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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOY AND DANTE GUINTO,  
individuals,

NO. CIV. S-11-372 LKK/GGH

Plaintiffs,

v.

WELLS FARGO BANK, a National  
Association; and DOES 1  
through 50, inclusive,

O R D E R

Defendants.

\_\_\_\_\_ /

**INTRODUCTION**

This case is one more of the many cases arising from a home foreclosure. According to the First Amended Complaint, defendant Wells Fargo Bank violated the Truth in Lending Act, 15 U.S.C. §§ 1601, et seq., in connection with two loans it extended to plaintiffs. Those loans were secured by plaintiffs' property, and eventually went into default. The property was subsequently foreclosed upon and sold at auction.



1 containing eleven (11) exhibits. See Dkt. No. 18 (referring back  
2 to the original Request for Judicial Notice, Dkt. No. 10).  
3 Defendant accordingly asks the court to look beyond the  
4 complaint's allegations.

5 A court may "take judicial notice of matters of public  
6 record outside the pleadings," and consider them for purposes of  
7 the motion to dismiss.<sup>1</sup> Mir v. Little Co. of Mary Hosp.,  
8 844 F.2d 646, 649 (9th Cir. 1988), quoting MGIC Indem. Corp. v.  
9 Weisman, 803 F.2d 500, 504 (9th Cir. 1986). The matters  
10 considered should be "generally known," or "capable of accurate  
11 and ready determination by resort to sources whose accuracy  
12 cannot reasonably be questioned." Fed. R. Evid. 201(f); U.S. v.  
13 Camp, 723 F.2d 741, 744 (9th Cir. 1984) (taking judicial notice  
14 of a public record, "verifiable with certainty").

15 Having reviewed the exhibits, the court takes judicial  
16 notice of the following: **(i)** Exhibit A (Dkt. No. 10-1), which  
17 includes a Deed of Trust securing a \$555,000 adjustable rate loan  
18 from Wells Fargo Bank to the plaintiffs, executed October 24,  
19 2005; **(ii)** Exhibit B (Dkt. No. 10-3), which includes a Deed of  
20 Trust (With Future Advance Clause), securing a \$111,000 loan (or  
21 line of credit) from Wells Fargo Bank to plaintiffs, executed  
22 January 20, 2006; and **(iii)** Exhibit C (Dkt. No. 10-44), which  
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24 <sup>1</sup> Indeed, in a Rule 12(b)(6) motion, the court may reject  
25 allegations of the complaint that contradict matters properly  
26 subject to judicial notice or by exhibit. Sprewell v. Golden  
State Warriors, 266 F.3d 979 (9th Cir. 2001), citing Mullis v.  
United States Bankr. Ct., 828 F.2d 1385, 1388 (9th Cir. 1987).

1 includes two documents, each entitled "Notice of Default and  
2 Election To Sell Under Deed of Trust," in respect to the two  
3 above-referenced loans, dated September 10, 2009.

4 The documents in these exhibits purport to be recorded in  
5 the official records of Solano County. Plaintiffs have not  
6 disputed that the documents are what defendant says they are,  
7 that they are authentic, or that Exhibits A and B were signed by  
8 plaintiffs. See Daniels-Hall v. National Educ. Ass'n, 629 F.3d  
9 992, 998-999 (9th Cir. 2010) (taking judicial notice where  
10 neither party disputed the accuracy of the information).  
11 Defendant's remaining exhibits are not necessary to the court's  
12 decision and are not further considered.

13 **1. The Loans at Issue**

14 On or about October 24, 2005, Wells Fargo Bank extended a  
15 \$555,000 variable rate refinancing loan (the "Primary Loan") to  
16 plaintiffs. First Amended Complaint ("FAC") ¶ 28 & Exh. A (Dkt.  
17 No. 13);<sup>2</sup> RfJN Exh. A. The loan was secured by a Deed of Trust  
18 against plaintiffs' home ("the property"). RfJN Exh. A. This  
19 loan was made after a Wells Fargo representative contacted  
20 plaintiffs about extending this loan to them. FAC ¶ 34. The  
21 representative indicated that plaintiffs were properly qualified  
22 for the loan, FAC ¶ 17, even though Wells Fargo did not verify

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26 <sup>2</sup> Plaintiff has attached a "Deeds History" to the  
complaint, as permitted by Fed. R. Civ. P. 10(c).

1 plaintiffs' financial situation.<sup>3</sup> FAC ¶ 35. Instead, Wells  
2 Fargo "qualified" plaintiffs "with disregard to the obvious  
3 [financial] limitations of the Plaintiffs," including their  
4 limited equity in the home, their age, expected income and  
5 obligations and employment status.<sup>4</sup> FAC ¶ 25.

6 In February 2006, plaintiffs took out an additional \$111,000  
7 loan ("Home Equity Line of Credit") from Wells Fargo, also  
8 secured by a Deed of Trust against their home (the "Secondary  
9 Loan").<sup>5</sup> FAC ¶¶ 30 & Exh. A; RfJN Exh. B.

10 The Primary Loan carried an initial interest rate of 5.625%,  
11 which lasted for five years. RfJN Exh. A. Thereafter the rate  
12 could change every twelve (12) months. FAC ¶ 28; RfJN Exh. A.  
13 The Wells Fargo representative promised plaintiffs that they  
14 could refinance the note in five years "with no problems." FAC  
15 ¶ 34.

16 In extending both loans, Wells Fargo failed to clearly and  
17 conspicuously make the following disclosures: (1) "how much and  
18 how soon the interest rate and monthly payment would increase  
19  
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21 <sup>3</sup> For purposes of this Rule 12(b)(6) motion only, the court  
22 will describe the allegations of the complaint assuming them to  
be true.

23 <sup>4</sup> In certain circumstances, Regulation Z prohibits lenders  
24 from extending credit "without regard to the consumer's  
25 repayment ability as of consummation . . . ." 12 C.F.R.  
§§ 226.34(a) & 226.35(b)(1).

26 <sup>5</sup> The complaint refers to the loans collectively as the  
Subject Loan, with an outstanding balance of \$667,000.

1 after the teaser rate expired;"<sup>6</sup> (2) "whether stated monthly  
2 payments included amounts due for insurance and taxes;"<sup>7</sup> and  
3 (3) "closing costs and fees."<sup>8</sup> FAC ¶ 19. Wells Fargo failed  
4 entirely to disclose "the true costs and risks associated with  
5 refinancing after the interest rate adjusted."<sup>9</sup> FAC ¶ 19.

## 6 **2. Subsequent Events**

7 After the loan was extended, plaintiffs' loan payments were  
8 not properly credited to their account.<sup>10</sup> At some unspecified  
9 point, plaintiffs suffered a "financial hardship," and stopped  
10 making payments on the loan. FAC ¶ 36. In August 2008,  
11 plaintiffs applied to Wells Fargo for a "loan modification." FAC  
12 ¶ 40. Plaintiffs applied again in February 2009, this time using  
13 a "professional intermediary." FAC ¶ 43. In late 2009, Wells  
14 Fargo "officially denied" plaintiffs a loan modification. FAC  
15 ¶ 42. "[R]oughly five years" after obtaining the loans,  
16 plaintiffs talked to defendant's representative about  
17 ///

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18  
19 <sup>6</sup> Regulation Z requires full disclosure - including a  
20 specific format for the disclosure - of the circumstances under  
21 which the rate could change. 12 C.F.R. § 226.18(s).

22 <sup>7</sup> Regulation Z requires disclosure of the amount financed,  
23 and an itemization of that amount. 12 C.F.R. § 226.18(b) & (c).

24 <sup>8</sup> Regulation Z requires disclosure of all non-exempt  
25 finance charges. 12 C.F.R. § 226.18(d).

26 <sup>9</sup> Regulation Z sets forth the required interest rate  
disclosures for variable rate loans. 12 C.F.R. § 226.19(b).

<sup>10</sup> Regulation Z prohibits the failure to timely credit the  
borrower's payments to the loan account, 12 C.F.R.  
§ 226.36(c)(i).

1 refinancing. FAC ¶ 38. Defendant's representative "flatly  
2 refused to refinance." FAC ¶ 38.

3 On or about September 10, 2009, Notices of Default were  
4 recorded on the property. FAC ¶ 44. Each Notice of Default  
5 stated that the properties would be sold to satisfy the loan  
6 obligations. RfJN Exhibit C. On or about December 11, 2009, "a  
7 Notice of Trustee's Sale was recorded in the office of [the]  
8 Solano County Recorder" in respect to the property. FAC ¶ 45.  
9 The Notice stated the Trustee's intention "to sell the Subject  
10 Property at public auction" on August 6, 2010. Id.

11 In early 2010, plaintiffs apparently made another  
12 application for a loan modification, which was denied in July  
13 2010. FAC ¶¶ 46 & 47. On August 5, 2010, plaintiffs filed a  
14 Chapter 13 bankruptcy petition. FAC ¶ 50. The sale nevertheless  
15 proceeded on August 6, 2010, the property was sold to US Bank  
16 National Association, and that entity held title to the property  
17 as of the date the FAC was filed.<sup>11</sup> FAC ¶ 51-53.

18 **B. Procedural History**

19 Plaintiffs initially filed suit in state court on  
20 December 6, 2010, almost five (5) years after they obtained the  
21 last loan from Wells Fargo on which the lawsuit is based. The  
22 complaint asserted a federal Truth in Lending Act claim, and  
23 state law claims against Wells Fargo Bank ("Wells Fargo"),

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24  
25 <sup>11</sup> Defendant has submitted documents in its Request for  
26 Judicial Notice which it says disproves these last allegations.  
It is not necessary to resolve this issue here, and the court  
does not do so.

1 JPMorgan Chase Bank and Bank of America. JPMorgan Chase Bank was  
2 dismissed without prejudice in the state court on February 7,  
3 2011.

4 On February 9, 2011, Wells Fargo removed the case to federal  
5 court, pursuant to 28 U.S.C. § 1441(b). On March 17, 2011,  
6 plaintiffs filed their First Amended Complaint in this court,  
7 which named only Wells Fargo as a defendant.<sup>12</sup> Wells Fargo moved  
8 to dismiss the First Amended Complaint on March 31, 2011.

9 Among other bases for dismissal, Wells Fargo asserts that  
10 the TILA damages claim was barred by the applicable one-year  
11 statute of limitations set forth at 15 U.S.C. § 1640(e), and that  
12 the rescission claim was barred by the three-year period set  
13 forth at 15 U.S.C. § 1635(f). Plaintiffs argue that equitable  
14 tolling prevents the complaint from being time-barred.

15 **II. ANALYSIS**

16 The Truth in Lending Act provides a private right of action  
17 for damages against a creditor "who fails to comply" with any of  
18 its requirements. 15 U.S.C. § 1640(a). It also provides a  
19 rescission remedy in some circumstances. 15 U.S.C. § 1635(f).

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23 <sup>12</sup> Plaintiffs also allege claims under the California  
24 Business and Professions Code (Section 17200, *et seq.*), as well  
25 as what appear to be state law claims for fraud, breach of the  
26 implied covenant of good faith and fair dealing, conversion,  
breach of fiduciary duty, breach of loan contracts, negligence,  
predatory lending, misrepresentation, wrongful disclosure, quiet  
title, and declaratory relief.



1           However, the Act also imposes a one year statute of  
2 limitations for civil damages claims. 15 U.S.C. § 1640(e).<sup>13</sup>  
3 The limitations period "runs from the date of consummation of the  
4 transaction." King v. California, 784 F.2d 910, 915 (9th Cir.  
5 1986). And it creates a three-year statute of repose for the  
6 rescission remedy. 15 U.S.C. § 1635(f).<sup>14</sup>

7 **A. Failure To State a Claim**

8           Defendant half-heartedly argues that plaintiffs have failed  
9 to state a claim for relief under TILA, stating: "it is wholly  
10 inadequate for the Guintos to allege merely that they 'relied on  
11 statements by the Defendants to their detriment,'" and noting  
12 that TILA is a "'complex law with different kinds of disclosure  
13 requirements.'" It is true that the First Amended Complaint is  
14 not a model of clear and concise pleading. To the contrary, the  
15 complaint scatters allegations throughout its "Factual" section  
16 with little apparent concern for chronology or clarity.  
17 Plaintiffs then incorporate all of these allegations wholesale  
18 into to TILA claim, without setting forth which facts apply to  
19 the TILA claim, nor which parts of TILA are implicated by those  
20 allegations.

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22  
23 <sup>13</sup> "Any action under this section may be brought ... within  
24 one year from the date of the occurrence of the violation."  
25 15 U.S.C. § 1640.

26 <sup>14</sup> "An obligor's right of rescission shall expire three  
years after the date of consummation of the transaction."  
15 U.S.C. § 1635.

1 It is doubtful that this "Where's Waldo?" manner of pleading  
2 could satisfy the "short and plain statement" requirement of  
3 Fed. R. Civ. P. 8(a). However, the one thing about the complaint  
4 that is plain and clear on its face, is that it was filed nearly  
5 five years after the facts alleged took place. If the complaint  
6 is in fact time-barred, judicial economy counsels against  
7 requiring plaintiff to plead more sensibly, or hunting down the  
8 relevant allegations of the complaint and matching them up to  
9 relevant TILA provisions.

10 **B. The TILA Claims Are Time-Barred**

11 **1. Standard for a Motion to Dismiss Based on the Statute**  
12 **of Limitations**

13 A claim may be dismissed under Fed. R. Civ. P. 12(b)(6) on  
14 the ground that it is barred by the applicable statute of  
15 limitations only when "the running of the statute is  
16 apparent on the face of the complaint." Huynh v. Chase  
17 Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006).

18 Von Saher v. Norton Simon Museum of Art, 592 F.3d 954, 969 (9th  
19 Cir. 2010).

20 In making the above determinations, the court considers  
21 the complaint "in its entirety," as well as "documents  
22 incorporated into the complaint by reference, and matters of  
23 which a court may take judicial notice." TellLabs, Inc. v. Makor  
24 Issues & Rights, Ltd., 551 U.S. 308, 322-23 (2007).

25 Because the statute of limitations is an affirmative  
26 defense, however, its invocation in the context of a motion to

1 dismiss raises specific concerns, especially where, as here, the  
2 plaintiff raises an equitable tolling argument. Champlaie v. BAC  
3 Home Loans Servicing, LP, 706 F. Supp.2d 1029, 1052-1053 (E.D.  
4 Cal. 2009). If the face of the complaint demonstrates that the  
5 limitations period has run, but that period is subject to  
6 equitable tolling, a dismissal motion generally cannot be  
7 granted. "Generally, the applicability of equitable tolling  
8 depends on matters outside the pleadings, so it is rarely  
9 appropriate to grant a Rule 12(b)(6) motion to dismiss ... if  
10 equitable tolling is at issue." Huynh v. Chase Manhattan Bank,  
11 465 F.3d 992, 1003-04 (9th Cir. 2006) (citing Supermail Cargo,  
12 Inc. v. United States, 68 F.3d 1204, 1206 (9th Cir. 1995)).  
13 Indeed, the motion must be denied if "the complaint, liberally  
14 construed in light of our 'notice pleading' system, adequately  
15 alleges facts showing the potential applicability of the  
16 equitable tolling doctrine." Cervantes v. City of San Diego,  
17 5 F.3d 1273, 1277 (9th Cir. 1993); see also, Morales v. City of  
18 Los Angeles, 214 F.3d 1151, 1153 (9th Cir. 2000).<sup>15</sup>

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19  
20 <sup>15</sup> Because equitable tolling turns on matters outside of the  
21 pleadings, the Supreme Court's recent decisions in Bell Atlantic  
22 Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal,  
23 556 U.S. \_\_\_, 129 S. Ct. 1937 (2009) which concerned the  
24 requirements of Fed. R. Civ. P. 8, do not provide a reason to  
25 revisit this rule. Although the Ninth Circuit has not discussed  
26 the rule since Twombly was decided, this and other courts have  
continued to follow it. See, e.g., Champlaie, 706 F. Supp.2d at  
1052-53; Mendoza v. Wilmington Finance, 2011 WL 2182914 at \*3  
(N.D. Cal. June 6, 2011); Wende v. Countrywide Home Loans, Inc.  
2011 WL 1002193 at \*3 (S.D. Cal. March 21, 2011); Nava v.  
VirtualBank, 2008 WL 2873406, 2008 U.S. Dist. LEXIS 72819  
(E.D. Cal. July 16, 2008) (Damrell, J).

1           **1. The Lawsuit Was Filed Five Years After the Alleged**  
2           **Violations Occurred.**

3           According to the complaint and matters subject to Judicial  
4 Notice, defendants extended loans to plaintiffs no later than  
5 October 24, 2005 and January or February 2006. FAC ¶ 28 (Primary  
6 Loan); Exhibit B (Dkt No. 10-3) (Secondary Loan). Plaintiffs  
7 first filed suit in state court in December 2010, nearly five (5)  
8 years after the second loan was extended, and well outside the  
9 limitations period.

10          Plaintiff argues that the complaint is not time-barred  
11 because the "ramifications" of defendant's alleged TILA violation  
12 - the plaintiff's alleged loss of their home through a Trustee  
13 Sale - did not occur until August 6, 2010, less than one year  
14 before the complaint was filed. This argument fails because the  
15 one-year TILA limitations period commences on the date of the  
16 violation. 15 U.S.C. 1640(e). Plaintiffs cite no authority, and  
17 the court is aware of none, for the proposition that the  
18 limitations period commences on the date of the "final  
19 ramification" of a TILA violation.

20          Unless the commencement of the limitations period can be  
21 suspended or "tolled" until December 2009 therefore, the TILA  
22 claims are barred by the statute of limitations.

23           **2. Equitable Tolling of the TILA One-Year Limitations**  
24           **Period.**

25          The Section 1640(e) one-year limitations period is subject  
26 to "equitable tolling" in appropriate circumstances. King v.

1 California, 784 F.2d at 915. This tolling is appropriate where  
2 the plaintiff had an "excusable ignorance" of the limitations  
3 period, and no prejudice will result to defendant. See Naton v.  
4 Bank of California, 649 F.2d 691 (9th Cir. 1981). When equitable  
5 tolling applies, the limitations period is suspended "until the  
6 borrower discovers or had reasonable opportunity to discover the  
7 fraud or nondisclosures that form the basis of the TILA action."  
8 King v. California, 784 F.2d at 915; see also, Hubbard v.  
9 Fidelity Federal Bank, 91 F.3d 75, 79 (9th Cir. 1996) (rejecting  
10 tolling argument because "nothing prevented Hubbard from  
11 comparing the loan contract, Fidelity's initial disclosures, and  
12 TILA's statutory and regulatory requirements").

13       The Ninth Circuit has held (in non-TILA cases) that  
14 dismissal was appropriate where "it [was] clear that [plaintiffs]  
15 have had the information necessary to bring suit ... for many  
16 years," and plaintiffs did not argue that "extraordinary  
17 circumstances beyond [their] control made it impossible to file  
18 the claims on time." Lien Huynh, 465 F.3d at 1004. Conversely,  
19 dismissal was inappropriate where plaintiff alleged both "that it  
20 did not discover" the defendant's alleged wrongdoing until soon  
21 before the claim was filed and that plaintiff's "failure to  
22 discover the [wrongdoing] earlier was not due to [plaintiff's]  
23 lack of diligence, but rather to the [defendant]'s deliberate  
24 failure to provide [plaintiff] with accurate information."  
25 Supermail Cargo, 68 F.3d at 1208; see also Cervantes, 5 F.3d at  
26 1277 (reversing dismissal).

1 Here, the First Amended Complaint contains no allegations  
2 acknowledging the existence of a statute of limitations problem,  
3 nor any allegations specifically raising the possibility of  
4 equitable tolling. Nevertheless, plaintiffs' opposition brief  
5 argues that the limitations period should be equitably tolled.

6 **a. Alleged Misrepresentations and failure to credit**  
7 **payments.**

8 The issue of tolling is at least touched upon by two sets of  
9 allegations in the complaint, namely the allegations that  
10 defendant made misrepresentations to plaintiffs and that  
11 defendant failed to properly credit plaintiffs' payments to their  
12 account. The allegations are that defendant's representative  
13 "promised that in five years, Plaintiffs could refinance again  
14 'with no problems;'" defendant indicated that plaintiffs were  
15 qualified for the loan when they were not; defendant made the  
16 loan without considering plaintiffs' ability to repay; and  
17 defendant didn't credit plaintiffs' payments to their account.

18 Even assuming that each of these allegations is true, they  
19 are not supported by any allegations or inferences that  
20 plaintiffs did not discover these things despite their due  
21 diligence. To the contrary, the complaint shows that plaintiffs  
22 were unable to make their loan payments by 2008. In this  
23 context, due diligence means that plaintiffs were at that point  
24 required to investigate to find out why they could no longer  
25 afford the loan they were told they were qualified for, and which  
26 would be easily refinanced. And, by September 10, 2010, a Notice

1 of Default was placed on their loan, giving them clear notice  
2 that they were behind on their payments. That would be the time  
3 that due diligence required plaintiffs to check to make sure that  
4 all their payments had been credited to their account. Nothing  
5 in the complaint, or even their opposition brief, indicates that  
6 they ever did so.<sup>16</sup>

7 Finally, there is the representative's promise that  
8 plaintiffs could refinance after five years. Plaintiff's problem  
9 here is that they had reason to know that they were not going to  
10 get the refinancing, at the latest, when defendant filed a Notice  
11 of Default against them in September 2009.<sup>17</sup> Therefore, even if  
12 the statement was a falsehood actionable under TILA,<sup>18</sup> plaintiffs  
13 knew it was false more than a year before they filed suit.  
14 Through the exercise of due diligence, they would have discovered

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15  
16 <sup>16</sup> In other words, if plaintiffs thought they had an  
17 affordable loan, whose terms they could meet, then they were on  
18 notice that they were mistaken - or had been lied to - when, in  
19 2008, they defaulted on the loan.

20 <sup>17</sup> In fact, if defendant lied to plaintiffs about being able  
21 to refinance, plaintiffs had all the facts they needed to know  
22 it was false in 2009, when they had already defaulted on their  
23 loan, and they were denied a loan modification. FAC ¶ 38.

24 <sup>18</sup> The complaint does not appear even to allege that the  
25 promise was false. According to plaintiffs, the Wells Fargo  
26 representative promised that refinancing could occur in five  
years. Plaintiffs allege that they applied for a loan  
"modification" after only three years, in 2008, after they were  
already in default. They also allege that they applied for a  
refinancing after five years, long after they had stopped making  
their payments. An alleged statement that plaintiffs would be  
able to refinance in five years cannot reasonably be construed  
to be a statement that they would be able to get a loan  
"modification" in three years, or to refinance after five, even  
after they have defaulted on their loan.

1 the alleged TILA violation when they could no longer make the  
2 required payments, or when they were forced to apply for a loan  
3 modification, or when the modification request was denied, or at  
4 the latest, when defendant filed a Notice of Default against  
5 their home on September 10, 2009 for failure to make required  
6 payments.

7 **b. New allegations.**

8 Plaintiffs now put forth the following new allegations, none  
9 of which can be found in, or inferred from, the complaint: "the  
10 Plaintiffs' primary language is Tagalog, and the bank never  
11 provided a translator to help explain the financial  
12 technicalities of the Subject Loan;"<sup>19</sup> "Earlier discovery of the  
13

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14 <sup>19</sup> Even if this were alleged in the complaint, it would not  
15 be a basis for tolling the limitations period, at least not as  
16 it is asserted here. Plaintiffs now claim that Tagalog is their  
17 "primary" language, but they fail to assert that they do not  
18 understand English. The case Galindo v. Financo Financial,  
19 Inc., 2008 WL 4452344 (N.D. Cal. 2008), an unpublished order  
20 cited by plaintiffs, does not support their tolling argument.  
21 In Galindo, the borrower could not read the loan documents she  
22 had signed, and instead relied on the lender's oral  
23 representation that the loan was at a fixed rate. It was not  
24 until the rate actually changed that the borrower became aware  
25 that she had been deceived, and would have to pay a higher rate  
26 than had been disclosed to her. The borrower filed her TILA  
action within one year of realizing that her new rate was not  
what she had been told it would be.

In this case, the complaint indicates that plaintiffs' interest rate had not changed by the time plaintiffs stopped making payments and defaulted. According to the complaint itself, the plaintiffs' introductory rate would not change for five (5) years, until October 2010. The complaint does not allege that the rate changed notwithstanding this provision. Accordingly, plaintiffs had all the information they needed about how much their payments were, as soon as their first payment was due, whether or not they could read the loan documents.



1 harm was unreasonable because Plaintiffs were unsophisticated  
2 consumers who relied on the expert representation of  
3 Defendant;"<sup>20</sup> "Defendant encouraged borrowers not to worry about  
4 most loan terms."<sup>21</sup> Under the applicable standard, the complaint  
5 must be dismissed - given the limitations bar apparent on the  
6 face of the complaint - unless the basis for equitable tolling  
7 can be discerned from the complaint. Accordingly, none of these  
8 new allegations can save the complaint.

9 **c. Insufficient allegations**

10 Plaintiffs also recycle in their opposition briefs the  
11 following allegations as reasons for tolling the limitations  
12 period: "the complaint alleges that Plaintiffs were never given  
13 any of the required TILA disclosures;" "Defendant failed to  
14 explain and/or disclose in a meaningful manner the terms and  
15 conditions of their loan products;" and defendant "provided  
16 incomplete or confusing information" about the loans. These are

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17  
18 <sup>20</sup> The assertion is not a basis for tolling the limitations  
19 period in any event. The TILA statute, by its nature, protects  
20 unsophisticated borrowers. Yet, the Congress in its wisdom,  
21 knowing that it would cut off unsophisticated borrowers from an  
22 otherwise meritorious damages claim, imposed a limitations  
23 period of one year. Plaintiffs, in essence are asking this  
24 court to overrule the will of the Congress, and to do so without  
25 providing the court with any reason for such an extraordinary  
26 action. The court will not do so.

23 <sup>21</sup> This also gets plaintiffs nowhere. This brand-new  
24 assertion seems to concede that plaintiffs did receive some  
25 disclosures, but indicates that they didn't know about the  
26 disclosures they had been given because defendant told them not  
to look. There is nothing in the complaint or any case law  
identified by plaintiffs or known to this court, that indicates  
that this decision to turn a blind eye was reasonable or  
sufficed to toll a statutory period of limitations.

1 simply conclusory allegations of TILA violations. They do not  
2 amount to an argument for equitable tolling.<sup>22</sup>

3 **B. The Three-Year Statute of Repose for Rescission Claims.**

4 TILA provides a right of rescission under certain  
5 circumstances, 15 U.S.C. § 1635(a), and allows three years to  
6 bring the claim, 15 U.S.C. § 1635(f). Plaintiffs here seek  
7 "rescission," FAC at 26 ¶ 6, but do not specify if they seek it  
8 under TILA or under state law. If they intend to bring it under  
9 TILA, they are barred by the three-year statute of repose, 15  
10 U.S.C. 1635(f), even if the rescission remedy applies to the  
11 types of loans plaintiffs received.<sup>23</sup> The three-year period is a  
12 statute of repose, and not subject to equitable tolling. After  
13 the three-year period, the right of rescission itself is  
14 completely extinguished, and the district court is divested of  
15 jurisdiction over the claim. Miguel v. Country Funding Corp.,

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17 <sup>22</sup> In addition, they are at least partly belied by the Trust  
18 Deeds themselves (of which this court has taken judicial  
19 notice), both of which bear plaintiffs' signatures, and both of  
which clearly set forth at least some of the disclosures which  
plaintiffs say they never received.

20 <sup>23</sup> It appears that the right of rescission does apply to the  
21 loans at issue here. It is true that rescission does not extend  
22 to "residential mortgage transactions," 15 U.S.C. § 1635(e)(1),  
Champlaine v. BAC Home Loans Servicing, LP, 706 F. Supp.2d at  
23 1042. However, a "residential mortgage transaction" is one for  
24 the "acquisition or initial construction of a home." 15 U.S.C.  
25 § 1602(w). The \$555,000 loan at issue here is alleged to be a  
26 "refinancing" by Wells Fargo of a World Savings loan, not a loan  
to buy or build a home. The \$111,000 loan is alleged to be a  
home equity loan on that same property, and thus not a loan to  
buy or build a home. Since there is no "residential mortgage  
transaction" here, the rescission remedy appears to be  
available.

1 309 F.3d 1161, 1164 -1165 (9th Cir. 2002), citing Beach v. Ocwen  
2 Federal Bank, 523 U.S. 410 (1998).


3 Because the lawsuit here was first filed well after the  
4 three-year period, there is no existing claim for rescission  
5 under TILA.

6 **III. CONCLUSION**

7 For the reasons set forth above, the Truth in Lending claims  
8 are dismissed for failure to state a claim. The damages claim is  
9 barred by the one-year statute of limitations set forth at  
10 15 U.S.C. § 1640(e), and the rescission claim is barred by the  
11 three-year statute of repose set forth at 15 U.S.C. § 1635(f).

12 Plaintiffs are Ordered to Show Cause why this court should  
13 not decline to exercise supplemental jurisdiction over their  
14 state law claims, pursuant to 28 U.S.C.A. § 1367(c)(3).<sup>24</sup>

15 DATED: June 30, 2011.

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17   
18 LAWRENCE K. KARLTON  
19 SENIOR JUDGE  
20 UNITED STATES DISTRICT COURT  
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23 <sup>24</sup> Defendant Wells Fargo has asserted diversity jurisdiction  
24 as an "alternative" basis for removal, citing 28 U.S.C. §§ 1332  
25 and 1441(b), and stating that it is a citizen of South Dakota.  
26 Dkt. No. 1 ("Notice of Removal"). In their responses to the  
OSC, the parties should address whether diversity jurisdiction  
exists in light of 28 U.S.C. § 1348 and Wachovia Bank v.  
Schmidt, 546 U.S. 303 (2006).