

\*\*E-Filed 2/23/2010\*\*

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5 **IN THE UNITED STATES DISTRICT COURT**  
6 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
7 **SAN JOSE DIVISION**

8  
9 CHERYL J. PATITO,

10 Plaintiff

11 v.

12 COUNTRYWIDE BANK, FSB; RECONTRUST  
13 COMPANY, N.A.; MORTGAGE ELECTRONIC  
14 REGISTRATION SYSTEMS, INC.; and DOES  
15 1 to 250, inclusive,

16 Defendants

Case Number C 09-04843 JF (HRL)

ORDER GRANTING MOTION TO  
DISMISS AND MOTION TO STRIKE  
PRAYER FOR ATTORNEY'S FEES  
AND PUNITIVE DAMAGES

[Re: Document No. 5]

16  
17 On May 22, 2007, Plaintiff Cheryl Patito ("Patito"), a licensed real estate agent and loan  
18 broker, Defendant's Request for Judicial Notice ("RJN") Ex. 5, 6,<sup>1</sup> entered into a loan agreement

19  
20 <sup>1</sup> Defendants make an unopposed request that the Court take judicial notice of six  
21 documents: the promissory note ("the note"), Ex. 1; deed of trust, Ex. 2; the Truth in Lending  
22 Disclosure Statement ("TILDS"), Ex. 3; the Payment Advantage Adjustable Rate Mortgage  
23 Disclosure, Ex. 4; the Loan Application, Ex. 5; and records of the California Department of Real  
24 Estate establishing Patito's status as a licensed broker in California, Ex. 6. Under the  
25 incorporation by reference doctrine, the Court may consider "documents whose contents are  
26 alleged in a complaint and whose authenticity no party questions, but which are not physically  
27 attached to the pleading." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th  
28 Cir.1999), quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994) (alteration in original);  
*see also In re Stac Elcs. Sec. Litig.*, 89 F. 3d 1399, 1405 n.4 (9th Cir. 1996) (noting that complete  
copies of documents whose contents are alleged in the complaint may be considered in  
connection with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)). Accordingly, the  
Court takes judicial notice of these documents.

Moreover, "it is proper for the [Court] to 'take judicial notice of matters of public record  
outside the pleadings' and consider them for purposes of the motion to dismiss." *Mir v. Little*

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ORDER GRANTING MOTION TO DISMISS AND MOTION TO STRIKE PRAYER FOR ATTORNEY'S FEES AND  
PUNITIVE DAMAGES

(JFLC1)

1 with Defendant Countrywide in the amount of \$487,500.00, secured by real property located at  
2 1369 Glacier Drive, Milpitas, CA 95035 (“ the Property”). Complaint ¶¶ 1, 8, 9, Ex. A (Deed of  
3 Trust); D. RJN Exs. 1, 2. Patito does not allege that the Property is her primary residence. The  
4 loan application lists three properties Patito owns and indicates that the purpose of the loan at  
5 issue here was to refinance an investment property. RJN Ex. 5 at 1, 3.

6 Patito alleges that Defendants failed to disclose clearly and conspicuously in the Loan  
7 Documents the actual interest rate, the actual amounts financed by the notes, the adjustable  
8 features of the note, and that Patito was not qualified to obtain the loan. Complaint ¶ 5.

9 In February 2009, ReconTrust, the foreclosing trustee, served Patito with a Notice of  
10 Default and Election to Sell Under the Deed of Trust, stating that she owed \$13,441.61. *Id.* ¶ 12,  
11 Ex. B (Notice of Default). Patito does not allege that she has tendered the amount due on her  
12 loan or that she has or will have the ability to do so. On or about September 4, 2009, Patito filed  
13 a complaint in the Santa Clara Superior Court for violations of the Truth in Lending Act  
14 (“TILA”), unlawful business practices, unfair and fraudulent business practices, fraudulent  
15 omissions, quiet title, rescission based on fraud, unfair debt collection practices, breach of  
16 fiduciary duty, breach of contract, and breach of the covenant of good faith and fair dealing. In  
17 addition to damages, Patito sought declaratory and injunctive relief.

18 On October 13, 2009, Defendants Countrywide Bank, FSB, ReconTrust Company, N.A.,  
19 and Mortgage Electronic Registration Systems, Inc. (collectively, “Defendants”) removed the  
20 action to this Court. On October 20, 2009, Defendants moved to dismiss the instant action for  
21 failure to state a claim and to strike Patito’s prayer for attorney’s fees and punitive damages. On  
22 January 29, 2010, Defendants notified the Court that they had not received opposition to their  
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25 *Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) (internal citations omitted); *see also*  
26 *Kourtis v. Cameron*, 419 F.3d 989, 994 n. 2 (9th Cir. 2005). The official records of the  
27 California Department of Real Estate are subject to judicial notice as a public record. Fed. R.  
28 Evid. 201 (b); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (holding that the Court’s  
consideration of such documents does not convert the Rule 12(b)(6) motion into a motion for  
summary judgment).

1 motions to dismiss and strike. On February 1, 2010, ten days after her opposition papers were  
2 due, Patito filed opposition to the motion to dismiss.<sup>2</sup>

## 3 II. LEGAL STANDARD

### 4 A. Motion to Dismiss

5 A complaint may be dismissed for failure to state a claim upon which relief may be  
6 granted if a plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its  
7 face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Allegations of material fact must  
8 be taken as true and construed in the light most favorable to the nonmoving party. *Pareto v.*  
9 *FDIC*, 139 F.3d 696, 699 (9th Cir. 1998), *see also Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336,  
10 337-38 (9th Cir. 1997). However, the Court need not accept as true allegations that are  
11 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*  
12 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Twombly*, 550 U.S. at 561 ("a wholly  
13 conclusory statement of [a] claim" will not survive motion to dismiss). Leave to amend should  
14 be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment.  
15 *Lucas v. Dep't of Corr.*, 66 F. 3d 245, 248 (9th Cir. 1995). When amendment would be futile,  
16 dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

### 17 B. Motion to Strike

18 Pursuant to Federal Rule of Procedure Rule 12(f), the Court may strike "from any  
19 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous  
20 matter." Fed. R. Civ. P. 12(f). This includes striking parts of the prayer for relief when the relief  
21 sought is "not recoverable as a matter of law." *Shabaz v. Polo Ralph Lauren Corp.*, 586  
22 F.Supp.2d 1205, 1209 (C.D. Cal. 2008) (citations omitted).

23 As with motions to dismiss, when ruling on a motion to strike, the Court takes the  
24 plaintiff's allegations as true and must liberally construe the complaint in the light most favorable  
25 to the plaintiff. *See Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 1849, 23 L.Ed.2d

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26  
27 <sup>2</sup> Because Patito proceeds pro se, the Court has considered her late-filed opposition  
28 papers. However, Patito must comply with the Civil Local Rules in all future filings.

1 404 (1969); *Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994). Also as with motions  
2 to dismiss, leave to amend must be granted unless it is clear that the complaint's deficiencies  
3 cannot be cured by amendment. *See Lucas*, 66 F.3d at 248.

### 4 III. DISCUSSION

#### 5 A. TILA Claims

##### 6 1. TILA Damages Claim

7 Patito seeks money damages for which the applicable limitations period is one year. 15  
8 U.S.C. § 1640(e). The complaint alleges that the loan transaction at issue in this action was  
9 consummated on May 22, 2007. Complaint ¶ 8. Patito did not file her complaint in the instant  
10 action until September 4, 2009. It is undisputed that the one-year time limit of §1640(e) has  
11 expired. Patito claims, however, that the doctrine of equitable tolling suspends the one-year  
12 statute of limitations. She contends that:

13 Plaintiff in this instant case never knew the real intentions of the Defendants in  
14 the loan transaction. All she knew was that she badly needed to procure the loan  
15 and Defendants, under the guise of being a good helper, took advantage of the  
16 Plaintiff's financial situation and her lack of knowledge in regard to the  
transaction they were about to enter into. This situation by the Plaintiff made  
everything easy for the Defendants to facilitate their real intentions defrauding the  
Plaintiff in the loan transaction.

17 Opp. Mot. at 8-9.

18 Equitable tolling of the TILA limitations period is authorized in appropriate  
19 circumstances. *King v. California*, 784 F.2d 910, 914-15 (9th Cir. 1986). Such circumstances  
20 exist where "a reasonable plaintiff would not have known of the existence of a possible claim  
21 within the limitations period." *Santa Maria v. Pac Bell*, 202 F.3d 1170, 1178 (9th Cir. 2002). In  
22 such a case, the limitations period may be extended "until the borrower discovers or had  
23 reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA  
24 action." *King*, 784 F.2d at 915. A motion to dismiss on statute of limitations grounds should be  
25 granted "only if the assertions of the complaint, read with the required liberality, would not  
26 permit the plaintiff to prove that the statute was tolled." *Plascencia v. Lending 1st*, 583  
27 F.Supp.2d 1090, 1097 (N.D. Cal. 2008), quoting *Durning v. First Boston Corp.*, 815 F.2d 1265,

1 1278 (9th Cir. 1987). The current complaint fails to meet even this liberal pleading standard.  
2 Patito makes no allegations as to when or how she discovered the alleged fraud or the non-  
3 disclosures that form the basis of her TILA action.

4 Defendants contend that Patito cannot cure this shortcoming by amendment because she  
5 had all the information needed to evaluate a claim at the time she received her disclosures.  
6 Defendants assert that the TILDS, which Patito signed and admitted receiving, included a full  
7 disclosure of Patito’s annual percentage rate, finance charge, amount financed, and payment  
8 schedule. RJN, Ex. 3. Patito does not oppose Defendants’ requests for judicial notice in her  
9 opposition or question the authenticity of the TILDS. However, at this early stage of the  
10 proceedings, the Court will afford Patito an opportunity to explain with specificity how the  
11 TILDS failed to provide the clear and conspicuous disclosure required under TILA.

## 12 **2. TILA Rescission Claim**

### 13 **a. Principal Dwelling**

14 Defendants contend that TILA does not provide Patito with a right of rescission because  
15 the subject property is an investment property rather than Patito’s principal dwelling. By its  
16 express terms, Regulation Z applies only to “a credit transaction in which a security interest is or  
17 will be retained or acquired in a consumer’s *principal dwelling*...” 12 C.F.R. § 226.23(a)  
18 (emphasis added); *see* 15 U.S.C. § 1635(a); *see also Cataulin v. Washington Mut. Bank, SFB*,  
19 2009 WL 648921 (S.D. Cal. Mar. 9, 2009) (“pursuant to Regulation Z, the right to rescind flows  
20 only to transactions ‘in which a security interest is or will be retained or acquired in a consumer's  
21 principal dwelling ....Plaintiffs allege the loan was used ‘to purchase’ the Property as a ‘rental  
22 investment’ rather than their principal dwelling.”) As noted earlier, the loan documents establish  
23 that Patito intended to use the subject property for investment. RJN Ex. 5 at 1. Patito identifies  
24 no exception to the rule that TILA rescission claims do not apply to investment property loans.  
25 Accordingly, Patito may amend her rescission claim only if she can allege truthfully that the  
26 subject property is her principal residence.

1                   **B. Fair Debt Collections Act Claim**

2                   Patito claims that Defendants engaged in unfair debt collection practices under the federal  
3 Fair Debt Collection Practices Act (“FDCPA”). Complaint. ¶¶ 95-97. However, the FDCPA  
4 does not apply to foreclosures. *Izenberg v. ETS Servs., LLC*, 589 F.Supp.2d 1193, 1199 (C.D.  
5 Cal. 2008) (“foreclosing on [a] property pursuant to a deed of trust is not the collection of a debt  
6 within the meaning of the FDCPA.” Patito argues that *Piper v. Portnoff Law Associates, Ltd.*,  
7 396 F.3d 227 (3rd Cir. 2005) and *Oppong v. First Union Mortgage Corp.*, 407 F.Supp.2d 658  
8 (E.D. Pa. 2005) support her position. However, *Piper* addressed the debt collection practices of a  
9 law firm on behalf of its client and the facts of that case are irrelevant to the non-judicial  
10 foreclosure at issue here. *Oppong* also is distinguishable in that the defendant bank was an  
11 assignee of a previously defaulted mortgage; here, Countrywide Bank was Patito’s lender, not an  
12 assignee of a mortgage already in default. Because it does not appear that the deficiency in the  
13 claim could be cured by amendment, leave to amend will be denied.<sup>3</sup>

14                   **C. Supplemental jurisdiction**

15                   Patito’s TILA and FDCPA claims provide the sole basis for federal subject matter  
16 jurisdiction. While federal courts may exercise supplemental jurisdiction over state-law claims  
17 "that are so related to claims in the action within [the court's] original jurisdiction that they form  
18 part of the same case or controversy under Article III of the United States Constitution," 28  
19 U.S.C. § 1367(a), a court may decline to exercise supplemental jurisdiction where it "has  
20 dismissed all claims over which it has original jurisdiction," id. § 1367(c)(3). Indeed, unless  
21 "considerations of judicial economy, convenience[,] and fairness to litigants" weigh in favor of  
22 the exercise of supplemental jurisdiction, "a federal court should hesitate to exercise jurisdiction  
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24                   <sup>3</sup> It is unclear whether Patito intended to assert an independent claim for relief pursuant  
25 to the Real Estate Settlement Procedures Act (“RESPA”). While a RESPA claim is not included  
26 among her claims for relief, Patito does reference RESPA within her “[e]ight [*sic*] cause of  
27 action for unfair debt collection practices.” Complaint ¶ 96 (alleging a violation of Sections 2601  
28 to 2617). Defendants move to dismiss this claim. Patito does not address the motion to dismiss  
the potential RESPA claim in her opposition papers. Accordingly, this aspect of Defendants’  
motion will be granted.

1 over state claims." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see also*  
2 *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) ("[A] federal court should consider  
3 and weigh in each case, and at every stage of the litigation, the values of judicial economy,  
4 convenience, fairness, and comity."). Because it is not clear that Patito can state a viable federal  
5 claim, the Court will defer its review of the remaining state-law claims.

6 **D. Motion to Strike**

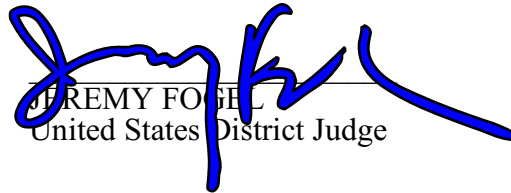
7 Defendants' motion to strike Patito's prayer for attorney's fees and punitive damages  
8 remains unopposed. The motion is well-taken and will be granted.

9 **IV. ORDER**

10 Good cause therefor appearing, the motions to dismiss and strike are GRANTED, with  
11 leave to amend the TILA claims as set forth above. The FDCPA and RESPA claims are  
12 dismissed without leave to amend. Any amended complaint shall be filed within thirty (30) days  
13 of the date this order is filed.

14 **IT IS SO ORDERED.**

15 DATED: February 23, 2010

16   
17 JEREMY FOGEL  
18 United States District Judge

1 This Order has been served upon the following persons:

2 Cheryl J Patito  
1425 Little Orchard Street  
3 San Jose, CA 95110  
PRO SE  
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