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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 William R Donges, et al.,

No. CV-18-00093-TUC-RM

10 Plaintiffs,

ORDER

11 v.

12 USAA Federal Savings Bank,

13 Defendant.
14

15 Pending before the Court are Plaintiffs William and Carolyn Donges' Motion for
16 Partial Summary Judgment (Doc. 54) and Defendant USAA Federal Savings Bank's
17 Motion for Summary Judgment (Doc. 64).¹ The summary judgment motions are fully
18 briefed and suitable for determination without oral argument. For the following reasons,
19 summary judgment will be granted in favor of Defendant.

20 **I. Standard of Review**

21 Summary judgment is proper "if the movant shows that there is no genuine dispute
22 as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
23 Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the
24 governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual
25 dispute is genuine if the evidence is such that a reasonable trier of fact could resolve the
26 dispute in favor of the nonmoving party. *Id.* In evaluating a motion for summary judgment,

27 ¹ Also pending are Plaintiffs' Requests for Judicial Notice (Docs. 74, 75).
28 They ask the Court to take notice of the "Great Recession," the "Banking Crises," the
"Mortgage Crises," and certain statutes, regulations, and agency guidelines. Their requests
are granted.

1 the court must “draw all reasonable inferences from the evidence” in favor of the non-
2 movant. *O’Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1150 (9th Cir. 2002). A
3 reasonable inference is one which is supported by “significant probative evidence” rather
4 than “threadbare conclusory statements.” *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676,
5 680–81 (9th Cir. 1985) (internal quotation marks omitted). If “the evidence yields
6 conflicting inferences [regarding material facts], summary judgment is improper, and the
7 action must proceed to trial.” *O’Connor*, 311 F.3d at 1150.

8 The party moving for summary judgment bears the initial burden of identifying
9 those portions of the record, together with affidavits, if any, that it believes demonstrate
10 the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
11 (1986). If the movant meets this burden, the burden shifts to the nonmovant to “come
12 forward with specific facts showing that there is a genuine issue for trial.” *Matsushita*
13 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks
14 and emphasis omitted); *see also* Fed. R. Civ. P. 56(c)(1).

15 **II. Background²**

16 On April 9, 2004, Plaintiffs entered into a Home Equity Line of Credit (“HELOC”) with
17 Defendant, establishing a line of credit of \$50,000. (Doc. 70, ¶ 6.) Plaintiffs
18 subsequently entered into two more HELOC agreements, increasing their line of credit by
19 \$50,000 and \$183,800, respectively. (*Id.* ¶¶ 8, 10.) All three HELOCs were consolidated
20 and secured by deeds of trust on Plaintiffs’ home in Tucson, Arizona.³ (*Id.* ¶¶ 2, 6, 8, 10.)

21 ² The following recitation of facts is undisputed. Additional facts are
22 discussed in subsequent sections as relevant.

23 As a preliminary note, Plaintiffs’ 36-page controverting statement of facts (Doc.
24 72), which is responsive to Defendant’s 8-page statement of facts (Doc. 65), is a gross
25 violation of Rule 56.1(b) of the Local Rules of Civil Procedure. *See Pruett v. Arizona*, 606
26 F. Supp. 2d 1065, 1075 (D. Ariz. 2009) (explaining that Rule 56.1(b) does not permit
27 explanation or argument). Plaintiffs use their controverting statement to “argue over the
28 legal significance of facts, purport to dispute a fact simply because [Defendant] did not
also include additional information that [Plaintiffs] think[] is important, [and] argue over
semantics by identifying a fact as undisputed but then following with a needless re-wording
of the fact[.]” *Lowe v. Maxwell & Morgan PC*, No. CV-15-02481-PHX-DLR, 2018 WL
4693532, at *1 n.1 (D. Ariz. Sept. 27, 2018). The Court has not considered any information
provided by Plaintiffs in their controverting statement beyond whether the fact is disputed,
whether there is an objection, and citations to evidence. The Court considers only the
arguments set forth in the briefs. *See Pruett*, 606 F. Supp. 2d at 1075.

³ For convenience, the Court hereinafter refers to the three consolidated

1 The HELOC has a maturity date of April 9, 2024. (*Id.* ¶¶ 6, 8, 10.)

2 Plaintiffs borrowed the full line of credit. (Doc. 72, ¶ 18.) Plaintiffs made timely
3 minimum payments until defaulting on a monthly minimum payment due on October 19,
4 2009. (Doc. 70, ¶ 16.) Defendant sent Plaintiffs a letter on October 4, 2017, stating that a
5 foreclosure would occur if Plaintiffs did not show the debt was invalid or pay the debt
6 within 30 days. (Doc. 72, ¶ 33.) On November 27, 2017, Defendant filed a Notice of
7 Trustee’s Sale. (Doc. 72, ¶ 34.)⁴

8 **III. Discussion**

9 **A. Statute of Limitations⁵**

10 Defendant contends that it is entitled to summary judgment because the statute of
11 limitations on its right to foreclose did not begin running until it accelerated the debt in
12 November 2017, through the initiation of foreclosure proceedings. Plaintiffs assert that
13 Defendant’s right to foreclose accrued no later than May 2011, which puts Defendant’s
14 October 2017 demand for payment outside of Arizona’s six-year statute of limitations.
15 Summary judgment will be granted in favor of Defendant.

16 There is a threshold legal question on which the parties disagree: when does the
17 statute of limitations begin running on a claim for a borrower’s default on a HELOC that
18 has a defined maturity date? Plaintiffs argue that the statute begins running on the entire
19 outstanding debt when the borrower first fails to make a full minimum monthly payment.
20 They rely exclusively on the Arizona Supreme Court’s recent decision in *Mertola, LLC v.*
21 *Santos*, 422 P.3d 1028 (Ariz. 2018). Defendant relies on *Navy Federal Credit Union v.*
22 *Jones*, 930 P.2d 1007, 1008 (Ariz. Ct. App. 1996), which set forth the longstanding rule

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24 HELOCs simply as “HELOC.”

25 ⁴ Plaintiffs neither admit nor dispute this statement of fact. Instead, they argue
26 that Defendant failed to respond to a letter they sent to Defendant prior to the filing of the
27 Notice—a point wholly irrelevant to the truthfulness of Defendant’s statement. (Doc. 72,
28 ¶¶ 34.1–34.2.) Because they failed to properly address Defendant’s statement of fact, it is
treated as undisputed. Fed. R. Civ. P. 56(e)(2).

⁵ Both parties seek summary judgment on Plaintiffs’ statute-of-limitations
claim. The following analysis is based on Defendant’s summary judgment motion so that
Plaintiffs are given the benefit of all reasonable inferences. However, the Court considers
all materials submitted in connection with both motions, including the briefing. *See* Fed.
R. Civ. P. 56(c)(3) (court may consider other materials in the record).

1 that the statute of limitations “commences on the due date of each matured but unpaid
2 installment and, as to unmatured future installments, the period commences on the date the
3 creditor exercises the optional acceleration clause.” For the following reasons, the *Navy*
4 *Federal* rule applies.

5 In *Navy Federal*, the defendant’s husband defaulted on a promissory note that was
6 payable to the plaintiff over 15 years in equal monthly installments. *Id.* Years after the
7 first missed payment, the plaintiff accelerated the balance on the note and then filed suit
8 when the defendant did not pay. *Id.* The defendant argued that the plaintiff’s claim accrued
9 at the time of the first missed payment, thus making the plaintiff’s claim untimely under
10 the six-year limitation period. *Id.* The plaintiff argued that its claim did not accrue until it
11 accelerated the balance on the note. *Id.* at 1008–09.

12 The Arizona Court of Appeals concluded that both parties were “partly correct.” *Id.*
13 at 1009. The defendant was “partially correct in contending that each time her husband
14 defaulted on an installment payment, [the plaintiff] could have sued for the amount of that
15 installment any time within the six-year statute of limitations.” *Id.* The plaintiff was “also
16 partly correct, however,” because “the statute of limitations runs as to future installments
17 from the date the creditor exercises the [optional] acceleration clause.” *Id.* In other words,
18 the statute of limitations does not commence on an unmatured installment unless the
19 creditor accelerates it. *See id.*

20 In *Mertola*, the Arizona Supreme Court refused to apply the *Navy Federal* rule to
21 credit-card debt, holding instead that “when a credit-card contract contains an optional
22 acceleration clause, a cause of action to collect the entire outstanding debt accrues upon
23 default: that is, when the debtor first fails to make a full, agreed-to minimum monthly
24 payment.” 422 P.3d at 1032. The court distinguished between closed accounts, which
25 typically involve a fixed principal amount and defined schedule of repayment, and credit-
26 card contracts, under which the ultimate debt, monthly payment, and final payment date
27 vary depending on how the card is used and the current interest rate, and found that
28 [b]ecause a closed-end installment contract involves an exact sum that must
be paid in full in equal payments by an agreed-on date, a cause of action for

1 the entire balance owed will accrue no later than that date. After that date,
2 the creditor may not prevent the statute of limitations from running simply
3 by refusing to accelerate the debt.

4 Under credit-card contracts like the one at issue here, however, the
5 date when the entire debt will become due is uncertain and may not occur
6 until far in the future. To hold that a cause of action on the debt does not
7 accrue until the creditor exercises his right to accelerate would vest the
8 creditor with unilateral power to extend the statutory limitation period and
9 permit interest to continue to accrue, long after it is clear that no further
10 payments will be made, subject only to a standard of reasonableness and
11 other equitable doctrines. This would functionally eliminate the protection
12 provided to [borrowers] by the statute of limitations. We decline to extend
13 such power to the creditor.

14 *Id.* at 1031–32.

15 Because the Arizona Supreme Court expressly declined to decide which rule applies
16 “for other types of debt,” Plaintiffs devote much of their briefing to arguing that HELOCs
17 are open-end accounts, similar to credit-card accounts, and that the *Mertola* rule of accrual
18 therefore applies. *Id.* at 1032. For two related reasons, their argument is unavailing.

19 First, *Mertola* did not announce a bright-line “open-end account versus closed-end
20 account” rule. Although the court distinguished between the two types of accounts, it did
21 so only to explain how the *Navy Federal* rule would give creditors of a certain type of
22 open-end account (i.e., credit cards) the unfair ability to unilaterally extend the statute of
23 limitations. *See id.* at 1031–32. Specifically, because the date when the entire debt
24 becomes due on a credit-card account is uncertain, application of the *Navy Federal* rule
25 “would vest the creditor with unilateral power to extend the statutory limitation period,”
26 thereby “functionally eliminat[ing] the protection provided to [borrowers] by the statute of
27 limitations.” *Id.* at 1032. This risk is not present with Plaintiffs’ HELOC debt because
28 their HELOC agreement clearly states a final maturity date. (*See* Doc. 56-1 at 1 (April 9,
2024).) And although the ultimate amount of debt is not certain, because the total debt
“must be paid in full . . . by an agreed-on date, a cause of action for the entire balance owed
will accrue no later than that date,” which means “the creditor may not prevent the statute
of limitations from running simply by refusing to accelerate the debt.” *Mertola*, 422 P.3d

1 at 1032. In other words, the HELOC’s defined due date eliminates the very risk that led
2 the *Mertola* court to create a new rule for credit-card accounts.

3 Second, Plaintiffs’ argument largely ignores the terms of their HELOC. *See id.* at
4 1033 (“Parties remain free to contractually define default and otherwise negotiate
5 repayment of debt.”). Defendant does not exaggerate in arguing that, to apply the *Mertola*
6 rule, the Court would need to ignore the parties’ clear contractual intent. Plaintiffs agreed
7 that they would repay the entire outstanding principal “in a single payment” “[a]t maturity,”
8 and that, if they missed an interest payment, Defendant could, but was not required to,
9 accelerate the principal. (Doc. 56-1 at 1–2; Doc. 56-2 at 1–2; Doc. 56-3 at 1–2.) Accepting
10 Plaintiffs’ position would make the HELOC maturity date meaningless and turn the
11 optional acceleration clause—which generally is a protective device for the lender, *see*
12 *Mertola*, 422 P.3d at 1030—into a sword for the debtor. Fundamental principles of contract
13 law weigh against this result. *See Grosvenor Holdings, L.C. v. Figueroa*, 218 P.3d 1045,
14 1050 (Ariz. Ct. App. 2009) (“The purpose of contract interpretation is to determine the
15 parties’ intent and enforce that intent.” (citing *Taylor v. State Farm Mut. Auto. Ins. Co.*,
16 854 P.2d 1134, 1138 (Ariz. 1993))).

17 Consequently, the *Navy Federal* rule applies. The maturity date for the entire debt
18 was in 2024; therefore, if Defendant had not accelerated the debt, the six-year limitation
19 period would have commenced at that time. *See Navy Fed.*, 930 P.2d at 1009; *cf. Bird v.*
20 *Real Time Resolutions, Inc.*, 183 F. Supp. 3d 1058, 1062–63 (N.D. Cal. 2016) (applying
21 California’s version of the *Navy Federal* rule to a HELOC and finding that, if the lender
22 had not accelerated, the four-year statute of limitations would have commenced in 2030,
23 when the loan matured).

24 Because Defendant did accelerate the debt, however, the determinative issue is
25 when that event occurred: this is the date on which Defendant’s claim accrued and which
26 marks the commencement of the statute of limitations.⁶ Defendant contends that it

27 ⁶ When a claim “has accrued is ‘usually and necessarily’ a question of fact for
28 the jury,” but where the facts leave only one reasonable conclusion, the Court may decide
the issue as a matter of law. *Thompson v. Pima County*, 243 P.3d 1024, 1028–29 (Ariz.

1 accelerated the debt on November 27, 2017, by initiating foreclosure proceedings.
2 Plaintiffs rely almost entirely on their position that the statute of limitations began running
3 on the entire debt at the time of their first default; in so doing, Plaintiffs fail to meaningfully
4 develop an alternative argument regarding the specific date on which their debt was
5 accelerated. (See Doc. 54 at 15 (“Perhaps Defendant gave notice of acceleration and
6 perhaps not[.]”); Doc. 71 at 12 (same).)

7 To accelerate a debt, the creditor “must undertake some affirmative act to make
8 clear to the debtor it has accelerated the obligation.” *Baseline Fin. Servs. v. Madison*, 278
9 P.3d 321, 322 (Ariz. Ct. App. 2012). Arizona courts have held that a creditor accelerates
10 a debt by repossessing property, sending a written demand for full payment, or filing suit
11 to collect the debt. See *id.* at 323 (collecting cases). An internal write-off is not an
12 affirmative act that accelerates a debt. *Id.* at 324.

13 Defendant initiated foreclosure proceedings on November 27, 2017, by filing a
14 Notice of Trustee’s Sale. (Doc. 72, ¶ 34.) This is an affirmative act that makes clear that
15 the debt was accelerated. Cf. *Frei v. Hamilton*, 601 P.2d 307, 310 (Ariz. Ct. App. 1979)
16 (filing a lawsuit to collect debt exercises acceleration clause). Furthermore, Defendant
17 offers evidence that it did not accelerate the debt on an earlier date. (See Doc. 65, ¶¶ 24,
18 25; Doc. 65-2, Ex. B, ¶¶ 17–20 (declaration of Defendant’s foreclosure manager stating
19 that the debt was not accelerated until the Notice of Trustee’s Sale).) This evidence, which
20 Plaintiffs do not properly dispute or object to (see Doc. 72, ¶¶ 24.1–24.3, 25.1 (providing
21 only one irrelevant citation to evidence)), satisfies Defendant’s initial burden to show the
22 absence of a genuine dispute regarding the acceleration date. See *Celotex Corp.*, 477 U.S.
23 at 323.

24 In their response to Defendant’s summary judgment motion, Plaintiffs only briefly
25 touch on the specific question of when the debt was accelerated. None of their analysis,
26 save one statement, is supported by citation to the record. (See Doc. 71 at 9–10.) This

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28 Ct. App. 2010) (quoting *Doe v. Roe*, 955 P.2d 951, 961 (Ariz. 1998)); see *Kopacz v. Banner Health*, 425 P.3d 586, 589 (Ariz. Ct. App. 2018).

1 statement cites to a paragraph in their controverting statement of facts, asserting that the
2 paragraph recites “the overt events that clearly and unequivocally signaled to the Plaintiff,
3 as it would to any other reasonable borrower, that Defendant had exercised” the
4 acceleration clause. (*Id.* at 10.) The cited paragraph, however, is comprised of improper
5 argument, none of which is supported with citation to evidence. (*See* Doc. 72, ¶ 11.1.)
6 Plaintiffs’ summary judgment motion is no more helpful, as it is devoted entirely to their
7 argument that the *Mertola* rule applies. Because invocation of an acceleration clause is not
8 necessary under that rule, Plaintiffs do not argue when the debt was accelerated (or even
9 that Defendant accelerated it). (*See* Doc. 54 at 12–13.)

10 Plaintiffs draw the Court’s attention to the declaration of Plaintiff William Donges,
11 who asserts that he called Defendant in September 2010 and spoke to an unnamed
12 employee, who told Plaintiff that “the only payment accepted would be the entire
13 \$284,301.27.” (Doc. 73, ¶ 13.) As a matter of law, however, no reasonable juror could
14 find that this *Plaintiff-initiated* conversation was an “affirmative act” by Defendant to
15 accelerate the debt. *Cf. Navy Fed.*, 930 P.2d at 1008–09 (finding creditor accelerated by
16 sending written notice); *Wheel Estate Corp. v. Webb*, 679 P.2d 529, 531 (Ariz. Ct. App.
17 1983) (finding creditor accelerated by repossessing property); *Frei*, 601 P.2d at 310
18 (finding creditor accelerated by filing lawsuit).

19 Plaintiffs have failed to show a genuine dispute of material fact as to when their debt
20 was accelerated. Because the record shows that Defendant accelerated the debt in 2017,
21 Defendant’s attempt to foreclose was well within the applicable six-year statute of
22 limitations. Therefore, summary judgment will be granted in favor of Defendant on Count
23 One and Count Five of the First Amended Complaint.⁷

24 **B. Promissory Estoppel**

25 Defendant argues that it is entitled to summary judgment on Plaintiffs’ claim of
26 promissory estoppel because Plaintiffs can establish none of the elements of that claim.
27 *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000)

28 ⁷ Although pleaded separately, Count One and Count Five both seek a declaration that the statute of limitations bars Defendant’s right to foreclose.

1 (stating that summary judgment is appropriate if the moving party can “show that the
2 nonmoving party does not have enough evidence of an essential element of its claim or
3 defense to carry its ultimate burden of persuasion at trial”); *Mendiola-Martinez v. Arpaio*,
4 836 F.3d 1239, 1247 (9th Cir. 2016). Plaintiffs respond that they have made a showing
5 sufficient to proceed to trial. The Court will grant summary judgment in favor of
6 Defendant.

7 Plaintiffs’ claim of promissory estoppel is based on a 1099-C that was issued by
8 Defendant to Plaintiffs for the 2013 calendar year.⁸ (Doc. 35 at 19–21.) The 1099-C states
9 “289,691.63” as the “amount of debt discharged.” (Doc. 72-5.) Plaintiffs allege that
10 although they knew the 1099-C did not extinguish their debt, it nevertheless constituted an
11 enforceable promise from Defendant to not attempt to collect the debt. (Doc. 35 at 20.)
12 They allege that they reasonably relied on that promise by “undert[aking] several measures
13 to preserve long term residency in the property securing the cancelled debt and . . .
14 under[taking] several measures to improve [their] financial condition, such as efforts to
15 obtain a reverse mortgage.” (*Id.* at 21.)

16 Under Arizona law, “[p]romissory estoppel provides an equitable remedy that
17 renders a promise enforceable, where a promise has been made which the promissor should
18 reasonably foresee would cause the promisee to rely, and upon which the promisee actually
19 relies to his detriment.” *Sholes v. Fernando*, 268 P.3d 1112, 1117 (Ariz. Ct. App. 2011)
20 (internal citations, quotations marks, and brackets omitted). Detrimental reliance requires
21 a “substantial and material change of position . . . for the worse.” *Weiner v. Romley*, 381
22 P.2d 581, 584 (1963); *see Leal v. Allstate Ins. Co.*, 17 P.3d 95, 99 (Ariz. Ct. App. 2000).

23 The Court agrees with Defendant that Plaintiffs cannot show that they detrimentally
24 relied on the 1099-C. To support their argument, Defendant points to evidence that
25 Plaintiffs attempted to negotiate a settlement of the debt *after* issuance of the 1099-C. (*See*
26 Doc. 65-2, Ex. C, at 19; Doc. 73, ¶¶ 20–23.) Plaintiffs’ claim of detrimental reliance is

27 ⁸ A 1099-C is an IRS form that lenders must file when they discharge debts.
28 It is not conclusive evidence that a debt is cancelled, or that the lender will cease trying to
collect the debt; under Arizona law, though, it is prima facie evidence that a debt has been
discharged. *See Amtrust Bank v. Fossett*, 224 P.3d 935 (Ariz. Ct. App. 2009).

1 belied by their attempt to settle (for a very substantial sum, 50% of \$280,000) what they
2 allegedly thought was an uncollectable debt. Thus, this evidence is sufficient to shift the
3 burden on summary judgment to Plaintiffs, who have the ultimate burden of persuasion at
4 trial. *See Fritz Cos.*, 210 F.3d at 1106.

5 Plaintiffs offer no evidence on which a reasonable jury could find that they
6 reasonably relied to their detriment. They merely deny, both in their argument and in the
7 cited documents that purportedly support their argument, that their settlement offer is
8 linked to whether they relied on the 1099-C. (*See* Doc. 71 at 13–14 (citing Doc. 72, ¶¶
9 27.1–27.3, 28.1–28.2).) This is insufficient. *See Fritz Cos.*, 210 F.3d at 1103 (“If . . . a
10 moving party carries its burden of production, the nonmoving party *must produce evidence*
11 to support its claim or defense.” (emphasis added)).

12 Furthermore, the only specific act of reliance alleged by Plaintiffs in the First
13 Amended Complaint is their attempt to “improve [their] financial condition” by obtaining
14 a reverse mortgage, which they concede was unsuccessful. (*See* Doc. 35 at 21; Doc. 67.)
15 Because they failed to “improve [their] financial condition,” they remained in the same
16 position they were in prior to the issuance of the 1099-C (i.e., in significant financial debt).
17 Thus, Plaintiffs have offered nothing to suggest that their reliance on Defendant’s promise
18 substantially and materially worsened their position. *See Weiner*, 381 P.2d at 584. This
19 failure is fatal to their claim.

20 **C. Estoppel by Inaction & Estoppel by Misrepresentation⁹**

21 On October 4, 2017, Defendant sent Plaintiffs a “Notice of Demand for Payment,”
22 stating that Plaintiffs’ loan was “in serious default,” that Plaintiffs had “the right to cure,”
23 and that if Plaintiffs did not cure their default within 30 days, Defendant would “accelerate
24 [the] loan” (Doc. 65-4, Ex. J, at 9.) On November 15, 2017, Defendant sent a second
25 default notice. (Doc. 72, ¶ 35.) The second notice states that Defendant “will assume the

26 ⁹ The Court is unaware of any claim under Arizona law called “estoppel by
27 inaction.” “Estoppel by misrepresentation,” on the other hand, is another name for
28 “equitable estoppel.” *See St. Joseph’s Hosp. & Med. Ctr. v. Reserve Life Ins. Co.*, 742 P.2d
808, 818 (Ariz. 1987). Plaintiffs admit that these claims were “poorly” and “inartfully”
crafted, and they would have withdrawn the claims had the Court granted them leave to
file a second amended complaint. (*See* Doc. 71 at 14; Doc. 78 at 1.)

1 debt to be valid unless [Plaintiffs], within thirty days after receipt of th[e] notice, dispute
2 the validity of the debt or a portion thereof.” (Doc. 65-4, Ex. K, at 12.) On November 27,
3 2017 (12 days after the second notice), Defendant filed a Notice of Trustee’s Sale. (Doc.
4 72, ¶ 34.)

5 Plaintiffs allege in their First Amended Complaint that they sent a letter on October
6 25, 2017, disputing the validity of the debt. (Doc. 35, ¶ 60.) They do not properly present
7 this assertion as an undisputed statement of fact, but they provide evidence that they did in
8 fact send the letter. (*See* Doc. 73, ¶ 28.) Defendant, through its attorneys, failed to respond
9 to the letter. (Doc. 35, ¶ 123; Doc. 73, ¶ 29.)

10 In their claim for “estoppel by inaction,” Plaintiffs allege that Defendant’s failure to
11 respond to their dispute letter “can only be interpreted in favor of” their claim that the
12 notice of default was defective. In their equitable estoppel claim, they allege that
13 Defendant misrepresented in the second notice that they had 30 days to dispute the debt,
14 since Defendant planned to and did initiate foreclosure proceedings less than two weeks
15 later. Plaintiffs also allege that both acts were a violation of the Fair Credit Reporting
16 Act.¹⁰

17 As an initial matter, Plaintiffs have not stated a claim for violation of the Fair Credit
18 Reporting Act, much less offered any evidence that Defendant violated the Act. *See Snyder*
19 *v. HSBC Bank, USA, N.A.*, 913 F. Supp. 2d 755, 778 (D. Ariz. 2012) (stating requirements
20 of claim). Plaintiffs do not specify in their First Amended Complaint which statutory
21 provision Defendant allegedly violated. Nor do they use their summary judgment response
22 as an opportunity to provide clarification.

23 Furthermore, Plaintiffs’ argument completely ignores the elements of an estoppel
24 claim: “(1) the party to be estopped commits acts inconsistent with a position it later adopts;
25 (2) reliance by the other party; and (3) injury to the latter resulting from the former’s
26 repudiation of its prior conduct.” *Gorman v. Pima County*, 287 P.3d 800, 804–05 (Ariz.

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28 ¹⁰ Defendant’s summary judgment motion purports to challenge only the
equitable estoppel claim, but Plaintiffs acknowledge that, in substance, it also challenges
the “estoppel by inaction” claim. (Doc. 71 at 14–15.)

1 Ct. App. 2012) (quoting *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 959 P.2d 1256,
2 1267–68 (Ariz. 1998)). As Defendant points out, the facts belie Plaintiffs' claims. First,
3 Plaintiffs *did* receive 30 days to dispute the debt. They received the first notice of default
4 on October 4, 2017, and sent a dispute letter on October 25, and Defendant initiated
5 foreclosure proceedings on November 27. Next, Plaintiffs misread the second notice; it
6 states only that Plaintiffs had 30 days to dispute the debt, not that Defendant would wait
7 30 days before filing the Notice of Trustee's Sale. (Doc. 65-4, Ex. K, at 12.) Thus,
8 Defendant has offered evidence that it did not make a misrepresentation or act
9 inconsistently.

10 Additionally, Plaintiffs acknowledge that the heart of their claims is that Defendant
11 denied them the opportunity to dispute the validity of Defendant's right to foreclose. (*See*
12 Doc. 71 at 15 (complaining that Defendant never responded to their dispute letter and
13 stating that "Defendant should be estopped because the default letter sent to Plaintiff[s] did
14 not give Plaintiff[s] the mandated time to dispute the debt".) Thus, assuming Defendant
15 made a misrepresentation or acted inconsistently, for two reasons, there is no evidence of
16 injury: first, Defendant's right to foreclose is not barred by the statute of limitations;
17 second, Plaintiffs received the opportunity to dispute the debt by means of this litigation.¹¹

18 The foregoing is sufficient to shift the burden to Plaintiffs, who must come forward
19 with evidence to show a genuine factual dispute. They have failed to do so, offering only
20 unsupported denials and improper responses to Defendant's statements of fact. (*See* Doc.
21 71 at 14–16; Doc. 72, ¶¶ 33.1–33.4, 34.1–34.2.) Summary judgment is therefore
22 appropriate.

23 **IT IS ORDERED:**

- 24 1. Plaintiffs' Requests for Judicial Notice (Docs. 74, 75) are **granted**.
25 2. Plaintiffs' Motion for Partial Summary Judgment (Doc. 54) is **denied**.


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28 ¹¹ Defendant agreed to delay the foreclosure sale pending resolution of this case. (Doc. 26.)

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3. Defendant's Motion for Summary Judgment (Doc. 64) is **granted**.
Dated this 30th day of April, 2019.



Honorable Rosemary Márquez
United States District Judge