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

GLORIA JEAN DAVIS, Plaintiff, vs. 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

The above-styled action is before the Court on the Non-Final Report and Recommendation (R&R) [Doc. No. 45] issued by Magistrate Judge Linda T. Walker on March 1, 2011. The R&R, which actually is an Order and R&R, granted Plaintiff leave to file a Second Amended Complaint, recommended that Defendants Fannie Mae's and BAC Home Loans Servicing, LP's Motion to Dismiss Amended Complaint ("Motion to Dismiss") be denied, and granted Plaintiff leave to file a surreply to oppose further the Motion to Dismiss. Defendant BAC Home Loan Servicing, LP ("BAC") has filed timely objections to the R&R. Having conducted a de novo review of those portions of the R&R to which BAC objects and reviewed the remainder of the R&R for plain error, the Court concludes that the R&R is due to be adopted over BAC's objections, except with respect to the R&R's finding that Plaintiff adequately alleged a pattern or practice of noncompliance by BAC with 12 U.S.C. § 2605.

I. BACKGROUND

The Magistrate adequately summarized the background facts in the R&R, and the Court will repeat herein only those facts that are relevant to the objections raised

by BAC. On September 23, 2009, Plaintiff Gloria Jean Davis ("Plaintiff") filed this action against GreenPoint Mortgage Funding, Inc. ("GreenPoint"), BAC, Bank of America, N.A., and John Doe. Plaintiff initially sought to rescind two consumer credit transactions pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1666, and named BAC, the servicer of the loans, as a purported necessary party.

On October 7, 2009, while this lawsuit was pending, Plaintiff sent a letter to BAC seeking the following information:

> (A) the identity, address and telephone number of the new creditor;
> (B) the date of the [loan] transfer;
> (C) how to reach an agent or party having authority to act on behalf of the new creditor;
> (D) the location of the new place where transfer of ownership is recorded; and
> (E) any other relevant information regarding the creditor.

BAC received the correspondence but did not provide any information responsive to Plaintiff's requests. Nor did BAC provide an explanation stating that the information was unavailable and explaining why the information was unavailable. Instead, BAC allegedly took the position that it was not legally required to provide the information sought by Plaintiff.

As a result of BAC's failure to respond to Plaintiff's correspondence, Plaintiff moved for leave to amend her complaint to assert, inter alia, a claim against BAC for allegedly violating Section 2605(e) of the Real Estate Settlement Procedures Act ("RESPA"). On May 13, 2010, the Magistrate granted Plaintiff's request for leave to amend her complaint to include this RESPA claim against BAC. On May 26, 2010, Plaintiff filed her Amended Complaint.

Following Plaintiff's filing of the Amended Complaint, in which Plaintiff also added Federal National Mortgage Association, N.A. ("Fannie Mae") as a defendant, Fannie Mae and BAC filed the instant Motion to Dismiss. Fannie Mae argued that the TILA claims Plaintiff alleged against Fannie Mae were barred by the applicable statute of limitations, and BAC argued that it did not violate RESPA as a matter of law because the letter sent by Plaintiff was not a qualified written request ("QWR")

under RESPA.

In the R&R, the Magistrate resolved the arguments of Fannie Mae and BAC in Plaintiff's favor. Fannie Mae has not objected to any portion of the R&R. BAC objects to the portions of the R&R permitting the RESPA claim to proceed.

II. STANDARD

After reviewing a magistrate judge's findings and recommendations, a district judge may accept, reject, or modify the findings or recommendations. 28 U.S.C. § 636(b)(1). A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Id. The district judge must "give fresh consideration to those issues to which specific objection has been made by a party." Jeffrey S. v. State Bd. of Educ. of Ga., 896 F.2d 507, 512 (11th Cir. 1990) (citation omitted). Those portions of a report and recommendation to which an objection has not been made are reviewed for plain error. United States v. Slay, 714 F.2d 1093, 1095 (11th Cir. 1983).

III. DISCUSSION

A. Qualified Written Request

BAC first objects to the Magistrate's conclusion that the correspondence sent by Plaintiff constitutes a QWR within the meaning of RESPA. BAC argues that the correspondence is not a QWR because it does not request information related to the servicing of Plaintiff's loan. As such, BAC maintains that it had no obligation to respond to Plaintiff's correspondence. While there is substantial non-binding authority supporting BAC's position that the correspondence is not a QWR, the Court agrees with the Magistrate's well-reasoned analysis and concludes that a consumer's request for the identity of the entity on whose behalf a loan servicer is receiving payments is a request that relates to the servicing of the loan.

Section 2605(e) of RESPA requires a loan servicer to provide a written response to a borrower's QWR. 12 U.S.C. § 2605(e). The QWR must be: (1) a written correspondence, other than notice on a payment coupon or other payment medium

supplied by the servicer; (2) that includes, or otherwise enables the servicer to identify, the name and account of the borrower; and (3) that includes a statement of the reasons for the borrower's belief, 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). To qualify as a QWR, the correspondence must seek information relating to the servicing of the loan. 12 U.S.C. § 2605(e)(1)(A). RESPA defines "servicing" as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan ... 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). Upon receipt of such a QWR, the loan servicer has twenty days to acknowledge receipt and sixty days to take corrective action, provide a written explanation why the servicer believes the account is correct, or provide a written explanation including information requested by the borrower or an explanation of why the information requested is unavailable. 12 U.S.C. § 2605(e)(1)-(2).

"Not all requests that relate to the loan are related to the servicing of the loan." Williams v. Wells Fargo, No. C 10-00399 JF (HRL), 2010 WL 1463521, at *3 (N.D. Cal. Apr. 13, 2010) (citation omitted). "A written inquiry that does not relate to servicing is not a QWR." Lettenmaier v. Federal Home Loan Mortg. Corp., No. CV–11–156–HZ, 2011 WL 3476648, at *11 (D. Or. Aug. 8, 2011). "A loan servicer only has a duty to respond if the information request is related to loan servicing." Copeland v. Lehman Bros. Bank, FSB, No. 09-1774-WQH-RBB, 2010 WL 2817173, at *3 (S.D. Cal. July 15, 2010).

The Eleventh Circuit has not addressed the issue of whether RESPA requires a loan servicer to provide information concerning loan ownership, transfer, and/or recording, but courts that have addressed the issue almost unanimously hold that RESPA does not require a loan servicer to provide such information. See Paschette

v. Wells Fargo Bank, N.A., No. 6:11-cv-442-Orl-31GJK, 2011 WL 3962274, at *1 (M.D. Fla. Sept. 8, 2011) ("RESPA does not require a servicer such as Wells Fargo to provide the identity of the owner of a loan."); Dietz v. Beneficial Loan and Thrift Co., No. 10–3752 (DWF/TNL), 2011 WL 2412738, at *4 (D. Minn. June 10, 2011) (holding that information regarding loan ownership fell outside of the scope of a QWR); Patton v. Ocwen Loan Servicing, LLC, No. 6:11-cv-445-Orl-19DAB, 2011 WL 1706889, at *3 (M.D. Fla. May 5, 2011) ("Because identifying the owner of a mortgage note does not relate to 'servicing' of the mortgage, 12 U.S.C. § 2605(i)(3), it is not a proper request in a QWR, id. § 2605(e)(1)(B), and [the defendant] did not violate Section 2605(e)(2) merely by failing to identify the current and past owners of Plaintiff's mortgage...."); Marsh v. BAC Home Loans Servicing, LP, No. 2:09-cv-813-FtM-29DNF, 2011 WL 1196415, at *8 n.8 (M.D. Fla. Mar. 29, 2011) ("[T]he Court notes that plaintiffs' allegation that BAC violated RESPA by not identifying the 'true owner' of the obligation is inaccurate. This obligation arises under TILA, not RESPA."); Skaggs v. HSBC Bank USA, N.A., No. 10-00247 JMS/KSC, 2010 WL 5390127, at *4 n.4 (D. Haw. Dec. 22, 2010) ("RESPA does not require that a loan servicer provide information on the holder of the note."); Gates v. Wachovia Mortg., FSB, No. 2:09-cv-02464-FCD/EFB, 2010 WL 2606511, at *3 (E.D. Cal. June 28, 2010) (holding that an inquiry into the ownership of a loan does not constitute a QWR and noting that "[c]ourts routinely interpret section 2605 as requiring a QWR to relate to the servicing of a loan, rather than the creation or modification of a loan"); DeVary v. Countrywide Home Loans, Inc., 701 F. Supp. 2d 1096, 1107 (D. Minn. 2010) (holding that requests regarding loan ownership issues were not QWRs). But see Selby v. Bank of America, Inc., No. 09cv2079 BTM (JMA), 2011 WL 902182, at *5 (S.D. Cal. Mar. 14, 2011) (finding that a plaintiff's request for the identity and the contact information for the owner of her note arguably pertained to the servicing of her account); Woods v. Greenpoint Mortg. Funding, Inc., No. CIV. 2:09-1810 WSB KJM, 2010 WL 1729711, at *7 (E.D. Cal. Apr. 28, 2010) ("Information regarding oh

[sic] 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."). Most of these decisions include little, if any, analysis, however, regarding why the identity of the entity for whom a loan servicer is receiving payments is not related to servicing.

Although the Eleventh Circuit has not addressed the precise issue disputed here, the Eleventh Circuit has instructed, as the Magistrate aptly noted, that "RESPA is to be 'construed liberally in order to best serve Congress' intent.'" McLean v. GMAC Mortg. Corp., 398 F. App'x 467, 471 (11th Cir. 2010) (quoting Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 707 (11th Cir. 1998)). Also, as the Magistrate pointed out, the U.S. Department of Housing and Urban Development, in its promulgation of the regulations that implement RESPA, has explained 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, installing payments, or account balances." 59 Fed. Reg. 65,442, 65,445 (Dec. 19, 1994).

Here, Plaintiff's correspondence requested information regarding the "new creditor" or the owner of the loan and the owner's agents, the transfer of the beneficial rights to the underlying loan, and the recording of the transfer. While almost all of the information requested goes beyond the scope of information relating to the servicing of the loan, the Court holds that an inquiry regarding the identity of a new creditor or, phrased another way, the identity of the entity on whose behalf the servicer receives payments plainly relates to the servicing of the loan. Since the RESPA statute does not define "relating," as used in the phrase "information relating to the servicing of [the] loan," 12 U.S.C. § 2605(e)(1)(A), the Magistrate consulted the Merriam-Webster Dictionary, which defines "relating" as "to have relationship or connection." (See R&R at 31.) The Court finds no error in the Magistrate's reliance on the dictionary definition and agrees, without

reservation, with the logical position that the identity of the owner of the loan relates to the servicing of the loan, given that the servicing is done on the owner's behalf. The Court recognizes that this holding represents a minority view, which only a couple of other courts appear to have endorsed. See Selby, 2011 WL 902182, at *5; Woods, 2010 WL 1729711, at *7. However, the Magistrate's thorough analysis of the statutory language, the underlying policy of the statute, the clarifying statement by HUD, and relevant case law persuades the Court that this is a well-reasoned view and the correct one. Accordingly, after the Court's de novo review of the record and relevant authorities, this Court reaches the same conclusion as the Magistrate. Inasmuch as Plaintiff's correspondence requested the identity of the new creditor, the correspondence does qualify as a QWR.

B. Actual Damages

BAC next objects to the Magistrate's determination that Plaintiff adequately pled actual damages under RESPA in the Amended Complaint. Under RESPA, a plaintiff may recover actual damages as a result of a loan servicer's failure to respond to a QWR. 12 U.S.C. § 2605(f)(1)(A). However, a plaintiff must allege that the loan servicer's breach of RESPA duties resulted in actual damages. Hutchinson v. Del. Sav. Bank FSB, 410 F. Supp. 2d 374, 383 (D.N.J. 2006). The pleading of damages claims is interpreted liberally, particularly given that RESPA is a consumer protection statute that is remedial in nature. See McLean, 398 F. App'x at 471. As such, the Eleventh Circuit has stated, albeit in dicta in an unpublished decision, that a plaintiff may seek non-pecuniary damages as "actual damages" under § 2605(f)(1)(A). Id. Additionally, as the Magistrate emphasized, courts have specifically permitted RESPA plaintiffs to recover actual damages for the following: "(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." (R&R at 34-35) (citations omitted). Still, "the loss alleged must be related to the RESPA violation itself." Lal v. Am. Home Servicing, Inc., 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010).

The Court finds that Plaintiff has adequately pled actual damages. Plaintiff alleges in her Amended Complaint that BAC's failure to comply with her QWR has inconvenienced her and caused her to incur expenses in seeking the information that BAC refused to provide. Unlike the plaintiffs in many of the cases relied on by BAC, Plaintiff has not alleged in just a conclusory fashion that she is entitled to actual damages. See, e.g., Amaral v. Wachovia Mortg. Corp., 692 F. Supp. 2d 1226, 1232 (E.D. Cal. 2010); Saldate v. Wilshire Credit Corp., 711 F. Supp. 2d 1126, 1134 (E.D. Cal. 2010). To the contrary, she specifically seeks to recover for the inconvenience caused by BAC's alleged RESPA violation, and many courts have held or suggested that damages are recoverable for such non-pecuniary harm. McLean, 398 F. App'x at 471; Conley v. Bank of America, N.A., No. 2:11–CV–353 JCM (PAL), 2011 WL 3444196, at *2 (D. Nev. Aug. 5, 2011) (holding that § 2605(f)(1) does not mandate that a plaintiff plead pecuniary damages to recover for a violation of § 2605(e)); Wynkoop v. Wells Fargo Home Mortg., Inc., 2011 WL 2078005, No. 11-60392-CV, at *3 (S.D. Fla. May 26, 2011) (holding that the term "actual damages," as set forth in the RESPA statute, includes non-pecuniary injuries); James v. Litton Loan Servicing, L.P., No. 4:09-CV-147 (CDL), 2011 WL 59737, at *10 (M.D. Ga. Jan. 4, 2011) (permitting plaintiffs to seek recovery for non-pecuniary damages); Lee v. Equifirst Corp., No. 3:10-cv-809, 2010 WL 4320714, at *9 (M.D. Tenn. Oct. 26, 2010) (permitting claim for non-pecuniary damages under RESPA to go forward). But see, e.g., Molina v. Wash. Mut. Bank, No. 09-CV-00894-IEG (AJB), 2010 WL 431439, at *7 (S.D. Cal. Jan. 29, 2010) ("Numerous courts have read Section 2605 as requiring a showing of pecuniary damages in order to state a claim.") (collecting cases). Moreover, while Plaintiff has not identified the specific expenses she incurred seeking the information that BAC refused to provide,

the Court nevertheless finds that Plaintiff's allegation, taken as true, is sufficient enough "to raise the right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

C. Additional or Statutory Damages

Courts also have authority to award additional or statutory damages not to exceed $1,000 in cases where there is a "pattern or practice of noncompliance" with Section 2605. 12 U.S.C. § 2605(f)(1)(B). Plaintiff's factual allegations indicate that BAC did not respond to her correspondence because BAC took the position that it was not legally required to do so. A loan servicer's failure to respond to one QWR, however, is not sufficient to establish entitlement to statutory damages. See Soriano v. Countrywide Home Loans, Inc., No. 09–CV–02415–LHK, 2011 WL 1362077, at *7 (N.D. Cal. Apr. 11, 2011) ("A single alleged RESPA violation is insufficient to establish a 'pattern or practice."); Anokhin v. BAC Home Loan Servicing, LP, No. 2:10-cv-00395-MCE-EFB, 2010 WL 3294367, at *3 (E.D. Cal. Aug. 20, 2010) (holding that a loan servicer's failure to respond to a qualified written request on one occasion is insufficient to establish entitlement to statutory damages); McLean v. GMAC Mortg. Corp., 595 F. Supp. 2d 1360, 1365-66 (S.D. Fla. 2009) (finding that a loan servicer's failure to respond to two QWRs was insufficient to support a pattern or practice of noncompliance as required by section 2605(f)); Garcia v. Wachovia Mortg. Corp., 676 F. Supp. 2d 895, 909 (C.D. Cal. 2009) ("[A]lmost as a matter of definition, a single failure to respond to a Qualified Written Request does not state a claim for a 'pattern or practice' of doing so."); In re Maxwell, 281 B.R. 101, 123 (Bankr. D. Mass. 2002) (finding that evidence of two RESPA violations was insufficient to support a pattern or practice). Plaintiff does allege that BAC "demonstrated that its general policy was not to provide the type of information sought [in Plaintiff's correspondence]" and that BAC "has made it a practice, based on the above policy, not to comply with the qualified written request provisions." (Compl. ¶¶ 49, 50.) However, contrary to the conclusion reached by the Magistrate, the Court finds these

allegations are conclusory and are insufficient to permit the "pattern or practice" claim for statutory damages to survive the motion to dismiss.

IV. CONCLUSION

Based on the foregoing, the Court **ADOPTS** the Magistrate Judge's Non-Final Report and Recommendation [Doc. No. 45], except with respect to the Magistrate's finding that Plaintiff adequately alleged a pattern or practice of noncompliance by BAC with 12 U.S.C. § 2605. The Court **DENIES** Defendants Fannie Mae's and BAC's Motion to Dismiss Amended Complaint [Doc. No. 36].

SO ORDERED this 19th day of September, 2011.

s/ CLARENCE COOPER

CLARENCE COOPER
SENIOR UNITED STATES DISTRICT JUDGE