IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GLORIA JEAN DAVIS, Plaintiff, v. GREENPOINT MORTGAGE FUNDING, INC., BAC HOME LOANS SERVICING, LP, FEDERAL NATIONAL MORTGAGE ASSOCIATION, N.A., JOHN DOE 1, And JOHN DOE 2, Defendants.	CIVIL ACTION NO. 1:09-CV-2719-CC-LTW

MAGISTRATE JUDGE'S NON-FINAL REPORT AND RECOMMENDATION

This case is presently before the Court on Plaintiff's Motion for Leave to File Second Amended Complaint and Defendants Fannie Mae's and BAC's Motion to Dismiss Amended Complaint. Docket Entries [35, 36]. For the reasons outlined below, Plaintiff's Motion for Leave to File Second Amended Complaint is **GRANTED.** Docket Entry [35]. Additionally, this Court **RECOMMENDS** that Defendants Fannie Mae's and BAC's Motion to Dismiss Amended Complaint be **DENIED**. Docket Entry [36]. Also before the Court is Plaintiff's Motion for Leave to File Surreply. Docket Entry [43]. For good cause shown, Plaintiff's motion is **GRANTED**. Docket Entry [43].

PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

I. BACKGROUND

Plaintiff filed the instant lawsuit on September 23, 2009. Docket Entry [1]. Therein, Plaintiff asserted that she entered into consumer credit transactions with Defendant GreenPoint Mortgage Funding, Inc. ("GreenPoint") on five occasions in 2005 and 2006. (Compl. ¶¶8-9). On September 25, 2006, GreenPoint provided Plaintiff with two mortgage loans, whereby Plaintiff secured the loans with her principal residence. (Compl. ¶ 11). Although Countrywide initially serviced the loans, Plaintiff believes the loans are now serviced by Bank of America N.A.'s ("BOA") subsidiary, Defendant BAC Home Loans Servicing, LP ("BAC"). (Compl. ¶ 12). Plaintiff contends that GreenPoint violated the Truth in Lending Act, 15 U.S.C. § 1635 ("TILA") and Regulation Z, 12 C.F.R. § 226.23 when it failed to make proper disclosures of material credit terms as well as Plaintiff's right of rescission. (Compl. ¶¶ 19-20). Plaintiff claims that as a result, she has a right to rescind the transactions. (Compl. ¶¶ 21, 27). Plaintiff also argues that Defendants should be ordered to return any money or property she gave to anyone in connection with the transaction and should pay her costs and litigation expenses. (Compl. ¶ 27).

Plaintiff's initial Complaint did not explain what claims Plaintiff was lodging against BOA and BAC. On May 13, 2010, this Court granted Plaintiff leave to amend her Complaint in order to remove the claims against Bank of America. Docket Entry [23]. This Court denied, however, Plaintiff's request for leave to amend her complaint in order to add a TILA claim against BAC pursuant to Section 1641(f). Docket Entry

[23]. Plaintiff alleged that on October 7, 2009, she sent a letter to BAC requesting that it provide information, such as identification of the holder of her loan, required by 15 U.S.C. § 1641(f)(2), 1641(g), and the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(e) ("RESPA"). (Proposed Compl. ¶¶ 18-21). According to Plaintiff, BAC failed to do so in violation of TILA and RESPA. (Proposed Compl. ¶¶ 20-21, 44-47, 58). This Court denied Plaintiff leave to amend her Complaint to add the TILA claim against BAC because TILA does not provide for liability against a servicer for inaccurate or deceptive disclosures, except when the servicer is or was the owner of the obligation. 15 U.S.C. § 1641(f)(1), (2). Because Plaintiff did not allege that BAC was, at any point, an assignee or an owner of her obligation, it could not be held liable under 15 U.S.C. § 1641(f). Fullmer v. JP Morgan Chase Bank, N.A., No. 2:09-cv-1037 JFM, 2010 U.S. Dist. LEXIS 3551, at *9-11 (E. D. Cal. Jan. 5, 2010) (holding that although TILA provides for liability of creditors and assignees, servicers who have not owned the obligation at some point are not liable under TILA); Longo v. First Nat'l Mortg. Sources, No. 07-4372, 2009 U.S. Dist. LEXIS 8878, at *10-11, 14-15 (D.N.J. Feb. 5, 2009) (dismissing TILA claim against servicer who did not own obligation); Hartman v. Deutsche Bank Nat'l Trust Co., No. 07-5407, 2008 U.S. Dist. LEXIS 59136, at *7-8 (E.D. Pa. Aug. 1, 2008).

Plaintiff now seeks to amend her Complaint to add claims against GreenPoint, Federal National Mortgage Association, N.A. ("Fannie Mae"), and John Doe 2 (in the event that Fannie Mae is not the holder of the $110,400 mortgage loan dated September

25, 2006). Plaintiff asserts therein that in November 2006, the interest in one of the loans (which she refers to as the "first mortgage") was assigned to Fannie Mae, and Fannie Mae is still the holder. (Prop. Second Amended Compl. ¶ 13). Plaintiff argues, citing Consumer Solutions REO, LLC v. Hillery, No. C-08-4357, 2010 U.S. Dist. LEXIS 1437, *10-12 (N.D. Cal. Jan. 8, 2010), that GreenPoint and Fannie Mae are vicariously liable under 15 U.S.C. § 1641(f)(2) for BAC's failure to identify the holder of the note because BAC is their agent. (Proposed Second Amended Compl. ¶¶ 15, 18-21).

II. LEGAL ANALYSIS

A. Motion to Amend Standard

Pursuant to the Federal Rules of Civil Procedure, leave to amend a party's pleading shall be "freely given when justice so requires." Fed. R. Civ. P. 15(a). The court has discretion to make this determination, but it must provide a substantial reason for such a denial because "[r]ule 15(a) severely restricts the district court's freedom." Shipner v. Eastern Air Lines, 868 F.2d 401, 407 (11th Cir. 1989) (policy embodied in Federal Rules of Civil Procedure favors liberality of amendments).

However, both the Supreme Court and the Eleventh Circuit have enumerated factors which allow the denial of a motion to amend. These factors include undue prejudice to the opposing party, undue delay, bad faith on the part of the movant, futility of the motion, or repeated failure to cure deficiencies by previous amendments. Foman v. Davis, 371 U.S. 178, 182 (1962); Equity Lifestyle Props., Inc. v. Florida Mowing and Landscape, 556 F.3d 1232, 1241 (11th Cir. 2009). "An amendment adding a cause of

action is considered futile if the new cause of action does not state a claim upon which relief can be granted." See Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commnc'ns, Inc., 376 F.3d 1065, 1077 (11th Cir. 2004); Rudolph v. Arthur Andersen & Co., 800 F.2d 1040, 1042 (11th Cir. 1986). "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." Galindo v. ARI Mut. Ins. Co., 203 F.3d 771, 777 n.10 (11th Cir. 2000). "In deciding whether the amendment to the complaint would be futile, the court should be guided by the principles that govern consideration of a motion to dismiss." See Wyatt v. BellSouth, Inc., 176 F.R.D. 627, 630 (M.D. Ala. 1998); Glick v. Koenig, 766 F.2d 265, 268 (7th Cir. 1985); Holloway v. Dobbs, 715 F.3d 390, 392-93 (8th Cir. 1983).

B. Plaintiff's Proposed Section 1641(f)(2) Claim Against GreenPoint and Fannie Mae

Plaintiff seeks to amend her Complaint to add claims against GreenPoint, Federal National Mortgage Association, N.A. ("Fannie Mae"), and John Doe 2 (in the event that Fannie Mae is not the holder of the $110,400 mortgage loan dated September 25, 2006). Plaintiff contends that GreenPoint and Fannie Mae are vicariously liable under 15 U.S.C. § 1641(f)(2) for BAC's failure to identify the holder of the note because BAC is their agent. (Proposed Second Amended Compl. ¶¶ 15, 18-21).

Defendants Fannie Mae, BAC, and GreenPoint (collectively "Defendants") argue that Plaintiff's proposed amendment is futile because there is no legal basis for applying agency principles to Plaintiff's TILA claim and if Congress had wanted creditors to be liable for violations of 15 U.S.C. § 1641(f)(2), it could have done so explicitly.

Additionally, Defendants argue that Plaintiff has not sufficiently pled an agency relationship because her simple declaration that BAC is the agent of both GreenPoint and Fannie Mae is a legal conclusion and not factually sufficient to raise to raise a right to relief above the speculative level. Defendants further argue that because the act of an agent is held to be the act of the principal, BAC's alleged failure to respond would be the act of Fannie Mae and/or GreenPoint. As a result, Defendant argues that because Section 1641(f)(2)'s disclosure obligations only apply to servicers, and since neither Fannie Mae nor GreenPoint are servicers, the alleged failure to respond would not violate TILA.

In response, Plaintiff contends that Congress must have intended to create a right of action against a creditor for a violation of 15 U.S.C. § 1641(f)(2), because in 2009, Congress amended Section 1640(a) to specifically add damages claims for violations of subsection (f) or (g) of section 1641. Plaintiff points out that the only requirement imposed by Section 1641(f) is the obligation of the servicer to provide the name, address, and telephone number of the owner of the obligation. Plaintiff argues that the 2009 amendments would be rendered meaningless if Section 1641(f)(2) could not be enforced against servicers or obligation owners. Plaintiff further argues that Congress chose to impose the remedial obligation upon creditors. Plaintiff additionally argues that case law supports the notion that creditors are liable for TILA violations under agency principles and that it makes sense given the consumer protection purpose of the statute and borrowers' difficulties in ascertaining the identities of their creditors. This Court is persuaded by Plaintiff's analysis.

1. Creditor Liability Pursuant to Section 1641(f)(2)

15 U.S.C. § 1641(f)(2) initially appeared in the 1995 amendments to TILA. It states, in relevant part:

> Upon written request by the obligor, the *servicer* shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.

15 U.S.C. § 1641(f)(2) (emphasis added).

In May 2009, TILA was further amended to add to Section 1640(a), a private right of action against *creditors* for a violation of Section 1641(f)(2). See Pub. L. No. 111-22, § 404(b), 123 Stat. 1632, 1658 (2009); 15 U.S.C. § 1640(a) ("Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under . . . subsection (f) or (g) of section 1641 of this title, . . . with respect to any person is liable to such person . . . ."). Authorizing a private right of action for a violation of Section 1641(f)(2) was, in part, a reaction to the continuing concern that, lacking a private right of action, Section 1641(f)(2) had failed to protect homeowners from harms associated with nondisclosures. 155 Cong. Rec. S5173-74 (daily ed. May 6, 2009). Furthermore, the amendment responded to concerns voiced by various consumer protection agencies and illustrated by a 2007 TILA case that highlighted the disastrous effects that a failure to disclose pursuant to a Section 1641(f)(2) request can have upon a consumer's ability to exercise her rights. 155 Cong. Rec. S5173-74 (daily ed. May 6, 2009); see In re Meyer, 379 B.R. 529, 553-554 (Bkrtcy. E.D. Pa. Nov. 29, 2007) (describing situation where consumers attempted to exercise

rescission rights pursuant to TILA, servicer refused to reveal identity of note holder, and statute of limitations for the cause of action expired). Thus, it is apparent that Congress intended to hold creditors liable for violations of Section 1641(f)(2).

To reconcile the substantive obligation imposed upon servicers in Section 1641(f)(2) and the remedial obligation levied upon creditors in Section 1640(a), this Court reads TILA to allow the application of agency principles so that creditors may be held vicariously liable for the acts of servicers as Plaintiff urges. By its plain language, 15 U.S.C. § 1641(f)(2) imposes a disclosure obligation that is directed to servicers only. Thus, it is a servicer's failure to act that gives rise to the private right of action that is authorized in 15 U.S.C. § 1640(a). See 15 U.S.C. § 1641(f)(2); 15 U.S.C. § 1640(a). TILA, however, does not contain any provisions allowing a consumer to bring a civil action against a servicer for a violation of Section 1641(f)(2). Section 1641(f)(2) does not provide for a servicer's liability for damages if it fails to comply with the section's obligations, 15 U.S.C. § 1641(f)(2), and the only provisions within Section 1641 concerning servicer liability limits a servicer's liability to situations in which the servicer was once an assignee or owner of the loan. 15 U.S.C. § 1641(f)(1). Thus, this Court has previously concluded that servicers, who have no ownership in a loan obligation and who have never had any such ownership, are not subject to liability for a violation of Section 1641(f)(2). Docket Entry [23]; see also Consumer Solutions REO, LLC v. Hillery, No. C-08-4357 EMC, 2010 WL 144988, at *3 (N.D. Cal. Jan. 8, 2010) (servicer not liable for damages under Section 1641(f)(2) for failure to disclose information about

owner of obligation); Fullmer v. JP Morgan Chase Bank, NA, No. 2:09-cv-1037 JFM, 2010 WL 95206, at *11 (E.D. Cal. Jan. 6, 2010) (same). Because TILA does not impose liability upon a servicer who is not an owner or assignee of a note, the private right of action that Section 1640(a) creates would be meaningless, unless agency principles permit a creditor to be held liable for Section 1641(f)(2) violations committed by its servicer. To avoid rendering Section 1640(a) superfluous, this Court concludes that agency principles apply, and creditors may be held vicariously liable for the Section 1641(f)(2) violations of their servicers. See Consumer Solutions REO, LLC v. Hillery, No. C-08-4357 EMC, 2010 U.S. Dist. LEXIS 37857, at *16 (N.D. Cal. Mar. 24, 2010) (holding agency principles apply to Section 1641(f)(2) and rejecting argument that vicarious liability based on TILA is not possible under Section 1641(f)(2)). This conclusion gives force to the disclosure provision in Section 1641(f)(2) and comports with the intent of TILA to be "remedial in nature . . . and . . . [to] be construed liberally in order to best serve Congress's intent." Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 707 (11th Cir. 1998).

Defendants, relying upon Fullmer v. JP Morgan Chase Bank, NA, 2010 U.S. Dist. LEXIS 3551 (E.D. Cal. Jan. 6, 2010), argue that "the common law doctrine of agency does not apply to TILA" and therefore the plaintiff cannot "use common law principles of agency to distribute liability for a TILA violation between the creditor and the

servicer."[1] (Defs.' Resp., Docket Entry [38], 7.) Defendants note that in Fullmer, the plaintiff was attempting to hold the servicer liable under agency principles for the actions of the creditor, but argues that the reasoning applies equally when a plaintiff attempts to hold a creditor liable for the actions of the servicer. (Id. at 8.) This Court disagrees. Fullmer's prohibition on assessing liability against a servicer through agency principles is reasonable in light of TILA's mandate that, unless possessing an ownership interest, a servicer is not liable for damages for failure to disclose information about the note's owner. See Hillery, 2010 WL 144988, at *3. There is no similar mandate for creditors. Indeed, TILA expressly provides for creditor liability in Section 1640. 15 U.S.C. § 1640. Therefore, holding creditors vicariously liable does not violate the intent of TILA as holding non-owner or non-assignee servicers vicariously liable would.

Defendants also contend that if Congress meant to extend agency principles to creditors or make creditors liable under § 1641(f)(2), it would have done so explicitly. (Defs.' Mot. 8). However, Congress's intentional insertion of the private right of action for violation of § 1641(f)(2) into a remedy section that provides for civil liability against creditors suggests that Congress did exactly what Defendants suggest it should have done.

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[1] Defendants also cite to Khon Som v. JP Morgan Chase Bank, NA, 2010 U.S. Dist. LEXIS 31097 (E.D. Cal. Mar. 30, 2010; Ruiz v. Nat'l City Bank, 2010 U.S. Dist. LEXIS 36007 (E.D. Cal. Mar. 16, 2010); Petracek v. Am. Home Mortg. Servicing, 2010 U.S. Dist. LEXIS 20930 (E.D. Cal. Feb. 10, 2010), all of which adopted Fuller's rejection of the agency theory in those instances in which the plaintiff sought to attribute liability to the *servicer* for acts of the *creditors*.

Lastly, Defendants argue Fannie Mae and GreenPoint cannot be held liable under Section 1641(f)(2) because under agency principles, the act of the agent is held to be the act of the principal. According to Defendants, if BAC's alleged failure to respond to a Section 1641(f)(2) request were held to be the act of Fannie Mae or GreenPoint, then the act would not violate TILA as neither Fannie Mae nor GreenPoint are servicers. Defendants stretch their reading of agency principles and O.C.G.A. § 10-6-53 too far. O.C.G.A. § 10-6-53 provides: "The form in which the agent acts is immaterial; if the principal's name is disclosed and the agent professes to act for him, it will be held to be the act of the principal." This provision appears in the section of the Georgia Code that discusses the rights and liabilities of the principal with respect to third parties. See O.C.G.A. §§ 10-6-50 to -64. While it is true that for purposes of assessing liability with respect to a third party, the act of the agent is held to be the act of the principal, for purposes of determining whether the agent has committed an act for which the principal can be held liable, the act of the agent should be evaluated independently. See, e.g., O.C.G.A § 10-6-60 (assessing the agent's act in providing that "[t]he principal shall be bound for the care, diligence, and fidelity of his agent in his business, and hence he shall be bound for the neglect and fraud of his agent in the transaction of such business."). Furthermore, if this Court accepted Defendants' argument as true, Section 1640(a) would once again be rendered meaningless as most servicers and all creditors could not be held liable for Section 1641(f)(2) violations. Lastly, in a practical sense, attributing the servicer's failure to respond to a Section 1641(f)(2) request to the creditor to say that a

creditor's failure to respond does not constitute a violation of TILA is not persuasive. Indeed, if the borrower knew the identity of the creditor in order to send a Section 1641(f)(2) request, the request itself would be unnecessary.

2. Agency Liability

Defendants argue that even if the agency theory could support liability of an obligation owner for the servicer's violation of Section 1641(f)(2), Plaintiff's proposed claim does not survive the standard articulated in Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In support, Defendants contend that Plaintiff has not sufficiently pled an agency relationship because her simple declaration that BAC is the servicer of GreenPoint and Fannie Mae is a legal conclusion and not factually sufficient to raise a right to relief above the speculative level. Defendants base their argument on the conclusion reached in Fullmer, Khon Som, Ruiz, and Petracek that agency principles do not apply to hold servicers liable for the acts of creditors. Defendant additionally argue that the servicer relationship is a contractual, and a contractual relationship does not itself create an agency relationship.

Under Georgia law, an agency relationship "arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." O.C.G.A. § 10-6-1. Agency may be established "by showing circumstances, apparent relations, and conduct of parties." Lewis v. Citizens and Southern Nat. Bank, 229 S.E.2d 765, 768.

In her proposed second amended complaint, Plaintiff alleges that "BAC Home Loans now holds the servicing rights in the Transactions." (Proposed Am. Compl. ¶ 12.) Plaintiff also alleges that "[a]s servicer of the first mortgage for Fannie Mae, BAC Home Loans is Fannie Mae's agent. As servicer of the second mortgage for GreenPoint, BAC Home Loans is GreenPoint's agent." (Id. ¶ 15.) Further, Plaintiff alleges that she sent a demand for rescission of her first mortgage loan to Fannie Mae on November 19, 2009, and Fannie Mae, rather than responding to the demand, forwarded it to BAC, who in turn forwarded the demand to GreenPoint. (Id. ¶¶ 38-40.)

As an initial matter, Defendants' reliance on Fullmer, Khon Som, Ruiz, and Petracek is misplaced. As explained in *supra* II.B.1, those cases declined to extend TILA liability to servicers for acts of creditors. However, this Court concludes that a creditor may be held liable for the acts of the servicer based on agency principles. Additionally, Plaintiff's alleges that BAC "holds the servicing rights" to her mortgage loans; BAC is the servicer for Fannie Mae and for GreenPoint; and BAC served as an intermediary between Fannie Mae and GreenPoint by forwarding Plaintiff's rescission demand from Fannie Mae to GreenPoint. As Plaintiff argues, the term "servicer" connotes a special relationship between the lender and the servicer. See, e.g., 12 U.S.C. § 2605(i)(2) ("The term 'servicer' means the person responsible for servicing of a loan . . . ."); 12 U.S.C. § 2605(i)(3) ("The term 'servicing' means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts . . . , and making the payments of principal and interest and such

other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan."). Therefore, these allegations, taken together, infer a particular set of "apparent relations" between the BAC and Fannie and BAC and Green Point. See Lewis, 229 S.E.2d at 768. Accordingly, Plaintiff pleads enough facts to establish an agency relationship for purposes of Section 1641(f)(2). See Palestini v. Homecomings Fin., LLC, No. 10CV1049-MMA, 2010 U.S. Dist. 72985, at *6 (S.D. Cal. July 20, 2010) (holding that because complaint "clearly allege[d] that Homecomings was hired by GMAC to service plaintiffs' loan for the benefit of GMAC," plaintiffs alleged "enough to support an agency theory of liability"); Cf. Griley v. Nat'l City Mortg., No. 2:10-1204WBS KJM, 2011 WL 219574 (E.D. Cal. Jan. 19, 2011) (holding that allegations of lender-servicer relationship enough to infer agency at pleading stage). Further, while a contractual relationship alone may be insufficient to establish an agency relationship under Georgia law, Defendants cite to no authority to support its argument that the servicer relationship alone cannot establish an agency relationship between the creditor and the servicer.[2] Therefore, this Court concludes that Plaintiff's proposed

[2] In Aon Risk Services, Inc. of Georgia v. Commercial & Military Systems Company, Inc., cited by Defendants, the Georgia Court of Appeals did conclude that a contractual obligation alone is not enough to establish an agency relationship. Id., 607 S.E.2d 157, 161 (2004). However, the Court did suggest that a confidential relationship in addition to the contractual obligation would create an agency relationship. Id. The Court specifically noted, that the plaintiff in that case "did not act on [the defendant's] behalf in any business transaction." Id. Defendants here do not address whether or not the servicer relationship also encompasses a confidential relationship. Given that servicers may act on behalf of the lender in business transactions, this Court does not find that Defendants have adequately supported their argument that the servicer relationship does not create an agency relationship.

amendment is not futile, and Plaintiff's proposed Second Amended Complaint states enough facts to state a claim for damages against Fannie Mae and GreenPoint based on BAC's alleged violation of Section 1642(f)(2).

DEFENDANTS' FANNIE MAE AND BAC'S MOTION TO DISMISS AMENDED COMPLAINT

I. BACKGROUND

Plaintiff filed an Amended Complaint on May 26, 2010. Docket Entry [24]. Plaintiff contends in her Amended Complaint that the first mortgage on her residence, in the principle amount of $110,400, was assigned to Fannie Mae in November 2006 and that Fannie Mae remains the assignee and holder of her first mortgage. (Amended Compl. ¶¶ 13, 16). On October 7, 2009, Plaintiff sent a letter to BAC Home Loans requesting that it identify, address, and telephone number of the new creditor, the date of the transfer, how to reach an agent or party having authority to act on behalf of the new creditor, the location of the place where transfer of ownership of the debt is recorded, and any other relevant information regarding the new creditor. (Amended Compl. ¶ 18; Docket Entry [24-1]). BAC did not provide the requested information. (Amended Compl. ¶¶ 20, 47). Thus, in Count II of Plaintiff's Complaint, she contends that the letter constituted a Qualified Written Request and BAC violated RESPA, 12 U.S.C. § 2605(e)(2) because it did not provide the requested information within sixty days of its receipt. (Amended Compl. ¶¶ 42-52).

In Count I of Plaintiff's Amended Complaint, she asserts that she attempted to rescind her first and second mortgage transaction with GreenPoint because GreenPoint

violated TILA and Regulation Z by "failing to make proper disclosures of [her] right to rescission" when GreenPoint failed to deliver her two copies of the Notice of Right to Cancel. (Amended Compl. ¶ 26). On September 16, 2009, Plaintiff sent GreenPoint her demand for rescission of the transaction pursuant to TILA, but GreenPoint rejected her demand. (Compl. ¶¶ 31-32). Plaintiff subsequently sent demand for rescission addressed to "holders of the note" care/of Bank of America, which was received by Bank of America on September 18, 2009. (Compl. ¶¶ 33-34). Plaintiff contends that Fannie Mae was a holder of the note, but failed to respond. (Compl. ¶¶ 36). Thus, Plaintiff sent a third letter, this time to Fannie Mae, demanding rescission of her first mortgage on November 19, 2009, but Fannie Mae did not respond. (Compl. ¶¶ 37-38). Fannie Mae forwarded the demand to BAC, which forwarded it to GreenPoint, which rejected the rescission demand. (Compl. ¶ 39). As a result, Plaintiff claims that Fannie Mae and GreenPoint's actions violated TILA.

In Fannie Mae and BAC's Motion to Dismiss Amended Complaint, they argue that (1) Plaintiff's TILA claims for damages and rescission against Fannie Mae stemming from GreenPoint's alleged failure to properly disclose her right of rescission fail as a matter of law because they are time-barred and (2) Plaintiff fails to state a RESPA violation against BAC because the October 7, 2009 letter was not a QWR.

II. LEGAL ANALYSIS

A. Motion to Dismiss Standard

Dismissal is warranted under Rule 12(b)(6) if, assuming the truth of the factual allegations of the plaintiff's complaint, there is a dispositive legal issue which precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown v. Crawford County, 960 F.2d 1002, 1009-10 (11th Cir. 1992). A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint against the legal standard set forth in Rule 8: "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint, however, "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To state a claim with sufficient specificity requires that the complaint have enough factual matter taken as true to suggest required elements of the claim. Watts v. Florida Int'l Univ., 495 F.3d 1289, 1296 (11th Cir. 2007); Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003). Factual allegations in a complaint need not be detailed but "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555 (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002)).

The Court should not consider matters outside the pleadings when considering a party's motion to dismiss. See Fed. R. Civ. P. 12(b)(6); Prop. Mgmt. & Inv. v. Lewis, 752 F.2d 599, 604 (11th Cir. 1985). However, a court may consider documents attached to the defendant's motion when they are central to the plaintiff's claim and their

authenticity is not disputed. Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002); Harris v. Ivax Corp., 182 F.3d 799, 802 n.2 (11th Cir. 1999).

B. Plaintiff's TILA Claims Against Fannie Mae

Plaintiff contends in Count I of her Complaint that she attempted to rescind her first and second mortgage transaction with GreenPoint because GreenPoint violated TILA and Regulation Z by "failing to make proper disclosures of [her] right to rescission" when GreenPoint failed to deliver her two copies of the Notice of Right to Cancel. (Compl. ¶ 26). On September 16, 2009, Plaintiff sent GreenPoint her demand for rescission of the transaction pursuant to TILA, but GreenPoint rejected her demand. (Compl. ¶¶ 31-32). Plaintiff subsequently sent a demand for rescission addressed to "holders of the note" care/of Bank of America, which was received by Bank of America on September 18, 2009. (Compl. ¶¶ 33-34). Plaintiff contends that Fannie Mae was a holder of the note, but failed to respond. (Compl. ¶¶ 36). Thus, Plaintiff sent another letter, this time to Fannie Mae, demanding rescission of her first mortgage on November 19, 2009, but Fannie Mae did not respond. (Compl. ¶¶ 37-38). Fannie Mae forwarded the demand to BAC, which forwarded it to GreenPoint, which rejected the rescission demand. (Compl. ¶ 39). As a result, Plaintiff contends that Fannie Mae and GreenPoint's actions violated TILA. In Fannie Mae and BAC's Motion to Dismiss Amended Complaint, they argue that Plaintiff's TILA claims for damages and rescission against Fannie Mae due to GreenPoint's alleged failure to properly disclose her right of rescission fail as a matter of law because they are time-barred.

1. Plaintiff's TILA Claim for Damages

Fannie Mae contends that Plaintiff's TILA claim for damages is time-barred because it was filed more than one year after the closing of her loan. In response, Plaintiff contends that she does not seek damages from Fannie Mae for disclosure violations. Instead, Plaintiff seeks damages from Fannie Mae for its failure to respond in a timely manner to her rescission demands and claims that she filed her Complaint within one year of the time that these violations occurred.

The TILA requires creditors to provide borrowers with certain disclosures regarding finance charges, interest rates, and borrower's rights. See 15 U.S.C. §§ 1631, 1632, 1635, 1637, 1638; Beach v. Ocwen Fed. Bank, 523 U.S. 410, 412 (1998). If a creditor fails to make a required disclosure, the borrower may sue for statutory and actual damages within one year of the violation. 15 U.S.C. § 1640(e). In addition to providing a right to damages, TILA also permits a borrower whose loan is secured by a "principal dwelling" to rescind the loan transaction entirely until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms containing the required material disclosures, whichever is later. 15 U.S.C. § 1635(a); Velardo v. Freemont Inv. Co., 298 F. App'x 890, 892 (11th Cir. 2008); Sueiro v. Countrywide Home Loans, Inc., No. 09-21436-CIV-HOEVELER, 2009 WL 2915781, at *3-4 (S.D. Fla. Sept. 11, 2009). If the lender fails to deliver the appropriate forms and disclosures, the borrower's right of rescission lasts three years after

consummation of the transaction (or upon sale of the property, whichever comes first). See 15 U.S.C. § 1635(f).

When a borrower exercises a *valid* right of rescission, the creditor must take action within twenty days after receipt of the notice of rescission, returning the borrower's money and terminating the security interest. See 15 U.S.C. § 1635(b), 1640(a); Frazile v. EMC Mortg. Corp., 382 F. App'x 833, 839 (11th Cir. 2010); Smith v. Am. Fin. Sys. (In re Smith), 737 F.2d 1549, 1552 (11th Cir. 1984). Failure to do so is a violation of 15 U.S.C. §§ 1635(b), 1640(a). Frazile, 382 F. App'x at 839; Smith, 737 F.2d at 1552. Plaintiff alleges that she sent demands for rescission to GreenPoint on September 16, 2009, and Fannie Mae on November 19, 2009, but they failed to respond. Plaintiff filed her Amended Complaint less than one year later on May 26, 2010. Docket Entry [24]. Accordingly, her claims for damages would not be time-barred.

2. Plaintiff's TILA Claim for Rescission

Fannie Mae also argues that Plaintiff's TILA claim for rescission is time-barred because she sent her rescission notice to Fannie Mae more than three years after the time she closed her loan on September 26, 2006. Plaintiff argues that her claim for rescission against Fannie Mae is not time-barred because she timely notified GreenPoint, the creditor, of her desire to rescind the mortgage transactions on September 16, 2009, which was within three years from the date of the closings. Plaintiff further argues that TILA only requires her to demand rescission from the creditor and did not require her to make a rescission demand to the assignee, Fannie Mae. Plaintiff also argues that if BAC had

identified the assignee when it received her QWR, she could have easily timely sent the rescission demand to the assignee as well. Plaintiff further argues that her September 16, 2009, rescission demand to Bank of America was timely and was effective against Fannie Mae because there was an agency relationship between Bank of America and Fannie Mae and the notice was sent to the "Holders of the Subject Mortgage Loans Care of its Servicing Agent, Bank of America." Finally, Plaintiff argues that the September 24, 2009 rescission demand that she sent to BAC, the servicer of the transactions, was effective against Fannie Mae.

TILA permits a borrower whose loan is secured by a "principal dwelling" to rescind the loan transaction entirely until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms containing the required material disclosures, whichever is later. 15 U.S.C. § 1635(a); Velardo, 298 F. App'x at 892; Sueiro, 2009 WL 2915781, at *1-2. If the lender fails to deliver the appropriate forms and disclosures, the borrower's right of rescission lasts three years after consummation of the transaction (or upon sale of the property, whichever comes first). See 15 U.S.C. § 1635(f).

The TILA and Regulation Z set forth the procedures that a borrower must take to invoke his or her right of rescission. Both the statute and the regulation only require notification to the "creditor." 15 U.S.C. § 1635(a) ("[T]he obligor shall have the right to rescind the transaction . . . by notifying the creditor . . . of his intention to do so"); 12 C.F.R. § 226.23(a)(2) ("[T]he consumer shall notify the creditor of the rescission by

mail, telegram or other means of written communication"). The use of the word "creditor" is significant because that word has a defined meaning under TILA. A "creditor" "refers only to a person who . . . is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the indebtedness . . ." 15 U.S.C. § 1602(f). Therefore, under the plain language of the statute, Plaintiff fulfilled her obligation to rescind the first mortgage held by Fannie Mae when she timely notified GreenPoint, the "creditor," that she wanted to rescind.[3]

The limited case law addressing this issue supports this conclusion. In Hubbard v. Ameriquest Mort. Co., 624 F. Supp. 2d 913, 920 (N.D. Ill. 2008), the case Plaintiff here relies upon, the Court held that timely notice to the creditor was effective as to the assignee. In that case, Hubbard, the plaintiff, timely notified Ameriquest, the original lender, of his intent to rescind his loan for TILA violations. Id. The loan, however, had been assigned to Deutsche Bank. Id. Hubbard did not timely notify Deutsche Bank of his intent to rescind. Id. Rather, Deutsche Bank first received notice when it was added as a party in Hubbard's amended complaint, more than three years after the loan closed. Id. The Hubbard court granted summary judgment to Hubbard because it held that

[3] Plaintiff alleges that she sent demands for the rescission of her two mortgage loan transactions to GreenPoint on September 16, 2009. (Am. Compl. ¶ 31.) Plaintiff also alleges that Fannie Mae holds the first mortgage loan and GreenPoint holds the second mortgage loan. (Id. ¶¶ 13-14.) Following the plain language of 15 U.S.C. § 1635(b), Plaintiff properly sent the notice of rescission for the second mortgage to GreenPoint, the creditor and the current holder of the mortgage loan. Thus, the only issue for this Court to decide is whether sending the sending the rescission notice to GreenPoint for Fannie Mae for the first mortgage loan was sufficient.

timely notice to the original lender was sufficient to effectuate rescission as to Deutsche Bank, the assignee. Id. at 922.

In its well-reasoned opinion, the Court reached this conclusion first by looking to the plain language of TILA, 15 U.S.C. § 1635(a), and Regulation Z, 12 C.F.R. § 226.23(a)(2), as this Court has done. Id. at 920. The Court then relied on Congress's use of the word "transaction" in 15 U.S.C. § 1635(a) and the Seventh Circuit's language in Handy v. Anchor Mortg. Corp., 464 F.3d 760 (7th Cir. 2006), that "rescission terminates the entire *transaction* and thus encompasses a right to return to the status quo that existed before the loan." (internal quotations and citations omitted) (emphasis in original). Id. at 921. Read together, the Court concluded that "[t]he only way to effectuate the statutory right to be returned to the status quo is to involve the original lender and all subsequent assignees-parties that would not have been involved in the transaction or received any of the obligor's interest payments were it not for the original loan." Id. Finally, the Court noted that the language of 15 U.S.C. § 1641(c) was consistent with its conclusion. Id.; see 15 U.S.C. § 1641(c) ("Any consumer who has a right to rescind a transaction under section 1635 of this title may rescind the transaction against any assignee of the obligation."). The court reasoned that Section 1641(c) "simply clarifie[d] that assignees may not hide behind an assignment and that as long as the borrower has properly rescinded the transaction by giving notice to the 'creditor' within the three year statutory period, the rescission of the transaction is effective against any assignee." Id.

On the other hand, in Harris v. OSI Fin. Servs., Inc., 595 F. Supp. 2d 885, 897-898 (N.D. Ill. 2009), the case relied upon by Defendants, the Court found that the plaintiffs could not effectuate notice of rescission on the assignee by notifying the creditor.[4] Declining to address the plain language of 15 U.S.C. § 1635(a) and 12 C.F.R. § 226.23(a)(2), the Court instead relied upon 15 U.S.C. § 1641(d), which states that an assignee of a mortgage is "subject to all claims and defenses with respect to the mortgage that the consumer could assert against the creditor of the mortgage." Id. The Court held there was no indication from the language in TILA that assignees should not be entitled to same rights of notice as the original creditors. Id. The Court also rejected the argument that public policy considerations favor binding assignees to rescission demands made to the original creditors because ascertaining the identities of assignees can be difficult for borrowers since the given assignee for a loan is not always a matter of public record. Id. Instead, the Court appeared to be more troubled by the fact that the plaintiff's interpretation of the rescission notice requirement could subject assignees, who have no notice of a rescission demand, to rescission and damages. Id.

Courts that have ruled on the issue of assignee notice after Hubbard and Harris and that have considered both cases have found the reasoning in Hubbard to be more persuasive than the reasoning in Harris. See Schmit v. Bank United FSB, No. 08 C 4575, 2009 WL 320490, at *3 (N.D. Ill. Feb. 6, 2009) (finding "[t]he reasoning in

[4] Even though the Hubbard decision preceded the Harris decision by four months, the Harris Court did not cite to or consider Hubbard directly in its analysis.

Hubbard is persuasive"); Mattek v. Deutsche Bank Nat. Trust Co., No. 09-C-231, 2011 WL 338801, at *3 (E.D. Wis. Jan. 28, 2011) (adopting the position set forth in Hubbard, noting that it was consistent with the statutory language and TILA's purpose of providing protection to the consumer).

Although the Eleventh Circuit has not ruled on the assignee notice issue, the Court has noted that TILA's rescission process has two goals (1) to place the consumer in a stronger bargaining position than traditional common law rescission remedies and (2) "to return the parties most nearly to the position they held prior to entering the transaction." Williams v. Homestake Mortg. Co., 968 F.2d 1137, 1141 (11th Cir. 1992). The Court has further noted that TILA's rescission remedies are an important enforcement tool to ensure creditor compliance with TILA's disclosure requirements as evidenced by the fact that the statute places all of the burdens for rescission on the creditor and is "a painless remedy" for the borrower. Id.

Bearing in mind the principles articulated by the Eleventh Circuit and noted case law, this Court finds the reasoning in Hubbard to be more persuasive than Harris. Allowing a borrower to rescind his or her loan as to the assignee by timely notifying the creditor reinforces the "painless" nature of the rescission procedures for the borrower, as the borrower is likely to readily know the identity of the creditor. It also advances the consumer protection force of TILA by mitigating the concern of borrowers not being able to adequately enforce their rights because they cannot identify the entities who own their loans. Indeed, that issue is highlighted in this action as Plaintiff alleges that BAC,

the servicer, refused to provide her with information about the current holders of her mortgage loans when she requested that information. (Am. Compl. ¶¶ 43-48)

Defendants argue that this "hyper-literal" interpretation of the word "creditor" is untenable when reading 15 U.S.C. § 1635 because it would require GreenPoint, not Fannie Mae, to return any earnest money or down payment and terminate the security deed in the property and would entitle GreenPoint, not Fannie Mae, to Plaintiff's tender of the loaned funds. (Defs.' Mot., Docket Entry [42], 6.) According to Defendants, Plaintiff's literal interpretation of the word "creditor" when applied to 15 U.S.C. § 1635(b) would mean that rescission of the subject loan could not occur if the loan had been assigned. The Hubbard court's analysis implicitly addresses Defendants' concern. Hubbard urged reading the rescission notice procedures of Section 1635(a) to give the term "creditor" its literal statutory meaning for purposes of determining the borrower's obligation, but held that the term "creditor" also covered assignees. See Hubbard, 624 F. Supp. 2d at 920. Applying the term "creditor" in the same way to Section 1635(b) offers Plaintiff the very protection for which Defendants advocate. In other words, GreenPoint, to include Fannie Mae, "shall return to the obligor any money or property given as earnest money, down payment, or otherwise"; GreenPoint, to include Fannie Mae, "shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction"; plaintiff "shall tender the property to" GreenPoint, to include Fannie Mae, after GreenPoint and Fannie Mae have performed their rescission obligations. See 15 U.S.C. § 1635(b). Because this Court finds that

Plaintiff's timely notice to GreenPoint constitutes timely notice to Fannie Mae, it need not consider Plaintiff's other arguments at this juncture.

C. Plaintiff's RESPA Claim Against BAC

In Count Two of Plaintiff's Complaint, she contends that her October 7, 2009 letter was a QWR and BAC's failure to respond violated RESPA. BAC argues that Plaintiff's Complaint fails to state a RESPA violation against it because the October 7, 2009 letter was not a QWR and because Plaintiff fails to plead what her actual damages were.

1. Whether the October 7, 2009 Letter was a QWR

BAC argues that Plaintiff's October 7, 2009 letter was not a QWR because it did not request information concerning the servicing of the loan. Plaintiff argues that since servicing involves the collection of loan payments, the identity of the party for whom the payments are collected would be a related matter and that this interpretation is appropriate given the policy of liberally construing consumer protection statutes in favor of the consumer.

This Court agrees with Plaintiff. RESPA was enacted to "insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process." 12 U.S.C. § 2601(a). RESPA is a remedial consumer-protection statute and has been "construed liberally in order to best serve Congress' intent." McLean v. GMAC Mortg. Corp., No. 09-11054, 2010 WL 3784527, at *3 (11th Cir. Sept. 30, 2010); Hardy v. Regions Mortg., Inc., 449 F.3d 1357, 1359

(11th Cir. 2006); Rawlings v. Dovenmuehle Mortg., Inc., 64 F. Supp. 2d 1156, 1165 (M.D. Ala. June 23, 1999) (citing Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 707 (11th Cir. 1998)). RESPA requires a servicer of a federally related mortgage loan to respond to a borrower's qualified written request ("QWR") seeking information relating to the servicing of the loan. 12 U.S.C. § 2605(e)(1)(A). To that end, Section 2605(e)(2) requires that the servicer acknowledge in writing the receipt of the QWR within twenty days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested by the borrower is taken within such period. 12 U.S.C. § 2605(e)(2). Additionally, the servicer must take action with respect to the QWR no "later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of [the QWR]."[5] 12 U.S.C. § 2605(e). The servicer may take action by (1) making appropriate corrections in the account of the borrower and transmitting written notification of the correction to the borrower; (2) conducting an investigation and

[5] Section 2605(e)(2) was amended on July 21, 2010, in order to decrease the servicer's time period to acknowledge receipt of the QWR from twenty days to five days and for taking action on the QWR from sixty days to thirty days. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010). However, the Act had not been passed at the time of the alleged RESPA violations in this case and there is no indication that Congress intended provisions altering RESPA to apply retroactively. See AT&T Corp. v. Hulteen, 129 S.Ct. 1962, 1971 (2009) (explaining that there is a presumption that a statute is not applied retroactively and that in order for a statute to apply retroactively, Congress has to clearly manifest its intent to do so); Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1281-82 (11th Cir. 2005). Accordingly, this Court concludes, as others have, that the Act does not apply retroactively. See, e.g., Megino v. Linear Fin., No. 2:09-CV-00370-KJD-GWF, 2011 WL 53086, at *8 n.1 (D. Nev. Jan. 6, 2011); Citgo Petroleum Corp. v. Bulk Petroleum Corp., No. 08-CV-654-TCK-PJC, 2010 WL 3212751, at *3 n.4 (N.D. Okla. Aug. 12, 2010).

explaining in writing the reasons for which the servicer believes the account of the borrower is correct; or (3) conducting an investigation and explaining in writing why the information requested by the borrower is unavailable or cannot be obtained by the servicer. 12 U.S.C. § 2605(e)(2).

The statutes protections are not triggered, however, unless the consumer's correspondence is a QWR relating to the servicing of the loan. See, e.g., Malally v. BAC Home Loan Serv., LLC, No. 3:10-CV-0074-JTC-JFK, 2010 WL 5140626, at *7 (N.D. Ga. Oct. 8, 2010). To qualify as a QWR, the inquiry must be:

> [W]ritten 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 number 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.

12 U.S.C. § 2605(e)(1)(B). Thus, to qualify as a QWR, written correspondence must request "information relating to the servicing of a loan," § 1605(e)(1)(A), providing "sufficient information for the servicer to identify the name and account of the borrower," § 2605(e)(l) (B)(i), and setting forth either "a statement of the reasons for the borrower's belief, to the extent applicable, that the account is in error or provide sufficient detail to the servicer regarding other information sought by the borrower." Mallaly, 2010 WL 5140626, at *7.

Defendants argue that Plaintiff's letter is not a QWR because it does not relate to the servicing of the loan. Specifically, Defendants argue that the information sought concerned the identity of the new creditor and transferring the beneficial rights to the underlying loan which does not relate to the making or receiving of payments under the terms of the loan. The term servicing of the loan encompasses more than the transfer of servicing, installment payments, or account balances. As Section (ii) of 12 U.S.C. § 2605(e)(1)(B) is written in the disjunctive, it allows borrowers to seek "other information" from the servicer when the borrower provides sufficient detail to the servicer regarding the information sought. 12 U.S.C. § 2605(e)(1)(B); 24 C.F.R. § 3500.21(e)(2); see Goldman v. Aurora Loan Servs., LLC, No. 1:09-CV-3337-RWS, 2010 WL 3842308, at *4 (N.D. Ga. Sept. 24, 2010); Greetis v. National City Mortg., No. 09cv1502 JM(JMA), 2010 WL 695536, at *3 (S.D. Cal. Feb. 24, 2010). However, the term "other information sought by the borrower" does not incorporate an unlimited scope of inquiries that a borrower may make to the servicer; instead, the term must be construed in light of the requirements of 12 U.S.C. § 2605(e)(1)(A), which triggers a servicer's duty to respond when it receives a QWR from the borrower for "information *relating to the servicing* of such loan . . ." 12 U.S.C. § 2605(e)(1)(A) (emphasis added); see Kee v. Fifth Third Bank, No. 2:06-CV-00602-CW, 2009 WL 735048, at *3 (D. Utah Mar. 18, 2009); Tsien v. Wells Fargo Home Mortg., No. C 09-04790 SI, 2010 WL 2198290, at *2 (N.D. Cal. May 28, 2010) (finding that other courts have held that "other

information" must be related to loan servicing). To guide this analysis, RESPA provides a definition of "servicing":

> The term "servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

12 U.S.C. § 2605(i)(3). HUD, in its promulgation of the regulations that implement RESPA, explains that "[t]he statute encompasses *all information relating to the servicing* of a mortgage loan and *does not restrict* the subject matter to questions concerning the transfer of servicing, installment payments, or account balances." 59 Fed. Reg. 65,442, 65,445 (Dec. 19, 1994) (emphasis added); see also Greetis, 2010 WL 695536, at *1, 3 (finding that RESPA claim survived motion to dismiss where borrower had provided sufficient information regarding servicing of the loan by requesting, among other things, "detailed charges for unpaid principal, interest, escrow, and other charges; interest rate history; a full set of loan-related documents; name, mailing address, phone and fax number of all current owners; documentation and proof of ownership for all owners . . . .").

Inquiries concerning the identity of the new creditor relate to the servicing of the loan. Statutory interpretation must begin with the language of the statute, which must be interpreted in accordance with its plain meaning. Blue Cross and Blue Shield of Ala. v. Weitz, 912 F.2d 1544, 1548 (11th Cir. 1990). "Relating," according to Merriam-Webster, means "to have relationship or connection." Merriam-Webster Dictionary,

available at http://www.merriam-webster.com/dictionary/relating. Thus, a proper inquiry will seek information that has a "relationship or connection" to loan servicing, defined as receiving and applying payments as required pursuant to the terms of the loan. 12 U.S.C. § 2605(i)(3). Indeed, the identity of the entity for whom the servicer receives payments certainly has a relationship to the servicing by virtue of the fact that the payments are received by the servicer specifically on behalf of the owner of the obligation. To hold otherwise would be in derogation of the plain meaning of the terms utilized in the statute. Additionally, construing the term "relating to the servicing of the loan" in a manner to permit the servicer to refuse to identify the very owner of the obligation on whose behalf it is collecting and processing payments would be in derogation of the consumer protective nature of RESPA. Indeed, in such an instance, a servicer's failure to identify the note holder could leave borrowers without an adequate route to discover who, in fact, owned the loan,[6] and servicers could help "hide the ball" indefinitely. Accordingly, consistent with the consumer protective purpose of RESPA, this Court concludes that Plaintiff's letter seeking the identity of the holder of the note qualifies as a QWR and BAC had an obligation to respond pursuant to 12 U.S.C. §

[6] Though TILA contains a requirement that servicers must disclose, upon request by the borrower, the note holder's identity, this Court has found that TILA's statutory language explicitly forecloses the right to pursue damages against a servicer because the private right of action lies exclusively against the creditor (whose identity may be unknown). See 15 U.S.C. § 1640(a); 15 U.S.C. § 1641(f)(2).

2605(e)(2).[7] Woods v. Greenpoint Mortg. Funding, Inc., No. 2:09-1810 WSB KJM, 2010 WL 1729711, at *7 (E.D. Cal. Apr. 28, 2010) ("Information on whose behalf the servicer is accepting loan payments seems to clearly be related to the servicing of plaintiff's loan and a proper subject of a QWR under RESPA."); Quintero Family Trust v. OneWest Bank, F.S.B., No. 09-CV-1561-IEG (WVG), 2010 WL 392312, at *9 (S.D. Cal. Jan. 27, 2010) (explaining that defendant's failure to respond to borrower's written request for information including a request to identify the "true owner of the note and mortgage for the loan" would entitle the plaintiff to relief under RESPA).

2. Whether Plaintiff's Complaint Adequately Pleads Damages

BAC contends that Plaintiff's RESPA Claim is not adequately pled because she fails to allege any actual damages as a result of the alleged RESPA violation. In response, Plaintiff contends that RESPA does not require that she plead actual damages, but even if she was required to plead actual damages, RESPA has interpreted this requirement liberally, and her Amended Complaint states that she incurred expenses as a result of the RESPA violations. Plaintiff further contends that should the Court

[7] BAC relies upon Consumer Solutions REO, LLC v. Hillery, 658 F. Supp. 2d 1002, 1014 (N.D. Cal. Aug. 26, 2009) to bolster its position that the Plaintiff's inquiry did not relate to the loan servicing. However, Consumer Solutions stands for the proposition that correspondence relating to the *validity* of a loan is not related to its servicing, and thus, is not a QWR. Id. The Court likewise disagrees, for the reasons stated herein, with the conclusion in Gates v. Wachovia Mortg., FSB, No. 2:09-cv-02464-FCD/EFB, 2010 WL 2606511, at *3 (E.D. Cal. June 28, 2010) (finding that "neither an inquiry into the ownership of a loan, nor an allegation of defective loan documentation, are sufficient to transform an otherwise non-qualifying correspondence into a QWR").

conclude that a more definite statement concerning her damages is required, she requests an opportunity to amend her Complaint.

Damages are a necessary element of a RESPA claim. See McLean v. GMAC Mortg. Corp., 595 F. Supp. 2d 1360, 1365 (finding that plaintiffs have burden to prove not only damages under REPSA, but also that defendant's violation of RESPA proximately caused damages), aff'd, No. 09-11054, 2010 WL 3784527 (11th. Cir. 2010). See also Frazile v. EMC Mortg. Corp., 382 F. App'x 833, 836 (11th Cir. 2010) (holding that actual or statutory damages allegation is "a necessary element of any claim under Section 2605"). The following damages are recoverable under RESPA for a section 2605 violation: "(A) any actual damages to the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $1,000." 12 U.S.C. § 2605(f)(1). Plaintiff's Complaint asserts that she is entitled to actual as well as additional damages for BAC's pattern or practice of noncompliance.

a. Actual Damages

The term "actual damages" is not defined by RESPA. In tune with the consumer protective purpose of the Act, courts have interpreted the term "actual damages" broadly to include pecuniary damages such as: (1) out-of-pocket expenses incurred dealing with the RESPA violation including expenses for preparing, photocopying and obtaining certified copies of correspondence, (2) lost time and inconvenience, such as time spent away from employment while preparing correspondence to the loan servicer, to the

extent it resulted in actual pecuniary loss (3) late fees and (4) denial of credit or denial of access to full amount of credit line. McLean, 595 F. Supp. 2d at 1366; Rawlings v. Dovenmuehle Mortg., Inc., 64 F. Supp. 2d 1156, 1164-65 (M.D. Ala. 1999) (finding that the plaintiffs were entitled to recover $115.00 in actual damages for correspondence and travel and finding genuine issue of material fact as to whether the plaintiffs suffered actual damages in the amount of time taken away from work to prepare correspondence and travel to pick up registered mail). In this case, Plaintiff alleges that she was inconvenienced and incurred expenses in seeking the information that BAC Home Loans refused to provide. (Amended Compl. ¶ 51). This is sufficient factual matter taken as true to suggest that Plaintiff suffered actual damages. Speaker v. U.S. Dep't of Health and Human Servs. Ctrs., 623 F.3d 1371, 1383 (11th Cir. 2010) (providing that plaintiff's allegations that defendant's actions "had a substantial economic and noneconomic impact upon his livelihood," including loss of prospective clients is sufficient to state a claim for entitlement to actual damages).

b. Additional Damages

In order to recover additional or statutory damages, the plaintiff must show "a pattern or practice of noncompliance." 12 U.S.C. § 2605(f)(1)(B). Courts have interpreted the term "pattern or practice" in accordance with the usual meaning of the words. McLean, 595 F. Supp. 2d at 1365, citing In re Maxwell, 281 B.R. 101, 123 (Bankr. D. Mass. 2002). "The term suggests a standard or routine way of operating." McLean, 595 F. Supp. 2d at 1365; In re Tomasevic, 273 B.R. 682 (Bankr. M.D. Fla.

2002) (failure to respond to one QWR did not amount to a "pattern or practice"); Ploog v. HomeSide Lending, Inc., 209 F. Supp. 2d 863, 868-69 (N.D.Ill. 2002) (failure to respond to five QWRs established pattern or practice). The allegations of Plaintiff's Complaint are sufficient to allege that BAC's practice is to not respond to QWRs seeking the information that Plaintiff requested. Plaintiff alleges that in response to her QWR, BAC took the position that it was not legally required to provide the information sought in the letter, refused to provide the information, and as a result, has demonstrated its general policy not to provide the type of information. (Amended Compl. ¶¶ 48-50). Plaintiff alleges that based on this policy, BAC's practice is not to provide the information sought within her QWR. Plaintiff's allegations are sufficient to suggest a practice of not responding to similar QWRs. Because Plaintiff's letter sought appropriate information to qualify as a QWR and because Plaintiff has sufficiently alleged that she suffered damages due to the BAC's failure to provide information in response to her QWR, Defendants' Motion to Dismiss should be **DENIED** as to Plaintiff's RESPA claim.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Leave to File Second Amended Complaint is **GRANTED.** Docket Entry [35]. Additionally, this Court **RECOMMENDS** that Defendants Fannie Mae's and BAC's Motion to Dismiss Amended Complaint be **DENIED**. Docket Entry [36]. Also before the Court is

Plaintiff's Motion for Leave to File Surreply. Docket Entry [43]. For good cause shown, Plaintiff's motion is **GRANTED**. Docket Entry [43].

SO REPORTED AND RECOMMENDED, this 28th day of February, 2011.

s/Linda T. Walker
LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GLORIA JEAN DAVIS, Plaintiff, v. GREENPOINT MORTGAGE FUNDING, INC., BAC HOME LOANS SERVICING, LP, FEDERAL NATIONAL MORTGAGE ASSOCIATION, N.A., JOHN DOE 1, And JOHN DOE 2, Defendants.	CIVIL ACTION NO. 1:09-CV-2719-CC-LTW

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636 and this Court's Local Rule 72.1C. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation **within fourteen (14) days of the receipt of this Order**. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the

opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 28th day of February, 2011.

s/Linda T. Walker
LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE