



1 obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and  
2 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*,  
3 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a complaint  
4 suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 129 S. Ct.  
5 at 1949 (citing *Twombly*, 550 U.S. at 557). Rule 8 “does not unlock the doors of discovery for a  
6 plaintiff armed with nothing more than conclusions.” *Id.* at 1950.

7 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
8 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*,  
9 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts  
10 pled “allow[] the court to draw the reasonable inference that the defendant is liable for the  
11 misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not to say that the claim must  
12 be probable, but there must be “more than a sheer possibility that a defendant has acted  
13 unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability” fall short of a plausible  
14 entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept  
15 as true “legal conclusions” contained in the complaint. *Id.* This review requires context-specific  
16 analysis involving the Court’s “judicial experience and common sense.” *Id.* at 1950 (citation  
17 omitted). “[W]here the well-pleaded facts do not permit the court to infer more than the mere  
18 possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is  
19 entitled to relief.’” *Id.*

## 20 ANALYSIS

### 21 I. TRUTH IN LENDING ACT DAMAGES CLAIM

22 Plaintiff’s first cause of action is for damages under the Truth in Lending Act (TILA).  
23 (TAC PP 9--34.) In this Court’s Prior Order it stated: “because Plaintiff filed this action beyond  
24 the statute of limitations and has not pled facts that would entitle him to equitable tolling, his claim  
25 for damages under TILA is **DISMISSED WITH PREJUDICE.**” (Doc. No. 31 at 4.) Given this  
26 holding, Plaintiff was not free to include this claim in the TAC and the first cause of action must  
27 again be **DISMISSED.**

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1 **II. TRUTH IN LENDING ACT RESCISSION CLAIM**

2 The second cause of action is also based on TILA, but seeks a rescission of the loans in  
3 question. (TAC ¶¶ 35–38.) He claims that Defendant Wachovia violated TILA in four ways: (1)  
4 it did not disclose the interest rate in a sufficiently clear and conspicuous manner, (2) its disclosure  
5 regarding the interest rate is neither clear nor conspicuous, (3) the disclosures are intentionally  
6 deceptive, and (4) it did not disclose the interest rate in several documents. (*Id.* ¶ 19.)

7 In this Court’s Prior Order, it exercised its discretion and required Plaintiff to “plead his  
8 ability to tender in order to maintain his claim for rescission.” (Doc. No. 31 at 4–5.) The reason  
9 for this was that “[i]t would be a waste of the time and resources of the parties and the Court to  
10 proceed to the point of rescission only to have Plaintiff be unable to tender.” (*Id.* at 5.)

11 Defendants argue that this matter should be dismissed because Plaintiff has not alleged his  
12 ability and willingness to tender the amount of his loan.<sup>2</sup> (Memo. ISO Motion at 3.) Defendants  
13 are correct. Plaintiff added the following allegation to the TAC:

14 Plaintiff is prepared to rescind the real estate agreement with the Defendant  
15 WACHOVIA on the following basis: A. That all derogatory credit information  
16 caused by the Defendant be expunged from Plaintiff’s credit profile; B. That all  
17 payments and other credits and debits for the entire tenancy have been accounted  
18 for; C. Plaintiff shall thereupon make a rescission payment to the extent of the  
19 amount borrowed, but not to exceed the fair market value of the realty arrived at  
20 either by stipulation of all the parties or by finding of the Court.

21 (TAC PP 37.)

22 This is inadequate. Plaintiff conditions his willingness to repay on restitution to which he  
23 may or may not be entitled at the end of this matter. Such conditions place the cart before the  
24 horse. In order to proceed, Plaintiff must be prepared to rescind even in the event that he is not  
25 entitled to the other requests he makes.

26 He also only expresses a willingness to repay up to “the fair market value of the realty.”  
27 This condition is contrary to the most basic principles of rescission and therefore unacceptable.  
28 Rescission places the parties to a contract in the same position they were before the contract was

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<sup>2</sup> Defendants also argue that the rescission claim is time barred. (Memo. ISO Motion at 3–4.)  
The Court elects not to address this concern for two reasons. First, it is unnecessary since Plaintiff  
still has failed to show that he is willing to properly tender. Second, Defendants’ arguments require  
this Court to delve into the merits of a conflict between Plaintiff’s allegations and Defendants’  
proffered evidence. The Court believes that this is a conflict better resolved on a motion for summary  
judgment than on a motion to dismiss.

1 entered. In this case, that means Plaintiff must be willing and able to repay the full principal of his  
2 loans, regardless of the current market value of the real estate.

3 Plaintiff argues that “it would be absurd to require [him] to repay more than the home’s  
4 value simply to enrich the bank beyond its expectations at the time of the subject transaction.”  
5 (Opp. at 2.) This misses the entire point of rescission. The bank made these loans expecting to  
6 recoup the principal along with interest. As such, rescission does not “enrich the bank beyond its  
7 expectations at the time of the subject transaction.” (*Id.*) It simply puts the bank back where it  
8 started.

9 Moreover, this argument effectively requires the Defendants should bear the risk of market  
10 volatility. However rescission does not require them to shoulder such a burden. Instead, it simply  
11 requires both parties to return the other to its starting position. This places the burden of a  
12 negative market swing on the borrower, not the lender. For this reason alone, the TAC must be

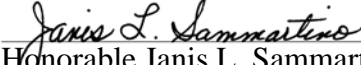
13 **DISMISSED.**

14 **CONCLUSION**

15 For the reasons stated, Defendants’ motion to dismiss is **GRANTED** and this matter is  
16 **DISMISSED.**

17 IT IS SO ORDERED.

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19 DATED: August 24, 2010

20   
21 Honorable Janis L. Sammartino  
22 United States District Judge  
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