

RESCISSION REQUIRES THAT BORROWER TENDER WHAT IT RECEIVED IN THE BARGAIN. I.E., THE BORROWER HAS TO RETURN

THE MONEY IT WAS LOANED TO HIM OR HER. FLEMING V.

KAGAN, 189 CAL. APP. 2D 791, 796 (1981). “Under TILA, a borrower who rescinds is required to tender the net loan proceeds to the lender, as the remedy seeks to **restore the parties to the status quo ante.**”

BROWN V. HSBC, 2011 WL 3101780 (E.D.Va.) “while the plaintiff can get out of the loan, she does not get to keep the principal amount of the

loan” **PARHAM V. HSBC**, 2011 WL 2414404 (E.D.Va.) “willing and able to **turn over the real property** secured by the loan”? MSJ **Granted** – “must tender the balance of the loan proceeds” **BRUNAT V. INDYMAC**, 2011 WL 1304589 (D.Ariz.)

“**offering their real property**, as opposed to the loan proceeds”? MTD **Granted** property received was loan proceeds, not the collateral **ADAMS V. AMERICAN MORTG. NETWORK, INC.**, 2011 WL 1298012 (S.D.Cal.) “ability and willingness to **convey the property** to [creditor] because the property itself constitutes the ‘loan proceeds’”? MJP **Granted** - “The Sanders received money, not a house.” **SANDERS V. ETHINGTON**, 2010 WL 5252843

(D.UTAH) PROPOSED “**SHORT SALE**” TO REPAY? MTD **GRANTED** – NEED A DEFINITE OFFER TO REPAY **MOSELEY V. COUNTRYWIDE**,

2010 WL 4481782 (E.D.N.C.). A pending foreclosure may “raise the inference that Plaintiffs are either presently in the foreclosure process because they are behind on loan payments or no longer own the home. Such circumstances suggest Plaintiffs lack the necessary means to tender loan proceeds, or their rescission right has expired.” **WARD V. SECURITY ATLANTIC MORT.**

ELECTRONIC REG. SYS., 2012 WL 871119 (E.D.N.C.) “Indeed, given the [borrowers’] inability to make a single mortgage payment after March 2008, the record provides no support for the contention that [they] were in a position to tender the balance due.” **US BANK V. GUILLAUME**, 38 A.3d 570 (N.J. 2012). “possess **sufficient liquid assets at their disposal** to tender the loan proceeds”? MTD **granted** - too “vague” and “unclear what ‘at their disposal’

means” **COOK V. WELLS FARGO**, 2010 WL 2724270 (S.D.Cal.) “**has the ability to tender** pursuant to TILA”? MTD **granted** – conclusory allegation without facts about resources is speculative **BRIOSOS V. WELLS FARGO**, 2010 WL 3341043 (N.D.Cal.) “would be able to tender” the borrowed funds, either **by refinance or sale of home?** MTD **denied** – not so speculative to be

implausible CARRINGTON V. HSBC, 2010 WL 5590761 (E.D.Va.) “**might be able**” to tender after credit for payments and damages, and can sell home if necessary? MTD **granted** – only “conceivable” and not “plausible” that will be able to tender CHECHE V. WITTSTAT TITLE, 723 F.Supp.2d 851 (E.D.Va. 2010) “*at the time of the notice of rescission, fully able and capable of tendering*”? MTD **granted** – need “clearly stated present ability to tender” TANCIO V. SAXON MORTG., 2011 WL 672641 (N.D.Cal.) “**will need time** to seek refinancing or a buyer”? MTD **granted** – “ability to tender is at best speculative” HUDSON V. BANK OF AMERICA, 2010 WL 2365588 (E.D.Va.), *aff’d.*, 2011 WL 1897551 (C.A.4 (Va.)) There is no question that, as a general rule, a proper tender includes amounts that were disbursed to third parties to pay off prior indebtedness. See POWERS V. SIMS & LEVIN, 542 F.2d 1216, 1220-21 (4th Cir. 1976); MAYFIELD V. VANGUARD SAV. & LOAN ASS’N, 710 F. Supp. 143, 148 (E.D. Pa. 1989); ABBOTT V. SHAFFER, 564 F. Supp. 1200, 1208 (D. Utah 1983). FED. DEPOSIT INS. CORP. V. HUGHES DEV. CO., INC., 938 F.2d 889, 890 n.3 (8th Cir. 1991) (noting that borrower must restore lender to the status quo); see also AM. MORTGAGE NETWORK, INC. V. SHELTON, 486 F.3d 815, 820 (4th Cir. 2007) (“The equitable goal of rescission under TILA is to restore the parties to the ‘status quo ante.’”); MCKENNA V. FIRST HORIZON HOME LOAN CORP., 475 F.3d 418, 421 (1st Cir. 2007) (“Rescission [under TILA] essentially restores the status quo ante; the creditor terminates its security interest and returns any monies paid by the debtor in exchange for the latter’s return of all disbursed funds or property interests.”); BUSTAMENTE V. FIRST FED. SAV. & LOAN ASS’N OF SAN ANTONIO, 619 F.2d 360, 365 (5th Cir. 1980) (stating that § 1635(b) “is designed to restore the parties to the status quo as closely as possible”).

In keeping with the flexible and equitable nature of TILA’s rescission remedy, numerous courts have recognized that they have the discretion to set up a payment plan for a borrower who cannot otherwise make a full tender. See PALMER V. WILSON, 502 F.2d 860, 862-63 (9th Cir. 1974) (inviting the district court on remand to “require the defendants to submit a proposed plan for repayment that is consistent both with the defendants’ desire to recover the amount of principal loaned to the Palmers and with the Palmers’ current financial situation”); IN RE STERTEN, 352 B.R. 380, 390 (Bankr. E.D. Pa. 2006) (ordering borrower to make monthly payments of \$790 for a period of 302 months), *rev’d* on other grounds by *Sterten v. Option One Mortg. Corp.*, 479 F. Supp. 2d 479 (E.D. Pa. 2007); IN RE BELL, 314 B.R. 54, 61-62 (Bankr. E.D. Pa. 2004) (concluding that borrower

should have a "reasonable time" for repayment under TILA even if that period exceeded the five-year period called for by the Bankruptcy Code); **SHEPEARD V. QUALITY SIDING & WINDOW FACTORY, INC.**, 730 F. Supp. 1295, 1308 (D. Del. 1990) (ordering borrower to tender over \$11,000 in monthly installments of \$199); **MAYFIELD V. VANGUARD SAV. & LOAN ASS'N**, 710 F. Supp. 143, 149 (E.D. Pa. 1989) (ordering borrower to tender over \$16,000 in monthly installments of \$171); **BOOKHART V. MID-PENN CONSUMER DISC. CO.**, 559 F. Supp. 208, 212-13 (E.D. Pa. 1983) (ordering borrower to tender approximately \$1,400 in monthly installments of \$15). **LARGE V. CONSECO FIN. SERVICING CORP.**, 292 F.3d 49, 54-55 (1st Cir. 2002)). In a scenario involving a contested rescission, such as the instant matter, if the trial judge determines that the plaintiff seeking rescission is "unable to tender the loan proceeds, the remedy of unconditional rescission [i]s inappropriate." Defendant also argues that Plaintiff's complaint is deficient because it fails to allege Plaintiff's willingness to tender her house, rather than a willingness to tender the loan proceeds. The Court is not convinced that, on these facts, "property," as that term is used in 15 U.S.C. § 1635(b), can be read to cover Plaintiff's house since the house is merely security for repayment of the "property" provided by the creditor, i.e. the loan proceeds. See **RALPH J. ROHNER & FREDERICK H. MILLER, TRUTH IN LENDING 654** (ABA Section of Business Law 2006) (indicating that the "issue of whether a particular tender involves money or property . . . should be governed by what was obtained from the creditor . . . [and] [t]hus, a loan should require the consumer to tender money . . ."); **POWERS SIMS & LEVIN**, 542 F.2d 1216, 1221-22 (4th Cir. 1976) (finding that the borrowers' right to rescission of a loan used to both pay off a prior loan and to improve the borrowers' home may be conditioned on the borrowers' "tender to the lender of all of the funds spent by the lender in discharging the earlier indebtedness of the borrowers as well as the value of the home improvements") (emphasis added); **YAMAMOTO V. BANK OF NEW YORK**, 329 F.3d 1167, 1171 (9th Cir. 2003) ("[I]n applying TILA, `a trial judge ha[s] the discretion to condition rescission on tender by the borrower of the property he had received from the lender.") (emphasis added) (quoting **LJEPAVA V. M.L.S.C. PROPS., INC.**, 511 F.2d 935, 944 (9th Cir. 1975)); 12 C.F.R. § 226.23 (indicating that after the creditor has complied with its duties in rescission "the consumer shall tender the money or property to the creditor") (emphasis added); **MCKENNA V. FIRST HORIZON HOME LOAN CORP.**, 475 F.3d 418, 421 (1st Cir. 2007) ("Rescission essentially restores the status quo ante; the creditor terminates its security interest and returns any monies paid by the debtor in exchange for the latter's return of all disbursed funds or property interests.") (emphasis added); **SHELTON**, 486 F.3d at 820 ("The equitable goal of rescission under TILA is to restore the parties to the `status quo ante.""). Here, as

the Complaint alleges that the "property" received by Plaintiff from Defendant was loan proceeds from two refinance credit transactions, the loan proceeds are the "property" that must be tendered by Plaintiff in rescission.