

1 ARIEL E. STERN, ESQ.  
 Nevada Bar No. 8276  
 2 ALLISON R. SCHMIDT, ESQ.  
 Nevada Bar No. 10743  
 3 AKERMAN SENTERFITT LLP  
 4 400 South Fourth Street, Suite 450  
 Las Vegas, Nevada 89101  
 5 Telephone: (702) 634-5000  
 Facsimile: (702) 380-8572  
 6 [ariel.stern@akerman.com](mailto:ariel.stern@akerman.com)  
 7 [allison.schmidt@akerman.com](mailto:allison.schmidt@akerman.com)

8 *Attorneys for Defendants*  
 9 *Bank of America, Bank of America, N.A.*  
*BAC Home Loan Servicing, LP*

10 **UNITED STATES DISTRICT COURT**  
 11 **DISTRICT OF NEVADA**

12 GREGORY LAPORTA, an individual,  
 13  
 14 Plaintiff,,  
 15

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

**REPLY IN SUPPORT OF MOTION TO  
 DISMISS OR, IN THE ALTERNATIVE,  
 FOR SUMMARY JUDGMENT**

16 v.

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

20 Defendants.  
 21

22 Defendants Bank of America, Bank of America, N.A. and BAC Home Loans Servicing, LP,  
 23 (collectively referred to herein as "BANA") hereby Reply in support of their Motion to Dismiss  
 24 Plaintiff Gregory Laporta's Complaint pursuant to Fed. R. Civ. P. 12(b)(6) or in the alternative for  
 25 summary judgment pursuant to Fed. R. Civ. Pro 56.

26 ///

27 ///

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Plaintiff's Opposition to BANA's Motion to Dismiss, or in the alternative, for Summary  
5 Judgment offers no cognizable legal or factual basis which would save Plaintiff's claims from  
6 Dismissal. Indeed, the Opposition offers no additional insight as to what possible "damages" the  
7 Plaintiff may have allegedly suffered, and it is largely unresponsive to many of the legal arguments  
8 set forth by BANA in their underlying Motion. Quite simply, Plaintiff's claims are insufficient or  
9 require Dismissal as a matter of law.

10 **II.**

11 **LEGAL STANDARD**

12 Plaintiff misstates the applicable standard for Motions to Dismiss. His claim that motions to  
13 dismiss are disfavored unless it appears beyond doubt that the plaintiff can prove no set of facts in  
14 support of the claims relies on outdated law. The no-set-of-facts standard was abrogated by the  
15 Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (the no-set-of-facts  
16 language is "best forgotten as an incomplete, negative gloss on an accepted pleading standard").  
17 Plaintiff's claims against BANA are not plausible under the pleading standard, as recently clarified by  
18 the Supreme Court in *Iqbal* and *Twombly*. This standard is more fully briefed in BANA's Motion to  
19 Dismiss or in the alternative, for Summary Judgment.

20 Additionally, the standard for Summary Judgment is familiar. A motion for summary  
21 judgment is a procedure which terminates, without a trial, actions in which "there is no genuine issue  
22 as to any material fact and ... the moving party is entitled to a judgment as a matter of law."  
23 Fed.R.Civ.P. 56(c). A summary judgment motion may be made in reliance on "the pleadings,  
24 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any."  
25 *Id.*

26 The movant is entitled to summary judgment if the non-moving party, who bears the burden  
27 of persuasion, fails to designate "specific facts showing that there is a genuine issue for trial."  
28

1 *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting  
 2 Fed.R.Civ.P. 56(e)). Thus, in order to preclude a grant of summary judgment, the non-moving party  
 3 must set forth "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus.*  
 4 *Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting  
 5 Fed.R.Civ.P. 56(e)). The substantive law defines which facts are material. *Anderson v. Liberty*  
 6 *Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All justifiable inferences  
 7 must be viewed in the light most favorable to the non-moving party. *County of Tuolumne v. Sonora*  
 8 *Cnty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001) (citing *Zenith Radio Corp.*, 475 U.S. at 587, 106  
 9 S.Ct. 1348).

10 Although the non-moving party has the burden of persuasion, the party moving for summary  
 11 judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Metro*  
 12 *Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996). That burden is met by showing an  
 13 absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325, 106  
 14 S.Ct. 2548. The burden then shifts to the non-moving party to set forth specific facts demonstrating  
 15 that there is a genuine issue for trial. *Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S.Ct. 2505. In  
 16 meeting this burden, "the non-moving party must go beyond the pleadings and by its own evidence  
 17 set forth specific facts showing that there is a genuine issue for trial." *Far Out Prods., Inc. v. Oskar*,  
 18 247 F.3d 986, 997 (9th Cir. 2001)

## 19 II.

### 20 STATEMENT OF FACTS

21 In his Opposition, Plaintiff merely reiterates factual allegations that were contained in his  
 22 Complaint. *See* Opp'n ¶¶ 1-23. Still, the only damages claimed by the Plaintiff was that he was not  
 23 approved for a credit card as a result of his lack of credit history, which he claims is BANA's fault  
 24 for not reporting his mortgage loan to credit agencies. These alleged "damages" simply cannot  
 25 sustain the claims that Plaintiff has asserted.

26 ///

27 ///

**III.**  
**ARGUMENT**

**A. Plaintiff Cannot State a Claim for RESPA Violations**

Plaintiff, in his Opposition, attempts to assert that his July 24, 2010 communication is a valid QWR, rather than merely a lengthy rant against BANA. To be a proper QWR under § 2605(e), Plaintiff's request must, among other things, **relate to the servicing of the loan** and include a statement of the reasons for borrower's belief that his account is in error or provide sufficient details regarding other information sought. *See* 12 U.S.C. § 2605(e)(1). Plaintiff's purported QWR is missing these requirements. Plaintiff seemingly acknowledges in his Opposition that he did not allege a servicing error, but argue that the information they requested satisfies 12 U.S.C. § 2605(e). This argument fails. As noted in BANA's Motion, 12 U.S.C. § 2605(e) does not entitle Plaintiff to everything he requested. That section merely requires disclosure of information related to "servicing." *See* 12 U.S.C. § 2605(e)(1)(A). The voluminous documents demanded by Plaintiff did not fundamentally deal with "servicing." *Cf., e.g., Morequity, Inc., v. Naeem*, 118 F. Supp. 2d 885, 900–01 (N.D. Ill. 2000) (holding borrower failed to state a claim under § 2605(e) because his "qualified written request" dealt with origination issues, not "servicing"). BANA cannot be held liable for failing to satisfy the harassing and unduly burdensome requests of the Plaintiff, which are neither contemplated or required under RESPA. Further, Plaintiff acknowledges that he did receive a response from BANA to his communication wherein BANA provided the servicing records for his account.

Finally, Plaintiff has not alleged any damages as a result of BANA's purported failure to respond to the QWR. "A plaintiff must, at a minimum, allege that the breach resulted in actual damages." *Hutchinson v. Delaware Sav. Bank FSB*, 410 F.Supp.2d 374, 382-83 (D.N.J. 2006); *accord Ash v. OneWest Bank, FSB*, Case No. 09-974 FCD, 2010 WL 375744, at \*6 (E.D.Cal. Jan. 26, 2010); *Abdollahi v. Washington Mutual FA*, Case No. C-09-00743-HRL, 2009 WL 1689656, \*3 (N.D.Cal. June 15, 2009). Plaintiff makes no effort to explain how the only damage pled, an alleged denial of a credit card application, was in any way related to the alleged failure of BANA to fully

1 respond to the Plaintiff's communication. Rather, the Complaint and Opposition filed by the  
 2 Plaintiff make it clear that the denial of the credit card application was the result of BANA's alleged  
 3 failure to report the mortgage loan to credit agencies at all. Therefore the only alleged damages do  
 4 not stem from any alleged RESPA violation<sup>1</sup>. Even if the communication were a valid QWR (which  
 5 it is not) and even if BANA failed to respond (which they did not), the Plaintiff's claim for RESPA  
 6 violations fail as a matter of law due to the lack of damages.

7 Additionally, Plaintiff has failed to plead any facts that show a "pattern or practice" of  
 8 RESPA violations. The Plaintiff's Complaint alleges one purported QWR. A loan servicer's alleged  
 9 failure to respond to one (1) written request is not a factual allegation of a pattern or practice of  
 10 RESPA violations. *See Morris v. Bank of America*, 2011 WL 250325, \*5 n.9 (N.D. Cal) (court  
 11 dismissed RESPA claim for statutory damages where plaintiff merely alleged two (2) RESPA  
 12 violations). The Plaintiff's RESPA claim therefore fails to state a claim and should be dismissed  
 13 with prejudice.

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

16 Plaintiff's Opposition is completely unresponsive to the Arguments advanced by BANA in  
 17 the underlying Motion regarding their second cause of action for alleged violations of the FCRA.  
 18 The Motion to Dismiss Plaintiff's FCRA claim should be granted on this basis alone. *See* LR 7-2(d)  
 19 ("The failure of an opposing party to file points and authorities in response to any motion shall  
 20 constitute a consent to the granting of the motion.").

21 ///

22 \_\_\_\_\_  
 23 <sup>1</sup> The Court will note that the only damages claimed by the Plaintiff was the denial of a Barclaycard. Plaintiff fails to  
 24 explain how the denial of a credit card application amounts to a "pecuniary loss". Further, it is clear that the denial of the  
 25 Barclaycard allegedly stems from the borrower's second cause of action for Fair Credit Reporting Acts, which the  
 26 Plaintiff has not Opposed the dismissal of, as discussed in further detail *infra*. Plaintiff grasps at straws by asserting that  
 27 the alleged failure to respond to the purported QWR has left the Defendant unable to "determine if further pecuniary loss  
 28 has even occurred related to inflated home appraisals or improper fees and servicing". *See* Opp'n 7:1-2. Asserting a lack  
 of knowledge of possible damages does not equate to pleading actual damages sustained as required by 12 U.S.C. §  
 2605(f)(1)(A)-(B). Further, BANA would not be liable for any damages relating to "inflated home appraisals" as BANA  
 did not originate the loan and therefore did not obtain any appraisal of the subject property. Lastly, Plaintiff admits in his  
 Opposition that he was provided with servicing records in response to his July 24, 2010 communication and is therefore  
 in possession of the information he would need to determine whether he suffered damages as a result of improper fees or  
 servicing. *See* Opp'n at 6:6.

1 As stated in BANA's Motion, Plaintiff claims that BANA violated 15 USC §1681s-  
 2 2(a)(1)(A) and (B) (incorrectly cited by Plaintiff as 12 USC §1681s-2(a)(1)(A) and (B)) by failing to  
 3 report the loan transactions to credit reporting agencies, and thereby failing to help Plaintiff establish  
 4 "credit history". See Compl. ¶¶ 29, 38, 39. However, numerous courts have held that provisions of  
 5 the FCRA may not be privately enforced. See, e.g., *Ram v. Wachovia Mortg.*, 2011 U.S. Dist.  
 6 LEXIS 32392, at \*20-21 (E.D. Cal. 2011); *Khomich v. Bank of Am., N.A.*, 2011 U.S. Dist. LEXIS  
 7 30028, at \*18-19 (2011). As such, Plaintiff's second cause of action under 15 USC §1681s-  
 8 2(a)(1)(A) and (B) require dismissal.

9 **C. There is No Affirmative Requirement for a Lender to Report a Loan Transaction to**  
 10 **Credit Reporting Agencies**

11 Again, Plaintiff's opposition is devoid of any response to BANA's arguments regarding a lack  
 12 of an affirmative requirement to report loans to credit reporting agencies. The Motion to Dismiss  
 13 Plaintiff's FRCA claim should be granted on this basis alone. See LR 7-2(d) ("The failure of an  
 14 opposing party to file points and authorities in response to any motion shall constitute a consent to  
 15 the granting of the motion."). Plaintiff's second cause of action is premised on the alleged failure by  
 16 BANA to report his mortgage payments to credit reporting agencies at all, thus allegedly causing  
 17 Plaintiff to lack "credit history" and "achieve upward mobility". See Compl. ¶¶ 29-30. In his  
 18 Opposition, Plaintiff cites no legal authority that would **require** a lender or any other creditor to  
 19 affirmatively report a transaction to a credit reporting agency. As stated in the underlying Motion,  
 20 credit reporting is entirely voluntary. If BANA had elected to report information, 15 USC §1681s-  
 21 2(a)(1)(A) and (B) require that the information furnished be accurate, however, the Plaintiff does not  
 22 assert that any information reported by BANA was inaccurate, only that BANA elected not to report  
 23 his loan transaction to credit agencies. No cause of action can lie for BANA failing to report to  
 24 credit agencies when no reporting requirement exists. As such, even if a private right of action  
 25 existed, Plaintiff has still failed to state a claim upon which relief may be granted, and BANA is  
 26 entitled to dismissal of Plaintiff's second cause of action for alleged violations of the FCRA.

27 ///

28 ///

{20869794;1}

AKERMAN SENTERFITT LLP

400 SOUTH FOURTH STREET, SUITE 450  
LAS VEGAS, NEVADA 89101  
TEL.: (702) 634-5000 – FAX: (702) 380-8572

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

3 As stated in BANA's underlying Motion, 15 USC §1681s-2(a)(1)(B)(i) requires that a  
4 consumer notify a furnisher of information to consumer reporting agencies, at an address specified,  
5 that specific information reported to a credit reporting agency is inaccurate. Plaintiff asserts that, in  
6 his Letter dated June 24, 2010, he inquired as to why BANA had not reported his mortgage  
7 payments. *See* Compl. ¶ 25. Nowhere in the letter does Plaintiff notify BANA of specific inaccurate  
8 information as required by the FCRA. Plaintiff makes no further allegations that he notified BANA  
9 of specific inaccurate information being furnished to a credit reporting agency. This alone is fatal to  
10 Plaintiff's second cause of action. Further, Plaintiff made no effort to address this argument in his  
11 Opposition, and therefore the second cause of action may be dismissed as Plaintiff has consented to  
12 its dismissal. *See* LR 7-2(d) ("The failure of an opposing party to file points and authorities in  
13 response to any motion shall constitute a consent to the granting of the motion.")

14 **IV.**  
15 **CONCLUSION**

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

19 DATED this 20th day of September, 2011.

20 **AKERMAN SENTERFITT LLP**

21 /s/ Allison R. Schmidt  
22 ARIEL E. STERN  
23 Nevada Bar No. 8276  
24 ALLISON R. SCHMIDT  
25 Nevada Bar No. 10743  
26 400 South Fourth Street, Suite 450  
27 Las Vegas, Nevada 89101

28 *Attorneys for Defendants*  
*Bank of America, Bank of America, NA and*  
*BAC Home Loan Servicing*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20th day of September, 2011, and 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 **REPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT** postage prepaid and addressed to:

Matthew Q. Callister, Esq.  
Adam P. Rosenberg, Esq.  
CALLISTER & ASSOCIATES, LLC  
823 Las Vegas Blvd. South – Fifth Floor  
Las Vegas, NV 89101

*Attorneys for Plaintiff*

/s/ Stacy Warner  
An employee of AKERMAN SENTERFITT LLP

AKERMAN SENTERFITT LLP

400 SOUTH FOURTH STREET, SUITE 450  
LAS VEGAS, NEVADA 89101  
TEL.: (702) 634-5000 – FAX: (702) 380-8572

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28