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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CHAE CHON and YUNG CHON,  
Plaintiffs,

No. 2:10-cv-00509-MCE-KJM

v.

MEMORANDUM AND ORDER

DOWNEY SAVINGS AND LOAN  
ASSOCIATION, F.A.; CENTRAL  
MORTGAGE COMPANY and DOES 1  
through 100, inclusive,  
Defendants.

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This action arises out of a mortgage loan transaction in which Plaintiffs Chae Chon and Yung Chon ("Plaintiffs") refinanced their home in August 2005. Presently before the Court is a Motion by Defendant Central Mortgage Company ("Defendant") to Dismiss Plaintiffs' Complaint for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Also before the Court is Defendant's Motion to Expunge Lis Pendens. For the reasons set forth below, Defendant's Motion to Dismiss is granted and Motion to Expunge Lis Pendens is denied.

1 **BACKGROUND<sup>1</sup>**

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3 As indicated in the Deed of Trust, on or about August 22,  
4 2005, Plaintiffs entered into a loan agreement for \$316,000.00  
5 secured by property at 8180 Rama Court, Sacramento, California.<sup>2</sup>  
6 Downey Savings and Loan Association served as the lender.  
7 Defendant is the successor-in-interest.

8 Plaintiffs later defaulted on the loan. On May 29, 2009, a  
9 Notice of Default was recorded by Trustee Corps as agent for the  
10 beneficiary. A Notice of Trustee's Sale was recorded on  
11 November 30, 2009. Plaintiffs subsequently filed suit and  
12 recorded a lis pendens against the property on February 2, 2010.

13 Plaintiffs allege that the proceedings surrounding the loan  
14 agreement were tainted by fraud and that Defendant failed to  
15 comply with a host of federal and state laws including the Truth  
16 in Lending Act ("TILA"), the Real Estate Settlement Procedures  
17 Act ("RESPA"), California's Rosenthal Fair Debt Collection  
18 Practices Act ("RFDCPA"), negligence, Fraud, violation of Business  
19 and Professions Code §17200, Breach of Fiduciary Duty, Breach of  
20 Contract, and Breach of the Covenant of Good Faith and Fair  
21 Dealing. Plaintiffs seeks both damages and rescission of the  
22 mortgage loan.

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24 <sup>1</sup> The factual assertions in this section are based on the  
25 allegations in Plaintiffs' Complaint unless otherwise specified.

26 <sup>2</sup> Documents not physically attached to a complaint can  
27 nonetheless be considered in ruling on a 12(b)(6) motion if the  
28 complaint refers to such documents, the documents are central to  
the plaintiff's claims, and there is no question regarding the  
authenticity of the documents. Branch v. Tunnell, 14 F.3d 449,  
454 (9th Cir. 1994).



1 In order to "state a claim for relief that is plausible on its  
2 face," Aschroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting  
3 Twombly, 550 U.S. at 570), plaintiff must plead "factual content  
4 that allows the court to draw the reasonable inference that the  
5 defendant is liable for the misconduct alleged." Id. at 1949.  
6 "The plausibility standard is not akin to a probability  
7 requirement, but is asks for more than a sheer possibility that a  
8 defendant has acted unlawfully." Id. at 1949 (internal citation  
9 and quotation omitted).

10 If the court grants a motion to dismiss a complaint, it must  
11 then decide whether to grant leave to amend. The court should  
12 "freely give[]" leave to amend when there is no "undue delay, bad  
13 faith[,] dilatory motive on the part of the movant,...undue  
14 prejudice to the opposing party by virtue of...the amendment,  
15 [or] futility of the amendment...." Fed. R. Civ. P. 15(a); Foman  
16 v. Davis, 371 U.S. 178, 182 (1962). Generally, leave to amend is  
17 only denied when it is clear that the deficiencies of the  
18 complaint cannot be cured by amendment. DeSoto v. Yellow Freight  
19 Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

#### 20

#### 21 **B. Motion to Expunge Lis Pendens**

#### 22

23 "A lis pendens is recorded by someone asserting a real  
24 property claim, to give notice that a lawsuit has been filed  
25 which may, if that person prevails, affect title to possession of  
26 the real property described in the notice." Federal Deposit Ins.  
27 Corp. V. Charlton, 17 Cal. App. 4th 1066, 1069 (1993) (citing  
28 Cal. Code Civ. Pro. §§ 405.2, 405.4, 405.20).

1 Once filed, a lis pendens prevents the transfer of that property  
2 until the litigation is resolved or the lis pendens is expunged.  
3 BGJ Assoc., LLC v. Superior Court of Los Angeles, 75 Cal. App.  
4 4th 952, 966-67 (1999). The lis pendens shall be expunged if the  
5 pleading on which the lis pendens is based does not contain a  
6 real property claim or the evidence fails to establish by a  
7 preponderance of evidence the probable validity of the real  
8 property claims. Orange County v. Hongkong and Shanghai Banking  
9 Corp. Ltd., 52 F.3d 821, 823-24 (9th Cir. 1995).

10 To constitute a "real property claim" the cause of action,  
11 if meritorious, must affect the right of possession of specific  
12 real property or affect the title to the specific real property.  
13 Cal. Code Civ. Pro. § 405.4. The "probable validity" standard  
14 means "it is more likely than not that the claimant will obtain a  
15 judgment against the defendant on the claim." Id. at § 405.3.

## 17 ANALYSIS

### 18 A. Motion to Dismiss under Rule 12(b)(6)

#### 19 1. TILA

20  
21 Plaintiffs seeks to rescind their loan and recover damages  
22 pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. § 1600  
23 et. seq., alleging that they were not provided material  
24 disclosures regarding the loan as required under TILA. Defendant  
25 argues that Plaintiffs' claim for TILA violations is time-barred.  
26 Under TILA, civil damages are subject to a one-year statute of  
27 limitations and claims for rescission have a three-year statute  
28 of limitations when material disclosure are not provided.

1 See 15 U.S.C §§ 1640(e), 1635(f). Plaintiffs' loan closed on  
2 approximately August 22, 2005, triggering a statute of  
3 limitations for damages that expired August 22, 2006 and a  
4 statute of limitations for rescission that expired August 22,  
5 2008. Plaintiffs, however, did not file suit until February 2,  
6 2010.

7 To save their claim, Plaintiffs argue that equitable tolling  
8 should apply to suspend the statutes of limitations. The Ninth  
9 Circuit has held that "the doctrine of equitable tolling may, in  
10 appropriate circumstances, suspend the limitations period until  
11 the borrower discovers or had reasonable opportunity to discover  
12 the fraud or nondisclosures that form the basis of the TILA  
13 action." King v. State of California, 784 F.2d 910, 915 (9th  
14 Cir. 1986). In determining justifiable application of the  
15 equitable tolling doctrine, a court "focuses on excusable delay  
16 by the plaintiff." Johnson v. Henderson, 314 F.3d 409, 414 (9th  
17 Cir. 2002). To establish excusable delay, the plaintiff must  
18 show "fraudulent conduct by the defendant resulting in  
19 concealment of the operative facts, failure of the plaintiff to  
20 discover the operative facts that are the basis of his cause of  
21 action within the limitations period, and due diligence by the  
22 plaintiff until discovery of those facts." Federal Election  
23 Com'n v. Williams, 104 F.3d 237, 240-41 (9th Cir. 1996).

24 Here, Plaintiffs have failed to exhibit the requisite due  
25 diligence necessary to warrant application of the equitable  
26 tolling doctrine. Plaintiffs argue that the alleged TILA  
27 violations by Defendant "were all discovered within the past year  
28 such that any applicable statute of limitations are extended."

1 This conclusory statement is insufficient to invoke the Court's  
2 equitable protection. Plaintiffs have failed to show any  
3 concealment of facts by the Defendant or any level of inquiry on  
4 their own part within the time frame provided by Congress.

5 Equitable tolling will not be applied, and thus the statute  
6 of limitations period has run. Defendant's Motion to Dismiss  
7 Plaintiffs' TILA claim is GRANTED.

8  
9 **2. RESPA**

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11 In response to Defendant's Motion to Dismiss their RESPA  
12 claim, Plaintiffs only request leave to amend. (Pl.'s Opp. 5:14-  
13 15). Resultantly, Defendant's Motion to Dismiss Plaintiffs'  
14 RESPA claim is granted.

15  
16 **3. Plaintiffs' Remaining Causes of Action**

17  
18 Having failed to successfully allege a federal claim, with  
19 only Plaintiffs' state law claims remaining, this Court ceases to  
20 have subject matter jurisdiction over the suit. The Court  
21 declines to exercise its supplemental jurisdiction over the  
22 remaining state causes of action and they are dismissed without  
23 prejudice.

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1           **B.     Motion to Expunge Lis Pendens**

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3           A recorded lis pendens may only be expunged if the pleading  
4 on which the lis pendens is based does not contain a real  
5 property claim, or if the evidence fails to establish the  
6 probable validity of the real property claims. Orange Cnty.,  
7 52 F.3d at 823-24. Plaintiffs' claims for violation of TILA,  
8 fraud, breach of contract, and breach of the covenant of good  
9 faith and fair dealing are causes of action which might  
10 constitute "real property claim[s]", as their validity may affect  
11 the right of possession or title to the property.

12           The Court finds that at the motion to dismiss stage, when  
13 Plaintiffs' allegations of fact must be accepted as true, it is  
14 not yet possible to make a finding by a preponderance of the  
15 evidence that Plaintiffs' real property claims are probably valid  
16 or not. Regardless of whether these claims are ultimately  
17 meritorious, there is an action currently pending which might  
18 affect title to the real property. A lis pendens, being a  
19 "notice of pending action", exists primarily as a signal to the  
20 world that a suit has been filed regarding the property, so as to  
21 ensure that there will not be a bona fide purchaser for value  
22 without notice. A ruling that would expunge such notification  
23 appropriately requires further litigation than has yet occurred  
24 here.

25           Accordingly, Defendant's Motion to Expunge Lis Pendens is  
26 denied without prejudice. Defendant is free to re-file said  
27 motion as circumstances merit.

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1 **CONCLUSION**

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3 For the reasons stated above, Defendant's Motion to Dismiss  
4 Plaintiffs' Complaint (ECF No. 11) is GRANTED with leave to  
5 amend. Defendant's Motion to Expunge Lis Pendens is DENIED.<sup>3</sup>

6 Plaintiffs may file an amended complaint not later than  
7 twenty (20) days after the date this Memorandum and Order is  
8 filed electronically. If no amended complaint is filed within  
9 said twenty (20)-day period, without further notice, Plaintiffs'  
10 claims against Defendant will be dismissed without leave to  
11 amend.

12 IT IS SO ORDERED.

13 Dated: August 20, 2010

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16 MORRISON C. ENGLAND, JR.  
17 UNITED STATES DISTRICT JUDGE  
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27 <sup>3</sup> Because oral argument will not be of material assistance,  
28 the Court orders this matter submitted on the briefs. E.D. Cal.  
Local Rule 230 (g).