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28UNITED STATES DISTRICT COURT  
For the Northern District of California

## UNITED STATES DISTRICT COURT

Northern District of California

San Francisco Division

EDGAR PERRY,

No. C 13-02369 LB

Plaintiff,

**AMENDED<sup>1</sup> ORDER GRANTING  
DEFENDANTS' MOTIONS TO  
DISMISS AND DENYING  
PLAINTIFF'S MOTION FOR A JURY  
TRIAL**

v.

CASHCALL, INC., et al.,

Defendants.

[Re: ECF Nos. 25, 32, 37, 70, 81]

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INTRODUCTION

Plaintiff Edgar Perry, who is proceeding *pro se*, has sued four Defendants: CashCall, Inc. (“CashCall”); First Bank of California (“First Bank”); the Portuguese Fraternal Society of America (“PFSA”); and the State of California. First Amended Complaint (“FAC”), ECF No. 18.<sup>2</sup> Defendants move to dismiss Mr. Perry’s First Amended Complaint. *See* CashCall’s Motion, ECF No. 25; First Bank’s Motion, ECF No. 32; PFSA’s Motion, ECF No. 37; State of California’s

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<sup>1</sup> The court issues this amended order to add the word “not” to the court’s sentence (at Lines 1 through 2 on Page 7 below) regarding Mr. Perry’s allegations against First Bank, which was inadvertently omitted from its prior order.

<sup>2</sup> Citations are to the Electronic Case File (“ECF”) with pin cites to the electronically-generated page numbers at the top of the document.

1 Motion, ECF No. 70. Pursuant to Civil Local Rule 7-1(b), the court finds this matter suitable for  
2 determination without oral argument and **VACATES** the March 20, 2014 hearing. Upon  
3 consideration of the papers submitted and the applicable authority, the court **GRANTS** Defendants'  
4 motions, **DISMISSES WITH PREJUDICE** Mr. Perry's claims against the State of California, First  
5 Bank, and PFSA and his TILA claim against CashCall, and **DISMISSES WITHOUT**  
6 **PREJUDICE** his breach of contract claim against CashCall.

7 **STATEMENT**

8 On May 24, 2013, Mr. Perry filed his initial complaint against CashCall and the United States  
9 Consumer Financial Protection Agency. Complaint, ECF No. 1. On July 28, 2013, pursuant to  
10 Federal Rule of Civil Procedure 15(a)(1), he filed a First Amended Complaint as a matter of course.  
11 FAC, ECF No. 18. He still named Cashcall as a defendant, but he dropped the United States  
12 Consumer Financial Protection Agency as a defendant. *Id.* at 2.<sup>3</sup> He also added the PFSA, First  
13 Bank, and the State of California as defendants. *Id.* Because Mr. Perry's allegations against each  
14 Defendant are distinct both in time and substance, the court summarizes them in turn below in the  
15 "Analysis" section of this order.

16 Defendants now move to dismiss Mr. Perry's First Amended Complaint. CashCall's Motion,  
17 ECF No. 25; First Bank's Motion, ECF No. 32; PFSA's Motion, ECF No. 37; State of California's  
18 Motion, ECF No. 70. Mr. Perry filed oppositions to CashCall's and the State of California's  
19 motions, but not First Bank's or the PFSA's motions. Opposition to CashCall, ECF No. 28<sup>4</sup>;  
20 Opposition to State of California, ECF No. 74. He also filed, without permission, a sur-reply to the  
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22 <sup>3</sup> See CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL §§ 8:1386  
23 (amendment under Rule 15 may be used to drop a party), 8:1551 (amended complaint that  
24 voluntarily drops a defendant named in the original complaint effectively dismisses that defendant  
25 from the action) (The Rutter Group 2013).

26 <sup>4</sup> Strictly speaking, the document Mr. Perry filed is titled "Plaintiff's Motion praying the  
27 court to rule as a matter of points of law and [Proposed] Order to same effect." See Opposition to  
28 CashCall, ECF No. 28. To the extent that the paper requested the court to "verify his  
evidence," *see id.* at 1, or enter judgment in his favor, the court previously denied the request as  
improper at that stage of the proceedings. *See* 10/30/2013 Order, ECF No. 54 at 4-5. To the extent  
that it can be construed as an opposition to CashCall's motion, the court does so.

1 State of California’s reply. Sur-Reply, ECF No. 82.

2 On March 10, 2014, Mr. Perry filed a “Motion to Solicit the Court for a Jury Trial and Summary  
3 Judgment, as a Matter of Law.” Plaintiff’s Motion, ECF No. 81.

4 All parties have consented to the undersigned’s jurisdiction. Consent (Plaintiff), ECF No. 9;  
5 Consent (CashCall), ECF No. 13; Consent (PFSA), ECF No. 38; Consent (First Bank), ECF No. 57;  
6 Consent (State of California), ECF No. 75.

## 7 ANALYSIS

### 8 I. LEGAL STANDARD

9 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does  
10 not contain enough facts to state a claim to relief that is plausible on its face. *See Bell Atlantic Corp.*  
11 *v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads  
12 factual content that allows the court to draw the reasonable inference that the defendant is liable for  
13 the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). “The plausibility standard  
14 is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a  
15 defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 557.). “While a complaint  
16 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s  
17 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
18 conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual  
19 allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S.  
20 at 555 (internal citations and parentheticals omitted).

21 In considering a motion to dismiss, a court must accept all of the plaintiff’s allegations as true  
22 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *Erickson v. Pardus*, 551  
23 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007).

24 If the court dismisses the complaint, it should grant leave to amend even if no request to amend  
25 is made “unless it determines that the pleading could not possibly be cured by the allegation of other  
26 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Cook, Perkiss and Liehe, Inc.*  
27 *v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)). But when a party  
28 repeatedly fails to cure deficiencies, the court may order dismissal without leave to amend. *See*

1 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (affirming dismissal with prejudice where  
2 district court had instructed *pro se* plaintiff regarding deficiencies in prior order dismissing claim  
3 with leave to amend).

4 **II. MR. PERRY’S ALLEGATIONS AND CLAIMS**

5 **A. Mr. Perry’s Allegations and Claims against the State of California**

6 Mr. Perry’s allegations against the State of California, in full, are as follows:

7           Insofar as the State of California (please see evidence/exhibits nos. 6 thru 13):  
8           Different departments, the California’s Attorney General (two), the Governor (Jerry  
9           Brown) abridged the plaintiff (US citizen)’s Constitutional and Bill of Rights time  
10           and time again and thus plaintiff prays the court compensation. The State of  
11           California disregards plaintiff’s complaints about health hazard (sewer “lateral” bring  
            connected from another’s neighbor next door and expenses to unclog them), Pacific  
            Gas and Electric refusal to care for hazards of power wires (“live”) fall on plaintiff’s  
            property and ordering Dave Tree to trim his trees and one of his cars suffering big  
            damage, et al.

12 FAC, ECF No. 18 at 7. Presumably, as he alleges that the State of California violated his  
13 constitutional rights, Mr. Perry brings a claim under 42 U.S.C. § 1983, which creates a federal civil  
14 cause of action against a “person who, under color of any statute, ordinance, regulation, custom, or  
15 usage, of any State” deprives another person of any of their “rights, privileges, or immunities  
16 secured by the Constitution and laws.”<sup>5</sup> He seeks \$300,000 in damages from the State of California.  
17 *Id.* at 8

18           The State of California makes two arguments, both of which are successful, in favor of  
19 dismissal. First, it points out that state sovereign immunity bars Mr. Perry’s claims. This is because  
20 the Eleventh Amendment bars suits seeking damages against the State, including an “arm of the  
21 state” such as a state agent or agency. *See Durning v. Citibank, N.A.*, 950 F.2d 1419, 1422–23 (9th  
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24           <sup>5</sup> “Section 1983 is not itself a source of substantive rights, but merely provides a method for  
25 vindicating federal rights elsewhere conferred.” *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (citing  
26 *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). To state a claim for damages under § 1983, a  
27 complaint must allege that (1) “the conduct complained of was committed by a person acting under  
28 color of state law,” and that “(2) “this conduct deprived a person of rights, privileges, or immunities  
            secured by the Constitution or laws of the United States.” *Parratt v. Taylor*, 451 U.S. 527, 535  
            (1981) *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Thus, “the first  
            step in any [section 1983] claim is to identify the specific constitutional right allegedly infringed.”  
            *Albright*, 510 U.S. at 271.

1 Cir. 1991); *see also Beentjes v. Placer County Air Pollution Control Dist.*, 397 F.3d 775, 777 (9th  
2 Cir. 2005) (“The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may  
3 not be sued by private individuals in federal court.”) (quoting *Bd. of Trs. of Univ. of Ala. v. Garrett*,  
4 531 U.S. 356, 363 (2001)).<sup>6</sup>

5 Second, it points out that it cannot be construed as a person for purposes of 42 U.S.C. § 1983.  
6 *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989). By its terms, Section 1983  
7 applies to “persons” acting under color of law. In *Monroe v. Pape*, the Supreme Court held that  
8 Section 1983 was not applicable to government entities. 365 U.S. 167, 190-92 (1961). This holding  
9 was reiterated in *Will v. Michigan Dep’t of State Police*, in which the Court held that “neither a State  
10 nor its officials acting in their official capacities are ‘persons’ under § 1983.” 491 U.S. at 71. Here,  
11 Mr. Perry has sued the State of California, which clearly is protected from Mr. Perry’s damages  
12 claims under these authorities.<sup>7</sup>

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14 <sup>6</sup> The Eleventh Amendment also bars damages actions against state officials in their official  
15 capacity. *See Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007); *see also Pennhurst State Sch.*  
16 *& Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) (“a claim that state officials violated state law in  
17 carrying out their official responsibilities is a claim against the State that is protected by the  
18 Eleventh Amendment”).

19 <sup>7</sup> “There is one exception to this general rule: When sued for prospective injunctive relief, a  
20 state official in his official capacity is considered a “person” for § 1983 purposes.” *Doe v. Lawrence*  
21 *Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) (citing *Will v. Michigan Dep’t of State*  
22 *Police*, 491 U.S. 58, 71 n.10 (1989)). “In what has become known as part of the *Ex parte Young*  
23 doctrine, *see Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), a suit for prospective  
24 injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment  
25 immunity.” *Id.* Mr. Perry refers to this doctrine (although not explicitly) in his opposition when he  
26 states that he is aware of federal cases in which Governor Brown has been sued in relation to  
27 overcrowding in California’s prisons. *See Opposition to State of California*, ECF No. 74 at 1-2; *see*  
28 *also Sur-Reply*, ECF No. 82 at 1. Mr. Perry, however, sues for damages. He also cites, in his sur-  
reply, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), but that case does not apply here. *See Sur-Reply*,  
ECF No. 82 at 1; *see also Hodge v. Oakland Unified School Dist.*, No. C 09-04719 RS, 2010 WL  
4117539, at \*2-3 & n.3 (N.D. Cal. Oct. 19, 2010) (dismissing a plaintiff’s § 1983 claims against a  
state entity despite the plaintiff’s citation of *Fitzpatrick*). It holds that Title VII’s authorization of  
federal-court jurisdiction to award money damages against a state government to individuals  
subjected to employment discrimination does not violate the Eleventh Amendment because  
Congress was exercising its Section 5 remedial powers. *See Fitzpatrick*, 427 U.S. at 456. His other  
citations simply support federal jurisdiction over civil rights claims, generally. *See Sur-Reply*, ECF  
No. 82 at 2-3.

1 Accordingly, Mr. Perry’s damages claims against the State of California are **DISMISSED**  
2 **WITH PREJUDICE.**

3 **B. Mr. Perry’s Allegations and Claims against First Bank**

4 As for First Bank, Mr. Perry alleges that on December 1, 2004 First Bank issued a \$150,000  
5 equity line of credit to his wife Isaura Perry and him. FAC, ECF No. 18 at 5-6.<sup>6</sup> The collateral for  
6 this loan was Mr. Perry’s property at 2540 Market Avenue in San Pablo, California. *Id.* at 6. He  
7 further alleges that the “then-manager” represented that the interest rate on the loan would be 2  
8 points over the prime rate, but later a “new manager,” “without warning” to Mr. Perry and his wife  
9 and without their “written consent,” “raised said number of points for 3 (three) %.” *Id.* He also  
10 alleges that he made a written request for reimbursement for excessive interest for the loan.” *Id.* He  
11 also alleges that First Bank made “billing error rights, even after [he and his wife] requested a  
12 correction on 9/7/05 by letter to [First Bank’s] CEO” and that he never received a Truth-in-Lending  
13 Statement. *Id.* He further alleges that the “first local branch manager” told him that the interest rate  
14 on the loan would be fixed, but “according to the Loan Request Summary and other documents” the  
15 interest rate was variable and increased several times beginning in 2005. *Id.* at 7. Finally, Mr. Perry  
16 alleges that he “wrote to the director of the currency [in] St. Louis, Missouri[] about First Bank’s  
17 federal lending irregularities and bank[] fraud in his bank[] accounts (whereas [the] local branch’s  
18 manager manipulated his accounts) and [First Bank] ended up defrauding his accounts in the total of  
19 \$5,834.50,” but “the US Controller of the Currency never gave satisfaction to” his complaint. *Id.*  
20 Through this action, Mr. Perry seeks only that amount from First Bank. *Id.* at 8.

21 First Bank argues that any claims that Mr. Perry might have against it are barred by the  
22 applicable statutes of limitation. First Bank’s Motion, ECF No. 32 at 9-13. Mr. Perry appears to  
23 allege claims for violations of the Truth in Lending Act (“TILA”), 15 U.S.C. §§ 1601-1667f, the  
24 Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. §§ 2601-2617, and fraud. But as

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26 <sup>6</sup> First Bank requests that the court take judicial notice of three documents related to Mr.  
27 Perry and his wife’s loan, *see* Request for Judicial Notice, ECF No. 33, but the court believes that  
28 Mr. Perry’s allegations are sufficient on their own for the court to analyze the arguments here. Thus,  
because they are unnecessary for this order, the court declines to take judicial notice of the  
documents at this time.

1 described below, the limitations periods for these claims have run, and Mr. Perry’s allegations do  
2 not support tolling them.

3 First, under TILA, if a lender fails to disclose required material information, a borrower has a  
4 right to monetary damages within one year of consummation of the loan. 15 U.S.C. § 1640(e); *see*  
5 *King v. California*, 784 F.2d 910, 915 (1986). Generally, inaccuracies in disclosures are evident  
6 upon reviewing the disclosure documents themselves, and the statute of limitations begins to run the  
7 day the documents are executed. *See Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th  
8 Cir. 2003). For damages claims<sup>7</sup>, “the doctrine of equitable tolling may, in the appropriate  
9 circumstances, suspend the limitations period until the borrower discovers or had reasonable  
10 opportunity to discover the fraud or nondisclosures that form the basis of the TILA [damages]  
11 action.” *King*, 784 F.2d at 915. Such tolling, however, is available only if “despite all due  
12 diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim.”  
13 *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000), *overruled on different grounds by*  
14 *Socop–Gonzalez v. INS*, 272 F.3d 1176, 1194 (9th Cir. 2000).

15 Second, RESPA provides plaintiffs with a private right of action for three types of wrongful acts:  
16 “(1) payment of a kickback and unearned fees for real estate settlement services, 12 U.S.C. §  
17 2607(a), (b); (2) requiring a buyer to use a title insurer selected by a seller, 12 U.S.C. § 2608(b); and  
18 (3) the failure by a loan servicer to give proper notice of a transfer of servicing rights or to respond  
19 to a qualified written request for information about a loan, 12 U.S.C. § 2605(f).” *Choudhuri v.*  
20 *Wells Fargo Bank, N.A.*, No. C 11-00518 SBA, 2011 WL 5079480, at \*8 (N.D. Cal. Oct. 25, 2011)  
21 (citing *Patague v. Wells Fargo Bank, N.A.*, No. C 10-03460 SBA, 2010 WL 4695480, at \*3 (N.D.  
22 Cal. Nov. 8, 2010)). Claims brought under §§ 2607 and 2608 are subject to a one-year statute of  
23 limitation, while claims brought under § 2605 are subject to a three-year statute. 12 U.S.C. § 2614.  
24 Equitable tolling of the statutes of limitations, however, may be appropriate if, “despite all due  
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26 <sup>7</sup> A borrower also has a right to rescind within three years of consummation of the loan. 15  
27 U.S.C. § 1635(f); *see King v. California*, 784 F.2d 910, 913 (9th Cir. 1986). The three-year  
28 limitations period for a TILA rescission claim is not subject to equitable tolling. *See Beach v.*  
*Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998). In any case, this does not apply here as Mr. Perry  
seeks only damages from First Bank.

1 diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim.”  
2 *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000); *Ancheta v. Golden Empire Mortg.,*  
3 *Inc.*, No. 10–CV–05589–LHK, 2011 WL 826177, at \*5 (N.D. Cal. Mar. 7, 2011) (“Although the  
4 Ninth Circuit has not decided whether or not equitable tolling applies to RESPA claims, the court  
5 applies the principles announced by the Ninth Circuit regarding equitable tolling of TILA claims.”).

6 Third, under California Code of Civil Procedure § 338(d), there is a three-year statute of  
7 limitation for fraud claims. Under the discovery rule, the statute of limitations does not begin to run  
8 until the plaintiff discovers (or reasonably should discover) that he has been injured. *See Fox v.*  
9 *Ethicon Endo–Surgery, Inc.*, 35 Cal. 4th 797, 807 (2005); *Nogart v. Upjohn Co.*, 21 Cal. 4th 383,  
10 397 (1999). Similarly, the statute of limitations may be equitably tolled if the plaintiff—despite due  
11 diligence—has not been able to discover the fraud or non-disclosures that form the basis for the  
12 action. *See King*, 784 F.2d at 915.

13 Here, Mr. Perry and his wife entered into the loan with First Bank in 2004. Based on his  
14 allegations, Mr. Perry was aware of the purported violations at least as of 2005, when his interest  
15 rate began going up and he complained to various First Bank and other officials about the problems.<sup>8</sup>  
16 Thus, the one-year statute of limitations period for his TILA claim ran in 2006, the one-year and  
17 three-year statutes of limitations periods for his RESPA claims ran in 2006 and 2008, and the three-  
18 year statute of limitations for his fraud claim ran in 2008. Accordingly, Mr. Perry’s claims against  
19 First Bank are **DISMISSED WITH PREJUDICE**.

20 **C. Mr. Perry’s Allegations and Claims against the PFSA**

21 As for PFSA, Mr. Perry alleges that on August 30, 2007, he entered into a \$150,000 mortgage  
22 loan with “Uniao Portuguesa do Estado da California,” which he says is a predecessor to PFSA.  
23 FAC, ECF No. 18 at 5. He alleges that when he questioned the TILA disclosure statement’s figures  
24 (showing a finance charge of \$178,111.20 and total payments of \$328,111.20) and told PFSA’s  
25 representative that the annual percentage rate was “more like 8%, not the assigned 6.125%” in the  
26 disclosure statement, the representative told him that the figures were produced by a formula and not  
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28 <sup>8</sup> And, as Mr. Perry filed no opposition to First Bank’s motion, he provides no other  
statements or argument in support of tolling.



1 by Mr. Perry’s own calculations. *Id.* In addition, another representative told him that PFSA would  
2 not modify or refinance his loan. *Id.* Through this action, Mr. Perry seeks only \$19,005, which is,  
3 according to his calculations, “the difference in the interest rate of 6.125% charged by contract and  
4 the actual 7.3926% . . . , or 1.267% for six years.” *Id.* at 8.

5 PFSA primarily argues that any claims that Mr. Perry might have against it are barred by the  
6 applicable statutes of limitation, and even if they are not time-barred, he cannot allege a claim on  
7 these facts. PFSA’s Motion, ECF No. 37 at 8-12. As he did against First Bank, Mr. Perry appears  
8 to allege claims for violations of TILA, fraud, and breach of contract.

9 First, the court notes that Mr. Perry entered into the loan with PFSA in 2007. TILA disclosure  
10 statements are provided by lenders when loans are consummated, and Mr. Perry alleges no facts to  
11 suggest that he did not receive one at this time. Thus, he was aware of all facts necessary for his  
12 claims as of 2007.<sup>9</sup> This means that the one-year statute of limitations period for his TILA claim ran  
13 in 2008, and the three-year statute of limitations for his fraud claim ran in 2010.

14 As for his breach of contract claim, California has a four-year statute of limitations for such  
15 claims. Cal. Code Civ. Proc. § 337. California, however, also applies the discovery rule to breach  
16 of contract claims. *See El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1039 (9th Cir. 2003). “The  
17 discovery rule may be applied to breaches which can be, and are, committed in secret, and moreover,  
18 where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a  
19 future time.” *Id.* (citations omitted). “Ultimately, the discovery rule permits delayed accrual until a  
20 plaintiff knew or should have known of the wrongful conduct at issue.” *Id.* (internal citations and  
21 quotation marks omitted). To invoke the discovery rule, a plaintiff must allege: (a) lack of  
22 knowledge; (b) lack of means of obtaining knowledge (in the exercise of reasonable diligence the  
23 facts could not have been discovered at an earlier date); and (c) how and when he actually  
24 discovered the fraud or mistake. *Gen. Bedding Corp. v. Echevarria*, 947 F.2d 1395, 1397 (9th Cir.  
25 1991). Here, Mr. Perry has clearly alleged that his breach of contract arises from his comparison of  
26 the interest rate PFSA allegedly promised him before entering into the loan with the interest rate that  
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28 <sup>9</sup> And, like with First Bank’s motion, Mr. Perry filed no opposition to PFSA’s motion, so he provides no other statements or argument in support of tolling.

1 appeared on the TILA disclosure statement that he received after entering into the loan. This is not  
2 the type of situation that supports tolling under the discovery rule, which means that his breach of  
3 contract claim ran in 2011.

4 Even if the statutes of limitations had not run, PFSA also points out that Mr. Perry's claims are  
5 based a misunderstanding of how the finance charge and the annual percentage rate are calculated.  
6 TILA requires lenders are required to disclose, among other things, the total finance charge and the  
7 annual percentage rate of interest, *see* 15 U.S.C. §§ 1605(a), 1606(a), and these are calculated  
8 differently. As one court explained in a case in which the plaintiffs made a claim similar to Mr.  
9 Perry's:

10 [12 C.F.R. §] 226.18[, one of the regulations promulgated under TILA,] requires  
11 creditors to disclose "[t]he annual percentage rate, using that term, and a brief  
12 description such as 'the cost of your credit as a yearly rate.'" 12 C.F.R. § 226.18(e).  
13 APR, as defined by the statute, is not necessarily the same as an interest rate. As  
14 directed by 15 U.S.C. § 1606, APR is calculated in relation to the "finance charge."  
15 15 U.S.C. § 1606. "Finance charge," meanwhile, is defined as "the sum of all  
16 charges, payable directly or indirectly by the person to whom the credit is extended,  
17 and imposed directly or indirectly by the creditor as an incident to the extension of  
18 credit." 15 U.S.C. § 1605(a). Examples of the types of charges that go into the  
19 determination of a credit charge include interest, service charges, loan fees, fees for a  
20 credit report, and fees for insurance. *Id.*; *see Smith v. Anderson*, 801 F.2d 661, 663  
(4th Cir. 1986) ("APR . . . differs from the general definition of interest rate because  
it considers, by definition, a broader range of finance charges when determining the  
total cost of credit as a yearly rate."). Essentially, both APR and the finance charge  
center on the same concept, the cost of credit. TILA requires that the cost of credit be  
expressed both as a dollar amount, the finance charge, and a yearly percentage rate,  
the APR. *See* 12 C.F.R. § 226.4(a) ("The finance charge is the cost of consumer  
credit as a dollar amount."); 12 C.F.R. § 226.22(a) ("The annual percentage rate is a  
measure of the cost of credit, expressed as a yearly rate, that relates the amount and  
timing of value received by the consumer to the amount and timing of payments  
made.").

21  
22 *Velazquez v. GMAC Mortgage Corp.*, 605 F. Supp. 2d 1049, 1061-62 (C.D. Cal. 2008). Here, Mr.  
23 Perry alleges that PFSA breached a contract because the "actual" interest rate he calculated was  
24 7.3926% but the disclosed annual percentage rate was 6.125%. As explained above, this is entirely  
25 consistent with TILA's requirements.

26 Accordingly, Mr. Perry's claims against PFSA are **DISMISSED WITH PREJUDICE**.

27 **D. Mr. Perry's Allegations and Claims against CashCall**

28 Finally, as for CashCall, Mr. Perry alleges that, "[a]bout one year ago," a CashCall loan officer

1 promised him a “refinance mortgage loan” with an interest rate of 2.75% and no closing costs. FAC,  
2 ECF No. 18 at 4. He further alleges that his credit was approved, CashCall had his property (which  
3 was to be used as collateral) appraised, and “all necessary steps” for the loan were taken. *Id.* In the  
4 end, however, CashCall denied the loan “based on [the] lack of property owner’s insurance on  
5 collateral property.” *Id.* Mr. Perry also alleges that a second CashCall loan officer told him that he  
6 could close the loan by paying \$4,000 in closing costs and providing a death certificate for the  
7 previous owner of the property to be used as collateral. *Id.* He alleges that he provided CashCall  
8 with a death certificate, but CashCall still refused to give him a loan. *Id.* Through this action, Mr.  
9 Perry seeks from CashCall only \$2,780, which he says is “2% of [the] interest difference he ha[d] to  
10 pay [to] refinance” his mortgage with another lender. *Id.* at 8.

11 CashCall argues that Mr. Perry’s claim fails because he does not specify the legal claim that he  
12 brings against it. CashCall’s Motion, ECF No. 25 at 5-6. It posits that Mr. Perry may bring a TILA  
13 claim (even though Mr. Perry does not allege disclosure deficiencies), and then correctly explains  
14 that such a claim would fail because Mr. Perry never consummated a loan with CashCall. *See*  
15 *Waters v. Weyerhaeuser Mortgage Co.*, 582 F.2d 503, 505 (9th Cir. 1978) (“There can be no  
16 violation of [TILA] until the transaction is consummated.”) (citations omitted). Perhaps more on  
17 point, to the extent that Mr. Perry brings a breach of contract claim (which CashCall does not  
18 mention), the court finds that he has not sufficiently alleged the terms of the purported contract, how  
19 he fulfilled all of his promises, and how CashCall breached its promises. While he alleges that  
20 CashCall stated that a loan with certain features was available (i.e., a “refinance mortgage loan” with  
21 an interest rate of 2.75% and no closing costs), he does not allege all of the things he had to do to be  
22 approved for it or that he did all of those things. For instance, he alleges that he was denied a loan  
23 because the property to be used for collateral lacked insurance, but he does not allege that the  
24 property actually was insured<sup>10</sup> or that this requirement was not a term of the purported contract. In  
25 short, assuming that Mr. Perry brings a breach of contract claim against CashCall, the court finds

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27 <sup>10</sup> Mr. Perry does, however, state in his opposition that the property was insured “[u]p to  
28 April 27, 2013,” “for a full year.” Opposition, ECF No. 28 at 2. This is not entirely helpful because,  
first, allegations must be contained in a complaint, and second, Mr. Perry never alleged the date on  
which CashCall denied his loan application.

1 that it is not sufficiently alleged. That said, the court cannot say at this time that he will not be able  
2 to allege it sufficiently. Accordingly, the court **DISMISSES WITHOUT PREJUDICE** Mr.  
3 Perry's breach of contract claim against CashCall. To the extent that Mr. Perry brings a TILA claim  
4 against CashCall, it is **DISMISSED WITH PREJUDICE**.

5 **E. Mr. Perry's Motion for a Jury Trial and Entry of Summary Judgment**

6 In light of the court's rulings on Defendants' motions, Mr. Perry's motion for a jury trial and  
7 entry of summary judgment is **DENIED** as either moot or premature.

8 **CONCLUSION**

9 Based on the foregoing, the court **GRANTS** Defendants' motions. Mr. Perry's claims against  
10 the State of California, First Bank, and PFSA are **DISMISSED WITH PREJUDICE**. As for his  
11 claims against CashCall, his TILA claim is **DISMISSED WITH PREJUDICE**, but his breach of  
12 contract claim is **DISMISSED WITHOUT PREJUDICE**. Mr. Perry may file a Second Amended  
13 Complaint against CashCall no later than April 7, 2014. Mr. Perry's motion for a jury trial and entry  
14 of summary judgment is **DENIED**.

15 **IT IS SO ORDERED.**

16 Dated: March 17, 2014

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18 LAUREL BEELER  
19 United States Magistrate Judge  
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