No. 14-51326

In the United States Court of Appeals
for the Fifth Circuit

DAVID BILLINGS AND TRESSA BILLINGS,
Plaintiffs-Appellants,

v.

PROPEL FINANCIAL SERVICES, LLC,
Defendant-Appellee.

On Appeal from the
United States District Court for the Western District of Texas
Hon. Orlando L. Garcia
Case No. 5:14-cv-00764

BRIEF OF *AMICUS CURIAE* CONSUMER FINANCIAL PROTECTION BUREAU IN SUPPORT OF APPELLANTS AND REVERSAL

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QUESTION PRESENTED

The Truth in Lending Act (TILA) imposes various disclosure and other consumer-protection requirements on "creditors." As relevant here, TILA defines a "creditor" as a person who "regularly extends . . . in connection with loans . . . consumer credit." 15 U.S.C. § 1602(g).

The question presented in this case is whether a private lender extends "consumer credit" under TILA by providing loans to consumers for the purpose of paying off residential property-tax delinquencies.

INTEREST OF *AMICUS CURIAE*

This case concerns the scope of the Truth in Lending Act (TILA). The Bureau is the federal agency charged with the responsibility to interpret TILA and to promulgate rules to effectuate its purposes. *See* 12 U.S.C. §§ 5481(12)(O); 5512(b)(1), (4); 15 U.S.C. § 1604(a); *see also* 12 C.F.R. part 1026 (interpreting and implementing TILA). The Bureau also has authority to enforce "compliance with the requirements" of TILA with respect to any person subject thereto. 15 U.S.C. § 1607(a)(6). The Bureau accordingly has a substantial interest in the Court's resolution of the issue presented in this case.

STATEMENT

A. Federal Regulation of Credit Transactions

1. Congress enacted TILA in 1968 because it found that "competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit." 15 U.S.C. § 1601(a). As one Senate report explained, "[b]anks, small loan companies, credit unions, retail merchants, savings and loan associations, and other creditors all compete for the consumer credit dollar," but they "follow somewhat different practices with regard to disclosing the cost of credit." S. Rep. No. 90-392, at 2 (1967). TILA is designed 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." 15 U.S.C. § 1601(a). TILA thus "requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998). "By providing a uniform system of disclosure, [TILA] permits the average person to compare the cost of credit from all of these alternative sources of credit." S. Rep. No. 90-392, at 2; *see also* H.R. Rep. No. 90-1040, at 14 (1967) ("by requiring all creditors to disclose credit information in a uniform

manner . . ., the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit."). Since its original enactment, Congress has amended TILA several times to provide additional consumer protections.[1] These consumer protections apply to the offering of "consumer credit" by "creditors" as those terms are defined by TILA. *See* 15 U.S.C. § 1602(f), (g), (i).

Under TILA, a "creditor" is defined as a person "who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, *consumer credit* which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement." 15 U.S.C. § 1602(g) (emphasis added). "Credit," in turn, means "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." *Id.* § 1602(f). And,

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[1] *See*, *e.g.*, Home Ownership and Equity Protection Act (HOEPA), Pub. L. No. 103-325, § 151 *et seq*., 108 Stat. 2160, 2190 (1994) (codified in part at 15 U.S.C. § 1639); Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, Title X, § 1100A(2), Title XIV, §§ 1411(a)(2), 1412, 1414(a), (c), (d), 124 Stat. 2107, 2142, 2145, 2149, 2152 (2010) (codified at 15 U.S.C. § 1639c).

the "adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." *Id.* § 1602(i). Thus, the term "consumer credit" includes an extension of credit to individuals that is "primarily for personal, family, or household purposes." *See* 12 C.F.R. § 1026.2(a)(12) (regulation defining "consumer credit").

2. Prior to 2011, TILA conferred on the Board of Governors of the Federal Reserve System the authority to "prescribe regulations to carry out the purposes" of TILA (Pub. L. No. 90-321, § 105, 82 Stat. 146 (1968); 15 U.S.C. § 1604 (1970)) and to issue official interpretations upon which creditors may rely in good faith, Pub. L. No. 93-495, § 406, 88 Stat. 1500 (1974); 15 U.S.C. § 1640(f) (1976)). Between 1969 and 1981, the Board exercised this authority by adopting regulations to implement TILA (known as Regulation Z, 12 C.F.R. part 226) and by issuing staff interpretations that, among other things, describe the types of credit transactions that are subject to TILA. For instance, although TILA makes clear that a "creditor" can include a "government or governmental subdivision or agency," 15 U.S.C. § 1602(d); *see also id.* §§ 1602(e), (g), and although nothing in TILA expressly excludes tax obligations from the definition of "credit," *see id.*

§ 1602(f), the Board consistently maintained that TILA does not extend to tax obligations or delinquencies. Fed. Reserve Bd. Staff Letter No. 166 (Oct. 20, 1969) (attached as Appendix A to this brief). As the staff explained, TILA's definition of "credit" refers to the debtor's right to "incur debt," 15 U.S.C. § 1602(f), which "necessarily assumes the right to avoid incurring debt." *Id.* Thus, to be subject to TILA, "the debt must arise from . . . a contractual relationship, voluntarily entered into, between the debtor and creditor." *Id.* Because tax obligations do not arise from such a relationship, they do not involve the extension of credit under TILA. *Id.*; *see also* Fed. Reserve Bd. Staff Letter No. 40 (Jul. 14, 1969) (attached as Appendix B to this brief).

By contrast, the Board has long made clear that TILA *does* apply to privately funded loans provided to consumers to pay off tax liabilities. In 1981, the Board, after engaging in notice-and-comment procedures, published in the Code of Federal Regulations a compilation of Official Staff Interpretations of Regulation Z. Truth in Lending; Official Staff Commentary, 46 Fed. Reg. 50,288 (Oct. 9, 1981). Consistent with the principle that "credit" entails a voluntary transaction, the Official Staff Interpretations explained that, although "[t]ax liens, tax assessments, court judgments, and court approvals of reaffirmation of debts in bankruptcy [are not considered credit under TILA,] third-party financing of such

obligations (for example, a bank loan obtained to pay off a tax lien) is credit for purposes of the regulation." *Id.* at 50,292. The Board never altered this interpretation. *See* 12 C.F.R. § 226, Supp. I, Sub. A, cmt. 2(a)(14)(1)(ii) (2011)).

On July 21, 2011, the Board's authority to adopt rules and interpretations under TILA was transferred to the Bureau pursuant to the Dodd-Frank Act. 12 U.S.C. § 5581(b)(1); *see also* 15 U.S.C. §§ 1604(a), 1640(f). On that day, the Bureau issued a notice stating that "the official commentary, guidance, and policy statements issued prior to July 21, 2011, by [the Board] will be applied by the CFPB pending further CFPB action." 76 Fed. Reg. 43,569, 43,570 (July 21, 2011). On December 22, 2011, the Bureau republished Regulation Z and the official commentary without material change. *See* 76 Fed. Reg. 79,768-01, 79,803 (Dec. 22, 2011); 12 C.F.R. § 1026. Accordingly, since 1981, the agency charged with interpreting TILA has concluded that "third-party financing" of tax obligations constitutes "credit" under TILA and Regulation Z. *See* 12 C.F.R. § 1026, Supp. I, Sub. A, cmt. 2(a)(14)(1)(ii) (2014).

B. Property-Tax Lending Under Texas Law

1. The State of Texas imposes a property tax, which constitutes a "personal obligation of the person who owns . . . the property." Tex. Tax Code § 32.07(a). To secure payment of "taxes, penalties, and interest," a "tax lien" automatically

attaches to taxable property each year "in favor of each taxing unit having power to tax the property." *Id.* § 32.01(a). The property-tax lien "takes priority over a homestead interest in the property" and, with limited exceptions, over "the claim of any creditor of a person whose property is encumbered by the lien" and "the claim of any holder of a lien on property encumbered by the tax lien." *Id.* § 32.05(a), (b).

When property taxes imposed on real property are delinquent (or, for unmortgaged property, when taxes are due), the owner "may authorize another person to pay the taxes." Tex. Tax Code § 32.06(a-1). When an authorized person (called a "transferee") pays the tax, the tax collector must "issue a tax receipt to that transferee" and "certify that the taxes and any penalties, interest, and collection costs on the subject property have been paid by the transferee on behalf of the property owner." *Id.* § 32.06(b). The taxing unit's lien is then "transferred to that transferee," *id.*, and the transferee "is subrogated to and is entitled to exercise any right or remedy possessed by the transferring taxing unit, including or related to foreclosure or judicial sale." *Id.* § 32.065(c); *see also id.* §§ 32.06(c), (j).

2. The Texas Finance Commission licenses property-tax lenders, which include entities "engage[d] in the business of making, transacting, or negotiating property tax loans" or "contract[ing] for, charg[ing], or receiv[ing]" a charge "in connection with a property tax loan." Tex. Fin. Code § 351.051(a). A "property

tax loan" is defined as "an advance of money (A) in connection with a transfer of [a] lien under [the Tax Code]; (B) in connection with which the person making the transfer arranges for the payment, with a property owner's written consent, of property taxes and related closing costs on behalf of the property owner in accordance with Section 32.06, Tax Code; and (C) that is secured by a special lien against property transferred from a taxing unit to the property tax lender and which may be further secured by the lien or security interest created by a deed of trust, security deed, or other security instrument." *Id.* § 351.002(2).

Licensed property-tax lenders may compete for business on the basis of the interest and fees they charge consumers, subject to statutory caps. *See*, *e.g.*, Tex. Tax Code §§ 32.06(e) (allowing interest on property-tax loans of up to 18 percent); (e-1) (specifying the fees that may be charged by property-tax lenders to consumers after closing); Tex. Fin. Code § 351.0021 (same). According to the Texas Finance Commission's Office of Consumer Credit Commissioner, approximately 80 property-tax lenders are licensed in Texas as of 2013.[2] In an August 2012 report, the Commission found that property-tax lenders made 10,854

[2] Property Tax Lending, Consolidated Volume Report, Calendar Year 2013, Office of Consumer Credit Commissioner (2013 Property Tax Lending Report) (*available at* http://web.occc.state.tx.us/pages/publications/consolidated_reports/PTL2013ConsolidatedReport.PDF) (last visited Apr. 9, 2015).

residential property-tax loans in 2011 that had an average loan amount of $8,809.77, average closing costs of $865.52, and an average interest rate of 14.37 percent.[3]

C. Proceedings Below

On August 27, 2014, David and Tressa Billings filed a class-action lawsuit against Propel Financial Services, LLC (Propel), a property-tax lender, alleging violations of various provisions of TILA, as amended by HOEPA. According to the Billings' second amended complaint, they entered into a Property Tax Payment Agreement (Payment Agreement) with Propel on February 11, 2014. Second Amend. Compl. (SAC), *Billings v. Propel Fin. Servs. LLC*, No. 5:14-cv-764 (W.D. Tex. Oct. 23, 2014), ¶ 12 (ROA 130). The Billings allege that at the time they signed the Payment Agreement, they owed the taxing authority $3,245.50 in property taxes on their home. *Id.* ¶ 13. Pursuant to the Payment Agreement, they financed this amount, plus $499.00 in closing costs and loan origination and processing fees, at an interest rate of 13.5%. *Id.*; *see id.* Ex. A (Payment

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[3] Legislative Report: Property Tax Lending Study, Finance Commission of Texas (August 2012) (Texas Property Tax Lending Study), at 20-21, 23 (*available at* http://web.occc.state.tx.us/pages/publications/A082025012%20PTL%20Amended%20Study%20with%20Appendices.pdf) (last visited Apr. 9, 2015).

Agreement) (ROA 144-47). Over the ten-year term of the loan, the Billings are obligated to pay finance charges of $3,404.79. *Id.* ¶ 13.

The Payment Agreement provided that it was to be "secured by the tax lien(s)" on the Billings' home, which "have been or will be transferred from the taxing unit" to Propel. *Id*. Ex. A (ROA 144). The Billings and Propel also entered into a Tax Lien Contract, under which the Billings authorized Propel to pay their taxes and any associated interest, costs, and fees. The Tax Lien Contract stated that the Billings "executed an affidavit permitting the taxing units to transfer the tax liens on the property to [Propel] to secure payment of the Funds Advanced." *Id*. (ROA 149).

Propel moved to dismiss, arguing that the property-tax loan was not a consumer-credit transaction subject to TILA. On November 28, 2014, the district court granted the motion. Order Granting Mot. to Dismiss (Dist. Ct. Op.), *Billings v. Propel Fin. Servs. LLC*, No. 5:14-cv-764, at 3 (ROA 198). The district court held that property taxes are not debt under Texas law and that "permitting individuals to defer payment of their property tax obligations" does not constitute an offer of credit. *Id*. The court further held that the property-tax loan was not consumer credit because property-tax obligations are for the "benefit of the public." *Id*. at 4 (citing Tex. Const. art. VII, § 3) (ROA 199).

Shortly after the district court's decision in this case, Judges Hudspeth and Pitman issued orders in three cases concluding that TILA applies to property-tax lenders. Order Regarding Mot. To Dismiss, *Torres v. Propel Fin. Servs., LLC*, No. 5:14-cv-1040 (W.D. Tex. Jan. 22, 2015), ECF No. 28; Order Granting Mot. to Certify Order for Interlocutory Appeal, *Thiery v. Texas Tax Solutions, Inc.*, No. 5:14-cv-940 (W.D. Tex. Jan 15, 2015), ECF No. 16; Order, *Orosco v. Ovation Lending, Inc.*, No. 5:14-cv-897 (W.D. Tex. Feb. 9, 2015), ECF No. 14. These three orders are before this Court on interlocutory review. *Torres v. Propel Fin. Servs., LLC*, Nos. 15-90004, 15-50199; *Thiery v. Texas Tax Solutions, Inc.*, No. 15-90003; *Orosco v. Ovation Lending, Inc.*, No. 15-90009.

SUMMARY OF ARGUMENT

The district court erred in concluding that property-tax lenders do not provide "consumer credit" under TILA. The statute's text and purpose, as well as the unambiguous language of an official agency interpretation, compel the conclusion that property-tax loans are subject to TILA's consumer-protection requirements.

I.A. TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. § 1602(f). As alleged in this case, the Payment Agreement between the Billings

and Propel falls comfortably within that definition. Under Texas law, a property-tax loan involves an "advance of money." Tex. Fin. Code § 351.002(2). Consistent with that definition, the Payment Agreement makes clear that Propel advanced funds to pay the Billings' property tax, in exchange for which Propel received a promise from the Billings to pay back the loan amount with interest. This type of arrangement is the quintessential example of an extension of credit of the type that TILA regulates.

The official interpretation to Regulation Z, which is entitled to deference, eliminates any doubt. The official interpretation provides that, although tax obligations are not "credit" under TILA, "third-party financing of such obligations (for example, a bank loan obtained to pay off a tax lien) is credit." 12 C.F.R. § 1026, Supp. I, Sub. A, cmt. 2(a)(14)(1)(ii). That longstanding interpretation reflects the traditional understanding that TILA applies when the debt that a consumer owes a creditor arises out of a voluntary transaction between those two parties. That interpretation also advances one of TILA's principal objectives — to enable consumers to evaluate the cost of credit and avoid the uninformed use of credit. The district court's reasoning, by contrast, would undermine that objective by exempting one class of creditors — property-loan lenders — from TILA's requirements.

B. In concluding that TILA does not apply to property-tax lending, the district court gave undue significance to the transfer of the tax lien that occurs when the funds advanced by the lender are used to pay the consumer's property tax. The transfer of the tax lien does not alter the fact that consumers enter into voluntary credit arrangements with property-tax lenders to obtain financing to pay off their tax delinquencies. The tax-lien transfer may encourage property-tax lending by providing lenders with a superpriority lien to secure their loans, but the transfer itself does not remove the loan from TILA's ambit.

Neither *In re Kizzee-Jordan*, 626 F.3d 239 (5th Cir. 2010), nor *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), supports the district court's decision. In *Kizzee-Jordan*, this Court held that a lender to whom a tax lien was transferred holds a "tax claim" within the meaning of § 511 of the Bankruptcy Code. That bankruptcy-specific decision does not address whether the loan agreement between a property-tax lender and a consumer involves an extension of credit for purposes of TILA. *Pollice* is also inapposite because, there, the taxing authorities assigned their rights to collect delinquent taxes directly to a private entity. Here, by contrast, it is the consumer who shops for financing and selects the lender with whom the consumer will enter into a voluntary loan arrangement. The two situations are not analogous for purposes of TILA.

II. The district court also erred in concluding that the extension of credit was not "consumer credit" under TILA. "Consumer credit" involves credit to individuals where "the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1602(i). Here, the Billings alleged that they sought a property-tax loan to avoid foreclosure on their home. Credit obtained for a consumer's personal residence falls squarely within the meaning of "consumer credit" under TILA.

In reaching the contrary conclusion, the district court noted that taxes are imposed for the benefit of the public. That analysis incorrectly focused on the state's purpose in imposing property taxes, rather than the Billings' purpose in obtaining a property-tax loan. As even the Texas Tax Code recognizes, a loan used to pay property taxes on residential property is inherently a transaction entered into for "personal, family, or household purposes."

ARGUMENT

Property-Tax Lenders That Lend Money to Consumers to Pay Off Residential Property Taxes Extend "Consumer Credit" Under TILA

Many states and localities sell their rights to collect delinquent tax obligations to private entities. Texas has established a different system for monetizing its overdue property-tax receipts. In Texas, the burden is on the

consumer to shop for a loan and negotiate the terms of financing with a property-tax lender (or find an alternative source of funds). Only after the consumer agrees to terms with a property-tax lender is the lender authorized to pay the consumer's tax bill and obtain a transfer of the tax lien to secure the loan.

In the decision under review, the district court concluded that property-tax lenders may do business with consumers under Texas's property-tax-lending framework without regard to the consumer-credit protections set forth in TILA. The conclusion was wrong. The district court erred by failing to distinguish between the Billings' initial property-tax obligation and the debt (including the significant finance charge) they incurred through their separate credit transaction with Propel. That distinction makes all the difference. TILA applies to all creditors who provide loans to consumers that must be repaid in installments or that are subject to a finance charge, where the loan is for a "personal, family, or household" purpose. For nearly 35 years, the federal agencies charged with administering TILA have consistently interpreted TILA as applying to "third-party financing" of tax obligations, even where the initial tax obligation was not subject to TILA. The district court erred in failing to apply that interpretation to property-tax loans. Likewise, the district court's conclusion that a loan used to pay off taxes on a consumer's home is not one for a "personal, family, or household" purpose

cannot be reconciled with the universal understanding of that phrase. For these reasons, the district court's decision should be reversed.

A. Property-Tax Lenders Offer "Credit" Under TILA

i. Property-Tax Lenders Grant Consumers the Right to Incur Debt and Defer its Payment

1. TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. § 1602(f); *see also* 12 C.F.R. § 1026.2(14). In common understanding, a "debt" refers to a "[l]iability on a claim [or] a specific sum of money due by agreement or otherwise." Black's Law Dictionary 488, 10th Ed. (2014); *see also Cain v. State*, 882 S.W.2d 515, 516 n.1 (Tex. App. 1994) ("[i]n legal usage, the word 'debt' refers ordinarily to a liquidated money obligation that is legally enforceable by the owner") (emphasis removed).

As alleged in the second amended complaint in this case, the property-tax loan between Propel and the Billings, in both form and substance, comfortably falls within TILA's definition of "credit." A "property tax loan" is, at bottom, an "advance of money." Tex. Fin. Code § 351.002(2). In the property-tax context, the advance of money is limited to "taxes, penalties, interest, and collection costs paid as shown on the tax receipt, expenses paid to record the lien, plus reasonable closing costs." Tex. Tax Code § 32.06(e).

In accordance with that framework, Propel allegedly advanced funds in the amount of $3,744.50, which included $3,245.50 in delinquent taxes and $499.00 in closing costs and other fees. SAC ¶ 13 (ROA 130); *see id.* Ex. A (ROA 144-47). The Payment Agreement between Propel and the Billings included a "Promise to Pay," under which the Billings "promise[d] to pay to the order of Tax Lien Holder [*i.e.*, Propel] the Funds Advanced plus interest on the unpaid balance at the Annual Interest Rate." *Id*. Ex. A (ROA 144). The "Annual Interest Rate" was set at 13.5%, and the Payment Agreement specifies that the "Funds Advanced, together with interest thereon, are due and payable in equal monthly installments of [$57.02] on the 15th day of each month." *Id*. Ex. A (ROA 144). Thus, by its terms, the Agreement grants the Billings the right to "incur debt" in the amount of $3,744.40 — a "liquidated money obligation that is legally enforceable," *Cain*, 882 S.W.2d at 516 n.1 — and "defer its payment." *See* 15 U.S.C. § 1602(f).

The district court avoided the natural reading of the Payment Agreement by concluding that "property taxes are not considered debt, and instead, are obligations that arise by virtue of property ownership." Dist. Ct. Op. at 3 (ROA 198). The Payment Agreement, however, does not impose a property tax on the Billings; rather, it "advance[s] . . . money . . . for the payment, with [the Billings'] written consent, of property taxes." Tex. Fin. Code § 351.002(2)(B). The

advancement of money in exchange for a promise to repay the balance with interest is the quintessential example of an extension of credit.[4]

2. In concluding that property-tax lenders do not extend credit to consumers, the district court purported to rely on the Official Staff Interpretation to Regulation Z, which states that "tax liens and tax assessments . . . are not considered credit for purposes of the regulation." 12 C.F.R. § 1026, Supp. I, Sub. A, cmt. 2(a)(14)(1)(ii). The district court ignored the rest of the interpretation, however, which provides that "third-party financing of such obligations (for example, a bank loan obtained to pay off a tax lien) *is credit* for purposes of the regulation." *Id*. (emphasis added). The interpretation set forth in Regulation Z — adopted by the Board's staff in 1981 after notice and comment and republished by the Bureau in 2011 — is entitled to "considerable respect" and, "[u]nless demonstrably irrational, . . . should be dispositive." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66 (1980); *accord Riviere v. Banner Chevrolet, Inc.*,

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[4] *See*, *e.g.*, *Curry v. United States*, 396 F.2d 630, 633 (5th Cir. 1968) ("if an advance creates unconditional obligations to pay a sum certain on a set date, it is normally considered a debt."); *cf. New Jersey v. Anderson*, 203 U.S. 483, 492 (1906) ("Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement.") (internal citations omitted).

184 F.3d 457, 461 (5th Cir. 1999) (reversing district court decision that "reject[ed] [the Board's] staff commentary.").

Here, the interpretation's conclusion that "credit" encompasses "third-party financing" of tax obligations is eminently rational. First, the interpretation is consistent with the traditional justification for excluding taxes from the scope of TILA. As the Board's staff explained shortly after TILA was enacted, the definition of "credit," by referring to the debtor's "right . . . to incur debt" (15 U.S.C. § 1602(f)) "necessarily assumes the right to avoid incurring debt." Fed. Reserve Bd. Staff Letter No. 166 (Appendix A). A "debt" for purposes of TILA, therefore, "must arise from . . . a contractual relationship, voluntarily entered into, between the debtor and creditor." *Id.*[5] Taxes are excluded from TILA because they do not arise out of such a voluntary relationship. Not so with the Payment Agreement: the Billings would have no payment obligation to Propel but for their

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[5] TILA's definition of "creditor" supports this distinction between taxes on the one hand and "credit" on the other. A "creditor" not only "extends . . . consumer credit which is *payable by agreement*," but also is "the person to whom the debt arising from the consumer credit *transaction* is initially payable *on the face of the evidence of indebtedness* or, if there is no such evidence of indebtedness, by *agreement*." 15 U.S.C. § 1602(g) (emphasis added). The definition of "creditor" thus contemplates the existence of an "agreement," a debt arising from a "transaction," and, in some cases, "evidence of indebtedness." Traditional property taxes generally lack these hallmarks.

voluntary decision to borrow money from Propel to pay off the property taxes on their home.

Indeed, it is because a property-tax loan requires the consumer's voluntary assent that application of TILA is so critical. Congress enacted TILA to "strengthen" competition among firms engaged in the extension of credit, to enable consumers "to compare more readily the various credit terms available" to them, and to "avoid the uninformed use of credit." 15 U.S.C. § 1601(a). To that end, TILA requires "*all* creditors to disclose credit information *in a uniform manner*" so that "the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." H.R. Rep. No. 90-1040, at 14 (emphasis added). A Texas homeowner seeking financing to pay off a property tax, for instance, may elect to apply for a second mortgage or home equity line of credit, use a credit card, or shop around for the best deal from one of the approximately 80 property-tax lenders operating in Texas. *See* Texas Property Tax Lending Study, *supra* p. 9, at Table 5; 2013 Property Tax Lending Report, *supra* p. 8. Because of TILA, that homeowner is able "to compare the cost of credit from all of these alternative sources." S. Rep. No. 90-392, at 2. Under the district court's decision, however, companies specializing in property-tax lending would be exempt from TILA's requirements

because the funds they advance would not be considered "credit." Such a result cannot be reconciled with either the official interpretation of Regulation Z — which makes clear that TILA applies to all "third-party financing of [tax] obligations" — or the animating purpose behind Congress's enactment of TILA.

ii. The Transfer of the Tax Lien to a Property-Tax Lender Does Not Preclude the Lender From Being a Creditor Under TILA.

In concluding that property-tax lenders do not extend credit under TILA, the district court focused not on the "Funds Advanced" by Propel to the Billings, but on the tax lien that was transferred from the taxing authority to Propel under Texas's tax-lien-transfer statute. Dist. Ct. Op. at 3-4 (ROA 198-99); *see* Tex. Tax Code § 32.06. Relying on *In re Kizzee-Jordan*, 626 F.3d 239 (5th Cir. 2010), and *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), the district court held that "transferring the tax lien to a private party does not change the nature of the tax obligation such that it becomes debt." The court also concluded that the "tax lien transfer did not extinguish or pay off [the Billings'] property tax obligation, but rather shifted the tax lien to a new entity." Dist. Ct. Op. at 3 (ROA 198). The district court's analysis was flawed.

1. The district court's conclusion that a property-tax loan does not "pay off" a consumer's tax obligation is inconsistent with Texas statutes, which repeatedly state that the funds advanced by property-tax loans are used to "pay" taxes. A

property owner "may authorize another person to *pay* the taxes . . . on the owner's real property," and a "tax lien may be transferred to the person who *pays the taxes* on behalf of the property owner under [that] authorization." Tex. Tax Code § 32.06(a-1), (a-2) (emphasis added). The tax collector must "issue a tax receipt to [the] transferee" and "certify that the taxes and any penalties, interest, and collection costs on the subject property *have been paid* by the transferee on behalf of the property owner." *Id.* § 32.06(b) (emphasis added). Indeed, the very definition of "property tax loan" refers to an "advance of money . . . for the *payment* . . . of property taxes . . . on behalf of the property owner." Tex. Fin. Code § 351.002(2) (emphasis added).

The district court appeared to believe, however, that the tax obligation is not paid because the tax lien is transferred to the property-tax lender. That analysis incorrectly conflates the "property tax[]," which is a "personal obligation" of the property owner (Tex. Tax Code § 32.07(a)), with the "tax lien," which "attaches to property to secure the payment of all taxes, penalties, and interest" on the property, (*id.* § 32.01(a)). Under Texas's tax scheme, a property-tax loan pays off the consumer's "personal obligation" to the taxing unit, but transfers the tax lien on the property to the lender chosen by the consumer to secure the loan taken out by the consumer. The tax-lien transfer may encourage property-tax lending by providing

lenders with the benefit of a superpriority lien to secure their loans. The district court erred, however, in concluding that the transfer itself was sufficient to remove property-tax loans from TILA's ambit.

2. The district court's reliance on this Court's decision in *Kizzee-Jordan* and the Third Circuit's decision in *Pollice* was misplaced.

a. In *Kizzee-Jordan*, this Court considered whether "a third-party lender who pays a debtor's *ad valorem* taxes and receives a transfer of the local taxing authority's tax lien under Texas law holds a tax claim protected from modification" under a Bankruptcy Code provision, 11 U.S.C. § 511, that states that the interest rate on a "tax claim" must be "determined under applicable nonbankruptcy law." *Kizzee-Jordan*, 626 F.3d at 240. In concluding that such a third-party lender holds a "tax claim," the Court relied on four considerations. First, the Court noted that the protections afforded by § 511 extended to "private parties," as evidenced by § 511's use of the term "creditor" rather than "governmental unit." *Id*. at 243. Second, the Court explained that, under bankruptcy law, a tax lien is itself is a tax claim because it evidences a "claim for payment." *Id.* at 244 (citing *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) ("a bankruptcy discharge extinguishes only one mode of enforcing a claim — namely, an action against the debtor *in personam* — while leaving intact another

— namely, an action against the debtor *in rem*.”). Third, the Court concluded that, even though “the transferee pays the taxes,” the “tax claim [had] not been extinguished.” *Id.* at 244. Finally, the Court noted that, because the third-party lender “is subrogated to all the rights and remedies of the taxing authorities,” it should be permitted to invoke the protections afforded by § 511 of the Bankruptcy Code. *Id*. at 245-246.

Nothing in *Kizzee-Jordan* addresses the question presented here, which is whether a property-tax loan agreement contains a “right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment,” (15 U.S.C. § 1602(f)), or constitutes “[t]hird-party financing” of a tax obligation (12 C.F.R. § 1026, Supp. I, Sub. A, cmt. 2(a)(14)(1)(ii)). As explained above, that question turns on the rights and obligations created by the loan agreement voluntarily entered into between the property-tax lender and the consumer. *Kizzee-Jordan*, by contrast, focused on the lender’s rights under the transferred tax lien, concluding that (1) such “tax liens” are “tax claims” under the bankruptcy laws (11 U.S.C. § 511),[6] (2) that “tax claim” is not “extinguished” when the lender “pays the taxes”

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[6] *Kizzee-Jordan* also uses the term “tax debt” to refer to claims subject to § 511. *See Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1990) (stating that, under the Bankruptcy Code, “the meanings of ‘debt’ and ‘claim’ [are] coextensive”).

of a debtor (*Kizzee-Jordan*, 626 F.3d at 244), and (3) the lender, by virtue of its subrogation rights, enjoys the same protection against interest-rate modifications under 11 U.S.C. § 511 that the taxing authority would, *id.* at 245-246. These bankruptcy-specific conclusions simply do not bear on the question whether the Payment Agreement between the Billings and Propel involves an extension of credit that is subject to TILA.[7]

b. In *Pollice*, the Third Circuit considered whether claims for unpaid taxes that were assigned to a private entity, National Tax Funding (NTF), for collection, and for which NTF entered into payment arrangements with consumers, involved "consumer credit transactions" under TILA. 225 F.3d at 410. The Court held that TILA did not apply because the payment plan involved "tax obligation[s]" and not a "debt" under TILA. *Id*. Relying on the official commentary to Regulation Z, however, the court noted that "the payment plans [were] not analogous to the

[7] In concluding that property-tax loans do not involve an extension of credit (Dist. Ct. Op. at 3 (ROA 198)), the district court relied on the statement in *Kizzee-Jordan* that Texas's "statutory scheme changes only the entity to which the [debtors were] indebted for the taxes originally owed, not the nature of the underlying debt upon which the claim is based." 626 F.3d at 244-245. That statement, however, merely reflects the fact that the tax-lien transfer maintains the *in rem* remedy against the debtor, which the Bankruptcy Code treats as a "claim" or "debt" distinct from the debtor's in *personam* tax obligation. *See Johnson*, 501 U.S. at 84. Indeed, *Kizzee-Jordan*'s recognition that a property-tax lender "pays the taxes" (626 F.3d at 244) of the debtor would make no sense if loan proceeds were not used to pay off the debtor's personal tax liability.

situation in which a third party, such as a bank, makes a loan to a consumer which is then used to satisfy a tax obligation." *Id*.

Property-tax lending does not resemble an assignment of tax claims such as the one at issue in *Pollice*. In *Pollice*, the local taxing authorities assigned their rights to collect unpaid taxes, and the assignee then entered into payment plans with consumers. The consumers in *Pollice* thus did not obtain financing from a private lender to pay off their taxes. With property-tax lending, consumers shop for their own financing, and it is only after the consumer agrees to terms with a property-tax lender that the lender is authorized to use the loan proceeds to pay off the property tax and effectuate the assignment of the tax lien. Because the Texas system puts the onus on consumers to seek out their own financing, lenders in the business of providing such financing to consumers must adhere to TILA's consumer-protection requirements. The district court erred in relying on *Pollice* to support its conclusion that property-tax lenders do not offer credit.

B. Property-Tax Lenders Offer "Consumer Credit" When Loan Proceeds Are Used to Pay Property Taxes on Residential Property

For a credit transaction to fall within TILA's scope, it must constitute "consumer credit," which means that the credit must be extended to individuals and "the money, property, or services which are the subject of the transaction [must be] primarily for personal, family, or household purposes." 15 U.S.C.

§ 1602(i); *see also* 12 C.F.R. § 1026.2(12). Determining whether a credit transaction involves consumer credit requires an examination of the transaction as a whole and the purpose for which the credit was extended. *Tower v. Moss*, 625 F.2d 1161, 1166 (5th Cir. 1980).

The Billings alleged in their second amended complaint that they sought a property-tax loan "to avoid foreclosure on their home." SAC ¶ 11 (ROA 129). Because the subject of the loan was "property" used "primarily for personal, family, or household purposes," the credit transaction at issue here falls squarely within the definition of "consumer credit" in TILA and Regulation Z. *See In re Dawson*, 411 B.R. 1, 33 (D.D.C. 2008) (loan obtained by homeowner for purpose of avoiding foreclosure on primary residence was a consumer credit transaction under TILA).

The district court concluded, however, that the property-tax loan that the Billings obtained was not "consumer credit" because property taxes are "for the benefit of the public" rather than for "personal, family, or household" purposes. Dist. Ct. Op. at 4 (ROA 199). The district court's analysis incorrectly focused on the reason Texas imposes property taxes rather than the reason the Billings obtained a loan from Propel. Just as an auto loan can involve "consumer credit" even though the car dealer's purpose in selling the car is to make a profit from the

sale, a property-tax loan can involve "consumer credit" even though Texas's purpose in imposing property taxes is to raise revenue for the benefit of the public. *See Pollice*, 225 F.3d at 410 (noting that third-party loans used to satisfy tax obligations on a consumer's home are loans for "personal, family, or household purposes"). Indeed, the Texas Tax Code itself recognizes that property-tax loans for residential property can have a "personal, family, or household purpose[]." *See* Tex. Tax Code §§ 32.06(d-1) ("A right of rescission described [in Regulation X] by 12 C.F.R. Section 226.23 applies to a transfer under this section of a tax lien on residential property owned and used by the property owner for personal, family, or household purposes."); 32.06(e-2) ("If the lien transferred is on residential property owned and used by the property owner for personal, family, or household purposes, the additional interest may not exceed five cents for each $1 of a scheduled installment.").

The district court's conclusion that property-tax lenders do not extend "consumer credit" when the loans at issue are for residential property should be reversed.

CONCLUSION

For the foregoing reasons, the district court's order granting the motion to dismiss should be reversed.

Respectfully submitted,

Dated: April 9, 2015

/s/ Jessica Rank Divine

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APPENDIX A

(Oct. 20, 1969 Federal Reserve Board Staff Letter No. 166)

nance charge is in excess of 50¢, Section 226.5(a)(3)(i) would require the quotient method, and the annual percentage rate would be 36% for a $25 average daily balance.

The above examples do not apply, however, when the finance charge is exclusively the product of one or more periodic rates. In such a case, a creditor should refer to Section 226.5(a)(i).

I certainly hope that the matter has been clarified. Please be assured that we have been in touch with the parties who misunderstood the sections discussed and steps have been taken to correct the information already conveyed.

Very truly yours,

Milton W. Schober,
Assistant Director

cc: Roger Hood,
FDIC

NO. 164

RECYCLING CREDIT CARD ACCOUNTS

October 17, 1969

As we understand the proposal, in all cases where a billing cycle is to be changed, such recycling of accounts would involve a lengthening of the first billing period in the new cycle from 1 to 29 days. If on or before the new date payments are due the customer pays in full any balance in his account, no finance charge will be imposed for the additional days in the lengthened first cycle. However, if less than any full balance is paid, the periodic rate or rates will be prorated over any days in addition to a regular billing cycle included in the first cycle so that the annual percentage rate or rates will be the same as if no additional days were included in the first cycle. Also you intend to provide the notice to customers required under Section 226.7(e) of Regulation Z.

Based upon the foregoing statement of our understanding, and provided the notice includes a clear explanation of the change and the manner in which it will be accomplished, we believe that the proposed procedure for recycling accounts would not conflict with the requirments of Regulation Z.

Very truly yours,

Milton W. Schober,
Assistant Director

NO. 165

CONFESSION OF JUDGMENT--MARYLAND

October 17, 1969

You state that the situation in Maryland is different because a creditor may not have judgment entered unless the debtor is in default.

In reaching its decision that the term "security interest" for the purpose of Regulation Z includes confession of judgment clauses and cognovit provisions, the Board took into consideration the laws of the States under which such clauses or provisions are recognized. In some states, judgment may be entered before or after default, depending upon the type of confession of judgment clause executed. In other States there must be a default before judgment may be entered.

The determining factor in the Board's interpretation Section 226.202 as to confession of judgment clauses or cognovit provisions is whether the laws of the State "...have the effect of depriving the obligor of the right to be notified of pending action and to enter a defense in a judicial proceeding <u>before</u> judgment may be entered or recorded against him..." This position obtains whether or not judgment must await default.

Although the laws or procedures of some States provide that notice is to be given to the obligor after judgment is entered and further provide that the obligor may have a right to reopen the judicial proceedings, such right is not considered to be equivalent to a right to receive notice of pending judicial action and a right to enter a defense <u>before</u> judgment is entered.

We appreciate your willingness to come in to discuss the matter with us; however, the basis of your exception seems to be only incidental to the substance of the Board's interpretation Section 226.202 and was given careful consideration prior to that interpretation.

Sincerely yours,

Frederic Solomon,
Director

NO. 166

COLLECTION AGREEMENTS WITH DELINQUENT TAXPAYERS

October 20, 1969

As we understand the situation, the Department of Revenue is required by statute to issue a tax warrant against a taxpayer who is more than 30 days in arrears. Frequently, an arrangement is reached between the State and the taxpayer for regular monthly payments bearing interest at the legal rate.

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Although this arrangement is typically payable in more than four instalments with a finance charge imposed, it does not meet the definition of "credit" under Section 226.2(l) of the Regulation. "'Credit' means the right granted by a creditor to a customer to defer payment of debt..." This right necessarily assumes the right to avoid incurring debt. That is, the debt must arise from a contractual relationship, voluntarily entered into, between the debtor and creditor. Since such a relationship does not exist in the delinquent tax arrangement case, the Truth-in-Lending Act and Regulation Z would not govern the transaction.

We hope this letter has been of some help to you. Please feel free to contact us at any time should the need arise.

Very truly yours,

Milton W. Schober
Assistant Director

NO. 167

(1) COMMITMENT FEES
(2) FHA AND MGIC INSURANCE
(3) ESCROW FEES
(4) REAL ESTATE BROKERAGE FEES

October 21, 1969

1. Your first question concerns the situation where a lender provides a take-out commitment to a builder for a fee to finance a series of homes. Although this fee is undoubtedly built into the cash price of the homes you suggest that its disclosure as a prepaid finance charge is misleading since a third party creditor financing that same home at the same cash price would not need to take that fee into account since it was not incident to <u>his</u> credit transaction.

Although it is arguable that such a standby fee is built into the seller's cash price, and he offers the same cash price whether or not financing is provided by the standby lender, it would not be realistic to assume that the standby lender is not the major lender. It seems improbable that any developer would pay a fee to a lender if there is little likelihood that it would lead toward an extension of credit. We, therefore, take the position that standby fees paid by the seller to the lender who extends consumer credit in the transaction shall be included in the finance charge as a prepaid finance charge. Of course in the event the purchaser obtains credit from another lender only those charges imposed directly or indirectly by that creditor as an incident to or a condition of the extension of credit need be included in the finance charge.

2. With regard to your second question as to the proper treatment of FHA premiums, the FHA mortgage insurance premium is a finance charge under Section 226.4(a)(7) and, unless this finance charge falls within the exception of Section 226.8(c)(8) or (d)(3), it must be described as an amount included in the total finance charge. The charge paid or deducted at closing for the first month (a) for such insurance is a prepaid finance charge under Section 226.8(a).

3. If the creditor simply absorbs the cost of M.G.I.C. insurance coverage by including such coverage in his rate and treats all customers alike, the cost of such insurance need not be itemized in disclosing the amount of the finance charge in those cases where the finance charge is required to be disclosed. Where such premium charge is imposed as a specific and separately stated charge, the cost of such insurance for the full term during which the creditor requires such insurance must be included in the finance charge and separately itemized. Where such premium is to be itemized, that part of the premium which is payable at inception of the loan is a prepaid finance charge whether it is deducted from the amount of the loan or is paid separately. If the creditor absorbs the cost of such insurance by including such insurance coverage in his rate without extra charge so that it need not be itemized as a part of the finance charge, the fact that he may discontinue such coverage at a later date need not be disclosed although a creditor might wish to do so.

4. A sales escrow charge which would be involved whether or not consumer credit is extended is not a finance charge. However, an escrow charge which is required to be paid in connection with an extension of consumer credit is a finance charge and is further classified as a prepaid finance charge under Section 226.8(e). If there is a combination sales and loan escrow that part of the escrow charge which exceeds the escrow charge for a sales escrow is a prepaid finance charge.

5. A commission paid to a real estate broker for his services in selling real property is not a finance charge irrespective of whether the sale is for cash or whether an extension of consumer credit is involved. However, a commission fee is a finance charge if it is paid to such a broker or any other person included in the definition of "creditor" under Section 226.2(m) for the purpose of compensating him for extending or arranging for the extension of consumer credit. If the real estate broker's fee is the same whether or not he helps a purchaser in obtaining financing, that fee or commission is not a finance charge.

6. Any unknown information needed for disclosures in connection with a construction loan may be estimated as provided under Section 226.6(f).

7. In your example, the amount financed should be $19,050 instead of $19,550. In determining the amount financed, pursuant to Section 226.8(c)(6) and [illegible] and (d)(2) the amount of any prepaid finance charge is deducted or excluded from the amount of the credit. Any method of determining the annual percentage rate by adjusting the contract interest rate in

APPENDIX B

(Jul. 14, 1969 Federal Reserve Board Staff Letter No. 40)

following the date of consummation of that transaction or the date of delivery of the disclosures required by Regulation Z, whichever is later. A confession of judgment clause creates a "security interest" for purposes of Section 226.9(a) under the circumstances described in interpretation Section 226.202 issued by the Board on May 26, 1969.

If a contract containing such a confession of judgment clause is entered between a creditor and customer at a time the customer owns no real property which is used or expected to be used as his principal residence, no right of rescission is ever then or thereafter available to him with respect to that contract. This is true even though proper disclosures are not made either before the contract is entered or later (which, in the case of a credit transaction subject to the right of rescission, would prevent expiration of the rescission period).

You can appreciate that if the result were otherwise the customer would obtain substantive rights that neither he nor the creditor could reasonably anticipate at the time of entering the agreement. This is not the intent of Truth-in-Lending.

Very truly yours,

Milton W. Schober
Assistant Director

NO. 39

CREDIT EXTENDED DEALER IN AGRICULTURAL PRODUCTS

July 10, 1969

Specifically, you asked whether Regulation Z applied to sales of agricultural products to a natural person who is a dealer for such products and who resells them to farmers or farm operators.

Such sales transactions are not subject to the requirements of Regulation Z. They do not involve extensions of "consumer credit" as defined in Section 226.2(k) of the Regulation and were intended to be specifically exempted under the provisions of Section 226.3(a). You will note that in Section 226.2(c), the Regulation defines "agricultural purpose" as meaning "...a purpose related to the production, harvest, exhibition, marketing, transportation, processing, or manufacture of agricultural products by a natural person who cultivates, plants, propagates, or nurtures those agricultural products." The sales which you described do not involve cultivating, planting, propagating, or nurturing agricultural products.

Yours very truly,

Milton W. Schober
Assistant Director

NO. 40

DISCOUNT FOR PROMPT PAYMENT OF TAXES

July 14, 1969

You raised the question of the applicability of Regulation Z to discount for early payment of ad valorem taxes. In reply to another inquiry, after citing the definition of "credit" we went on to say that the right on the part of the debtor to incur debt necessarily assumes an alternative right to avoid incurring debt. In other words, it was our position that the term "credit", for the purposes of Truth-in-Lending, assumes a contractual relationship, voluntarily entered, between creditor and debtor. Since such a relationship does not exist in the case of tax assessments by the Sewer District (and, similarly in the case of ad valorem taxes imposed by a city), it appeared to us that such assessments (an city taxes) would not fall within the coverage of the Truth-in-Lending Act or Regulation Z.

Yours very truly,

Milton W. Schober
Assistant Director

NO. 41

(1) "SIMILAR LIEN"--SEC. 226.8(j)

(2) LOAN COMMITMENT

(3) LIVESTOCK HAULER

July 15, 1969

Of course, the Regulation was not intended to change business practices; however, it has become apparent that in a number of areas, a change in business practice will greatly accommodate compliance with the Act and Regulation Z. For example, points out that very seldom is agricultural credit extended pursuant to a formal loan agreement. However, if this were done, disclosures could be made pursuant to Section 226.8(i), and only one disclosure would need to be made. Unless there is serious objections to entering into a form of written commitment, such a practice would certainly facilitate compliance.

Where a written commitment is not or cannot be used, under the provisions of Section 226.8(j) only one disclosure need be made for multiple advances for agricultural purposed made under an open-end real estate mortgage or similar lien provided that three conditions are met. By the term "similar lien" we intended to refer to the type of arrangement described by where the customer executes an initial note and mortgage for the full amount of the credit line and subsequently executes separate notes secured by a pledge of the mortgage note for individual advances. However, I should point out that such an arrangement does not qualify as a single transaction

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). My word processing program, Microsoft Word, counted 6,655 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

April 9, 2015

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CERTIFICATE OF SERVICE

I certify that on the 9th day of April, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to all counsel of record in this case.

April 9, 2015

/s/ Jessica Rank Divine

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