No. _____

In the Supreme Court of the United States

REGINALD JONES,
Petitioner,

v.

WELLS FARGO BANK, N.A., d/b/a America's Servicing Company,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 *et seq.*, provides special rescission rights for loans secured by a borrower's principal dwelling. This Court's unanimous opinion in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015), held that rescission is effected when the borrower notifies the lender of his intention to rescind. In this case, the United States Court of Appeals for the Fourth Circuit held that *res judicata* bars Petitioner from seeking the protection afforded by the Act because final foreclosure judgment was entered and the borrower's home was foreclosed upon. Because rescission occurred prior to the foreclosure, however, the lender had no legal right to foreclose. The lender's security interest had been extinguished as a matter of law by the rescission. The foreclosure judgment itself was therefore not valid. The question presented is:

Whether, where the right to foreclose is extinguished as a matter of law by federal statute and a unanimous Supreme Court decision, and a homeowner's home is foreclosed upon by improper foreclosure judgment, a lender can use *res judicata* to bar examination of an invalid judgment that was barred by federal consumer protection law.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Reginald Jones ("Mr. Jones"), respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the 4th Circuit.

INTRODUCTION

The 4th Circuit Court of Appeals affirmed the District Court's decision dismissing Mr. Jones's case, holding that *res judicata* bars his claim that he properly rescinded his mortgage loan per this Court's *Jesinoski* decision holding that rescission is *effected* upon notice. The state court's foreclosure judgment was improper because the lender's security interest was extinguished as a matter of law upon rescission. An improper and void judgment, where the lender lacked standing and the right to foreclose, cannot be the basis for *res judicata*. Moreover, Congressional intent in enacting the federal Truth in Lending Act ("TILA") was to protect such consumers with clear rescission procedures, which Mr. Jones followed. *Jesinoski* made clear when rescission is effected, but the banks, consumers and lower courts now are inconsistently applying the law *Jesinoski* sought to clarify. The case in bar, like many others in the wake of *Jesinoski*, are in direct conflict with this Court's important unanimous *Jesinoski* holding, and is a perversion of consumer law against the homeowners TILA was enacted to protect.

OPINIONS BELOW

The opinion of the court of appeals is an unpublished per curiam opinion (4th Cir. 2016) (App. at 1a-3a). The opinion from the district court is an

unpublished memorandum order (D. Md. 2016) (App. at 4a-6a).

JURISDICTION

The judgment of the court of appeals was entered on October 17, 2016. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Truth in Lending Act, 15 U.S.C. § 1635

Right of rescission as to certain transactions

(a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Bureau, to any obligor in a transaction subject to this section the rights of the obligor under this

section. The creditor shall also provide, in accordance with regulations of the Bureau, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a) 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, down payment, 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) [1] of this title;

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

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

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

(f) Time limit for exercise of right

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

(g) Additional relief

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under

section 1640 of this title for violations of this subchapter not relating to the right to rescind.

(h) Limitation on rescission

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

(i) Rescission rights in foreclosure

(1) In general

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) 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.

STATEMENT OF THE CASE

Reginald Jones refinanced a mortgage loan on his home on May 6, 2005, that was secured by a deed of trust, defined as a consumer credit transaction under the federal Truth in Lending Act ("TILA"), 15 U.S.C. § 1602. Mr. Jones alleged numerous TILA violations by the lender, including the failure to provide the required consumer notices and disclosures. On April 15, 2008, Mr. Jones timely exercised his right to rescind the mortgage transaction. Although Wells Fargo received Mr. Jones's rescission, Wells Fargo took none of the steps TILA requires of lenders following rescission.

Wells Fargo initiated foreclosure proceedings on July 10, 2009. In response, Mr. Jones initiated a lawsuit against Wells Fargo, alleging that Wells Fargo's deed of trust was void. That case was removed to federal court. Mr. Jones filed a Notice of Lis Pendens in the Circuit Court for Montgomery County, Maryland, on October 6, 2009, to give notice of a pending lawsuit to potential purchasers of the property. Despite Mr. Jones's rescission of the loan and the lender's concomitant lack of legal right to sell Mr. Jones's home, as well as a pending federal lawsuit of which the buyer had notice, the property was purchased in a foreclosure sale on October 7, 2009. The federal district court dismissed Mr. Jones's suit in 2011 by memorandum opinion and order granting a motion to dismiss on the basis of *res judicata*, and the Fourth Circuit affirmed the dismissal.

On January 13, 2015, the United States Supreme Court issued its unanimous opinion in *Jesinoski v. Countrywide Home Loans, Inc.*, holding that TILA's unequivocal language "leaves no doubt that rescission

is effected when the borrower notifies the creditor of his intention to rescind." Accordingly, the Court made clear that Mr. Jones's mortgage and note were immediately made void upon his timely rescission notification in 2008.

Based on this Court's ruling in *Jesinoski*, on December 10, 2015, Reginald Jones filed a complaint against Wells Fargo, in the Circuit Court for Montgomery County alleging TILA violations. Wells Fargo removed to the federal district court of Maryland,[1] which dismissed Mr. Jones's complaint, without a hearing, on the basis of *res judicata*. The Fourth Circuit affirmed (*per curiam*).

Mr. Jones lost his home despite his timely mortgage loan rescission. Following the rescission, the lender had no standing to foreclose. No court has adjudicated the fact that the mortgage occurred despite rescission. There never should have been a foreclosure, as the lender lacked the standing to foreclose following Mr. Jones's rescission. Because of the division of authority prior to *Jesinoski* regarding TILA's rescission provisions, Mr. Jones was unable to assert his rights as mandated by the Truth in Lending Act until this Court's recent clarification of TILA's rescission as being effective as a matter of law. The lower courts used the shield of *res judicata*--which is

[1] The District Court had federal question subject matter jurisdiction over the controversy pursuant to 28 U.S.C. § 1331 because the civil action arose under the Constitution, laws or treaties of the United States. The provisions of 28 U.S.C. § 1441(a) authorized the removal of any civil action in a state court over which the courts of the United States have original jurisdiction, and the District Court had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367 because they were part of the same case or controversy.

inapplicable here, where a lender's legal right to foreclose was extinguished as a matter of law and an improper foreclosure took place--to avoid dealing with thorny, unclear issues remaining in *Jesinoski*'s wake.

The landmark *Jesinoski* case explained when rescission was effected pursuant to TILA. But rescission jurisprudence is now littered with cases like the one at bar that are inconsistent with federal statutory law and this Court's *Jesinoski* decision. The Court must rectify this situation by providing needed guidance in this critical area of consumer protection law, whereby homeowners are being evicted and foreclosed upon despite having legally rescinded their mortgages. Years of the misapplication of TILA's mandates prior to *Jesinoski* should not be compounded by years of additional misapplication.

REASONS FOR GRANTING THE WRIT

The lower court in this case blatantly disregarded applicable Supreme Court precedent in denying Petitioner recourse despite this Court's unanimous *Jesinoski* decision. The United States Supreme Court, in its *Jesinoski* ruling, settled a Circuit split regarding the act of invoking a TILA rescission, relying on the plain language of the TILA statute. The Court did not, however, completely address the effect of a TILA rescission. Though the effect is also unambiguously spelled out in 15 U.S.C. § 1635(b), courts are inconsistently ruling on this important consumer protection law.

Because the result in the case at bar directly conflicts with this Court's unanimous *Jesinoski* decision and federal consumer protection law, this Court should resolve the conflict and provide clear

guidance to lower courts on this important matter of federal consumer protection law impacting consumers across the country. The protections afforded by TILA must be allowed where, as here, the consumer effectively rescinded the loan yet lost his home by invalid foreclosure, in which the lender's right to foreclose was extinguished as a matter of law by the borrower's rescission.

I. The Fourth Circuit's Decision in this Case is Directly in Conflict with the Supreme Court's *Jesinoski* Decision, Which Interpreted One of Our Nation's Most Important Consumer Protection Laws, and Rendered *Res Judicata* Inapplicable To a Void Foreclosure Judgment Where the Lender Lacked Authority to Foreclose.

The decision below ignores and is contrary to this Court's unanimous decision in *Jesinoski*. Without a hearing, the District Court issued a Memorandum Opinion and Order on March 7, 2016, dismissing Mr. Jones's complaint because "…a change in case law 'almost never warrants an exception to the application of res judicata.'" The Fourth Circuit affirmed in a per curiam opinion, to circumvent the substantive issue--the important implication of the *Jesinoski* decision in a case where a lender lacked authority to foreclose and an invalid foreclosure judgment occurred.

Without a hearing, the Fourth Circuit opined that Mr. Jones did not challenge the district court's determination that the doctrine of *res judicata* bars his claim and, therefore, abandoned his claim that the district court erred. That is simply not the case. Mr. Jones's argument was that the doctrine of *res judicata*

does not apply here because the underlying foreclosure judgment was illegal and void. There was no waiver of any argument, just as there was no proper judgment that would preclude a court from considering the effect of Mr. Jones's rescission in this case.

In Mr. Jones's brief to the Fourth Circuit, he argued:

> This court should review *de novo* a Fed. R. Civ. P. 12(b)(6) dismissal based on principles of res judicata. *Brooks v. Arthur*, 626 F.3d 194, 200 (4th Cir. 2010). The lower court erred in failing to declare that by operation of law on April 15, 2008, plaintiff's that debt and security instruments were extinguished. Plaintiff's debt and security instruments were extinguished by *operation of law* on April 15, 2008. The lower court in dismissing this matter on a motion to dismiss committed reversible error by failing to follow the unanimous Supreme Court holding in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015).

Mr. Jones's arguments in the Fourth Circuit were not, as that court claimed, on the merits of his underlying claim. His arguments directly addressed why *res judicata* was not applicable to this case: There was no valid foreclosure judgment from which *res judicata* would arise.

The lender's right to foreclose was extinguished by operation of law on April 15, 2008, when Mr. Jones rescinded the loan. No party could obtain any rights

or interest to enforce contracts that were made void after this date.

Pursuant to the TILA statute, rescission is effective by operation of law unless a court of competent jurisdiction vacates it:

> 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.

15 U.S.C. § 1635(b) (emphasis added).

Rescission cannot be ignored, as was the case here by the lender and the lower court. Mailing of the rescission is the only act required of the borrower to cancel the loan contract and render the note and mortgage void by operation of law. 135 S. Ct. at 792 ("Section 1635(a) explains in unequivocal terms how the right to rescind is to be exercised: It provides that a borrower "shall have the right to rescind ... *by notifying the creditor, in accordance with regulations of the Board, of his intention to do so*" (emphasis added). The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind."). Thus, the lender in this case had no standing to foreclose. A party cannot have standing based on being a purported holder of an instrument that is void.

The TILA rescission statute and this Court's opinion in *Jesinoski* declare the note and mortgage void upon mailing of the rescission. It is the lender who then must challenge the rescission, lest it be in

violation of the three TILA rescission duties: Return of the canceled note, cancel lien and return money paid by the borrower. 15 U.S.C. § 1635(b) ("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, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.") (emphasis added).

Based on this Court's clarification of TILA rescissions' effect, the mortgage contracts became void as of April 15, 2008. Regardless of whether the lender fulfilled its legal requirement to return all funds paid on the loan and reflect the termination of the security interest, the loan no longer exists; the contracts are void and any acts by any party based on the loan or contracts are illegal.[2]

One of the first federal courts to address the implications of the *Jesinoski* found that the Supreme Court's decision mandated non-dismissal of a borrower's rescission claim, even though foreclosure had occurred. *Paatalo v. JP Morgan Chase Bank*, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015). The court in *Paatalo* did not circumvent the borrower's claims by improperly applying *res judicata* to avoid them.

The homeowners here and in *Paatalo* previously litigated in state court over alleged numerous violations of TILA and did not assert a TILA

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[2] Even in the case of a disputed rescission, this Court made clear that there is no distinction between disputed and undisputed rescissions. 135 S. Ct. at 792 ("Section 1635(a) nowhere suggests a distinction between disputed and undisputed rescissions, much less that a lawsuit would be required for the latter.").

rescission claim at that time. The court dismissed the plaintiffs' objections in each case and the banks foreclosed in each case. Post-*Jesinoski,* each filed complaints seeking declaratory relief. The court in *Paatalo* correctly noted that:

> It is undisputed more than three years have passed since the consummation of plaintiff's 2006 loans and plaintiff's right to rescind, if not yet exercised, has expired. Thus, the viability of plaintiff's claim that WaMu's security interest in his property was voided in March 2008 hinges on the effect of the notices of rescission to WaMu. Taking the allegations in the complaint as true, if those notices actually rescinded the loan, plaintiff's complaint will survive the motion to dismiss. If, on the other hand, notice of intent to exercise the conditional right of rescission did not actually effect the rescission, defendant is entitled to dismissal. The Supreme Court answered this question in *Jesinoski.* A unanimous Court declared "rescission is effected when the borrower notifies the creditor of his intention to rescind." *Jesinoski,* 135 S. Ct. at 7 92 (emphasis added). Thus, if – as plaintiff alleges - WaMu failed to provide the required disclosures and plaintiff delivered written notice of rescission in March 2008, the rescission was effected and the security interest in plaintiff's property voided at that time. *Jesinoski*, 135 S. Ct. at 791. The Court had to determine when rescission actually occurred in order to answer that question: The language of [the statute] leaves no doubt that rescission is effected when the borrower notifies the creditor of his

> intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. Thus, the *Jesinoski* holding rested on the Court's determination, as a matter of statutory interpretation, that written notice actually effects the rescission. The question here is what happens when the unwinding process is not completed and neither party files suit within the TILA statute of limitations.[3] *Jesinoski* directs that the rescission and voiding of the security interest are effective as a matter of law as of the date of the notice.

Paatalo v. JP Morgan Chase Bank, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015). Res judicata was not a bar, in light of the *Jesinoski* decision.

The federal court for the Eastern District of Michigan cited *Paatalo*'s interpretation of *Jesinoski* with approval:

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[3] "After WaMu received plaintiff's notice of rescission, it had two options. It could have begun the unwinding process by returning plaintiff's down payment or earnest money and taking action to 'reflect the termination of [the] security interest,' pursuant to 15 U.S.C. § 1635(b). Those actions would, in turn, have triggered plaintiff's obligation to tender a payoff of the remaining loan amount. *See Lippner v. Deutsche Bank Nat'l Trust Co.*, 544 F. Supp. 2d 695, 702 (N.D. Ill. 2008) ("The issue of whether [the borrower] can satisfy her rescission obligations [does] not arise until [the lender] ha[s] completed [its] obligations pursuant to TILA.") In the alternative, WaMu could have filed a lawsuit to dispute plaintiff's right to rescind the loan. Plaintiff alleges WaMu did neither of those things." *Paatalo v. JP Morgan Chase Bank*, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015).

> Upon notice of rescission, the burden shifts to the lender to "return to the obligor any money or property given as earnest money, down payment, or otherwise" and to "take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." 15 U.S.C. § 1635(b). Once the lender fulfills those obligations, the borrower must tender the property to the lender or, if that would be impracticable or inequitable, must tender the property's "reasonable value." *Id.* And for the reasons noted in the *Paatalo* decision, the lender's failure to fulfill its obligations and failure to bring a lawsuit seeking to adjudge the rescission void would render the rescission effective as a matter of law as of the date of the notice, and **would void the lender's security interest in the property**. *See Paatalo*, 146 F. Supp. 3d at 1245.

Johnson-El v. JP Morgan Chase Bank National Asso., Civil No. 15-13954 (E.D. Mich. 2016) (emphasis added). The court properly noted that, "[i]f the lender does not fulfill its § 1635(b) obligations, the rescission takes effect as of the date of notice and voids any security interest created by the transaction." *Id.*

The *Paatalo* court acknowledged, but did not shrink from, the difficulty that would ensue if the foreclosure were found to be in error. *Jesinoski* made clear "[t]he loan and contracts were void as of the date of the rescission notice and must be cancelled as a matter of law." *Paatalo v. JP Morgan Chase Bank*, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015 at p.18).

TILA provides "[w]hen an obligor exercises his right to rescind, he is not liable for any finance or other charge, and any security interest given by the obligor, including any interest arising by operation of law, becomes void upon such a rescission." 15 U.S.C. § 1635(b). Within 20 days after "receipt of notice of rescission, the lender must return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary . . . to reflect the termination of any security interest created under the transaction." *Id*. At that point, the borrower is required to "tender the property to the creditor[.]" *Id*. According to the court in *Paatalo*: "[a]s a practical consequence of [the *Jesinoski*] ruling, a lender now bears the burden of filing a lawsuit to contest the borrower's ability to rescind. Alexandra P. Everhart Sickler, *And the Truth Shall Set You Free: Explaining Judicial Hostility to the Truth in Lending Act's Right to Rescind a Mortgage Loan*, 12 Rutgers J.L. & Pub. Pol'y 463, 481 (Summer 2015)." *Id*.

The foreclosure sale that occurred in this case was illegal and void. The lender lacked legal authority to foreclose. The foreclosure judgment was not a valid judgment. *Res judicata* is inapplicable to a void foreclosure judgment. *Res Judicata* derives immediately from the larger jurisprudential demand that **properly entered** judgments be regarded as final. 46 Am. Jur. 2d *Judgments*, § 397 (emphasis added). There was no properly entered judgment here.

In addition, had Mr. Jones made the arguments he now makes at the time of the trustee's sale, they would have been foreclosed by Circuit precedent.

Paatalo v. JP Morgan Chase Bank, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015 at p.18). *See also Alvear-Velez v. Mukasey*, 540 F.3d 672 (7th Cir. 2008). Indeed, courts consistently have refused to apply *res judicata* to preclude a second suit that is based on a claim that could not have been asserted in the first suit. *See Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26, 38 (1st Cir. 1998) ("Of course, *res judicata* will not attach if the claim asserted in the second suit could not have been asserted in the first."); *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997) ("Even where a second action arises from some of the same factual circumstances that gave rise to a prior action, *res judicata* is inapplicable if formal jurisdictional or statutory barriers precluded the plaintiff from asserting its claims in the first action."); *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1321 (9th Cir. 1992) ("If a claim could not have been asserted in prior litigation, no interests are served by precluding that claim in later litigation."); *Kale v. Combined Ins. Co.*, 924 F.2d 1161, 1167 (1st Cir. 1991) ("In general, the rule requiring all claims arising from a single cause of action to be asserted in a single lawsuit will not apply if the plaintiff was unable to assert a particular claim or theory in the original case `because of the limitations on the subject matter jurisdiction of the courts.'" (quoting Restatement (Second) of Judgments § 26(1)(c) (1982))); *Browning v. Navarro,* 887 F.2d 553, 558 (5th Cir. 1989) ("It is black-letter law that a claim is not barred by *res judicata* if it could not have been brought. If the court rendering judgment lacked subject-matter jurisdiction over a claim or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded."); 18 Charles Alan Wright, Arthur R.

Miller & Edward H. Cooper, Federal Practice and Procedure § 4412, at 276 (2d ed. 2002) ("Limitations on the jurisdiction or the nature of the proceedings brought in a first court may justify relaxation of the general requirement that all parts of a single claim or cause of action be advanced.").

Moreover, the foreclosure sale was illegal. *Res judicata* also is inapplicable because of the illegality of the foreclosure sale, where the lender lacked legal authority to sell. *See Manigan v. Burson*, 862 A.2d 1037, 1041 (Md. Ct. Spec. App. 2004) ("[o]n motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity") (*quoting* Md. Rule 2-535(b)); *Ed Jacobsen, Jr., Inc. v. Barrick*, 252 Md. 507, 511, 250 A.2d 646, 648 (1969) ("'[T]he law is firmly established in Maryland that the final ratification of the sale of property in foreclosure is *res judicata* as to the validity of such sale, except in case of fraud or illegality....'").

Res judicata is not applicable in this case. The lender's debt and security instruments were extinguished by operation of law prior to the foreclosure sale. The foreclosure judgment was invalid, as was the sale, because of Mr. Jones's rescission. Both TILA and this Court's holding in *Jesinoski* are clear on this point. The lower court's opinion is in direct conflict.

II. This Court Should Resolve the Inconsistent Application of TILA Among Lower Courts and Important Unsettled Issue Post-*Jesinoski*: Recourse Where a Consumer's Rescission is Effective as a Matter of Law Per *Jesinoski* But Foreclosure Unlawfully Occurred.

Just as this Court resolved in *Jesinoski* the inconsistent application of the effectiveness date of a TILA rescission, here, too, the Court should resolve the inconsistency the courts have had in applying TILA post-*Jesinoski*. While *Jesinoski* clarified some aspects of TILA law, it has caused dissension among lower courts regarding the decision's implications. This Court should not ignore the unequal enforcement of federal consumer law protection that is occurring post-*Jesinoski*.

"*Jesinoski* revealed the majority of federal courts had 'misinterpreted the will of the enacting Congress.'" *Paatalo v. JP Morgan Chase Bank*, Case No. AA 6:15-cv-01420 (D. OR. Nov. 12, 2015). Courts are continuing to do so, post-*Jesinoski*, because the effect of the Court's holding is unclear.

Legal analysts have opined that the *Jesinoski* decision "turned 40 years of TILA rescission jurisprudence into a scene which is now as clear as mud." Frank A. Hirsch Jr. and Richard A. McAvoy, *Life After Jesinoski: The New "Wild West" of TILA Rescission*, 18 Consumer Financial Services Law Report 4 (2015). Numerous unanswered questions remain for both consumers and lenders, such as that presented here: Where a homeowner effects a rescission by giving notice to the lender and the home

is improperly foreclosed upon, federal law has been violated and the homeowner must have recourse.

For example, a California appeals court recently found that *Jesinoski* required the court to vacate judgment and remand to "reevaluate respondent's standing and the merits concerning respondent's claims for cancellation of instruments" because "if the rescissionary remedy *is* completed, the security interest in the Property is void, the foreclosure sale is void." *US Bank National Asso. v. Naifeh*, No. A142994., Cal. Ct. App., 1st App. Dist. (5th Div. 2016) ("In light of *Jesinoski,* appellants urge that Naifeh's notice of rescission divested BofA of its security interest in the Property, renders the foreclosure sale void, and deprived respondent of standing to pursue its claims for cancellation of instruments…. [I]f the TILA disclosures *were* deficient, Naifeh's notice of rescission was timely because it was sent within the extended three-year period, and the trial court may, under section 1635(b), determine what procedure to impose to return the parties to the status quo ante, including whether Naifeh should be required to tender").

Other courts, however, have failed to give *Jesinoski* its due effect. *See, e.g., In re Kelley,* 2016 WL 281647, at *8 n.5 (Bankr. N.D. Cal. Jan. 21, 2016) (*Jesinoski* "did not hold, as Debtor appears to contend, that a loan is rescinded on notice and borrowers have no further obligation to perform if the lender does not respond."); *In re Brown*, 538 B.R. 714, 718-19 (Bankr. D. Va. 2015) (memorandum opinion in which the court disregarded *Jesinoski* and the effect of a rescission notice pursuant thereto); *In re Jensen-Edwards*, 535 B.R. 336, 347 (Bankr. D. Id. 2015)

("*Jesinoski* simply distinguishes the required timely notice of rescission from a deadline to file suit").

This Court's unanimous *Jesinoski* opinion held that rescission under TILA is effective upon notice. Courts are resisting the implications of that holding and are, as here, making rulings that conflict with TILA and *Jesinoski*. The Court should grant certiorari to rectify these conflicts in the application of federal consumer protection law.

III. The Decision Below is Irreconcilable with Clear Congressional Directives Set Forth in the Truth in Lending Act and is a Perversion of Consumer Protection Law.

The lender here ignored the rescission duly exercised by the homeowner in this case, which nullified the bank's right to foreclose on the owner's home. The court below is using the doctrine of *res judicata* to avoid dealing with the homeowner's rescission that occurred as a matter of law per this Court's unanimous *Jesinoski* decision and the Truth in Lending Act.[4] The application of *res judicata* under these circumstances would be inconsistent with TILA's statutory scheme and therefore would frustrate Congress' policy decision regarding homeowners and lenders. There are fundamental

[4] Although *res judicata* is inapplicable here, as set forth above, Petitioner further notes that claim and issue preclusion is not rigidly applied by courts. It is "qualified or rejected when their application would contravene an overriding public policy or result in manifest injustice." *Tipler v. E.I. Du Pont de Nemours and Co.*, 443 F.3d 125, 128 (9th Cir. 1971). *See also Old Dutch Farms, Inc. v. Milk Drivers & Dairy Employees Local Union No. 584*, 281 F. Supp. 971 (E.D.N.Y. 1968); 1B Moore's Federal Practice 0.405[12], at 791.

federal consumer protection rights at stake here involving citizens' basic right to shelter, which Congress sought to protect in enacting TILA.

The lender foreclosed on a home based on two void instruments it possessed--the rescinded note and mortgage. The lender was not entitled to foreclose. Neither the lender, nor the court, may ignore this fact without an order vacating the rescission.

This is and always has been Congress's intention when it passed TILA 50 years ago. TILA provides that, if a consumer finds, as was the case here, that he was not given the correct disclosures and no longer wants the lender's deal, he need only send a letter to cancel the entire transaction. The homeowner is then permitted to apply to a new lender for financing to pay back the prior loan without any finance charges or fees. 15 U.S.C. § 1635. Congress designed rescission as one of the TILA statute's punishments against banks for predatory practices. Furtherance of this important public policy depends on the courts' uniform interpretation of this clear Congressional mandate.

When a mortgage is properly rescinded, the law says that the note becomes void immediately. The deed of trust is void by operation of law when the borrower validly rescinds the mortgage. *Jesinoski*, 135 S. Ct. at 792; *Paatalo*; *Johnson-El*. Nothing can "unvoid" it. In this case, the lower courts allowed the resurrection of a voided promissory note, which runs afoul of TILA and this Court's unanimous *Jesinoski* opinion. Although the law is clear, this case exemplifies the reason the effect of a TILA rescission needs to be ruled upon now by this Court. Void is not voidable. It is void. Yet many courts are loathe to

enforce TILA properly, perhaps in anticipation of potential claims to quiet title, wrongful foreclosure suits and cancellation of instruments.

Even though the result of TILA's proper application may cause difficulties for banks and purchasers of foreclosed upon houses, that is no reason to nullify TILA's clear directives. It is the law. As the *Paatalo* court stated:

> It is unclear what should happen this many years down the road, after the original lender has failed and been placed in receivership, and the property has been sold at a trustee's sale, then re-sold following the trustee's sale. However, because plaintiff has adequately alleged (1) he had a conditional right to rescind in 2008; and (2) he exercised that right, he has stated a claim for at least some of the relief he seeks - a declaratory judgment deeming the foreclosure of the Deeds of Trust null and void….
>
> Although foreclosing trustees and purchasers at trustee's sales have a significant interest in finality, consumers have a countervailing interest in avoiding wrongful foreclosure. Jesinoski revealed the majority of federal courts had "misinterpreted the will of the enacting Congress," *Rivers* [*v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994)], in allocating to borrowers the burden to go to court to enforce their statutory rescission rights under TILA. Further factual development is necessary to determine what effect that revelation should have on the

> property rights of subsequent buyers of the property.

Paatalo at 13.

The issue presented in the case at bar is a matter of national importance. "Congress enacted TILA 'to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.'" *Paatalo* (quoting *Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1118 (9th Cir. 2009) (quoting 15 U.S.C. § 1601). "To effectuate TILA's purpose, a court must construe 'the Act's provisions liberally in favor of the consumer' and **require absolute compliance** by creditors." *Id*. (quoting *In re Ferrell*, 539 F.3d 1186, 1189 (9th Cir. 2008) (emphasis added). TILA provides special rescission rights for loans secured by a borrower's principal dwelling. 15 U.S.C. § 1635(a).

The lower court failed to acknowledge the unanimous holding in *Jesinoski*. There was no final judgment barring Mr. Jones's claim on the basis of *res judicata* because the foreclosure judgment itself was invalid. The lender lacked standing and security interest to foreclose. The rescission was valid and never vacated.

Jesinoski explained that the courts of appeal had misinterpreted the will of the enacting Congress. Yet the courts continue to do so. Consumer protection law codified by TILA requires that certiorari be granted here so that the law will be followed consistently by courts below.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted. The Fourth Circuit's decision cannot be reconciled with this Court's unanimous decision in *Jesinoski*, the holding of which is completely overlooked or ignored in the Fourth Circuit's decision. The court's action below is a perversion of the Truth in Lending Act's mandate. If the *Jesinoski* decision and the federal Truth in Lending Act are to provide their important intended consumer protections, certiorari must be granted.

Respectfully submitted,

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-1308

REGINALD JONES,
Plaintiff - Appellant,

v.

WELLS FARGO BANK, N.A., d/b/a
America's Servicing Company,
Defendant - Appellee.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Roger W. Titus, Senior District Judge.
(8:16-cv-00233-RWT)

Submitted: October 13, 2016
Decided: October 17, 2016
Entered: October 17, 2016

Before NIEMEYER, DUNCAN, and
WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Jon D. Pels, THE PELS LAW FIRM LLC, Bethesda, Maryland, for Appellant. Russell J. Pope, Justin E. Fine, TREANOR POPE & HUGHES, P.A., Towson, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Reginald Jones appeals the district court's order dismissing his complaint as barred by res judicata. On appeal, Jones does not challenge this finding; instead, he argues the merits of his underlying claim.

An appellant must present his "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). "Failure to comply with the specific dictates of this rule with respect to a particular claim triggers abandonment of that claim on appeal." Edwards v. City of Goldsboro, 178 F.3d 231, 241 n.6 (4th Cir. 1999).

Jones has not challenged the district court's determination that the doctrine of res judicata bars his claim. Accordingly, he has abandoned his claim that the district court erred. Thus, we affirm for the reasons stated by the district court. Jones v. Wells Fargo,N.A., No. 8:16-cv-00233-RWT (D. Md. Mar. 7, 2016). We dispense with oral argument because the facts and legal contentions are

adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No. RWT 16cv233

REGINALD JONES,	*
***Plaintiff*,**	*
	*
v.	*
	*
WELLS FARGO BANK, N.A.	*
***Defendant*.**	*

[Entered: March 7, 2016]

MEMORANDUM ORDER

On December 10, 2015, Plaintiff Reginald Jones filed a Complaint against the Defendant, Wells Fargo, in the Circuit Court for Montgomery County alleging violations of the Truth in Lending Act (TILA). ECF No. 2. Wells Fargo removed to this Court, ECF No. 1, and shortly after filed a Motion to Dismiss. ECF No. 12. The Court has reviewed the briefings and determines that no hearing is necessary. *See* Local Rule 105.6.

This is not the parties' first meeting in this Court. On February 3, 2011, the Court entered a memorandum opinion and order granting a Motion to Dismiss on the basis of res judicata. *Jones v. HSBC USA, N.A., et al.* (*Jones I*), No. 09-cv-2904 (D. Md. Feb. 3, 2011). This Court found both claim preclusion and issue preclusion were applicable based on the foreclosure proceedings. *Id.* at 5–10.

Jones now claims that the Supreme Court case of *Jesinoski v. Countrywide Home Loans*, 135 S. Ct. 790 (2015) entitles him to overcome res judicata and litigate his TILA claim, which he did not bring in the 2011 action. *See* ECF No. 13, at 1. This argument fails. First, a change in case law "almost never warrants an exception to the application of res judicata." *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 211 (4th Cir. 2013). Second, Jones does not dispute that this action is another attempt to collaterally attack his foreclosure, an issue that was decided on the merits by the state court in 2009. *See* ECF No. 2 (listing as Jones' requested declaratory relief that he "be put back in title to the subject property as sole owner" and that the foreclosure be voided). As this Court explained in its previous order, "[t]he Maryland courts and this Court, applying Maryland law, have consistently held that res judicata bars collateral attacks on foreclosure judgments entered in the Circuit Courts." *Jones I*, No. 09-cv-2904, at *9 (listing cases). Jones appears to argue that *Jesinoski* held that once a borrower submitted his notice of rescission, the debt was extinguished "by operation of law," and therefore Wells Fargo "has no standing to challenge the already valid and effective rescission." ECF No. 13, at 1. Whether or not this is the correct interpretation of *Jesinoski*, the argument provides no assistance to Jones because his foreclosure has already been litigated twice. Nothing in *Jesinoski* entitles Jones to a third try.

Accordingly, it is, this 7th day of March, 2016, by the United States District Court for the District of Maryland

ORDERED, that Defendant's Motion to Dismiss [ECF No. 12] is **GRANTED**; and it is further

ORDERED, that Plaintiff's Complaint [ECF No. 2] is **DISMISSED**; and it is further

ORDERED, that the Clerk **SHALL CLOSE** this case.

/s/
Roger W. Titus
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Case No. RWT 09cv2904

REGINALD JONES,	*
***Plaintiff*,**	*
	*
v.	*
	*
HSBC BANK USA, N.A., *et al.*,	*
***Defendant*.**	*

[Entered: February 3, 2011]

MEMORANDUM OPINION

This action arises out of Plaintiff Reginald Jones' execution of a promissory note and deed of trust to refinance his Rockville, Maryland home. Jones eventually defaulted on his obligations under the promissory note and his creditors foreclosed under the deed of trust. The property, located at 10214 Silver Bell Terrace, Rockville, Maryland (the "Property"), was sold at a foreclosure sale on October 7, 2009.

On October 6, 2009, Jones brought an action in the Circuit Court for Montgomery County, Maryland against Fremont Reorganizing Corporation ("Fremont"), the lender; Friedman & Mac Fayden ("Friedman"), the original trustee; Mortgage Electronic Registration Systems, Inc. ("MERS"), the original beneficiary of the deed of trust; Wells Fargo Bank, N.A. ("Wells Fargo"), the loan servicer; Home Equity Loan Trust ACE-2005-HES (the "Trust"),

which purchased the loan from Fremont in the secondary loan market; HSBC Bank USA, N.A. ("HSBC"), the successor trustee; Buonassissi, Henning & Lash, P.C. ("BHL"), the substitute trustee; One Call Lender Services, LLC ("One Call") and Superior Home Mortgage Corporation ("Superior Home"), whose alleged roles in the refinancing and foreclosure are unclear. Jones' Complaint alleged violations of the Fair Debt Collection Practices Act, breach of fiduciary duty, and fraud, and seeks damages, an order to quiet title to the property, declaratory and injunctive relief. ECF No. 2. All of Jones' claims stem from injuries allegedly arising out of the foreclosure.

This case was removed to this Court from the Circuit Court for Montgomery County on November 2, 2009. ECF No. 1. After much procedural wrangling, Defendants HSBC, the Trust, Wells Fargo, BHL, and MERS (collectively "Defendants") moved to dismiss Jones' Complaint on October 21, 2010. ECF No. 36. Defendants argue that Jones' claims are barred under the doctrine of *res judicata*, the Anti-Injunction Act, and the *Rooker-Feldman* doctrine. Further, even if Jones' claims are not barred under these doctrines, Defendants argue that Jones' Complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

Soon after Defendants moved to dismiss the Complaint, Plaintiff moved for leave to file an amended complaint. ECF No. 39. Plaintiff's proposed amendments would recast this action as a statewide class action, replacing the claims initially advanced with claims that Defendants violated Maryland

Code, Real Property § 7-105.1 and various other laws, by submitting fraudulent affidavits in support of their right to foreclose on Maryland homes. For the reasons stated below, the motion to dismiss will be granted and leave to amend will be denied.

BACKGROUND FACTS AND PROCEDURAL HISTORY

In 2005, Plaintiff Jones refinanced his home with an $825,200 loan from Fremont. Compl. ¶¶ 16-17. In that loan transaction, Defendant Friedman was designated the trustee and Defendant MERS was named the beneficiary under the deed of trust. Defs.' Mem. in Support of Mot. to Dismiss, at 1, ECF No. 36-1. Shortly after the loan was made, it was assigned to Wells Fargo for servicing. *Id.* Fremont sold the promissory note and deed of trust in the secondary loan market to the Trust, and HSBC was appointed as successor trustee. *Id.*

Jones eventually defaulted on his obligations under the note. *Id.* In 2008, Jones began receiving demands for payment and threats of foreclosure from Defendant Wells Fargo, the servicer, and Defendant BHL, the substitute trustee. Compl. ¶ 20. On July 10, 2009, BHL filed an order to docket a foreclosure of the Property in the Circuit Court for Montgomery County, pursuant to Md. Rule 14-207.[1][1] *Buonassissi v. Jones* (Case No. 316757-V), Dkt. No. 1, ECF No. 33-1, Ex. C.

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[1] Rule 14-207(a)(1) provides, in pertinent part, "An action to foreclose a lien pursuant to a power of sale shall be commenced by filing an order to docket."

Jones moved to rescind the order to docket the foreclosure on July 27, 2009, and filed amended objections to the order to docket on August 21, 2009. *Id.* Dkt. Nos. 7, 10. On October 7, 2009, a foreclosure sale was held at which Defendant HSBC purchased the Property. ECF No. 33-1, Ex. B. In an apparent attempt to forestall the foreclosure proceedings, Jones had filed this action in the Circuit Court the day before. ECF No. 2. Wells Fargo and BHL removed the case to this Court on November 2, 2009. ECF No. 1. Defendants Fremont and Friedman were dismissed from this action pursuant to consent motions on November 20, 2009. ECF Nos. 16, 17.

The Circuit Court held a hearing on Jones' motion to rescind the order to docket on December 2, 2009. All of Jones' objections to the order were overruled, and the motion was denied. *Buonassissi v. Jones* (Case No. 316757-V), Dkt. Nos. 24-26. Jones filed a motion for reconsideration which was denied on January 22, 2010. *Id.* Dkt. Nos. 28, 31. The Circuit Court entered a final order ratifying the foreclosure sale on March 1, 2010. *Id.* Dkt. No. 34. After HSBC moved for a judgment awarding it possession of the property, Jones filed a motion seeking a preliminary injunction to prevent HSBC from taking possession of the Property. *Id.*, Dkt. Nos. 36, 40. On May 13, 2010, the Circuit Court for Montgomery County entered an order awarding possession of the Property to HSBC. ECF No. 36-2, Ex. B.

On May 15, 2010, Jones filed a Motion for Preliminary Injunction and/or Temporary Restraining Order in this Court, seeking an injunction preventing HSBC from taking possession

of the Property—the same relief he had requested in the Circuit Court foreclosure proceeding. ECF No. 32. Defendants opposed the motion, arguing that the issuance of a preliminary injunction would violate the Anti-Injunction Act, the *Rooker-Feldman* doctrine, and *res judicata* in light of the Circuit Court's order awarding possession of the Property to HSBC. ECF No. 33. Plaintiff filed a putative withdrawal of his motion for a preliminary injunction in this Court on June 18, 2010, conceding that "[s]ince Plaintiff's Motion for Preliminary Injunction will be heard in state court, final judgment on the merits of said motion in this court will no longer be necessary or appropriate." ECF No. 34, at 1.

The Circuit Court held a hearing on Jones' motion for a preliminary injunction on July 1, 2010, denied the motion as moot, and issued a writ of possession for the Property. *Buonassissi v. Jones* (Case No. 316757-V), Dkt. Nos. 47-50. On September 28, 2010, Jones was evicted from the Property. *Id.*, Dkt. No. 51.

Defendants HSBC, the Trust, Wells Fargo, BHL and MERS moved to dismiss Plaintiff's Complaint on October 21, 2010. ECF No. 36. Soon thereafter, Jones sought leave to file an amended complaint that would convert this action into a class action on behalf of all Maryland home buyers who have allegedly been defrauded by Defendants. ECF No. 39. Both the motion to dismiss and the motion for leave to amend the complaint are now ripe for resolution.

STANDARDS OF REVIEW

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 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* at 1950 (quoting Fed. R. Civ. P. 8(a)(2)).

Pursuant to Federal Rule of Civil Procedure 15(a), "[a] party may amend its pleading once as a matter of course within [ ] 21 days after serving it, or [ ] if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." F. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." F. R. Civ. P. 15(a)(2). Rule 15 dictates that "[t]he court should freely give leave when justice so requires." F. R. Civ. P. 15(a)(2).

ANALYSIS

I. Res Judicata

Defendants argue that Plaintiff Jones' claims are barred by the doctrine of *res judicata* because they were already resolved in the foreclosure action in Montgomery County Circuit Court. The Court agrees.

"Although an affirmative defense such as res judicata may be raised under Rule 12(b)(6) only if it clearly appears on the face of the complaint, when entertaining a motion to dismiss on the ground of res judicata, a court may take judicial notice of facts from a prior judicial proceeding when the res judicata defense raises no disputed issue of fact." *Andrews v. Daw,* 201 F.3d 521, 524 n. 1 (4th Cir. 2000) (citations and internal quotations omitted).

"The doctrine of *res judicata* encompasses two concepts: (1) claim preclusion and (2) issue preclusion, sometimes called collateral estoppel." *DeCosta v. U.S. Bancorp*, 2010 WL 3824224 (D. Md. Sept. 27, 2010) (citing *In re Varat Enters., Inc.*, 81 F. 3d 1310, 1315 (4th Cir. 1996)). Defendants argue that Plaintiff's Complaint is barred under the doctrine of issue preclusion, which "bars a party from re-litigating an issue that he or she has already litigated unsuccessfully in another action." *Culver v. Md. Ins. Comm'r*, 175 Md. App. 645, 653 (2007).

For issue preclusion to apply, four elements must be met: (1) the issue decided in the prior adjudication must be identical to the one presented in the present action; (2) there was a final judgment on the merits in the first action; (3) the party against

whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the plea is asserted was given a fair opportunity to be heard on the issue in the first action. *Culver v. Md. Ins. Comm'r*, 175 Md. App. 645, 657 (2007).

Here, prongs two, three, and four were clearly met. Plaintiff Jones was a party to the Circuit Court foreclosure action, and actively opposed the foreclosure for almost a year. Jones' filings in the Circuit Court indicate that Jones was given a fair opportunity to be heard. Jones moved to rescind BHL's order to docket the foreclosure, filed amended objections to that order, moved for reconsideration after his objections were overruled, and filed a motion for a preliminary injunction seeking to prevent HSBC from taking possession of the Property. His multiple filings were considered by the Circuit Court, which held hearings to consider the merits of Jones' motion to rescind and his motion for a preliminary injunction.

Moreover, Jones raised the very issues he raises in this action in the Circuit Court proceeding. At the heart of Jones' Complaint is his argument that Fremont's sale of the promissory note and deed of trust in the secondary loan market somehow voided the security interest, depriving the Trust and HSBC, the purchaser and successor trustee, of any rights under the deed of trust. *See* Compl. at ¶¶ 26, 60, 61, 63. The Complaint repeatedly asserts that Plaintiff has sole title to the Property and seeks an adjudication of the rights of the parties to the Property, an issue clearly resolved by the Circuit Court's May 13, 2010 Judgment Awarding

Possession of the Property to HSBC. ECF No. 33-1, Ex. B. The identity of issues raised in this Court and the Circuit Court becomes even more apparent when comparing Jones' opposition to HSBC's motion for judgment awarding possession of the Property to HSBC in the Circuit Court with Jones' motion for a preliminary injunction in this Court. Jones advances the same argument in both, namely, that Defendants have no security interest in the Property because the sale of the promissory note and deed of trust somehow "split" the note from the deed of trust, voiding Defendants' interests. *Compare* ECF No. 32, ¶¶ 22-24 *with* ECF No. 33-1, Ex. D, ¶¶ 18-23. In entering a judgment for possession of the property in favor of HSBC, the Circuit Court rejected the arguments Plaintiff now raises in this Court.

Finally, it is clear that the Circuit Court entered a final judgment on the merits. After denying Jones' motion to rescind the order to docket, the Circuit Court ratified the foreclosure sale and entered judgment awarding possession of the Property to HSBC. *See* ECF No. 33-1, Ex. A & B. Jones did not appeal the judgment, and was evicted on September 28, 2010. This Court has previously held that a Circuit Court's denial of a motion to dismiss an order to docket a foreclosure is a final determination on the merits sufficient to invoke issue preclusion. *DeCosta v. U.S. Bancorp*, 2010 WL 3824224, at *7 (D. Md. Sept. 27, 2010), *see also Coleman v. Countrywide Home Loan, Inc.*, 2010 WL 5055788, at *3 (D. Md. Dec. 3, 2010) (failure to file exception to foreclosure sale or take an appeal from Circuit Court's judgment ratifying foreclosure sale rendered

ratification of sale a final judgment on the merits). Further, Jones did not move to revise or set aside the order granting HSBC possession under Maryland Rule 2-535,[2] nor did he appeal the order. The order granting HSBC possession therefore stands as a final adjudication of the rights of the parties in the Property.

Jones' claims are also barred under the doctrine of claim preclusion. Under Maryland law, claim preclusion "embodies three elements: (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined *or that which could have been raised and determined in prior litigation*; and (3) there was a final judgment on the merits in the prior litigation." *R & D 2001, LLC v. Rice*, 938 A.2d 839, 848 (Md. 2008) (emphasis added). "Privity in the res judicata sense generally involves a person so identified in interest with another that he represents the same legal right." *Anyanwutaku v. Fleet Mortgage Group, Inc.*, 85 F. Supp. 2d 566, 572-73 (D. Md. 2000); *see also Coleman v. Countrywide Home Loans, Inc.*, 2010 WL 5055788, at *3; *Green v. Ford Motor Credit Co.*, 828 A. 2d 821, 838-39 (Md. App. 2003) (noting that requirement of privity "has been relaxed . . . [and] would not bar estoppel by judgment (i.e. the bar of either res judicata or

[2] Rule 2-535 provides "On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534." Rule 2-534 allows the Circuit Court to set aside all or part of any judgment.

collateral estoppel) if all the other elements of those doctrines were proven.) Though the nominal Plaintiff in the foreclosure action was BHL, the substitute trustee, the defendants sued in this case are in privity with BHL because Plaintiff's claims against all defendants in this action are premised on Plaintiff's claim that the foreclosure judgment was invalid. Because all defendants share a mutuality of interest with respect to the validity of the foreclosure judgment, the first element of the claim preclusion test is met.

The second element of the claim preclusion test is also met. Jones' allegations that Defendants have no security interest in the Property because the sale of the promissory note and deed of trust somehow "split" the note from the deed of trust, voiding Defendants' interests, was raised in the prior foreclosure proceeding. *Compare* ECF No. 32, ¶¶ 22-24 *with* ECF No. 33-1, Ex. D, ¶¶ 18-23. Further, even if this Court were to allow Plaintiff to amend his complaint, the proposed amended complaint advances claims that *could have been raised and determined* in the foreclosure proceeding. Jones' proposed amended complaint asserts that the foreclosure was improper because Defendants "submit[ed] false and insufficient affidavits" in connection therewith, a claim that clearly could have been raised in the proceeding before the Circuit Court for Montgomery County. *See* ECF No. 39. Finally, as discussed, *supra*, the judgment of the Circuit Court for Montgomery County was a final judgment on the merits. Claim preclusion prevents

this Court from re-adjudicating issues which were or could have been decided by the Circuit Court for Montgomery County.[3]

The Maryland courts and this Court, applying Maryland law, have consistently held that *res judicata* bars collateral attacks on foreclosure judgments entered in the Circuit Courts. *See Coleman v. Countrywide Home Loan, Inc.*, 2010 WL 5055788, at *4 (D. Md. Dec. 3, 2010), *DeCosta v. U.S. Bancorp*, 2010 WL 3824224, at **6-7 (D. Md. Sept. 27, 2010), *Anyanwutaku v. Fleet Mortgage Group, Inc.*, 85 F. Supp. 2d 566, 572-73 (D. Md. 2000), *Fairfax Svngs. v. Kris Jen Ltd. Partnership*, 655 A. 2d 1265, 1280 (Md. 1995). Each claim in Jones' Complaint seeks to re-litigate rights to title over the Property, an issue finally resolved by the Circuit Court's entry of judgment awarding possession of the Property to HSBC. Because Plaintiff's claims seek to nullify the foreclosure judgment by re-litigating issues resolved by the Circuit Court, his claims are barred under the doctrine of *res judicata*. Accordingly, the Complaint will be dismissed as to Defendants HSBC, the Trust, Wells Fargo, BHL, and MERS.

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[3] Because Jones' claims, both in his original and proposed amended complaint, are barred by *res judicata*, it is not necessary to address the applicability of the *Rooker-Feldman* doctrine. The Court notes, however, that the *Rooker- Feldman* doctrine does not deprive federal courts of subject matter jurisdiction where the federal action was filed before a state court judgment was rendered. *See Exxon Mobil Corp. v. Saudi Basic Industries Corp*., 544 U.S. 280, 292 (2005) ("When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court.")

Though Defendants Superior Home Mortgage Corporation and One Call Lender Services, LLC did not join in the motion to dismiss, the Court will *sua sponte* dismiss the Complaint as to those defendants.[4] The Complaint makes no allegations against Superior Home Mortgage Corporation or One Call that are distinct from the allegations made against the other Defendants. For the reasons stated above, claims premised on Jones' claim to title over the Property were adjudicated by the Circuit Court, and may not be re-litigated in this Court.

II. Motion for Leave to Amend the Complaint

Federal Rule of Civil Procedure 15(a) provides that the Court "should freely give leave [to amend pleadings] when justice so requires." Fed. R. Civ. P. 15(a)(2). Whether to grant leave to amend rests within the sound discretion of the trial court. *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1148 (4th Cir. 1988). Denial of leave to amend a complaint must be based on a showing of prejudice, bad faith, futility, or dilatoriness associated with the motion. *Id.*

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[4] The Court also notes that Defendant One Call Lender Services, LLC, a limited liability company now forfeited in the state of Maryland, may not have been properly served with process. Though this Court has previously held that "delivering a copy of a summons and complaint to a registered agent of a forfeited limited liability company less than one year after the forfeiture is effective service on that limited liability company," it is unclear when Defendant One Call Lender Services, LLC forfeited its right to do business in Maryland. *J & J Sports Prod., Inc. v. Royster*, 2010 WL 1741354 (D. Md. April 28, 2010). Therefore, One Call may not have been properly served in this action. Because claims against One Call are barred by *res judicata*, the Court need not resolve this issue.

Jones' motion for leave to amend the Complaint is futile because his claims are barred under the doctrine of claim preclusion, as discussed, *supra*. Further, Jones' motion is clearly dilatory. This action was filed on October 7, 2009, and Jones did not move for leave to amend until over a year later. Jones advances no persuasive argument as to why leave to amend was not sought earlier in the course of this litigation. *See, e.g., Sandcrest*, 853 F. 2d at 1149 (affirming district court's finding that an 8 month delay in seeking leave to amend after the filing of the initial complaint was dilatory).

Moreover, Plaintiff's proposed amendments do not so much amend his Complaint as delete all of his original claims and replace them with class action claims based on entirely different factual allegations. *See* ECF No. 39. Jones' proposed amended complaint asserts seven causes of action premised on Defendants' alleged submission of fraudulent affidavits in Maryland state foreclosure proceedings—allegations that were not in any way a part of the original Complaint. *See* ECF No. 39-1. Such sweeping amendments would prejudice Defendants, who have already devoted considerable time and resources to responding to Plaintiff's motion for preliminary injunction and Plaintiff's earlier frivolous "motion to show authority." *See* ECF Nos. 25-28. Plaintiff has not demonstrated good cause why these sweeping amendments, which would greatly alter the character and scope of this litigation, should be allowed at this late date. Accordingly, Jones' motion for leave to amend his Complaint will be denied.

CONCLUSION

Plaintiff's claims are barred by *res judicata*. Further, granting Plaintiff's dilatory motion for leave to amend the Complaint at this late date would be both futile and prejudicial to Defendants. Accordingly, Defendants' motion to dismiss will be granted, and Plaintiff's motion for leave to amend the Complaint will be denied by separate order.

February 3, 2011 /s/

Roger W. Titus
United States District Judge