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SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

11 SCOTT COPELAND,  
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Plaintiff,

vs.

LEHMAN BROTHERS BANK, FSB;  
MONEYWORLD SALES/  
MORTGAGES, INC.; AURORA LOAN  
SERVICES, INC.; and all other claimants  
of whatsoever kind and character against  
real property commonly known as 7066  
Keighley Street, San Diego, CA 92120;  
APN 672-390-01-00; and DOES 1  
through 100, inclusive,

Defendants.

CASE NO. 09cv1774-WQH-RBB

ORDER

HAYES, Judge:

The matter before the Court is the Motion to Dismiss the First Amended Complaint, filed by Defendants Lehman Brothers Bank, FSB ("Lehman") and Aurora Loan Services, Inc. ("Aurora") (collectively, "moving Defendants"). (Doc. # 27).

**I. Background**

On August 14, 2009, Plaintiff Scott Copeland initiated this action by filing a Complaint in this Court. (Doc. # 1).

On December 23, 2009, the Court granted Lehman and Aurora's motion to dismiss, and dismissed the Complaint without prejudice. (Doc. # 11).

On April 20, 2010, Plaintiff filed the First Amended Complaint. (Doc. # 26).

1           **A.     Allegations of the First Amended Complaint**

2           Plaintiff is the owner of real property commonly known as 7066 Keighley Street, San  
3 Diego, CA 92120. (Doc. # 26 ¶ 1). On June 14, 2007, “[a]t the request of” Defendant  
4 Moneyworld Sales/Mortgages, Inc. (“Moneyworld”) and Lehman, Plaintiff obtained a loan  
5 from Lehman. (Doc. # 26 ¶ 13). Prior to the funding of the loan, Moneyworld and/or Lehman  
6 misrepresented the terms of the loan. (Doc. # 26 ¶¶ 14-15). “Defendants failed to provide  
7 Plaintiff with the proper disclosures required under state and federal law.” (Doc. # 26 ¶ 16).  
8 At the time the loan was executed, all Defendants engaged in “predatory lending behavior,”  
9 including “[c]reating the loan with a high APR,” “[c]harging improper broker fees,”  
10 “[c]harging excessive prepayment penalties,” and “[r]ushing the loan closing.” (Doc. # 26 ¶  
11 20). The loan contract “was incomprehensible to a standard consumer.” (Doc. # 26 ¶ 21).

12           The First Amended Complaint alleges eight claims: (1) violation of the Real Estate  
13 Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2605 *et seq.*; (2) violation of the Truth in  
14 Lending Act (“TILA”), 15 U.S.C. § 1601 *et seq.*; (3) violation of California’s Unfair  
15 Competition Law, Cal. Bus. & Prof. Code § 17200; (4) negligent misrepresentation; (5) fraud;  
16 (6) rescission; (7) quasi-contract; and (8) “determination of validity of lien” (Doc. # 26 at 26).

17           **B.     Motion to Dismiss**

18           On May 3, 2010, the moving Defendants filed the Motion to Dismiss, seeking the  
19 dismissal of all claims against the moving Defendants in the First Amended Complaint  
20 pursuant to Federal Rules of Civil Procedure 12(b)(6). (Doc. # 27). The moving Defendants  
21 contend:

22           Plaintiff’s first amended complaint cannot survive this Rule 12(b)(6) motion to  
23 dismiss. In many respects, it is little changed from the complaint the Court  
24 already dismissed. It continues to assert time-barred TILA claims and  
25 non-actionable supposed RESPA violations. Many of the state law claims are  
preempted by federal law. Some are not causes of action at all, but remedies.  
The entire first amended complaint should be dismissed with prejudice against  
Lehman and Aurora.

26 (Doc. # 27-1 at 22).

27           On May 24, 2010, Plaintiff filed a response in opposition to the Motion to Dismiss.  
28 (Doc. # 30). Plaintiff contends that the Motion to Dismiss should be denied in its entirety, or,

1 alternatively, Plaintiff should be granted leave to amend the First Amended Complaint.

2 On May 27, 2010, the moving Defendants filed a reply brief. (Doc. # 32).

3 **II. Discussion**

4 **A. Standard of Review**

5 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim  
6 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6)  
7 is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support  
8 a cognizable legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
9 1990). Courts may “consider ... matters of judicial notice without converting the motion to  
10 dismiss into a motion for summary judgment.” *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir.  
11 2003).

12 To sufficiently state a claim to relief and survive a Rule 12(b)(6) motion, a complaint  
13 “does not need detailed factual allegations” but the “[f]actual allegations must be enough to  
14 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
15 555 (2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
16 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause  
17 of action will not do.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion to  
18 dismiss, a court must accept as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*,  
19 --- U.S. ---, 129 S. Ct. 1937, 1950 (2009). However, a court is not “required to accept as true  
20 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
21 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “In sum,  
22 for a complaint to survive a motion to dismiss, the non-conclusory factual content, and  
23 reasonable inferences from that content, must be plausibly suggestive of a claim entitling the  
24 plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations  
25 omitted).

26 **B. Request for Judicial Notice**

27 “A district court ruling on a motion to dismiss may consider documents whose contents  
28 are alleged in a complaint and whose authenticity no party questions, but which are not

1 physically attached to the plaintiff's pleading." *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06  
2 (9th Cir. 1998) (quotation omitted). Also, "a district court ruling on a motion to dismiss may  
3 consider a document the authenticity of which is not contested, and upon which the plaintiff's  
4 complaint necessarily relies." *Id.* at 706.

5 The moving Defendants request that the Court take judicial notice of the documents  
6 executed by Plaintiff and relating to the property at issue, including the Deed of Trust and the  
7 Adjustable Rate Note, and the correspondence related to Plaintiff's qualified written request  
8 made pursuant to the RESPA. (Request for Judicial Notice ("RJN"), Doc. # 27-2). Plaintiff  
9 does not oppose the request for judicial notice.

10 The First Amended Complaint either references or necessarily relies upon each of the  
11 documents which are attached to the request for judicial notice. The authenticity of the  
12 documents has not been challenged. Accordingly, the request for judicial notice is granted.

### 13 C. RESPA

#### 14 1. Allegations of the First Amended Complaint

15 The First Amended Complaint alleges that Aurora "failed to adequately respond" to  
16 Plaintiff's qualified written request ("QWR") in violation of 12 U.S.C. § 2605(e)(1)(A). (Doc.  
17 # 26 ¶ 39). The First Amended Complaint alleges that Aurora "failed to provide the requested  
18 information including but not limited to: documentation and proof of ownership for all parties  
19 currently holding any ownership rights under the note relating to the loan; yield spread  
20 premiums or other payments made to any broker, lender or servicer in the course of servicing  
21 the loan, or transferring servicing or ownership of the loan; documents evidencing the  
22 servicer's acquisition of the loan; pooling and servicing agreements related to the loan; all  
23 documents evidencing [Aurora]'s acquisition of the loan." (Doc. # 26 ¶ 38). The First  
24 Amended Complaint alleges that as a result of the Defendant's failure to adequately respond  
25 to the QWR, Plaintiff sustained damages, and as a result, is entitled to recover both statutory  
26 and punitive damages under RESPA. (Doc. # 26 ¶ 41). The First Amended Complaint also  
27 alleges that "Defendants failed to provide Plaintiff with a copy of the GFE [i.e., good faith  
28 estimate]." (Doc. # 26 ¶ 40).

1                   **2. Analysis**

2                   **a. Qualified Written Request**

3                   Section 2605 of RESPA requires that “[i]f any servicer of a federally related mortgage  
4 loan receives a qualified written request from the borrower (or an agent of the borrower) for  
5 information relating to the servicing of such loan, the servicer shall provide a written response  
6 acknowledging receipt of the correspondence within 20 days ... unless the action requested is  
7 taken within such period.” 12 U.S.C. § 2605(e)(1)(A). “Not all requests that relate to the loan  
8 are related to the *servicing* of the loan.” *Williams v. Wells Fargo, N.A.*, No. C 10-00399, 2010  
9 WL 1463521, at \*3 (N.D. Cal. April 13, 2010) (citations omitted). A loan servicer only has  
10 a duty to respond if the information request is related to loan servicing. *See, e.g., id.*;  
11 *Champlain v. BAC Home Loans Servicing, LP*, No. S-09-1316, 2009 WL 3429622, at \*7 (E.D.  
12 Cal. Oct.22, 2009). If a loan servicer fails to comply with the provisions of § 2605, a borrower  
13 shall be entitled to “any actual damages to the borrower as a result of the failure” and “any  
14 additional damages, as the court may allow, in the case of a pattern or practice of  
15 noncompliance with the requirements of [§ 2605].” 12 U.S.C. § 2605(f)(1).

16                   **i. Actual Damages**

17                   “Numerous courts have read Section 2605 as requiring a showing of pecuniary damages  
18 to state a claim.” *Molina v. Wash. Mut. Bank*, No. 09cv894, 2010 WL 431439, at \*7 (S.D. Cal.  
19 Jan. 29, 2010) (collecting cases); *see also Eronini v. JP Morgan Chase Bank NA*, No. 08-  
20 55929, 2010 WL 737841, at \*1 (9th Cir. Mar. 3, 2010) (“The district court properly dismissed  
21 the action because Eronini suffered no damages as a result of the alleged RESPA violation.”).  
22 “This pleading requirement has the effect of limiting the cause of action to circumstances in  
23 which plaintiff can show that a failure to respond or give notice has caused them actual harm.”  
24 *Shepherd v. Am. Home Mortg. Servs., Inc.*, No. 09-1916, 2009 WL 4505925, at \*3 (E.D. Cal.  
25 Nov. 20, 2009) (citation omitted). Courts “have interpreted this requirement liberally.”  
26 *Yulaeva v. Greenpoint Mortg. Funding, Inc.*, No. 09-1504, 2009 WL 2880393, at \*15 (E.D.  
27 Cal. Sept. 9, 2009) (plaintiff sufficiently pled actual damages where plaintiff alleged she was  
28 required to pay a referral fee prohibited under RESPA).

1 Plaintiff alleges that “[a]s a proximate result of the negligent conduct of Defendants and  
2 their failure[] [to respond to the qualified written request], Plaintiff sustained damages,  
3 including monetary loss, medical expenses, emotional distress, loss of employment, loss of  
4 credit, loss of opportunities, and other damages to be determined at trial.” (Doc. # 26 ¶ 41).  
5 Even reading the First Amended Complaint liberally, Plaintiff fails to plead non-conclusory  
6 factual allegations indicating how he was damaged by the alleged failure to fully respond to  
7 the QWR. *Cf. Allen v. United Fin. Mortg. Corp.*, 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009)  
8 (“Allen only offers the conclusory statement that ‘damages consist of the loss of plaintiff’s  
9 home together with his attorney fees.’ He has not actually attempted to show that the alleged  
10 RESPA violations caused any kind of pecuniary loss (indeed, his loss of property appears to  
11 have been caused by his default).”). The Court concludes that Plaintiff’s RESPA claim for  
12 actual damages for failure to respond to the QWR is insufficiently pled.

#### 13 **ii. Statutory Damages**

14 To recover statutory damages, a Plaintiff must plead a pattern or practice of  
15 noncompliance with RESPA. *See* 12 U.S.C. § 2605(f)(1)(b).

16 Plaintiff alleges that he is entitled to statutory damages (Doc. # 26 ¶ 41), but he does  
17 not allege facts which would plausibly show a pattern and practice of RESPA violations by  
18 Defendants. *See Lal v. Am. Home Mortg. Servicing*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal.  
19 2010) (RESPA claim deficient because “Plaintiffs flatly claim a pattern of noncompliance but  
20 state no facts other than the assurance that at trial they will present other customers who also  
21 did not receive QWR responses from Defendant.”); *see also Garvey v. Am. Home Mortg.*  
22 *Servicing, Inc.*, No. CV-09-973, 2009 WL 2782128, at \*2 (D. Ariz. Aug. 31, 2009) (same).  
23 The Court concludes that Plaintiff’s RESPA claim for statutory damages for failure to respond  
24 to the QWR is insufficiently pled.

25 The Motion to Dismiss the RESPA claim for failure to respond to the QWR is granted.

#### 26 **b. Good Faith Estimate**

27 The First Amended Complaint alleges that Defendants violated RESPA because  
28 “Defendants failed to provide Plaintiff with a copy of the GFE.” (Doc. # 26 ¶ 40).

1 The Court has taken judicial notice of documents signed by Plaintiff, indicating that on  
2 May 15, 2007 and June 14, 2007, Plaintiff received a “good faith estimate” of the charges he  
3 was likely to incur. (RJN, Exs. # 7, 9, Doc. # 27-2).

4 Even if Plaintiff did not receive a good faith estimate, RESPA does not provide a  
5 private right of action for a violation of the “good faith estimate” requirement, 12 U.S.C. §  
6 2604(c). *See Collins v. FMHA-USDA*, 105 F.3d 1366, 1368 (11th Cir. 1997) (“There is no  
7 private civil action for violation of 12 U.S.C. § 2604(c), or any regulation relating to it.”);  
8 *Delino v. Platinum Cmty. Bank*, 628 F. Supp. 2d 1226, 1232-33 (S.D. Cal. 2009) (same).

9 The Motion to Dismiss the RESPA claim for failure to provide a good faith estimate  
10 is granted.

11 **D. TILA**

12 **1. Allegations of the First Amended Complaint**

13 The First Amended Complaint alleges that all Defendants violated TILA and related  
14 regulations “at the time of origination because, among other things: (a) the interest rate on the  
15 note and the Truth-in-Lending disclosure were deceptively presented and not consistent; (b)  
16 the APR was not correctly calculated; (c) the required payments to the lender and broker were  
17 not fully disclosed.” (Doc. # 26 ¶ 46). The First Amended Complaint alleges that “[a]ll  
18 Defendants have fraudulently concealed facts upon which the existence of Plaintiff’s claim for  
19 Negligent Misrepresentation is based, and as such, the statute of limitations is tolled as to this  
20 Cause of Action.” (Doc. # 26 ¶ 43).

21 **2. Analysis**

22 The moving Defendants contend that Plaintiff’s TILA claims are barred by the statute  
23 of limitations.

24 TILA is intended to protect consumers in credit transactions by requiring “meaningful  
25 disclosure of credit terms.” 15 U.S.C. § 1601(a). A lender’s violation of TILA allows the  
26 borrower to seek damages or to rescind a consumer loan secured by the borrower’s primary  
27 dwelling. A plaintiff’s damage claims relating to improper disclosures under TILA are subject  
28 to a one-year statute of limitations, 15 U.S.C. § 1640(e), which runs from the time the loan

1 transaction is consummated. *See King v. State of Cal.*, 784 F.2d 910, 915 (1986); *see also*  
2 *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th Cir. 2003) (failure to make the  
3 required disclosures under TILA occurs at the time the loan documents were signed). The  
4 right to rescission under TILA expires three days after the necessary disclosures are provided  
5 to the borrower. *See* 15 U.S.C. § 1635(a).

6 Plaintiff consummated his loan transaction on June 14, 2007. (RJN, Ex. 1, Doc. # 27-  
7 2). On the same day, Plaintiff received, and signed, the “Notice of Right to Cancel” and  
8 “Truth-in-Lending Statement” disclosures. (RJN, Exs. 11-12, Doc. # 27-2). These constituted  
9 the necessary disclosures to trigger the three-day rescission limitations period. *See* 12 C.F.R.  
10 § 226.23(a)(3) & n.48. This lawsuit was initiated on August 14, 2009. (Doc. # 1).  
11 Accordingly, Plaintiff’s TILA claims are time-barred, unless the doctrine of equitable tolling  
12 applies. *See King*, 784 F.2d at 915.

13 Equitable tolling of TILA claims may be appropriate “in certain circumstances,” and  
14 can operate to “suspend the limitations period until the borrower discovers or had reasonable  
15 opportunity to discover the fraud or non-disclosures that form the basis of the TILA action.”  
16 *Id.* at 914-15. District courts have discretion to evaluate specific claims of fraudulent  
17 concealment and equitable tolling and “to adjust the limitations period accordingly.” *Id.* at  
18 915. Because the applicability of the equitable tolling doctrine often depends on matters  
19 outside the pleadings, it “is not generally amenable to resolution on a Rule 12(b)(6) motion.”  
20 *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 (9th Cir. 1995). However, when a plaintiff  
21 fails to allege facts demonstrating that he could have not discovered the alleged violations by  
22 exercising reasonable diligence, dismissal is appropriate. *See Meyer*, 342 F.3d at 902-03  
23 (refusing to apply equitable tolling to TILA claim because plaintiff was in full possession of  
24 all loan documents and did not allege any concealment of loan documents or other action that  
25 would have prevented discovery of the alleged TILA violations); *Hubbard v. Fid. Fed. Bank*,  
26 91 F.3d 75, 79 (9th Cir. 1996) (finding that plaintiff was not entitled to equitable tolling of her  
27 TILA claim because “nothing prevented [plaintiff] from comparing the loan contract, [the  
28 lender’s] initial disclosures, and TILA’s statutory and regulatory requirements”).



1 Plaintiff's conclusory allegation that "[a]ll Defendants have fraudulently concealed facts  
2 upon which the existence of Plaintiff's claim for Negligent Misrepresentation is based," (Doc.  
3 # 26 ¶ 43), is insufficient to satisfy the requisite pleading standards. *See Twombly*, 550 U.S.  
4 at 555. Plaintiff has failed to allege sufficient facts to show that equitable tolling may be  
5 warranted. The Motion to Dismiss the TILA claims is granted.

6 **E. State Law Claims**

7 The First Amended Complaint alleges that federal question jurisdiction exists pursuant  
8 to 28 U.S.C. § 1331, by virtue of the TILA and RESPA claims. (Doc. # 26 ¶ 10). The First  
9 Amended Complaint alleges that the Court has supplemental jurisdiction over the state law  
10 claims pursuant to 28 U.S.C. § 1367. (Doc. # 26 ¶ 11). The First Amended Complaint does  
11 not allege that diversity jurisdiction exists.

12 The federal supplemental jurisdiction statute provides: "[I]n any civil action of which  
13 the district courts have original jurisdiction, the district courts shall have supplemental  
14 jurisdiction over all other claims that are so related to claims in the action within such original  
15 jurisdiction that they form part of the same case or controversy under Article III of the United  
16 States Constitution." 28 U.S.C. § 1367(a). A district court may decline to exercise  
17 supplemental jurisdiction over a state law claim if:

18 (1) the claim raises a novel or complex issue of State law,

19 (2) the claim substantially predominates over the claim or claims over which the  
20 district court has original jurisdiction,

21 (3) the district court has dismissed all claims over which it has original  
jurisdiction, or

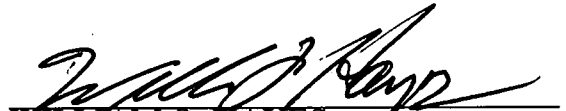
22 (4) in exceptional circumstances, there are other compelling reasons for  
23 declining jurisdiction.

24 28 U.S.C. §1367(c). Because the Court has dismissed all of the federal law claims against the  
25 moving Defendants, the Court declines to exercise supplemental jurisdiction over the state law  
26 claims against the moving Defendants pursuant to 28 U.S.C. §1367(c). *See Ove v. Gwinn*, 264  
27 F.3d 817, 826 (9th Cir. 2001) ("A court may decline to exercise supplemental jurisdiction over  
28 related state-law claims once it has dismissed all claims over which it has original  
jurisdiction.").

1 **III. Conclusion**

2 The Motion to Dismiss is GRANTED. (Doc. # 27). The First Amended Complaint is  
3 DISMISSED without prejudice as to Defendants Lehman Brothers Bank, FSB and Aurora  
4 Loan Services, Inc. No later than thirty (30) days from the date of this Order, Plaintiff may file  
5 a motion for leave to amend the First Amended Complaint, accompanied by a proposed second  
6 amended complaint.

7 DATED: 7/15/10

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9 WILLIAM Q. HAYES  
10 UNITED STATES DISTRICT COURT  
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