

1 default on his loan, and a notice of default was recorded on June 24, 2010. (*Id.*); (Compl. ¶ 7, ECF
2 No. 1-1) Foreclosure proceedings commenced soon thereafter. (Mot. to Dismiss 2–3, ECF No. 3)

3 On March 8, 2011, Plaintiff—proceeding pro se—filed the instant suit in the Superior
4 Court of the State of California for the County of Imperial. (Compl., ECF No. 1-1) Green Tree
5 was served on March 30, 2011, and on April 29, 2011 removed the action to this Court pursuant to
6 28 U.S.C. § 1441(b), asserting federal question jurisdiction based on Plaintiff’s Truth in Lending
7 Act claim. (Not. of Removal 2, ECF No. 1)

8 The present motion to dismiss was filed by Defendant Green Tree on May 6, 2011. (Mot.
9 to Dismiss, ECF No. 3) Plaintiff opposed on May 11, 2011, (Resp. in Opp’n, ECF No. 4), and
10 Green Tree replied on June 24, 2011, (Reply in Supp., ECF No. 8). A hearing set on the motion
11 was vacated and the matter was taken under submission without oral argument pursuant to Civil
12 Local Rule 7.1(d)(1).

13 A second motion to dismiss was filed by Defendant Quality Loan Service Corporation
14 (“QLSC”) on June 6, 2011. (QLSC Mot. to Dismiss, ECF No. 7) Plaintiff never filed a response
15 to this motion, and the Court issued an Order granting QLSC’s motion to dismiss without
16 prejudice, notifying Plaintiff of the need to file an amended complaint by August 1, 2011 if he
17 wished to continue litigating the case against QLSC. (Order, July 18, 2011, ECF No. 11) Plaintiff
18 failed to file an amended complaint.

19 LEGAL STANDARD

20 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that
21 the complaint “fail[s] to state a claim upon which relief can be granted,” generally referred to as a
22 motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and
23 sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and plain
24 statement of the claim showing that the pleader is entitled to relief.” Although Rule 8 “does not
25 require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned, the-
26 defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, — US — , 129 S. Ct. 1937, 1949
27 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a
28 plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than
labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”

1 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a
2 complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*,
3 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 557).

4 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
5 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*,
6 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts
7 pled “allow[] the court to draw the reasonable inference that the defendant is liable for the
8 misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not to say that the claim must
9 be probable, but there must be “more than a sheer possibility that a defendant has acted
10 unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability” fall short of a plausible
11 entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept
12 as true “legal conclusions” contained in the complaint. *Id.* This review requires context-specific
13 analysis involving the Court’s “judicial experience and common sense.” *Id.* at 1950 (citation
14 omitted). “[W]here the well-pleaded facts do not permit the court to infer more than the mere
15 possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is
16 entitled to relief.’” *Id.* Moreover, “for a complaint to be dismissed because the allegations give
17 rise to an affirmative defense[,] the defense clearly must appear on the face of the pleading.”
18 *McCalden v. Ca. Library Ass’n*, 955 F.2d 1214, 1219 (9th Cir. 1990).

19 Where a motion to dismiss is granted, “leave to amend should be granted ‘unless the court
20 determines that the allegation of other facts consistent with the challenged pleading could not
21 possibly cure the deficiency.’” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.
22 1992) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.
23 1986)). In other words, where leave to amend would be futile, the Court may deny leave to
24 amend. *See Desoto*, 957 F.2d at 658; *Schreiber*, 806 F.2d at 1401.

25 ANALYSIS

26 Plaintiff asserts one federal claim, violation of the Truth in Lending Act (“TILA”), and six
27 state law claims: (1) violation of California Civil Code section 2923.5; (2) fraud; (3) intentional
28 misrepresentation; (4) violation of California Civil Code section 2923.6; (5) violation of California
Civil Code section 1572; and (6) violation of California Business and Professions Code section

1 17200. (Compl., ECF No. 1-1) The Court addresses only the TILA claim and, having found that
2 Plaintiff fails to state a claim for violation of TILA, declines to exercise supplemental jurisdiction
3 over the remaining state law claims. 28 U.S.C. § 1367(c).

4 **1. TILA**

5 Plaintiff's TILA claim is based on Green Tree's alleged failure "to include and disclose
6 certain charges in the finance charge . . . statement, which charges were imposed on Plaintiff[]
7 incident to the extension of credit to the Plaintiff[] and were required to be disclosed." (Compl.
8 ¶ 69, ECF No. 1-1) As a result of Green Tree's failure to make the required disclosures, Plaintiff
9 seeks rescission of the loan transaction and purportedly seeks money damages as well. (*See id.*
10 ¶ 71)

11 Green Tree moves to dismiss Plaintiff's TILA claim on several bases. First, Green Tree
12 argues that Plaintiff's TILA claim for damages "fails because Green Tree did not originate the
13 subject loan," but rather National City Mortgage was party to the original loan transaction and
14 later assigned the deed of trust to Green Tree. (Mot. to Dismiss 11, ECF No. 3) Second, as to
15 Green Tree's liability as an assignee, Green Tree argues that Plaintiff's claim fails because he
16 failed to allege that the "violation he claims his original creditor committed was apparent on the
17 face of the TILA disclosure statement or the assigned promissory note or deed of trust." (*Id.* at
18 11–12) Third, Green Tree claims that Plaintiff's TILA claim is barred by the applicable statute of
19 limitations. (*Id.* at 12)

20 **(A) *Green Tree's Liability Under TILA—"Creditor" vs. Assignee***

21 "TILA authorizes suits against original creditors and their assignees." *Anderson Bros.*
22 *Ford v. Valencia*, 452 U.S. 205, 208 n.4 (1981) (citing 15 U.S.C. §§ 1614, 1640). To the extent
23 that Plaintiff is seeking damages, Plaintiff may only seek this type of relief from Green Tree if
24 Green Tree is a "creditor" under TILA, 15 U.S.C. § 1640, or if Green Tree is an assignee and "the
25 violation for which such action or proceeding is brought is apparent on the face of the disclosure
26 statement," *id.* § 1641. Section 1602 defines a "creditor" under TILA:

27 The term "creditor" refers only to a person who both (1) regularly extends,
28 whether in connection with loans, sales of property or services, or otherwise,
consumer credit which is payable by agreement in more than four installments or
for which the payment of a finance charge is or may be required, and (2) is the
person to whom the debt arising from the consumer credit transaction is initially

1 payable on the fact of the evidence of indebtedness or, if there is no such evidence
2 of indebtedness, by agreement.

3 15 U.S.C. § 1602(g). Under this definition, because Green Tree is not the party “to whom the
4 debt . . . is initially payable” as National City Mortgage—not Green Tree—originated the subject
5 loan, Green Tree cannot be deemed a “creditor” for purposes of TILA liability.

6 Nevertheless, Green Tree may be liable as an assignee for National City Mortgage’s failure
7 to disclose if the violation was apparent on the face of the loan document. 15 U.S.C. § 1641. The
8 Ninth Circuit has not yet interpreted this section, but the “Seventh Circuit has only extended
9 liability to ‘violations that a reasonable person can spot on the face of the disclosure statement or
10 other assigned documents.’” *Austero v. Aurora Loan Servs.*, No. C-11-00490, 2011 U.S. Dist.
11 LEXIS 85356, at *42 (N.D. Cal. Aug. 3, 2011) (quoting *Taylor v. Quality Hyundai, Inc.*, 150 F.3d
12 689, 694 (7th Cir. 1998) (noting that the Fifth and Eleventh Circuits are in accord).

13 Here, Plaintiff’s asserted TILA violation concerns “undisclosed charges includ[ing] a sum
14 identified on the Settlement Statement listing the amount finance which is different from the sum
15 listed on the original Note.” (Compl. ¶ 69, ECF No. 1-1) While Plaintiff does not explicitly assert
16 assignee liability against Green Tree, if, as Plaintiff alleges, the sum identified on the TILA
17 statement differs from the sum listed on the original note, this discrepancy would qualify as one
18 that a “reasonable person [could] spot on the face of the disclosure statement or other assigned
19 documents.” *Taylor*, 150 F.3d at 694; *see also Nunez v. Aurora Loan Servs.*, No. 11cv1121, 2011
20 U.S. Dist. LEXIS 123312, at *12 (S.D. Cal. Oct. 24, 2011) (“The discrepancy [between the final
21 HUD-1 statement and the TILA disclosure statement] was apparent on the face of these two
22 documents.”).

23 This is not the end of the inquiry, however. In order for assignee liability to attach, this
24 discrepancy must reveal the existence of a TILA violation. But Plaintiff’s complaint does not go
25 so far as to demonstrate that the finance charge disclosure constituted a violation of TILA.
26 National City Mortgage allegedly failed to disclose an accurate finance charge, in violation of 12
27 C.F.R. § 226.18(d). However, pursuant to that section, the disclosed finance charge “shall be
28 treated as accurate” so long as the amount disclosed “(i) is understated by no more than \$100; or
(ii) is greater than the amount required to be disclosed.” 12 C.F.R. § 226.18(d)(1). Here,

1 Plaintiff's complaint falls short by failing to allege whether the apparent discrepancy revealed that
2 the finance charge disclosure was understated by more than \$100.

3 Thus, Plaintiff fails to state a claim for assignee liability under TILA and Green Tree's
4 motion to dismiss this claim is therefore **GRANTED**. Because Plaintiff could supplement his
5 complaint with allegations regarding the allegedly inaccurate finance charge disclosure, however,
6 the Court **DISMISSES** this claim **WITHOUT PREJUDICE**.

7 **(B) Statute of Limitations Under TILA**

8 Even assuming Plaintiff alleged sufficient facts to state a claim under TILA, Plaintiff's
9 claim is untimely. TILA applies a one-year statute of limitations to damages claims and a three-
10 year limitations period for the right to rescind. 15 U.S.C. §§ 1635(f), 1640(e). TILA's statute of
11 limitations is not triggered by the discovery of a violation, but begins to run on the day the loan is
12 consummated. *King v. California*, 784 F.2d 910, 915 (9th Cir. 1986). However, equitable tolling
13 of the TILA claim may be available "if the general rule would be unjust or frustrate the purpose of
14 the Act." *King*, 784 F.2d at 915. Specifically, tolling is proper where there are "allegations of
15 fraudulent concealment which by their very nature, if true, serve to make compliance with the
16 limitation period imposed by Congress an impossibility." *Id.* (quoting *Jones v. TransOhio Sav.*
17 *Ass'n*, 747 F.2d 1037, 1041 (6th Cir. 1984)).

18 Plaintiff filed this action well outside of the limitations periods for both damages and
19 rescission. Plaintiff entered into the relevant loan transaction on August 16, 2007. (Compl. ¶ 6,
20 ECF No. 1-1) Thus, a timely damages claim would have been filed by August 16, 2008, and a
21 timely rescission claim by August 16, 2010. Plaintiff's claim here was filed on March 8, 2011,
22 over two and a half years too late for a damages claim and approximately six months late for a
23 rescission claim.

24 Regarding whether the limitations period should be tolled, here, Plaintiff alleges that "[t]he
25 aforementioned acts of Defendants, and each of them, were motivated by oppression, fraud, [and]
26 malice," but does not provide any additional factual support for this bare assertion. (Compl. ¶ 71,
27 ECF No. 1-1) Moreover, Plaintiff had a reasonable opportunity to discover the allegedly
28 inaccurate finance charge disclosure within the limitations period. In fact, as explained above, the
alleged discrepancy between the finance charge disclosure and the finance charge listed on the

1 original note is something that a “reasonable person could spot on the face of the disclosure
2 statement,” and ought to have alerted Plaintiff to the alleged TILA violation. The fact that
3 Plaintiff did not undertake an investigation of the inaccurate finance charge disclosure until after
4 the limitations period had already expired is no reason to compromise Congress’s stated
5 limitations period.


6 Thus, Plaintiff’s TILA claim is not timely and Green Tree’s motion to dismiss this claim is
7 **GRANTED** on this basis as well. It is nonetheless possible that facts justifying tolling exist and
8 therefore the Court **DISMISSES** this claim **WITHOUT PREJUDICE**.

9 **CONCLUSION**

10 For the reasons stated above, Green Tree’s motion to dismiss is **GRANTED**. Plaintiff’s
11 TILA claim is **DISMISSED WITHOUT PREJUDICE**. Having dismissed Plaintiff’s only
12 federal claim in this action, the Court declines to exercise supplemental jurisdiction over the
13 remaining state law claims. 28 U.S.C. § 1367(c). If Plaintiff wishes, Plaintiff may file an
14 amended complaint within fourteen days after this order is electronically docketed.

15 **IT IS SO ORDERED.**

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17 DATED: November 15, 2011

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19 Honorable Janis L. Sammartino
20 United States District Judge
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