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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 STEVE LOPEZ AND CARMEN LOPEZ,

Case No. 2:09-cv-01510-JAM-KJN

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12 Plaintiffs,

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS AND GRANTING
IN PART DEFENDANT'S MOTION TO
STRIKE

13 v.

14 WACHOVIA MORTGAGE individually
15 and as Successor in Interest to
16 WORLD SAVINGS BANK; COMSTOCK
17 MORTGAGE; DAVID MENDOZA; ADRIAN
18 DEL RIO and DOES 1-20
19 Inclusive,
20 Defendants.

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23 This matter comes before the Court on Defendant Wachovia
24 Mortgage's ("Defendant" or "Wachovia") Motion to Dismiss (Doc.
25 #49) Plaintiffs Steve Lopez and Carmen Lopez's ("Plaintiffs'")
26 eighth cause of action for violation of the Truth in Lending Act
27 ("TILA") in the Third Amended Complaint ("TAC") (Doc. #44) for
28 failure to state a claim pursuant to Federal Rule of Civil
Procedure 12(b)(6). Defendant also brings a Motion to Strike
(Doc. #50) portions of the TAC pursuant to Federal Rule of Civil

1 Procedure 12(f).¹ Plaintiffs oppose both motions and request an
2 opportunity to file a fourth amended complaint.
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4 I. FACTUAL AND PROCEDURAL BACKGROUND

5 In June 2006, Plaintiffs obtained an adjustable rate
6 mortgage loan to finance purchase of their residential property
7 located at 10398 Christo Way, Elk Grove, CA ("subject
8 property"). The terms of the loan were memorialized in the
9 promissory Note which was secured by a Deed of Trust on the
10 subject property. The lender was World Savings Bank, renamed and
11 now known as Wachovia. Plaintiffs allege that they did not
12 receive required disclosures, that disclosures were not clear,
13 and that the mortgage brokers misled them regarding the terms of
14 the loan.
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16 Plaintiffs defaulted on the loan in February 2009.
17 Accordingly, in March 2009, Defendant notified Plaintiffs of its
18 intent to foreclose. In April 2009, Plaintiffs sent Defendant a
19 Qualified Written Request ("QWR") under the Real Estate
20 Settlement Procedures Act, ("RESPA"), 12 U.S.C. §2605 et seq.,
21 including a demand to rescind the loan under a provision of the
22 TILA, 15 U.S.C. §1601, et seq.
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28 ¹ These motions were determined to be suitable for decision
without oral argument. E.D. Cal. L.R. 230(g).

1 Plaintiffs bring the present lawsuit alleging violations of
2 state and federal law. On October 15, 2009 the Court granted in
3 part and denied in part a Motion to Dismiss the First Amended
4 Complaint ("FAC") filed by Wachovia Mortgage's co-defendants in
5 this action. (Doc. #39). In response to that Order, but prior to
6 the Court deciding Defendant Wachovia Mortgage's Motion to
7 Dismiss, Plaintiffs filed a Second Amended Complaint ("SAC").
8 (Doc #40). On November 20, 2009, Defendant Wachovia Mortgage's
9 Motion to Dismiss Plaintiffs' SAC was granted, and Plaintiffs
10 were given the opportunity to file a TAC. (Doc # 41). The TAC
11 superseded the SAC and is now the operative complaint at issue
12 in the present order.
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15 II. OPINION

16 A. Legal Standard

17 1. Motion to Dismiss

18 A party may move to dismiss an action for failure to
19 state a claim upon which relief can be granted pursuant to
20 Federal Rule of Civil Procedure 12(b)(6). In considering a
21 motion to dismiss, the court must accept the allegations in the
22 complaint as true and draw all reasonable inferences in favor of
23 the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),
24 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
25 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). Assertions that
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1 are mere "legal conclusions," however, are not entitled to the
2 assumption of truth. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50
3 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555
4 (2007)). To survive a motion to dismiss, a plaintiff needs to
5 plead "enough facts to state a claim to relief that is plausible
6 on its face," Twombly, 550 U.S. at 570, and it is inappropriate
7 to "assume that the [plaintiff] can prove facts that [he or she]
8 has not alleged or that the defendants have violated the . . .
9 laws in ways that have not been alleged." Associated Gen.
10 Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
11 459 U.S. 519, 526 (1983). Dismissal is appropriate where the
12 plaintiff fails to state a claim supportable by a cognizable
13 legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
14 699 (9th Cir. 1990).

17 Upon granting a motion to dismiss, a court has discretion
18 to allow leave to amend the complaint pursuant to Federal Rule
19 of Civil Procedure 15(a). "Dismissal with prejudice and without
20 leave to amend is not appropriate unless it is clear . . . that
21 the complaint could not be saved by amendment." Eminence
22 Capital, L.L.C. v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir.
23 2002). Accordingly, a court should grant leave to amend the
24 Complaint unless the futility of amendment warrants dismissing a
25 claim with prejudice.
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1 2. Request for Judicial Notice

2 Generally, the Court may not consider material beyond the
3 pleadings in ruling on a motion to dismiss for failure to state
4 a claim. Sherman v. Stryker Corp., 2009 WL 2241664 at *2 (C.D.
5 Cal. Mar. 30, 2009) (internal citations omitted). There are two
6 exceptions: when material is attached to the complaint or relied
7 on by the complaint, or when the court takes judicial notice of
8 matters of public record, provided the facts are not subject to
9 reasonable dispute. Id.

10 Defendant requests the Court take judicial notice of five
11 exhibits. The exhibits are loan-related documents which are
12 either matters of public record or are relied upon in the TAC.
13 Plaintiffs do not challenge the authenticity of these exhibits.
14 However, Plaintiffs do object to the Court noticing Defendant's
15 summary of the exhibits. Accordingly, the Court takes only the
16 exhibits into consideration and disregards Defendant's summary.
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21 B. Defendant's Motions to Dismiss

22 Defendant moves to dismiss the only claim asserted against it
23 by Plaintiffs, a violation of TILA. Plaintiffs have conceded
24 that their loan does not qualify for rescission under TILA,
25 therefore Plaintiffs' request for TILA rescission is dismissed,
26 with prejudice. Plaintiffs' claim for TILA damages against
27 Defendant is also dismissed with prejudice because as Defendant
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1 correctly asserts, Plaintiffs' TAC fails to cure the defects
2 discussed in this Court's November 11, 2009, Order.

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4 TILA Claim Is Time Barred

5 An action for damages under TILA must be brought within
6 one year of the violation. 8 U.S.C. §1640(e). A TILA violation
7 occurs on "the date of consummation of the transaction," King v.
8 California, 784 F.2d 910, 915 (9th Cir. 1986), and
9 "consummation" means "the time that a consumer becomes
10 contractually obligated on a credit transaction." 12 C.F.R.
11 §226(a)(13). The doctrine of equitable tolling, however, may
12 "suspend the limitations period until the borrower discovers or
13 had reasonable opportunity to discover the fraud or
14 nondisclosures that form the basis of the TILA action." King,
15 784 F. 2d at 915.

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18 This Court's previous Order warned Plaintiffs that they had
19 not pled facts sufficient to allow equitable tolling to apply.
20 Plaintiffs added two paragraphs to the TAC in an attempt to
21 create a basis for equitable tolling. (Doc. #44, ¶¶ 137, 138).
22 However, as the Defendant points out, Plaintiffs' conclusory
23 allegations do not meet the minimal pleading requirements to
24 withstand a 12(b)(6) motion. Plaintiffs claim they were
25 "prevented from discovering" the lack of proper disclosures
26 until foreclosure of their home was threatened, that facts
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1 surrounding the loan "were purposefully hidden," and that
2 limited facts have been "discovered within the past year,"
3 tolling the statute of limitations. Plaintiffs' statements are
4 vague and do not provide facts allowing the Court to find the
5 claims even plausible. This Court finds that providing
6 Plaintiffs a fifth opportunity to amend the complaint would be
7 futile. Accordingly, Plaintiffs' claim for TILA damages is
8 dismissed with prejudice.
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11 C. Defendant's Motion to Strike

12 Defendant moves to strike paragraphs 43, 57, 124, 127, and
13 128, and a portion of paragraph 98, from the TAC. For the
14 foregoing reasons, Defendant's motion to strike is granted in
15 part and denied in part.
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17 Plaintiffs do not oppose Defendant's motion as to
18 paragraphs 57 and 98. Accordingly, paragraph 57 will be stricken
19 and paragraph 98 will no longer include the language "rescission
20 of the loan."
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22 Defendant argues that paragraphs 43, 124, 127, and 128
23 should be stricken from the TAC because they contain allegations
24 that were not previously pled in Plaintiffs' First Amended
25 Complaint ("FAC"). In granting leave to amend the complaint, the
26 Court did not authorize Plaintiffs to include new allegations of
27 RESPA violations in the TAC, and therefore, according to
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1 Defendant, the paragraphs must be removed from the TAC.

2 Plaintiffs argue that the references deal with RESPA section
3 2605, and therefore should not be stricken from the complaint.

4 The allegations at issue were added to Plaintiffs' RESPA
5 claim, which was a claim that the Court did not dismiss. When
6 the Court granted leave to amend the FAC, it was the Court's
7 intention to grant Plaintiffs leave to amend only those claims
8 that had been dismissed without prejudice. It was not the
9 Court's intention to allow Plaintiffs to amend the RESPA claim
10 that was not dismissed. However, this matter is still in the
11 early pleading stages, and Defendants have not shown that they
12 are prejudiced by the added allegations. Accordingly, paragraphs
13 43, 124, 127, and 128 will not be stricken from the TAC.
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17 D. Plaintiffs' Request to File a Fourth Amended Complaint

18 As part of Plaintiffs' Opposition to the Motion to Dismiss,
19 Plaintiffs request leave to file a Fourth Amended Complaint,
20 pursuant to Federal Rule of Civil Procedure 15(a). Plaintiffs
21 attached a proposed Fourth Amended Complaint, which contains
22 only TILA and RESPA claims against all defendants.
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24 Federal Rule of Civil Procedure 15(a)(2) states that a
25 party may amend its pleading only with the opposing party's
26 written consent or the court's leave, and the court should
27 freely give leave when justice so requires. Additionally, in
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1 this case a Pre-Trial Scheduling Order has been issued (Doc.
2 #38), which states that no further amendment of the pleadings is
3 allowed without good cause and leave of the Court.

4 Defendant opposes Plaintiffs' request to file a Fourth
5 Amended Complaint, pointing out that Plaintiffs have now had
6 numerous opportunities to plead their claims. In this case, the
7 Fourth Amended Complaint would be Plaintiffs' fifth attempt to
8 plead their claims. Defendant has had to expend time and
9 resources defending itself against each amended complaint. The
10 Court finds that Plaintiffs have not shown good cause to file a
11 Fourth Amended Complaint. Indeed, the Court notes that the
12 proposed Fourth Amended Complaint contains a TILA rescission
13 claim, one that Plaintiffs have already conceded is not a valid
14 claim. Accordingly, Plaintiffs' request to file a Fourth Amended
15 Complaint is denied. The TAC will remain the operative complaint
16 in this case.

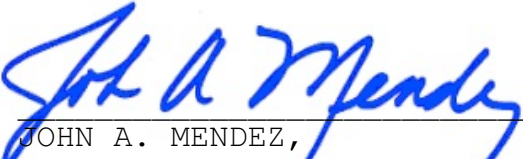
21 III. ORDER

22 As set forth above, it is hereby ordered that Defendant's
23 Motion to Dismiss is GRANTED, WITH PREJUDICE. Defendant's Motion
24 to Strike is GRANTED in part and DENIED in part. Paragraph 57
25 and the words "rescission of the loan" from paragraph 98 shall
26 be stricken. Paragraphs 43, 124, 127, and 128 shall not be
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1 stricken from the TAC. Plaintiffs request to file a Fourth
2 Amended Complaint is DENIED.

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4 IT IS SO ORDERED.

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7 Dated: June 3, 2010

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10 JOHN A. MENDEZ,
11 UNITED STATES DISTRICT JUDGE
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