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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 GREGORY LAPORTA, a individual

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

9 Plaintiff,

10 vs.

PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

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

14 Defendants.

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16
17 COMES NOW, Plaintiffs GREGORY LAPORTA, by and through his attorney, MATTHEW
18 Q. CALLISTER, ESQ, of the law firm of CALLISTER + ASSOCIATES, LLC, and hereby opposes
19 the Defendants' Motion to Dismiss. This Opposition is made and based upon the attached
20 Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral
21 arguments of counsel that may be entertained by this Honorable Court.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTRODUCTION**

24 Plaintiff has sued the defendants due to the refusal of the Defendants to fully comply with the
25 Plaintiff's Qualified Written Request ("QWR"). Plaintiff submitted to the Defendants a QWR in an
26 attempt to clarify various issue with his mortgage loan including a lack of credit reporting of his
27 mortgage payments, and based around numerous legal issues that the Defendants have had a pattern and
28 practice of charging excessive fees and costs associated with home loans as well as inflated appraisals

1 of real property. The Plaintiff is current on all his mortgage payments and is not attempting to alter his
2 mortgage terms or payments. Plaintiff is merely attempting to investigate the facts surrounding his loan
3 transaction for compliance with the original loan agreement. As such, Plaintiff is not asserting
4 wrongdoing due to the unhappiness with the terms of his mortgage as defense counsel asserts.

5 **II. FACTUAL BACKGROUND**

- 6 1. In early 2008 LAPORTA purchased the real property located at 7260 Early Pioneer Avenue,
7 Las Vegas, NV 89129 (henceforth referred to as the "HOME")
- 8 2. As part of the purchase of this home LAPORTA originated mortgages with First Horizon
9 Loans.
- 10 3. One month after the origination of the mortgage, First Horizons Loans sold LAPORTA's
11 loan to Countrywide Bank.
- 12 4. At this time LAPORTA began making payments to Countrywide Bank.
- 13 5. Countrywide filed the Assignment of Deed of Trust with Clark County Nevada Recorder's
14 Office on July 29, 2008..
- 15 6. In July, 2009 BANK OF AMERICA purchased Countrywide Bank.
- 16 7. BANK OF AMERICA at this time contacted LAPORTA requesting that he make all future
17 payments to BANK OF AMERICA.
- 18 8. BANK OF AMERICA never filed an Assignment of Deed of Trust with the Clark County
19 Nevada Recorder's Office and currently Countrywide is still listed as the beneficiary on the
20 Deed of Trust.
- 21 9. During the time that LAPORTA forwarded his mortgage payments to BANK OF AMERICA,
22 the Defendant failed to accurately report any of his mortgage payments to any credit reporting
23 agencies.
- 24 10. Due to the lack of reporting to the credit reporting agencies, LAPORTA's credit was
25 adversely affected.
- 26 11. On or about July 29, 2010 LAPORTA applied for a consumer credit line (henceforth referred
27 to as the "Barclaycard").
- 28 12. LAPORTA was denied the Barclaycard due to a lack of credit history and current accounts.

- 1 13. This denial was directly related to BANK OF AMERICA's failure to report LAPORTA's
2 mortgage payments.
- 3 14. On or about April 30, 2011 LAPORTA applied for a consumer credit line(henceforth referred
4 to as the "BankAmericard").
- 5 15. LAPORTA was denied the BankAmericard due to a lack of credit history.
- 6 16. On or about April 28, 2011 LAPORTA was notified by State Farm Insurance, LAPORTA's
7 home insurer, that BANK OF AMERICA was removed as the lien holder on the insurance
8 policy.
- 9 17. BANK OF AMERICA's failure to file an Assignment of Deed of Trust with the Clark
10 County Nevada Recorder's Office leaves LAPORTA unable to determine who the actual line
11 holder is.
- 12 18. On or About June 29, 2010 LAPORTA sent BANK OF AMERICA a "qualified written
13 request" to determine why BANK OF AMERICA had not reported his mortgage payments.
- 14 19. BANK OF AMERICA refused to fully comply with the Qualified Written Request (QWR).
- 15 20. BANK OF AMERICA stated that the request was "overly broad, [and] unduly burdensome."
- 16 21. After BANK OF AMERICA filed the processed the QWR, BANK OF AMERICA continued
17 in its failure to report LAPORTA's mortgage payments on his credit report.
- 18 22. As a result of BANK OF AMERICA's failure to submit accurate information to the credit
19 reporting agencies, LAPORTA is being continually damaged as his credit rating is not an
20 accurate reflection of his actual credit history.
- 21 23. As a result of BANK OF AMERICA's failure to submit accurate information to the credit
22 reporting agencies LAPORTA is unable to achieve any upward mobility for refinancing with
23 other lenders and is unable to obtain homeowners insurance through other insurance
24 companies.

25 III. LEGAL STANDARD

26 Under FRCP 12(b), a party may file a motion to dismiss for failure to state a claim upon which
27 relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual
28 matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129

1 S.Ct. 1937, 1949 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that
2 allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
3 *Id.*

4 To survive a motion to dismiss, the “complaint must set forth ‘factual allegation, either direct
5 or inferential, respecting each material element necessary to sustain recovery under some actionable legal
6 theory.” *Berner v. Delahanty*, 129 F.3d 20, 25 (1st Cir 1997) “A Court considering a motion to dismiss
7 can choose to begin by identifying pleading that, because they are no more than conclusions, are not
8 entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). A complaint should
9 be dismissed if it appears that the Plaintiff can prove no set of facts that would entitled him to relief.
10 *Cohn v. Mirage Resorts, Inc*, 62 P.3d 720, 734 (Nev. 2003), citing *Edgae v. Wagner*, 101 Nev. 226,
11 288(1985).

12 **IV. LEGAL ARGUMENT**

13 **A. Plaintiff’s Letter is a Qualified Written Request.**

14 A QWR is defined under 12 U.S.C. §2605(e)(1)(B) which states:

15 “A qualified written request shall be a written correspondence, other than notice a payment
16 coupon or other payment medium supplied by the servicers that:

17 (i) includes, or otherwise enables the service to identify, the name and account of the borrowers;
18 and

19 (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable,
20 that the account is in error or **provides sufficient detail to the servicer regarding other**
21 **information sought by the borrower.”** (Emphasis Added)

22 Given the statutory language 12 U.S.C. §2605(e)(1)(B) sets out three qualifications for a QWR:
23 (1) that the QWR be a writing not on a payment coupon or other payment medium; (2) that the QWR
24 have identifying marks such as a name and account number; and (3) provides a reason for error or
25 provides sufficient detail to the servicer regarding other information sought by the borrower.

26 In the case of LaPorta all three requirements are met under the statute and as such the letter dated
27 June 24, 2010 is a QWR. First, even based on a cursory review of the document in question, the letter
28 that LaPorta sent to Bank of America is a certified letter not either on a payment coupon or other

1 payment medium. Secondly LaPorta's name is on the qualified written request and on page 3 of the
2 document LaPorta identifies his loan number, in bold font, making it easily identifiable.

3 Finally counsel for the Defendant would have this court read only half the statute when they state
4 in their motion to dismiss that "nowhere in the letter does the Plaintiff ever set forth why he believes his
5 specific account is in error." Again, a cursory reading of 12 U.S.C. §2605(e)(1)(B)(ii) shows that a
6 drafter of a QWR has to state why he believes his account is in error or provide sufficient detail to the
7 **servicer regarding other information sought by the borrower.** By the Defendant's own admission
8 the communication resembles a request for production. As such all request for production are inherently
9 requested with specificity. The twenty requests for information that LaPorta made to the Defendants are
10 clearly proper under the statute and as such the letter in dispute sent to the Defendants is clearly a QWR.
11 The statute requires a specific error allegation in the alternative to specific information requests. As such
12 Defendants contention that the letter is not a QWR must fail as a matter of law.

13 **B. Defendant's Response 12 U.S.C. §2605(e)(2)(C) is inadequate and as such Defendant has**
14 **violated RESPA.**

15 12 U.S.C. §2605(e)(2)(C) expressly states that:

16 "Not later than 60 days...after the receipt from any borrower of any qualified written request...the
17 servicer shall

18 (A) make appropriate correction in the account of the borrower

19 (B) after conducting an investigation, provide the borrower with a written explanation or
20 clarification that include—

21 (i) to the extent applicable, a statement of the reasons for which the servicer believes the
22 account of the borrower is correct as determined by the servicer; and

23 (ii) the name and telephone number of an individual employed by, or the office or
24 department of, the servicer who can provide assistance to the borrower; or

25 (C) after conducting an investigation, provide the borrower with a written explanation or
26 clarification that includes—

27 **(I) information requested by the borrower or an explanation of why the**
28 **information requested is unavailable or cannot be obtained by the servicer; and**

1 (ii) the name and telephone number of an individual employed by, or the office
2 or department of, the servicer who can provide assistance to the borrower.”

3 (Emphasis Added)

4 The Defendants assert in their response to the QWR that “all other request are declined as they
5 seek documentation that goes beyond that which is available through a Qualified Written Request..”
6 Defendants go on to provide a “Loan Transaction History Statement” pursuant to the QWR. Defendant
7 is this case asserts that their response to the QWR in essence substantially complies with the QWR.
8 Furthermore the Defendants refer LaPorta to Fannie Mae as the entity who is more readily available to
9 help LaPorta.

10 Some of the items that LaPorta has requested include all data that the Defendants keep on the
11 subject loan, all assignments of the deed of trust, evidence of payment receipts, copies of all letters sent
12 by the Defendants to LaPorta, and all documents contained in LaPorta’s loan file. **LaPorta simply**
13 **wants a copy of his file at Bank of America in order to properly analyze his loan for compliance**
14 **with the original mortgage agreement and to determine any damage that may have been done to**
15 **his credit due to under reporting by the Defendants.** The Defendants cannot reasonably assert that
16 they do not have LaPorta’s mortgage file in their possession or simply state that a request for the
17 mortgage file is outside of the scope of RESPA. A Loan Transaction History Statement, as provided by
18 the defendants, does substantially comply with the requirements of RESPA, however the mandatory use
19 of the word “shall” in the statute clearly evidence a legislative intent that mortgagees have a right to their
20 records under federal law and the Defendants cannot merely decline to produce said documentation with
21 assertions that RESPA is limited in some fashion.

22 **C. Plaintiff has plead damages in the Complaint and as Such Defendants Cannot Reasonably**
23 **Assert that No Pecuniary Loss Has Occurred.**

24 Finally LaPorta has alleged a pecuniary loss despite the assertions of counsel that LaPorta has
25 made some genre of fatal omission. At a minimum LaPorta alleges in the fact section of the complaint
26 that the Defendants were failing to report his mortgage payments on his credit history. Damage to credit
27 can result in higher interest rates and increased costs which logically lead to a pecuniary loss. LaPorta
28 was out right denied credit due to Bank of America’s under reporting of his credit history when he
applied for a Barclaycard. Furthermore, the Defendant’s noncompliance with the QWR has actually

1 foreclosed LaPorta's ability to determine if further pecuniary loss has even occurred related to inflated
2 home appraisals or improper fees and servicing. As such LaPorta has plead sufficient damages to
3 survive a Motion to Dismiss.

4 **V. CONCLUSION**

5 Based on the laws and facts stated above, Plaintiffs respectfully request that this Honorable Court
6 deny Defendant's Motion to Dismiss in its entirety.

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9 DATED: This _____ day of September, 2011.

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12 **CALLISTER + ASSOCIATES, LLC**

13 /s/ Matthew Q. Callister, Esq.

14 _____
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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that I am an employee of the Law Firm of Callister + Associates, LLC, and not a party to nor interested in the within matter; that on the ____ day of September, 2011, service of the **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** was made by:

- by serving the following parties electronically through CM/ECF as set forth below;
- by faxing a copy to the numbers below;
- or by depositing a copy in the United States Mail postage prepaid to the parties listed below:

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