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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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LISA GATES,

Plaintiff,

v.

WACHOVIA MORTGAGE, FSB,

Defendant.

NO. 2:09-cv-02464-FCD/EFB

MEMORANDUM AND ORDER

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This matter is before the court on the motion of defendant Wachovia Mortgage, FSB ("Wachovia") to dismiss plaintiff Lisa Gates' ("plaintiff") second amended complaint ("SAC") pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff opposes the motion. For the reasons set forth below,<sup>1</sup> defendant's motion to dismiss is GRANTED in part and DENIED in part.

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<sup>1</sup> Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 230(g).



1 plaintiff pleads factual content that allows the court to draw  
2 the reasonable inference that the defendant is liable for the  
3 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

4 Nevertheless, the court "need not assume the truth of legal  
5 conclusions cast in the form of factual allegations." United  
6 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th  
7 Cir. 1986). While Rule 8(a) does not require detailed factual  
8 allegations, "it demands more than an unadorned, the defendant-  
9 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A  
10 pleading is insufficient if it offers mere "labels and  
11 conclusions" or "a formulaic recitation of the elements of a  
12 cause of action." Id. at 1950 ("Threadbare recitals of the  
13 elements of a cause of action, supported by mere conclusory  
14 statements, do not suffice."); Twombly, 550 U.S. at 555.  
15 Moreover, it is inappropriate to assume that the plaintiff "can  
16 prove facts which it has not alleged or that the defendants have  
17 violated the . . . laws in ways that have not been alleged."  
18 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council  
19 of Carpenters, 459 U.S. 519, 526 (1983).

20 Ultimately, the court may not dismiss a complaint in which  
21 the plaintiff has alleged "enough facts to state a claim to  
22 relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949  
23 (citing Bell Atl. Corp., 550 U.S. at 570). Only where a  
24 plaintiff has failed to "nudge [his or her] claims across the  
25 line from conceivable to plausible," is the complaint properly  
26 dismissed. Id. at 1952. While the plausibility requirement is  
27 not akin to a probability requirement, it demands more than "a  
28 sheer possibility that a defendant has acted unlawfully." Id. at

1 1949. This plausibility inquiry is "a context-specific task that  
2 requires the reviewing court to draw on its judicial experience  
3 and common sense." Id. at 1950.

4 In ruling upon a motion to dismiss, the court may consider  
5 only the complaint, any exhibits thereto, and matters which may  
6 be judicially noticed pursuant to Federal Rule of Evidence 201.  
7 See Mir v. Little Co. of Mary Hosp., 844 F.2d 646, 649 (9th Cir.  
8 1988); Isuzu Motors Ltd. v. Consumers Union of U.S., Inc., 12 F.  
9 Supp. 2d 1035, 1042 (C.D. Cal. 1998).

## 10 ANALYSIS

### 11 A. Wachovia's Exhibits

12 The court adopts the analysis of judicial notice of  
13 Wachovia's exhibits set forth in its Order on Wachovia's motion  
14 to dismiss plaintiff's FAC. Because the loan documents,  
15 specifically the Notice of Right to Cancel, form the basis of the  
16 relevant causes of action, the court considers them for the  
17 purpose of defendant's motion to dismiss.<sup>2</sup> (Def.'s Mot. Dismiss  
18 Pl.'s SAC ("MTD"), Filed April 6, 2010 (docket # 20).)

### 19 B. Truth in Lending Act

20 Plaintiff's first cause of action alleges defendant Wachovia  
21 violated the Truth in Lending Act ("TILA") 25 U.S.C. § 1601, *et*  
22 *seq.* (1) by failing to provide accurate copies of the required  
23 disclosures to plaintiff at the time of closing as required by  
24 the statute, and (2) by failing to respond to plaintiff's letter  
25 of "rescission." (SAC ¶¶ 27-30, 40-41, 43.) Wachovia moves to

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26  
27 <sup>2</sup> Defendant also requested judicial notice of various  
28 documents that prove its name was changed from World Savings  
Bank, FSB, on or about December 31, 2007. (RFJN ¶ 2.) The court  
also considers these documents for the purpose of this motion.

1 dismiss plaintiff's first cause of action, arguing that paragraph  
2 72 of plaintiff's SAC is an attempt to revive her rescission claim  
3 in direct contradiction of this court's Order. Specifically,  
4 Wachovia asserts: (1) plaintiff is barred from reasserting her  
5 rescission claim following this court's Order; and (2) plaintiff's  
6 rescission claim is time barred by TILA's three-year statute of  
7 limitations. Plaintiff responds that she is not attempting to  
8 reassert her rescission claim contrary to this court's Order, but  
9 merely "attempt[ing] to plead damages in the broadest form  
10 possible." (Pl.'s Opp'n to Mot Dismiss ("Opp'n"), Filed June 3,  
11 2010 (docket # 24) 3.) More specifically, plaintiff alleges that  
12 paragraph 72's "alternative requests" are merely an element of  
13 plaintiff's notice pleading, and necessary for a complete  
14 discussion of plaintiff's damages under her TILA claim. (Opp'n  
15 at 4.)

16 As noted by this court in its prior Order, if a borrower  
17 files his or her suit over three years from the date of a loan's  
18 consummation, a court is powerless to grant rescission. Miguel,  
19 309 F.3d at 1164 ("[S]ection 1635(f) represents an 'absolute  
20 limitation on rescission actions which bars any claims filed more  
21 than three years after the consummation of the transaction."  
22 (quoting King v. California, 784 F.2d 910, 913 (9th Cir. 1986));  
23 accord Beach, 523 U.S. at 412 ("[Section] 1635(f) completely  
24 extinguishes the right of rescission at the end of the 3-year  
25 period."). If a borrower exercises his or her right to rescind  
26 within the three-year limitation period, such action only  
27 entitles the borrower to damages, not rescission. Cazares v.  
28 Household Fin. Corp., No. CV 04-6887 DSF, 2005 U.S. Dist. LEXIS

1 39222, at \*24-25 (C.D. Cal. 2005) (citing 15 U.S.C. § 1640(a);  
2 Belini v. Wash. Mut. Bank, FA, 412 F.3d 17 (1st Cir. 2005)). But  
3 see Santos v. Countrywide Home Loans, No. 1:09-CV-00912-AWI-SM,  
4 2009 WL 2500710, at \*3-5 (E.D. Cal. Aug. 14, 2009) (finding that,  
5 if creditor does not properly respond to notice of rescission  
6 provided by borrower within limitations period, borrower could  
7 file suit after three-year period of repose). Accordingly,  
8 because a rescission action is time barred in the present action,  
9 this court granted Wachovia's motion to dismiss plaintiff's  
10 rescission claim and did not allow plaintiff leave to amend. (Order  
11 at 10.)

12 As such, plaintiff is barred from reasserting a rescission  
13 claim in her amended complaint, and this court will not consider  
14 a rescission claim brought under TILA by plaintiff. However,  
15 while plaintiff incorporates elements of a rescission claim into  
16 her first cause of action<sup>3</sup>, these requests are presented as an  
17 alternate prayer for relief, following a thorough discussion of  
18 plaintiff's claim for damages under TILA, which this court  
19 allowed in its prior Order. The court emphasizes that  
20 plaintiff's rescission claim has been dismissed and cannot be  
21 pressed in this litigation. However, as plaintiff unequivocally  
22 acknowledges the dismissal of this claim, Wachovia's motion to  
23 dismiss plaintiff's first cause of action is DENIED.

24 **C. RESPA Violation**

25 Plaintiff's second cause of action alleges Wachovia violated  
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27 <sup>3</sup> Plaintiff requests, *inter alia*, a voiding of the  
28 security interest and promissory note or lien as a matter of law,  
and a negation of Wachovia's interest in the property.

1 12 U.S.C. § 2605 by failing to provide a written response to  
2 plaintiff's letter dated January 15, 2009, which she claims is a  
3 valid qualified written request ("QWR"). (SAC ¶¶ 82-85.)  
4 Wachovia moves to dismiss this claim on the basis that, *inter*  
5 *alia*, the letter of January 15, 2009 does not contain a valid QWR  
6 as defined by RESPA § 2605(e). (MTD at 3-4.)

7 In order to qualify as a QWR, a borrower's inquiry must  
8 include a statement of the reasons for the belief of the borrower  
9 . . . that the account is in error or provide sufficient detail  
10 to the servicer regarding other information sought by the  
11 borrower." 12 U.S.C. § 2605(e)(1)(B)(ii). Under RESPA, the term  
12 "servicing" refers to "receiving any scheduled periodic payments  
13 from a borrower pursuant to the terms of any loan." *Id.* at §  
14 2605(i)(3). When presented with a valid QWR, section 2605  
15 requires a loan servicer to provide disclosures "relating to the  
16 servicing of [the] loan," *Id.* at § 2605(e)(1)(A), and may be  
17 liable for damages for failing to do so. *id.* at § 2605(f)(1).  
18 Courts routinely interpret section 2605 as requiring a QWR to  
19 relate to the servicing of a loan, rather than the creation or  
20 modification of a loan. See Consumer Solutions REO, LLC. v.  
21 Hillery, 658 F. Supp. 2d 1002 (N.D. Cal. 2009) (dismissing RESPA  
22 claim with prejudice because plaintiff's "QWR" disputed the  
23 validity of a loan and not its servicing); MorEquity, Inc. v.  
24 Naeem, 118 F. Supp. 2d 885, 901 (N.D. Ill. 2000) (dismissing  
25 plaintiff's RESPA claim after finding that none of the  
26 irregularities alleged in the "QWR" related to servicing as  
27 defined by section 2605); Philips v. Bank of Am. Corp., 2010 U.S.  
28 Dist. LEXIS 35131 (finding defendant had no duty under RESPA to

1 respond to plaintiff's "QWR" because it related to origination  
2 and modification of a loan, not its servicing).

3 In this case, exhibit B fails to relay any servicing error.  
4 The purported QWR contains no statement of plaintiff's belief as  
5 to the existence of a servicing error, nor does it contain  
6 anything to put Wachovia on notice of a servicing error. Rather,  
7 the letter is primarily aimed at uncovering documents relating to  
8 the ownership of the obligation, as well as seeking rescission or  
9 modification by calling into question the validity of the loan.

10 (Pl.'s Ex. B at 49 ("The loan being serviced is defective.").)

11 However, neither an inquiry into the ownership of a loan, nor an  
12 allegation of defective loan documentation, are sufficient to  
13 transform an otherwise non-qualifying correspondence into a QWR.

14 See Hillery, 658 F. Supp. 2d 1002; MorEquity, 118 F. Supp. 2d  
15 885, 901. Moreover, while plaintiff's letter requests a

16 "statement of all payments made on this loan," this request is  
17 similarly insufficient to meet the requirements of RESPA. A  
18 simple inquiry into payments made, without more, cannot be  
19 interpreted as either "a statement of the reasons for the belief  
20 of the borrower, to the extent applicable, that the account is in  
21 error," or, "provid[ing] sufficient detail to the servicer  
22 regarding other information sought by the borrower," as required  
23 by RESPA. 12 U.S.C. § 2605(e)(1)(B)(ii). In other words, an  
24 unadorned request for a statement of payments made toward a loan  
25 is not an allegation of a servicing error.

26 Thus, plaintiff's correspondence fails to meet the  
27 requirement of section 2605 that a QWR put a loan servicer on  
28 notice of a servicing error. Because plaintiff's letter does not



1 meet the requirements of a QWR, Wachovia was under no obligation  
2 to respond. Accordingly, there can be no liability for  
3 Wachovia's failure to provide a written response to plaintiff's  
4 correspondence.

5 Therefore, Wachovia's motion to dismiss plaintiff's second  
6 cause of action is GRANTED. Because plaintiff's RESPA cause of  
7 action is predicated on her having submitted a valid QWR to  
8 Wachovia, there is no possibility that the claim can be cured by  
9 amendment. Because leave to amend would be futile, plaintiff's  
10 RESPA cause of action is dismissed with prejudice.

11 **D. RFDCPA Violation**

12 Plaintiff's third cause of action alleges a violation of  
13 California's Rosenthal Fair Debt Collection Practices Act  
14 ("RFDCPA"). (SAC ¶¶ 105-111.) Plaintiff's SAC notes the date  
15 and time of 6 phone calls allegedly placed by Wachovia to  
16 plaintiff after plaintiff's January 15, 2009 letter to Wachovia  
17 requesting communications cease pursuant to RFDCPA. Wachovia  
18 moves to dismiss this cause of action arguing, *inter alia*, that  
19 plaintiff has failed to allege a violation of the RFDCPA with  
20 sufficient factual specificity. (MTD at 5-6.) Specifically,  
21 Wachovia contends that plaintiff's amended cause of action fails  
22 because contact alone is not enough to allege a violation of the  
23 RFDCPA. (*Id.* at 6.)

24 The RFDCPA precludes a debt collector from collecting or  
25 attempting to collect from a debtor on a consumer debt in a  
26 threatening or harassing manner. See Cal. Civ. Code § 1788 *et*  
27 *seq.* (West 2010). Specifically, the RFDCPA prohibits threats,  
28 obscenity, misleading or false communications, and overreaching.

1 Id. §§ 1788.10-.12, 1788.14-.16. However, "foreclosing on [a]  
2 property pursuant to a deed of trust is not the collection of a  
3 debt within the meaning of the FDCPA." Izenberg v. ETS Servs.,  
4 LLC, 589 F. Supp. 1193, 1199 (C.D. Cal. 2008) (quoting Ines v.  
5 Countrywide Home Loans, 2008 WL 4791863, at \*2 (S.D. Cal. Nov. 3,  
6 2008)). Nor does foreclosure meet the requirements of a debt  
7 collection within the meaning of the RFDCPA. Id.

8 While the federal rules contemplate a short and plain  
9 statement of the factual basis for a plaintiff's claims, the  
10 allegations must be sufficiently pled to allow the court to  
11 determine whether the conduct violates the statute. See Iqbal,  
12 129 S. Ct. at 1950; Twombly, 550 U.S. at 555. Although the SAC  
13 has improved upon the FAC's factually deficient claim by listing  
14 the date and time of the alleged debt collection phone calls, due  
15 to the unadorned nature of these added allegations, plaintiff's  
16 RFDCPA cause of action still fails to meet the applicable  
17 pleading requirements. As noted by the court in its prior Order,  
18 plaintiff's assertion that Wachovia "repeatedly called" plaintiff  
19 does not by itself constitute a violation of the RFDCPA.  
20 Plaintiff's SAC alleges little more than the FAC's bald assertion  
21 of harassment. Taken as true, plaintiff's SAC makes no  
22 allegation regarding the nature of the phone calls, only that  
23 they were placed. This alone is not enough to allow the court to  
24 infer that there has been conduct violating the statute.

25 Accordingly, Wachovia's motion to dismiss plaintiff's third  
26 claim for relief is GRANTED with leave to amend.

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1 **CONCLUSION**

2 For the foregoing reasons, Wachovia's motion to dismiss is  
3 GRANTED in part and DENIED in part. Plaintiff is granted fifteen  
4 (15) days from the date of this order to file a third amended  
5 complaint in accordance with this order. Defendant is granted  
6 thirty (30) days from the date of service of plaintiff's third  
7 amended complaint to file a response thereto.

8 IT IS SO ORDERED.

9 DATED: June 28, 2010

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12 FRANK C. DAMRELL, JR.  
13 UNITED STATES DISTRICT JUDGE  
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