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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GREGORY LAPORTA, an individual,

Plaintiff,,

v.

BANK OF AMERICA, a Delaware Corporation; BANK OF AMERICA NATIONAL CORPORATION, a North Carolina Corporation; BAC HOME LOAN SERVICING, a Texas Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: 2:11-cv-01094-KJD-GWF

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Defendants Bank of America, Bank of America, N.A. and BAC Home Loans Servicing, LP, (collectively referred to herein as "BANA") move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiff Gregory Laporta's Complaint, or in the alternative for summary judgment pursuant to Fed. R. Civ. Pro 56. This Motion is based on the pleadings and papers on file herein, the Memorandum of Points and Authorities below, and any oral argument this Court should entertain.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This lawsuit represents yet another factually and legally meritless attempt to assert wrongdoing on the part of BANA by a Plaintiff who is unhappy with the terms of the mortgage agreement he willfully entered in to in 2008. Plaintiff alleges that BANA has failed to adhere to the requirements of RESPA and the FCRA. Plaintiff's complaint should be dismissed, or in the alternative summary judgment should be entered in favor of BANA, as Plaintiff fails to state a claim upon which relief can be granted as Plaintiff's communication was not a proper Qualified Written Request, the claimed violations of the FCRA do not create a private right of action, and BANA has not violated the requirements of RESPA or the FCRA.[1]

II.

STATEMENT OF FACTS

Plaintiff obtained a mortgage loan on or about February 27, 2008 in the amount of $145,350.00, which was secured by a first Deed of Trust encumbering the real property located at 7260 Early Pioneer Avenue, Las Vegas, Nevada 89129. *See* **Exhibit A**, First Deed of Trust.[2]

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[1] In the event the Court must look beyond the Complaint and recorded documents, Defendants alternatively move for summary judgment pursuant to Fed. R. Civ. P. 56 on Plaintiff's claims for relief. Fed. R. Civ. P. 56(a) provides that "a court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Matsushita Elec. Ind. Co. v. Zenith Radio,* 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view all facts and draw all inferences in the light most favorable to the non-moving party. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied,* 460 U.S. 1085 (1983).

[2] BANA respectfully requests judicial notice of the attached Exhibits A-D. Under Federal Rule of Evidence 201, a court may judicially notice matters of public record. *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991). The deed, deeds of trust, and foreclosure notices should be judicially noticed because they are of public record in the Clark County Recorder's office.

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Additionally, Plaintiff obtained a second mortgage loan in the amount of $7,650.00 which was secured by a second Deed of Trust encumbering the property. *See* **Exhibit B**, Second Deed of Trust. Both Deeds of Trust were recorded in the official records of Clark County on March 3, 2008 as document numbers 20080303-0004107 and 20080303-0004108, respectively. Plaintiff obtained the loans from First Horizon Home Loans. *See* **Ex. A**, *see also* **Ex. B**. On or about July 14, 2008, First Horizon Home Loans assigned the beneficial interest in both loans to Countrywide Bank, FSB; the assignments were recorded on July 29, 2008. *See* **Exhibit C**, Assignments of Deeds of Trust. As stated in Plaintiff's Complaint, Countrywide was later purchased by BANA. *See* Compl. ¶ 13. After the purchase of Countrywide, BANA took over servicing of Plaintiffs loans.

On or about July 24, 2010, Plaintiff drafted and caused to be mailed a document entitled "Qualified Written Request – Dispute of Debt/Validation of Debt". *See* **Exhibit D**, July 24, 2010 Letter. This letter, while purported to be a Qualified Written Request ("QWR"), was merely the Plaintiff's attempt to dispute that the debt was due and owing at all. BANA's customer service department acknowledged receipt of the communication with a letter to Plaintiff dated July 27, 2010. *See* **Exhibit E**, Acknowledgement of Receipt. On July 28, 2010, BANA caused all available loan documents and payment history to be sent to the Plaintiff. *See* **Exhibit F**, July 28, 2010 Response to Plaintiff. On August 20, 2010, BANA provided a detailed response to Plaintiff's purported QWRt. *See* **Exhibit G**, August 20, 2010 Response.

Plaintiff now claims that BANA's response to his purported QWR was insufficient under 12 USC § 2605. *See* Compl. p. 4. Further, Plaintiff claims that BANA failed to report his mortgage payments to credit reporting agencies, thereby causing a lack of "credit history" which Plaintiff claims resulted in the denial of his application for a credit card. *See* Compl. 3.

III.

LEGAL STANDARD

The standard of review applicable to a motion to dismiss under Rule 12(b)(6) is familiar; however, the Supreme Court has clarified the standard in significant ways. Rule 8(a)(2) requires that

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the complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P 8(a)(2). According to the Supreme Court in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation' of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555).

A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). To "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* (quoting *Twombly*, 550 U.S. at 556). Factual allegations are assumed true, but the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 1949-50 (quoting *Twombly*, 550 U.S. at 555); *see also Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

IV.

ARGUMENT

A. Plaintiff's July 24, 2010 Communication is Not a QWR under 12 USC § 2605

Plaintiff alleges that he sent a QWR to Defendants on or about "July 29, 2010". *See* Compl., ¶ 25. Although he does explain why he believes it is proper under 12 U.S.C. § 2605(e), he asserts a RESPA claim pertaining thereto, seemingly based on his allegation that BANA failed to "fully comply" with the QWR. *See* Compl., ¶ 26.[3]

[3] It should be noted that, even though Plaintiff's Letter was not a QWR, BANA sent him a detailed response within 60 days as well as a number of the requested documents, including a detailed payment history.

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Contrary to Plaintiff's assertion that his June 29, 2010 letter is a valid QWR, it is clear the communication is merely a six-page diatribe most closely resembling requests for production and interrogatories, as well as a bald dispute of the validity of the mortgage debts at issue, based on Plaintiff's "understanding that [BANA] has been accused of engaging in one or more predatory lending and servicing schemes". *See* Ex. D Some highlights from the Letter include the following:

- I am concerned that such abuses are targeting the uneducated and uninformed consumed and disadvantaged, poor, elderly, and minorities.
- I am disputing the validity of the current debt you claim I owe
- To independently validate my debt, I need to conduct a complete exam, audit, review,, and accounting of my mortgage loan from its inception through the present date.
- I am thinking about contracting my local attorney to perform a forensic document review of your investigation and audit of my account.
- I am sure I have been a victim of such predatory practices leading toa n inflated appraisal of my property at the time of purchase

The Letter goes on to demand answers to 10 questions by the Plaintiff, as well as to demand responses to 20 requests for production of documents. *See* Ex. D. **Nowhere in the letter does the Plaintiff ever set forth why he believes his specific account is in error.** *Id.*

12 U.S.C. §2605(e)(1) imposes an obligation on loan servicers to respond to QWRs from mortgagors. A QWR is defined as follows:

> (B) Qualified written request
> For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that-- (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

See 12 U.S.C. §2605(e)(1)(B).

A QWR must state a reason why the "account is in error." *See* 12 U.S.C. §2605(e)(1)(B). The Letter does not qualify as a QWR under Section 2605(e)(1)(B) of RESPA because it does not

state why the account is in error. In *Pernell v. BAC Home Loans Servicing, L.P.*, the United States District Court for the Eastern District of California concluded that a letter similar to that at issue here was not a QWR as a matter of law, observing as follows:

> Even taking plaintiff's allegations as true, plaintiff's purported Qualified Written Requests really appear to be connected to plaintiff's legally unsupported allegations that defendants [must] "validate the purported debt" in order to foreclose on plaintiff's home and were not the "holders in due course."

No. 2:09-cv-03561 FCD KJN PS, 2011 WL 318539, *7 (E.D. Cal. Feb. 1, 2011). Similarly, in *Hamilton v. Bank of Blue Valley*, the United States District Court for the Eastern District of California concluded that the plaintiffs' RESPA claim failed because Plaintiffs did not plead the existence of a "legitimate QWR and allegations to that effect given that their written request fails to address loan servicing under RESPA." *See* 746 F. Supp. 2d 1160, 1175 (E.D. Cal. 2010).

As in *Pernell*, the Letter is entirely derivative of Plaintiff's conspiracy theories. Moreover, as in *Hamilton*, Plaintiff has failed to plausibly allege the existence of a valid QWR. This Court should employ the same analysis as the *Pernell* and *Hamilton* Courts and reach the same result as that reached therein. In particular, the Court should dismiss any RESPA claims pertaining to an alleged failure to properly respond to the Letter, as it is not a QWR under RESPA.

B. Plaintiff's RESPA Claim Fails Because Plaintiff Has not Alleged Actual Damages or Any Facts Showing a Pattern or Practice of RESPA Violations

12 U.S.C. § 2605(f)(1)(A)-(B) provides that the borrower can recover "actual damages . . . as a result of [a RESPA violation]" or "any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section." Here, Plaintiff's RESPA claim fails because Plaintiff has not alleged actual damages or a pattern or practice of RESPA violations.

Plaintiff's RESPA claim should be dismissed. The alleged failure of a servicer to respond to a QWR "alone does not substantiate a RESPA claim . . . [the borrower] must have also suffered a

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pecuniary loss to support a RESPA violation." *Moon v. Countrywide Home Loans, Inc.*, No. 3:09-CV-00298-ECR-VPC, 2010 WL 522753, *5 (D. Nev. Feb. 9, 2010); *see also Hamilton*, 746 F. Supp. 2d at 1175 ("A purported RESPA claim is doomed in the absence of allegations of Mr. and Mrs. Hamilton's identifiable damages attributable to a RESPA violation."). Plaintiff does not allege that he suffered any pecuniary loss as a result of BANA's alleged failure to provide an account history and application of payments. This is fatal to his RESPA claim and warrants dismissal thereof.

In addition, Plaintiff has not alleged any facts to sustain a statutory damages claim under RESPA. Plaintiff allegedly sent one QWR. Even if BANA had failed to respond to the purported QWR, which they did not, a loan servicer's alleged failure to respond to one (1) written request is not a factual allegation of a pattern or practice of RESPA violations.[4] *See Morris v. Bank of America*, No. C 09-02849 SBA, 2011 WL 250325, *5 n.9 (N.D. Cal. Jan. 26, 2011) (court dismissed RESPA claim for statutory damages where plaintiff merely alleged two (2) RESPA violations). For each of the foregoing reasons, Plaintiff's RESPA claims should be dismissed with prejudice.

C. Even if Plaintiff's Communication Was a Valid QWR, BANA did Not Fail to Respond.

Even if this Court were to find that the communication at issue was a valid QWR, it is clear that BANA responded to the communication properly. Receipt of the communication was acknowledged by BANA on July 27, 2010. *See* Ex. E. Copies of Loan Documents and a detailed payment history was mailed to the Plaintiff by BANA along with a letter dated July 28, 2010. *See* Ex. F. And finally, a detailed response was sent by BANA to the Plaintiff on August 20, 2010. *See* Ex. G. As such, even if the Letter dated June 24, 2010 could be considered a QWR, BANA did not fail to comply with any section of 12 U.S.C. § 2605 in providing a response to Plaintiff. As such, the Plaintiff's first cause of action for alleged RESPA violations must fail.

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D. Plaintiff's Second Cause of Action for Alleged Violations of the Fair Credit Reporting Act Must be Dismissed as No Private Right of Action Exists for the Claimed Violations.

Plaintiff claims that BANA violated 15 USC §1681s-2(a)(1)(A) and (B) (incorrectly cited by Plaintiff as 12 USC §1681s-2(a)(1)(A) and (B)) by failing to report the loan transactions to credit reporting agencies, and thereby failing to help Plaintiff establish "credit history". *See* Compl. ¶¶ 29, 38, 39. However, numerous courts have held that provisions of the FCRA may not be privately enforced. *See, e.g.*, *Ram v. Wachovia Mortg.*, 2011 U.S. Dist. LEXIS 32392, at *20-21 (E.D. Cal. 2011); *Khomich v. Bank of Am., N.A.*, 2011 U.S. Dist. LEXIS 30028, at *18-19 (2011). As such, Plaintiff's second cause of action under 15 USC §1681s-2(a)(1)(A) and (B) require dismissal.

E. Even if a Private Right of Action Existed Under 15 USC §1681s-2(a)(1)(A) and (B), Plaintiff's Second Cause of Action Must be Dismissed Because There is No Affirmative Requirement That BANA Report Mortgage Payment Information

Plaintiff's second cause of action is premised on the alleged failure by BANA to report his mortgage payments to credit reporting agencies at all, thus allegedly causing Plaintiff to lack "credit history" and "achieve upward mobility". *See* Compl. ¶¶ 29-30. Thus, Plaintiff is alleging that BANA did not report the loan transaction **at all**, not that information furnished to credit reporting agencies was inaccurate. There is no provision under the FCRA that created an affirmative obligation for mortgage lenders or servicers to report information to credit reporting agencies. However, if the lender or servicer does choose to report information, 15 USC §1681s-2(a)(1)(A) and (B) require that the information furnished be accurate. There is no legal duty imposed upon BANA to assist the Plaintiff in building good credit history by reporting to credit agencies. As such, even if a private right of action existed, Plaintiff has still failed to state a claim upon which relief may be granted, and BANA is entitled to dismissal of Plaintiff's second cause of action for alleged violations of the FCRA.

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F. Plaintiff's Second Cause of Action Must Also be Dismissed Due to Plaintiff's Failure to Notify BANA that Specific Information Was Inaccurate.

15 USC §1681s-2(a)(1)(B)(i) requires that a consumer notify a furnisher of information to consumer reporting agencies, at an address specified, that **specific information** reported to a credit reporting agency is inaccurate. Plaintiff asserts that, in his Letter dated June 24, 2010, he inquired as to why BANA had not reported his mortgage payments. *See* Compl. ¶ 25. Nowhere in the letter does Plaintiff notify BANA of specific inaccurate information as required by the FCRA. Plaintiff makes no further allegations that he notified BANA of specific inaccurate information being furnished to a credit reporting agency. This alone is fatal to Plaintiff's second cause of action.

V.

CONCLUSION

For the reasons stated above, the BANA respectfully requests that this Court dismiss each of Plaintiff's claims and the Complaint with prejudice, or in the alternative, issue an Order granting summary judgment in favor of BANA.

DATED this 19 day of August, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of August, 2011and pursuant to FRCP 5, I served via CM/ECF and/or deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** postage prepaid and addressed to:

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