2-3.] On September 21, 2007, Plaintiff allegedly conveyed the Property back to his father through a Warranty Deed. [Complaint at ¶ 10; Warranty Deed at 1.] The Mortgage was recorded on September 27, 2007 in the Land Court, State of Hawai'i, as document number 3660910 on certificate of title number 878,571. [Complaint at ¶ 9; Mortgage at 1.] On September 29, 2007, Plaintiff's father died. [Complaint at ¶ 12.]

On December 31, 2009, BAC recorded a Notice of Mortgagee's Intention to Foreclose Under Power of Sale ("Foreclosure Notice") in the Bureau of Conveyances, State of Hawai'i, as document number 2009-198743.<sup>2</sup> [Foreclosure Notice at 1.] BAC served both Plaintiff and Plaintiff's father with the Foreclosure Notice on an unspecified date. [Complaint at ¶ 15.]

On May 24, 2010, Plaintiff's lawyer, Gary Dubin, Esq., sent a letter to BAC ("Dubin Letter") stating, *inter alia*, that Plaintiff sought to exercise his right to rescind the loan transaction entered into by his father.<sup>3</sup> [Dubin Letter at 1.] In a letter dated June 8, 2010, BAC allegedly denied Plaintiff's request for rescission. [Complaint at ¶ 18.]

---

<sup>1</sup> The Mortgage is attached to BAC's Motion to Dismiss Plaintiff's Complaint ("Motion to Dismiss") as Exhibit A to the Declaration of Brandi J. Buehn. (Dkt. no. 6-3.).

<sup>2</sup> The Foreclosure Notice is attached to Plaintiff's memorandum in opposition to the Motion to Dismiss as Exhibit 5. [Dkt. no. 15-5.]

<sup>3</sup> The Dubin Letter is attached to Plaintiff's Complaint as Exhibit A.

<sup>4</sup> The Foreclosure Affidavit is attached to Plaintiff's memorandum in opposition to the Motion to Dismiss as Exhibit 8. [Dkt. no. 15-8.]

On July 12, 2010, BAC foreclosed on the Property and purchased it at auction. [Id. at ¶ 20 (citing Mortgagee's Affidavit of Foreclosure Under Power of Sale ("Foreclosure Affidavit"), recorded 7/15/10 as doc. no. 3979799).<sup>4</sup>] On December 6, 2010, the Land Court issued Aloha Asset Servicing a transfer certificate of title (TCT) for the Property. [Land Court, TCT No. 1005781.<sup>5</sup>] On January 21, 2011, Aloha Asset Servicing filed a Complaint for Ejectment in the District Court for the First Circuit, State of Hawai'i, claiming to be the owner of the Property. [Complaint at ¶ 21.]

On February 9, 2011, Plaintiff filed his two-count Complaint in the Circuit Court for the First Circuit seeking: (1) declaratory judgment as to the title of the Property ("Count I"); and (2) rescission and cancellation under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* ("Count II"). [Id. at p. 6.] Pursuant to 28 U.S.C. §§ 1331, 1367, 1441, and 1446, BAC timely removed the case to this district court on March 23, 2011. [Notice of Removal at 2.]

BAC filed its Motion to Dismiss on March 30, 2011. [Dkt. no. 6.] On July 1, 2011, the Court issued its Order Granting in Part and Denying in Part Defendant BAC Home Loans Servicing, LP's Motion to Dismiss Plaintiff's Complaint ("7/1/11 Order"). [Dkt. no. 19.] The Court granted the Motion to Dismiss insofar as it dismissed with

---

<sup>5</sup> A copy of the TCT for the Property is attached to Aloha Asset Servicing's memorandum in opposition to the Motion as Exhibit A. [Dkt. no. 23.]

prejudice Count II and Count I to the extent that it concerned BAC's alleged past wrongs. The Court denied the motion insofar as it dismissed without prejudice the portion of Count I concerning Plaintiff's present ownership rights to the Property. [Id. at 19-20.]

#### I. Motion

Plaintiff argues that the Court committed manifest error by misinterpreting the applicable federal and state law with respect to when a sale terminates a borrower's TILA rescission rights.

#### A. Federal Law

Plaintiff first argues that, as a matter of federal law, the cancellation letter was effective to cancel the mortgage loan regardless of the occurrence of any subsequent sale, so long as suit was filed within one year and twenty-one days following the failure of the mortgagee to accept rescission. [Mem. in Supp. of Motion at 3.]

Plaintiff argues that a notice of cancellation of a loan transaction is effective "when the right to rescind is exercised" if the notice is sent before the end of the rescission period. [Id. at 3 (citing Regulation Z, §§ 226.15(a) (2) & 226.23(a)(2)).] Plaintiff further argues that, once a lender receives a notice of rescission, the lender has twenty days to cancel the security interest or the underlying mortgage is deemed void. [Id. at 4 (citing Regulation z, §§ 226.15(d) & 226.23(d)).]

Plaintiff argues that, in Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998), the Supreme Court rejected the argument that § 1635(f)'s rescission period acted as a statute of limitations within which one must file suit. According to Plaintiff, the Supreme Court held that the right of rescission under § 1635(f) was intended by Congress to be an election given to borrowers. [Id. (citation omitted).] As a result, Plaintiff contends that the right of rescission, under Beach, need only be “exercised” within § 1635(f)'s three-year rescission period, and the borrower need not file suit in order to exercise that right. (Id. (citations omitted).)

Plaintiff argues that the Ninth Circuit's decision in Miguel v. Country Funding Corp., 309 F.3d 1161 (9th Cir. 2002), further supports his position. According to Plaintiff, the Ninth Circuit in Miguel held that “a TILA cancellation during the extended three-year rescission period allows borrowers one additional year thereafter pursuant to § 1640 to file for rescission twenty-one additional days after cancellation where the mortgage wrongfully refuses cancellation.” [Id. at 5 (citation omitted).]

Finally, Plaintiff argues that the Court misinterpreted Peyton v. Option One Mortgage Corp., Civil No. 10-00186 SOM-KSC, 2011 WL 1327028 (D.Hawai'i Mar. 31, 2011), in its 7/1/11 Order by finding that only a damage claim survives § 1635(f)'s three-year rescission period. Rather, Plaintiff contends that both damages and rescission claims may be filed in the additional year afforded by § 1640(e). [Id. (citing Peyton, 2011 WL 1327028, at \*5) .] According to Plaintiff, at least seven other

district courts within and outside of the Ninth Circuit have embraced this position. [Id. at 6 (citations omitted).]

#### B. State Law

Plaintiff's second argument is that the foreclosure sale was never finalized because a "sale" is determined by state law, and in Hawai'i, a non-judicial sale is not final and not an adjudication on the merits until confirmed by a state court. [Id. at 7.] Plaintiff contends that a foreclosure sale conducted pursuant to Hawai'i Revised Statutes § 667-5 is void and unenforceable where the foreclosure sale is contrary to the mortgage or contrary to a statute. [Id. (citing Lee v. HSBC Bank USA, 121 Haw. 287, 218 P.3d 775 (2009)).] Plaintiff argues that, since the non-judicial foreclosure sale of the Property was never confirmed by a state court, the sale should be treated as void and his claim for rescission deemed proper. [Id. at 7-8 (citations omitted).]

As a final matter, Plaintiff contends that the portion of § 1635(f) stating that borrowers may cancel loans within the three-year TILA rescission period except "upon the earlier sale of the property" means that "borrowers may exercise that right to rescind up to and until final judicial confirmation, notwithstanding a prior auction sale, which in Hawaii as elsewhere vests no title in the high bidder until confirmation of sale." [Id. at 8-9 (citing Brent v. Staveris Development Corp., 7 Haw. App. 40, 45, 741 P.2d 722 (1987)) .]

## II. BAC's Memorandum in Opposition

BAC argues that the Court did not commit manifest error of law or fact because the sale of the Property extinguished Plaintiff's TILA right of rescission. BAC further contends that the Court should disregard Plaintiff's arguments regarding enlargement of § 1635(f)'s three-year rescission period pursuant to § 1640(e) because the statute of limitations is not relevant to the Court's 7/1/11 Order.

### A. Sale of the Property and the Right to Rescind

First, BAC argues that the Court correctly determined that the TILA right of rescission was extinguished by the sale of the Property. BAC argues that “[i]t is well-settled that rescission under TILA is absolutely terminated upon the close of the foreclosure sale.” [BAC's Mem. in Opp. at 7 (citing Valdez v. Flexpoint Funding Corp., 2010 WL 3001922, at \*7 (D.Haw. 2010)).]

BAC refutes Plaintiff's argument that a non-judicial foreclosure in Hawai'i “is not final and not an adjudication of the merits until subsequently confirmed by a State Court[.]” [Id. at 8 (quoting Mem. in Supp. of Motion at 7).] BAC claims that this district court has imposed no such requirement.

Instead, this district court, and others, have found that a non-judicial foreclosure sale, like the one in the instant case, terminates an unexpired right to rescind. [Id. (citations omitted).]

BAC distinguishes the cases cited by Plaintiff on the ground that they are judicial - as opposed to non-judicial - foreclosures. BAC also claims that such cases did not adjudicate the issue of the finality of a non-judicial foreclosure sale in the context of a TILA rescission claim by the borrower. [Id. at 8-9.]

BAC argues that it is well-settled that a non-judicial foreclosure sale terminates an unexpired right to rescind. As a result, BAC contends that the Court was correct in holding that rescission is unavailable in the instant case because the Property was sold on July 12, 2010. [Id. at 8 (citations omitted).]

#### B. Three-year TILA Rescission Period

Second, BAC argues that the Court need not address Plaintiff's statute of limitations arguments because the statute of limitations was not the basis for the Court's decision in the 7/1/11 Order. Rather, BAC explains, the Court found that rescission is unavailable because the Property had already been sold. [Id. at 10 (citations omitted).]

BAC argues that, even if the Court considers Plaintiff's statute of limitations argument, it fails because there is an absolute limitation on rescission actions which bars any claims filed more than three years after the consummation of the transaction. BAC argues that, while § 1640(e) provides that a borrower has one year from the refusal of cancellation to file suit, any such suit must be for damages, not rescission. [Id. at 10-11 (citations omitted).]

BAC argues, moreover, that none of the cases cited by Plaintiff "stand for the proposition that a claim for rescission may be brought outside of the three year statute of limitations period." [Id. at 12.] Rather, BAC argues that such cases involve TILA claims for damages due to the lenders' failures to respond to borrowers' rescission requests. [Id. (citations omitted).] Finally, BAC argues that Plaintiff mischaracterized the Supreme Court's holding in Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998). BAC argues that the Supreme Court in Beach "determined that TILA permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run." [Id. at 14.]

### III. Aloha Asset Servicing's Memorandum in Opposition

Aloha Asset Servicing first contends that the Court did not misinterpret the law because the sale of the Property extinguished Plaintiff's right of rescission. According to Aloha Asset Servicing, "a mortgagor's right to impeach any foreclosure proceeding is expressly limited to the period before entry of a new certificate of title." [Aloha Asset Servicing's Mem. in Opp. at 6 (some citations omitted) (quoting Aames Funding Corp v. Mores, 107 Haw. 95, 101, 110 P.3d 1042, 1048 (2005)).] Aloha Asset Servicing therefore argues that Plaintiff can no longer seek to impeach the foreclosure proceedings or rescind the loan because of the TCT that the Land Court issued to Aloha Asset Servicing on December 6, 2008. [Id.]

Second, Aloha Asset Servicing argues that Plaintiff has misconstrued the case law interpreting TILA's three-year rescission period. [Id.] Aloha Asset Servicing contends that the Supreme Court's holding in Beach lends no support to Plaintiff's position that the right to impeach a foreclosure continues even after a sale and issuance of a new certificate of title because it "did not address the effect of a subsequent sale [.]" [Id. at 7-8.] Next, Aloha Asset Servicing argues that the Ninth Circuit's holding in Miguel is equally unhelpful because the court rejected the plaintiff's argument that, after the expiration of the three-year TILA rescission period, she had an additional year to file a suit pursuant to § 1640(e). [Id. at 8.] Aloha Asset Servicing contends that the Hawai'i Supreme Court's holding in Lee is similarly unhelpful because the plaintiffs in that case, unlike Plaintiff in the instant case, managed to cure their default. Aloha Asset Servicing notes, moreover, that the court in Lee did not find that non-judicial sales are never final or that non-judicial sales require confirmation by a court. [Id. at 9.] Finally, Aloha Asset Servicing argues that the Hawai'i Intermediate Court of Appeals' Brent decision is unpersuasive because the case contained no discussion of TILA and lends no support to the argument that non-judicial sales require a state court confirmation. [Id.]

#### IV. Reply

In his reply, Plaintiff first reiterates his argument that, under Hawai'i state law, a non-judicial foreclosure does not terminate an unexpired TILA right to rescind "if borrowers rescind based on TILA violations within the

rescission period and prior to any Hawaii state court approval of that non-judicial foreclosure sale." [Reply at 2-3.] Plaintiff relies on a Hawaii state trial court decision in Tabuyo v. Reish, Civ. No. 09-1-2029 BIA, which found that a "nonjudicial foreclosure sale is not a final adjudication on the merits." [Id. at 3 (quoting Tabuyo v. Reish, Civ. No. 09-1-2029 BIA, Order Denying Defendants' Motion for Order Expunging Notice of Pendency of Action Filed September 14, 2009 (Cir. Ct. Nov. 4, 2009), at 2).<sup>6</sup>]

Second, Plaintiff restates his argument that a borrower need not file suit within § 1635(f)'s three-year rescission period so long as he or she timely provides the lender with notice of rescission within that period. Plaintiff argues that an "overwhelming amount of federal case law", including the Ninth Circuit's Miguel decision, supports this interpretation of § 1635(f). [Id. at 4 (citation omitted).]

Third, Plaintiff argues that the issuance of a TCT does not automatically extinguish the previous titleholder's right of rescission. [Id. at 5.] Plaintiff contends that, in In re Estate of James Campbell, a Hawai'i Land Court judge in the First Circuit ruled that a TCT did not preclude the previous titleholder from asserting a fraud defense to the TCT following a non-judicial foreclosure. [Id. (citing In re Estate of James Campbell, 1LD No. 10-1-3068, Trans. of Proceedings for Respondent's Motion for Summary Judgment as to Frederick Antoine Waller & Tanya Davelyn-Santiago Waller's Petition to Amend Transfer Certificate of Title

806,482 & to Strike & Expunge Transfer Certificate of Title 970,858 Filed 9/28/10, dated 2/28/11, 3/2/11, & 3/16/11 (collectively "Campbell Estate Transcripts").<sup>7]</sup> As a result, plaintiff contends that Aames should not be read as barring the presentation of similar defenses in the instant case. [Id. at 4-5.]

#### STANDARD

"[A] successful motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate reasons why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." Donaldson v. Liberty Mut. Ins. Co., 947 F. Supp. 429, 430 (D. Hawai'i 1996); accord Tom v. GMAC Mortg., LLC, CIV. NO. 10-00653 SOM/BMK, 2011 WL 2712958, at \*1 (D. Hawai'i July 12, 2011) (citations omitted). This district court recognizes three grounds for granting reconsideration of an order: "(1) an intervening change in controlling law; (2) the availability of

---

<sup>6</sup> The Tabuyo order is attached to the Motion as Exhibit A to the Declaration of Gary Victor Dubin. [Dkt.no. 20-2.]

<sup>7</sup> The Campbell Estate Transcripts are attached to the Reply as Exhibits D (2/28/11), [dkt. no. 25-5,] E (3/2/11), [dkt. no. 25-6,] and F (3/16/11) [dkt. no. 25-7] to the Declaration of Gary Victor Dubin.

new evidence; and (3) the need to correct clear error or prevent manifest injustice." White v. Sabatino, 424 F. Supp. 2d 1271, 1274 (D. Hawai'i 2006) (citing Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1178-79 (9th Cir. 1998)); see also Local Rule LR60.1.

Courts generally do not grant reconsideration based on legal arguments that could have been raised in connection with the original motion. See Hawaii Stevedores, Inc. v. HT & T Co., 363 F. Supp. 2d 1253, 1269-70 (D. Hawai'i 2005) (citing Kona Enter., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (some citations omitted). "Whether or not to grant reconsideration [,]" however, "is committed to the sound discretion of the court." Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041, 1046 (9th Cir. 2003) (citing Kona Enter., Inc. v. Estate of Bishop, 229 F.3d 877, 883 (9th Cir. 2000)).

## DISCUSSION

### I. Effect of a Foreclosure Sale on the TILA Right of Rescission

In its 7/1/11 Order, the Court found that, pursuant to 15 U.S.C. § 1635(f) and 12 C.F.R. § 226.23(a) (3), the sale of the Property extinguished Plaintiff's rescission claim. As explained by the Court:

[E]ven assuming, *arguendo*, that Plaintiff has standing as a trustee, heir, or successor-in-interest to bring his TILA claim, rescission is unavailable because the Property has already been sold. See

15 U.S.C. § 1635(f) ("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 . . . ."); see also 12 C.F.R. § 226.23(a)(3) ("If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first."). As explained by this Court in Rodenhurst v. Bank of America:

Even an involuntary sale of the subject property terminates a borrower's right to rescind. According to the Official Staff Commentary to Regulation Z, "[a] sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind."

---F.-Supp. 2d ---, Civil No. 10-00167 LEK-BMK, 2011 WL 768674, at \*7 (D. Hawai'i Feb. 23, 2011) (alteration in original) (quoting Official Staff Commentary to Reg. Z, 12 C.F.R. § 226.23(a)(3)).

In the instant case, the Property was sold at a foreclosure auction on July 12, 2010, over six months before Plaintiff

filed this lawsuit. [Complaint at ¶ 20 (citation omitted).] The Court therefore FINDS that, even if Plaintiff has standing to bring his claim for rescission under TILA, Count II fails to state a claim upon which relief can be granted. Since Plaintiff's claim for rescission cannot be "saved by any amendment[.]" Harris v. Amgen, Inc., 573 F.3d 728, 737 (9th Cir. 2009) (citations and quotation marks omitted), the Court GRANTS BAC's Motion as to Count II and DISMISSES Count II WITH PREJUDICE.

2011 WL 2610208, at \*6-7 (footnote omitted) (some alterations in original).

Plaintiff argues that, because he sent BAC a notice of rescission within § 1635(f)'s three-year rescission period and before the sale of the property, his claim for rescission is both timely and valid. Plaintiff contends that this exercise of his right of rescission was sufficient to preserve his claim, and that the subsequent sale of the Property did not extinguish his right to rescind.

BAC argues that the Court did not commit manifest error because the sale of the Property extinguished Plaintiff's right of rescission. According to BAC, the sale of a property completely terminates a borrower's right of rescission with respect to that property. BAC relies on Valdez v. Flexpoint Funding Corp., Civ. No. 09-00296 ACK-BMK, 2010 WL 3001922 (D. Hawai'i July 30, 2010), in which this district court found that:

Even an involuntary sale of the subject property terminates a borrower's right to rescind. According to the Official Staff Commentary to Regulation Z, "[a] sale or transfer of the property need not be voluntary to terminate the right to rescind. For example, a foreclosure sale would terminate an unexpired right to rescind." Official Staff Commentary to Reg. z, 12 C.F.R. § 226.23(a)(3). Indeed, the cases are legion that a foreclosure sale terminates a borrower's right to rescind under TILA. Hallas v. Ameriquest Mortg. Co., 406 F. Supp. 2d 1176, 1183 (D. Or. 2005) (foreclosure sale terminated plaintiff's right of rescission); Fonua v. First Allied Funding, No. 09-0497, 2009 WL 816291 (N.D. Cal. Mar. 27, 2009) (same); Worthy v. World Wide Fin. Servs., Inc.; 347 F. Supp. 2d 502, 506 (E.D. Mich. 2004) (same); Hall v. Fin. Enter. Corp., 188 B.R. 476, 483-84 (D. Mass. Br. 1995) ("[E]ven if the statute of limitations had not expired, the [borrower's] claim is barred by the foreclosure sale.").

2010 WL 3001922, at \*7 (alterations in original).

As explained in the 7/1/11 Order, under TILA, a borrower's right of rescission expires either three years after the consummation of the loan transaction or upon the sale of the property, whichever occurs first. 15 U.S.C. § 1635(f); see also § 226.23(a)(3). It does not matter if the sale was not voluntary - the Official Staff Commentary to Regulation Z explains that "[a] sale or transfer of the property need not be voluntary to terminate the right to rescind. For

example, a foreclosure sale would terminate an unexpired right to rescind." Official Staff Commentary to Reg. Z, § 226.23(a) (3); see also Rodenhurst v. Bank of Am., --- F. Supp. 2d ---, Civil No. 10-00167 LEK-BMK, 2011 WL 768674, at \*7 (D. Hawai'i Feb. 23, 2011).

This district court has repeatedly found that, where a property has been sold, rescission is no longer possible. See, e.g., Rodenhurst, 2011 WL 768674 at \*7 ("[R]escission is no longer possible because the Property has been sold." (citations omitted)); Rey v. Countrywide Home Loans, Inc., Civil No. 11-00142 JMS/KSC, 2011 WL 2160679, at \*6 (D. Hawai'i June 1, 2011) ("[R]escission is not possible because as the Complaint alleges, the subject property has been sold."); Letvin v. Amera Mortg. Corp., Civil No. 10-00539 JMS/KSC, 2011 WL 1603635, at \*5 (D. Hawai'i Apr. 27, 2011) ("[R]escission is not possible because the subject property has been sold."); Peelua v. Imac Funding Corp., Civ. No. 10-00090-JMS/KSC, 2011 WL 1042559, at \*9 (D. Hawai'i Mar. 18, 2011) ("Rescission is not possible because the subject property has been sold."); Valdez, 2010 WL 3001922, at \*7 (D. Hawai'i July 30, 2010) ("Even an involuntary sale of the subject property terminates a borrower's right to rescind.").

Whether a timely TILA rescission request that predates the foreclosure sale of a property automatically preserves the borrower's right to seek rescission post-sale is an issue of first impression for this district court. The Ninth Circuit, however, addressed this issue in Meyer v. Ameriquest Mortgage Co., stating that, under § 226.23(a)(3), the sale of a property extinguishes

the borrower's right to rescind that property. 342 F.3d 899, 903 (9th Cir. 2003).

In Meyer, the plaintiff-borrowers received a loan from the defendant-lender secured by their residence in March 1999. In May 2000, the plaintiff-borrowers demanded rescission of the loan. The following month, they filed suit, seeking, *inter alia*, rescission and damages for TILA violations. In December 2000, the plaintiff-borrowers sold their home and paid off the loan. Id. at 901-02.

While the Ninth Circuit ultimately affirmed the district court's summary judgment order dismissing their TILA claim as time-barred, the Ninth Circuit observed that, "[o]nce the Meyers sold their home, took control of the loan proceeds and paid off the loan, the TILA rescission provision no longer applied and only the damages provision remained as a cause of action." Id. at 902 (citing 12 C.F.R. § 226.23(a)(3) (right to rescind expires when property is sold)). As further explained by the Ninth Circuit:

The regulation is clear: the right to rescind ends with the sale. "If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first." 12 CFR § 226.23(a)(3).

Id. at 903.

District courts interpreting Meyer have treated the Ninth Circuit's interpretation of § 226.23(a) (3) as completely terminating a borrower's right of rescission, even where the lender - rather than the borrower - sold the property. See Mehta v. Wells Fargo Bank, N.A., 737 F. Supp. 2d 1185, 1192 (S.D. Cal. 2010) ("The Ninth Circuit has unequivocally stated that the sale of property is an absolute bar to rescission. This tracks the statute's and regulation's language which offer no flexibility in this requirement." (citations omitted)); Benemie v. Countrywide Home Loans, Inc., No. CV 09-7870-GHK, 2010 WL 4228339, at \*2 (C.D. Cal. Oct. 26, 2010) (finding that Meyer is a "binding precedent" that the TILA right of rescission is extinguished upon the sale of the property, "even if the sale occurs after notice of a rescission claim"); Brown v. GMAC Mortg., LLC, No. 2:09-cv-03293-GEB-KJM, 2010 WL 3341834, at \*2 (E.D. Cal. Aug. 23, 2010) (citation omitted) (suggesting that the sale of a Property extinguishes a borrower's right of rescission despite timely notice of rescission).

Even if the Ninth Circuit's statement in Meyer about the availability of TILA rescission after the sale of the property is not considered binding precedent, the practice of at least one district court in the Ninth Circuit - the District Court for the Southern District of California - independently suggests that the Ninth Circuit's interpretation of § 226.23(a) (3) applies to the instant case. See, e.g., Ibarra v. Loan City, No. 09-CV-02228-IEG (POR), 2010 WL 1573811 (S.D. Cal. Apr. 20, 2010); Jacobson v. Balboa Arms Drive Trust No. 5402 HSBC Fin. Tr., No.

10-CV-2195-JM (RBB), 2011 WL 3328487 (S.D. Cal. Aug. 1, 2011).

In Ibarra, the plaintiff-borrower obtained a refinancing loan on September 6, 2006. In July 2009, the plaintiff-borrower sent notices of rescission to his original lender, the loan broker, and Aurora, the company that had since assumed the loan. In August 2009, the plaintiff-borrower initiated his lawsuit seeking, *inter alia*, rescission of the loan agreement and monetary damages for the defendants' violation of 15 U.S.C. § 1635(b). On September 8, 2009, Aurora purchased the property at a trustee's sale. Ibarra, 2010 W 1573811 at \*1-2.

The court in Ibarra dismissed the plaintiff-borrower's rescission claim with prejudice, finding that his "right to rescind under TILA expired on September 8, 2009 when the Property was sold at the trustee's sale." Id. at \*2. The court relied on the portion of § 1635(f) stating that the right of rescission expires upon the sale of the property. Id. (citation omitted). The court found that, even though the plaintiff-borrower exercised his right of rescission through a notice of rescission and the filing of a lawsuit, the subsequent sale of the property barred the plaintiff-borrower from seeking rescission. The court, however, did permit the plaintiff-borrower to proceed with his claim for damages as a result of Aurora's failure to comply with § 1635 (b). Id. at \*3.

The District Court for the Southern District of California reached a similar conclusion in Jacobson. In that case, the plaintiff-borrowers obtained loans secured by

deeds of trust on their property in August 2006. In February 2008, they sent notices of rescission to their defendant-lender and another bank requesting cancellation and rescission. In July 2010, defendant Balboa Arms Drive Trust No. 5402 HSBC Financial Trustee purchased the property at a trustee's sale. The plaintiff-borrowers commenced their suit in October 2010. Jacobson, 2011 WL 3328487, at \*1-2 (citations omitted).

The court in Jacobson found that, although the plaintiff-borrowers exercised their right of rescission within § 1635(f)'s three-year rescission period, "any right of rescission under TILA is terminated upon foreclosure sale of the property." Id. at \*6 (citation omitted). As a result, the court concluded that the plaintiff-borrowers' rescission claim was barred and the court dismissed it with prejudice. Id.

In the instant case, even assuming, *arguendo*, that the sale of the Property did not extinguish Plaintiff's right of rescission, the issuance of the TCT to Aloha Asset Servicing on December 6, 2010 bars Plaintiff from now challenging the foreclosure sale. Hawai'i Revised Statute § 501-118 provides, in pertinent part:

Mortgages of registered land may be foreclosed like mortgages of unregistered land.

....

In case of foreclosure by exercising the power of sale without a previous judgment, the affidavit required by chapter 667 shall be recorded with the

assistant registrar. The purchaser or the purchaser's assigns at the foreclosure sale may thereupon at any time present the deed under the power of sale to the assistant registrar for recording and obtain a new certificate. Nothing in this chapter shall be construed to prevent the mortgagor or other person in interest from directly impeaching by action or otherwise, any foreclosure proceedings affecting registered land, prior to the entry of a new certificate of title.

After a new certificate of title has been entered, no judgment recovered on the mortgage note for any balance due thereon shall operate to open the foreclosure or affect the title to registered land.

Haw. Rev. Stat. § 501-118 (emphasis added).

In Aames Funding Corp. v. Mores, the Hawai'i Supreme Court held that "a mortgagor's right to 'impeach [ ] ...any foreclosure proceeding' is expressly limited to the period before entry of a new certificate of title." 107 Hawai'i 95, 101, 110 P.3d 1042, 1048 (2005) (alterations in original) (quoting Haw. Rev. Stat. § 501-118). The court further explained:

HRS § 501-118 clearly recognizes a mortgagor's right to challenge a foreclosure proceeding, stating that "[n]othing...shall...prevent the mortgagor...from directly impeaching... any foreclosure proceedings." [Haw. Rev. Stat. § 501-118.] However, the statute directs that such a right is to be

exercised "prior to the entry of a new certificate of title." Id. Consistent with this proposition, HRS § 501-118 provides that "[a]fter a new certificate of title has been entered, no judgment recovered on the mortgage note for any balance due thereon shall operate to open the foreclosure or *affect the title to registered land.*" Id. (emphasis added). This indicates that conclusive effect is to be given the certificate of title on the question of title to land.

Accordingly, it may be surmised from the text of HRS § 501-118 that a mortgagor's right to "impeach [ ] ... any foreclosure proceeding" is expressly limited to the period before entry of a new certificate of title. This proposition appears to be buttressed by HRS § 501-88 (1993), which provides that the matters stated in the certificate are to be given conclusive effect in the courts.

Id. (some alterations in original); accord Caraang v. PNC Mortg., --- F. Supp. 2d ---, Civil No. 10-00594 LEK-BMK, 2011 WL 2470637, at \*17 (D. Hawai'i, June 20, 2011) ("[E]ven assuming, *arguendo*, that Plaintiffs had valid defenses to the propriety of the non-judicial foreclosure sale, the defenses are time-barred because Plaintiffs failed to raise them before the new certificate of title was issued." (citations omitted)) ; 143 Nenuu Holdings, LLC v. Bonds, No. 28505, 2010 WL 2126481, at \*2 (Hawai'i Ct. App. May 27, 2010) (finding that, because the defendant failed to challenge the foreclosure

sale until after the issuance of the TCT, the new title, pursuant to Hawai'i Revised Statute § 501-118, was "conclusive and unimpeachable"), cert. rejected *by*, 2010 WL 4227723 (Hawai'i Oct 26, 2010), cert. denied *by*, 2011 WL 289986 (U.S. May 2, 2011) (alterations in original) (quoting Haw. Rev. Stat. § 501-118).

Plaintiff argues that a TCT does not preclude the previous titleholder from asserting defenses against the TCT following a non-judicial foreclosure. [Reply at 5 (citing Campbell Estate Transcripts).] In permitting the plaintiffs in Campbell Estate to proceed with their defense of fraud, the Land Court found:

The Court views as controlling authority in this case HRS 501-118 and the Hawaii Supreme Court decisions in Aames Funding. . . . Aames Funding holds that HRS 501-118 provides that defenses to mortgages foreclosed upon by the power of sale must be raised prior to the entry of a new certificate of title in the name of the mortgagor as the new owner of the property foreclosed upon. An exception to this rule is found in cases of fraud to which the mortgagor was a party.

....

However, all other defenses are barred by HRS 501-118.

(Campbell Estate Transcript, dated 3/16/11, at 30-31.)

The Hawai'i Intermediate Court of Appeals appears to have reached a similar conclusion in Provident Funding Associates, L.P.

v. Vimahi, No. 29797, 2010 WL 4491364 (Hawai'i Ct. App. Nov. 10, 2010). The court in that case found that, following the issuance of a TCT, the new titleholder's title is "conclusive and unimpeachable." 2010 WL 4491364 at \*2 (citing Haw. Rev. Stat. § 501-118; Aames Funding Corp. v. Mores, 107 Hawai'i 95, 110 P.3d 1042 (2005)). The court noted, however, that "[i]n cases where registration was allegedly procured by fraud, the owner may pursue all remedies against the parties to the fraud." Id. (citing Haw. Rev. Stat. § 501-106(b)).

Hawai'i Revised Statute § 501.106(b) provides, in pertinent part:

The new certificate [of title] or memorandum shall be binding upon the registered owner and upon all persons claiming under the registered owner, in favor of every purchaser for value and in good faith; provided that in all cases of registration procured by fraud the owner may pursue all the owner's remedies against the parties to the fraud, without prejudice however to the rights of any innocent holder for value of a certificate of Title . . . .

Section 501.106(b), however, has no bearing on the instant case because Plaintiff has neither alleged fraud nor made any showing of fraud. The Court, moreover, finds no reason for treating the fraud defense to Hawai'i Revised Statute § 501-118 as a justification for entertaining other defenses, as advocated by Plaintiff. [Reply at 5.]

In summary, the Court reaffirms its finding that the sale of the Property extinguished Plaintiff's right of rescission. The Court further FINDS that the TCT issued to Aloha Asset Servicing after the foreclosure sale bars Plaintiff from subsequently challenging the sale.

II. Effect of a notice of rescission on the three-year TILA rescission period

Plaintiff argues that, since he submitted a rescission notice to BAC within § 1635(f)'s three-year rescission period, he is entitled to an additional year, pursuant to § 1640(e), to file a lawsuit for rescission. The Court declines to consider the parties' arguments with respect to this issue because the relationship between § 1635 (f) and § 1640 (e) does not affect this Court's finding that the sale of the Property terminated Plaintiff's right of rescission.

III. Requirement that a state court confirm a non-judicial sale in order for it to be deemed final

Finally, Plaintiff argues that the non-judicial sale of the Property is void because it was never confirmed by a state court. Plaintiff argues that, notwithstanding a prior foreclosure sale, he is entitled to exercise his right to rescind until final judicial confirmation.

As this district court has previously explained, a "motion for reconsideration may not present evidence or raise legal arguments that could have been presented at the time of the challenged decision." White v. Sabatino, 424 F.

Supp. 2d 1271, 1274 (D. Hawai'i 2006). Plaintiff's argument regarding the confirmation requirement is a new legal argument that could have been made in his opposition to BAC's Motion to Dismiss. As a result, this argument is untimely and cannot be used as a basis for reconsideration of the 7/1/11 Order.

In summary, Plaintiff failed to either: set forth new material facts that were not previously available; identify an intervening change in law; or demonstrate that the Court made a manifest error of law or fact in its 7/1/11 Order. The Court therefore FINDS that Plaintiff is not entitled to reconsideration of the 7/1/11 Order.

#### CONCLUSION

On the basis of the foregoing, Plaintiff's Motion for Reconsideration of this Court's July 1, 2011 Order Granting in Part and Denying in Part Defendant BAC Home Loans Servicing, LP's Motion to Dismiss Plaintiff's Complaint, filed July 12, 2011, is HEREBY DENIED.

Plaintiff has until September 22, 2011 to file an amended complaint in accordance with the Court's 7/1/11 Order. The Court notes that the only claim dismissed without prejudice in the 7/1/11 Order was the portion of Count I concerning Plaintiff's present ownership rights to the property. The Court CAUTIONS Plaintiff that, if he fails to file his amended complaint by September 22, 2011, this Court will dismiss Plaintiff's remaining claim with prejudice.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII,  
August 31, 2011

/s/ Leslie E. Kobayashi .  
Leslie E. Kobayashi  
United States District Judge

C. DISTRICT COURT JUDGMENT IN A CIVIL  
CASE, DATED DECEMBER 28, 2011.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

ROCKY FUJIO	)	CIVIL NO. 11-00189
TAKUSHI, Individually	)	LEK-KSC
and as Trustee of the	)	Judgment in a Civil
Albert G. Takushi	)	Case, Dated December
Revocable Living Trust	)	28, 2011
Dated April 11, 2007,	)	
Plaintiff,	)	
v.	)	
BAC HOME LOANS	)	
SERVICING, LP, et al.,	)	
Defendants.	)	

**Decision by Court.** This action came for hearing and for consideration before the Court. The issues have been heard and considered and a decision has been rendered.

Plaintiff, having failed to amend the complaint within the time period prescribed and as directed in the Court's Orders: (1) The "ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT BAC HOME LOANS SERVICING, LP'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT" ("Dismissal Order") filed July 1, 2011, and (2) The "ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION" ("Reconsideration Order")

filed August 31, 2011, IT IS ORDERED AND ADJUDGED that:

The Portion of Count I concerning BAC Home Loans Servicing, LP's ("BAC") alleged past wrongs is DISMISSED WITH PREJUDICE, and Dismissed as pursuant to and in accordance with the Dismissal Order.

The Portion of Count I concerning Plaintiff's request for declaratory relief as to Plaintiff's present ownership rights to the Property having previously been Dismissed without Prejudice in accordance with the Dismissal Order, is DISMISSED WITH PREJUDICE, and Dismissed as pursuant to and in accordance with the Dismissal Order, the Reconsideration Order, and the Court's Order filed December 9, 2011: The "ORDER DENYING PLAINTIFF'S MOTION TO CERTIFY LEGAL QUESTION TO THE HAWAII SUPREME COURT PURSUANT TO RULE 13 OF THE HAWAII RULES OF CIVIL PROCEDURE."

Count II of Plaintiff's Complaint is DISMISSED WITH PREJUDICE, and Dismissed as pursuant to and in accordance with the Dismissal Order.

December 28, 2011  
Date

SUE BEITIA  
Clerk

/s/ Sue Beitia by AC  
(By) Deputy Clerk

D. CIRCUIT COURT MEMORANDUM OPINION  
AFFIRMING HAWAII DISTRICT COURT  
JUDGMENT, DATED OCTOBER 16, 2013.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROCKY FUJIO	)	NO. 12-15211
TAKUSHI, Individually	}	MEMORANDUM
and as Trustee of the		
Albert G. Takushi		
Revocable Living Trust		
Dated April 11, 2007,		
Plaintiff-Appellant,		
v.		
BAC HOME LOANS		
SERVICING, LP and		
DOES 1-50,		
Defendants-Appellees.		

Before: KOZINSKI, Chief Judge, and CLIFTON and  
WATFORD, Circuit Judges

The district court properly dismissed Takushi's Truth in Lending Act (TILA) claim because it is time barred. Under TILA, a borrower seeking to rescind a mortgage loan must bring suit within three years of consummation of the loan (with one exception not relevant here). 15 U.S.C. § 1635(f). Takushi's loan closed on September 21, 2007, but he did not file suit until February 9, 2011. That Takushi sent a notice of rescission within the

three-year period is irrelevant under our decision in *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012). The rule announced in *McOmie-Gray* applies retroactively to "all cases still open on direct review," regardless of whether the underlying events pre-date announcement of the rule. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993); see also *Morales-Izquierdo v. DHS*, 600 F.3d 1076, 1087-88 (9th Cir. 2010).

**AFFIRMED.**

## E. SECTION 1635 OF TITLE 15 OF U.S. CODE.

### (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) of this section, 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.

**(d) Modification and waiver of rights**

The Bureau may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

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

This section does not apply to—

(1) a residential mortgage transaction as defined in section 1602 (w) <sup>[1]</sup> 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) of this section, 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—

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Bureau or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) Tolerance for disclosures

Notwithstanding section 1605 (f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be

treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than \$35 or is greater than the amount required to be disclosed under this subchapter.

**(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.