

1 IN THE UNITED STATES DISTRICT COURT
 2
 3 EASTERN DISTRICT OF CALIFORNIA
 4

5 CLIFFORD M. ANDERSON,) 2:16-CV-01783 LEK
 6 MARLENE J. ANDERSON,)
 7)
 8 Plaintiffs,)
 9)
 10 vs.)
 11)
 12 WELLS FARGO HOME MORTGAGE;)
 13 and BARRETT DAFFIN, FRAPPIER,)
 14 TREDER & WEISS, LLP,)
 15)
 16 Defendants.)
 17 _____)

18
 19 **ORDER GRANTING IN PART AND DENYING**
 20 **IN PART DEFENDANT'S MOTION TO DISMISS**
 21

22 Before the Court is Defendant Wells Fargo Home
 23 Mortgage's, doing business as America's Servicing Company ("Wells
 24 Fargo" or "Defendant"), Motion to Dismiss ("Motion"), filed on
 25 August 3, 2016.¹ [Dkt. no. 4.] Plaintiffs Clifford M. Anderson
 26 and Marlene J. Anderson ("Plaintiffs") filed a memorandum in
 27 opposition on August 18, 2016, and Defendant filed its reply on
 28 September 1, 2016. [Dkt. nos. 6, 8.] The Court finds this
 29 matter suitable for disposition without a hearing pursuant to
 30 Rule LR230(g) of the Local Rules of Practice of the United States
 31 District Court for the Eastern District of California ("Local

32 _____
 33 ¹ The Motion states that Defendant is actually Wells Fargo
 34 Bank, N.A., and was "erroneously sued as Wells Fargo Home
 35 Mortgage d/b/a America's Servicing Company." [Motion at 1.]
 36 Defendant has not moved to alter or correct its name in the
 37 docket, and the Court will therefore refer to Defendant as its
 38 name appears in this district court's electronic case filing
 system.

1 Rules"). Defendant's Motion is granted in part and denied in
2 part for the reasons set forth below.

3 **BACKGROUND**

4 Plaintiffs filed their Complaint for Damages and
5 Equitable Relief ("Complaint") in the Superior Court of
6 California in and for the County of Nevada on June 15, 2016, and
7 Defendant removed the Complaint on July 29, 2016. [Notice of
8 Removal, filed 7/29/16 (dkt. no. 1), Exh. A (Complaint).]
9 Plaintiffs are residents of and owners of a property in Nevada
10 City, California ("the Property"). [Complaint at ¶¶ 1-3.]

11 Plaintiffs allege that Defendant is involved in a
12 scheme that fraudulently conceals mortgage-default-related fee
13 income. [Id. at ¶ 23.] According to Plaintiffs:

14 Defendants² order default-related services from
15 their subsidiaries and affiliated companies, who,
16 in turn, obtain the services from third-party
17 vendors. The third-party vendors charge
18 Defendants for their services. Defendants, in
19 turn, charge borrowers a fee that is significantly
20 marked-up from the third-party vendors' actual
21 fees for the services. As a result, even though
22 the mortgage market has collapsed, and more and
23 more borrowers are following into delinquency,
24 Defendants continue to earn substantial profits by
25 assessing undisclosed, marked-up fees for default-
26 related services on borrowers' accounts.

27
28 [Id. at ¶ 24.] Plaintiffs argue that mortgage contracts do not
29 allow a mortgage servicer to mark up the costs of default-related

30 ² Barrett, Daffin, Frappier, Treder, & Weiss, LLP ("Barrett
31 Daffin") is also named as a defendant, but Plaintiffs apparently
32 have not completed service on Barrett Daffin.

1 services in order to make a profit. [Id. at ¶ 27.] Moreover,
2 Plaintiffs submit that these default-related fees are not
3 disclosed to the borrowers. [Id. at ¶ 29.] “[T]he assessment of
4 these marked-up fees can make it impossible for borrowers to
5 become current on their loan.” [Id. at ¶ 33.]

6 In the instant matter, Plaintiffs state that they
7 obtained a \$1,072,000 loan to purchase the Property, secured by
8 the Deed of Trust to the Property. [Id. at ¶ 38.] Due to
9 changes in their financial situation, Plaintiffs fell behind on
10 their loan payments, and, on July 18, 2012, Defendant recorded a
11 Notice of Default. [Id. at ¶ 39.] According to Plaintiffs, due
12 to their financial hardship, they applied for a loan modification
13 on May 5, 2015. [Id. at ¶ 45.] Plaintiffs state that, on
14 August 27, 2015, they submitted six requests for information
15 (“8/27/15 Requests”), pursuant to 12 C.F.R. § 1024.36
16 (“Regulation X”) of the Real Estate Settlement Procedures Act
17 (“RESPA”) and 12 C.F.R. § 1026.36 (“Regulation Z”) of the Truth
18 in Lending Act (“TILA”).³ [Id. at ¶ 46.] Plaintiffs also allege
19 that Defendant’s response to the 8/27/15 Requests was untimely,

20 ³The Complaint states that the requests were sent on
21 August 27, 2016, although it subsequently states that the
22 requests were sent in 2015. Compare Complaint at ¶ 46, with
23 id. at ¶ 56. Defendant also states that the 8/27/15 Requests
24 were sent in 2016. See Mem. in Supp. of Motion at 2 (“Plaintiffs
25 allegedly mailed six letters to Wells Fargo, all dated August 27,
26 2016.” (citation omitted)). Given the filing date of the
27 Complaint, any reference to 2016 with respect to the 8/27/15
28 Requests is clearly an oversight.

1 pursuant to § 1024.36(c). [Id. at ¶ 47.] On December 7, 2015,
2 Plaintiffs sent Defendant six Notices of Error ("12/7/15
3 Notices"), pursuant to 12 C.F.R. § 1024.35. Plaintiffs assert
4 that Defendant has not adequately responded to the 12/7/15
5 Notices. [Id. at ¶¶ 47-48.] Defendant recorded a Notice of
6 Trustee's Sale on May 18, 2016. [Id. at ¶ 49.]

7 Plaintiffs allege that Defendant's failure to respond
8 to the 8/27/15 Requests in a timely fashion, and its failure to
9 sufficiently respond to the 12/7/15 Notices, are violations of
10 Regulation X and Regulation Z ("Count I"). [Id. at ¶¶ 50-81.]
11 Plaintiffs also allege that Defendant's actions violated Cal.
12 Bus. & Prof. Code § 17200, *et seq.* ("Count II"). [Id. at ¶¶ 82-
13 96.] Plaintiffs seek: an order rescinding the Trustee's Sale;
14 an order vacating and setting aside the foreclosure sale, and an
15 order rescinding that sale; damages that resulted from
16 Defendant's actions; "disgorgement of all monies acquired by
17 Defendants by means of any act or practice declared by this Court
18 to be wrongful"; interest; punitive damages; relief under Cal.
19 Civil Code § 2924.12(b); attorneys' fees and costs and any other
20 relief under Cal. Civil Code § 2923.12(i); injunctive relief; and
21 any other relief the Court believes to be appropriate. [Id. at
22 Prayer for Relief ¶¶ 1-10.]

23 //

1 DISCUSSION

2 **I. Request for Judicial Notice**

3 On August 3, 2016, Defendant filed a Request for
4 Judicial Notice in Support of Motion to Dismiss ("Request"), and
5 Plaintiffs filed an objection on August 18, 2016. [Dkt. nos. 5,
6 7.] The Request seeks judicial notice of the United States
7 Postal Service ("Postal Service") tracking information for the
8 12/7/15 Notices. [Request at 1-2.] Plaintiffs oppose the
9 Request "because it is unfairly prejudicial to Plaintiffs,
10 contains hearsay statements, and is improper documentary evidence
11 which lacks foundation." [Objection at 2.] Another district
12 court in the Ninth Circuit has considered whether or not a court
13 may take judicial notice of the Postal Service's tracking
14 information:

15 The Court generally cannot consider materials
16 other than the complaint when ruling on a motion
17 to dismiss under [Fed. R. Civ. P.] 12(b)(6), but a
18 court may take judicial notice of facts that are
19 "(1) generally known within the territorial
20 jurisdiction of the court; or (2) capable of
21 accurate and ready determination by resort to
22 sources whose accuracy cannot reasonably be
23 questioned." Fed. R. Evid. 201(b); see also
24 Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)
25 (providing that courts may also take judicial
26 notice of materials that are included as part of
27 the complaint or relied upon by the complaint).
28 Where a party submission satisfies any of these
29 requirements, the court "**must** take judicial notice
30 if a party requests it and supplies the court with
31 the necessary information." Fed. R. Evid.
32 201(c)(2) (emphasis added).
33

1 These submissions are appropriate for
2 judicial notice as matters in the public record or
3 sources whose accuracy cannot reasonably be
4 questioned. See Marder, 450 F.3d at 448.

5
6 Whiting v. United States, Case No.: CV 15-01472-AB (DTBx), 2016
7 WL 3946920, at *2-3 (C.D. Cal. June 21, 2016). The Court notes
8 that, here, Plaintiffs include the tracking numbers for each of
9 the 12/7/15 Notices. See Complaint at ¶¶ 68-73 (describing each
10 of the 12/7/15 Notices, including the Postal Service tracking
11 numbers). The Court concludes that the tracking information for
12 the 12/7/15 Notices provide facts that are "capable of accurate
13 and ready determination by resort to sources whose accuracy
14 cannot reasonably be questioned," see Whiting, 2016 WL 3946920,
15 at *3 (citation omitted), and Defendant's Request is therefore
16 granted.

17 **II. Count I - Violation of Regulation X and Regulation Z**

18 **A. Timeliness of Defendant's Responses to the**
19 **8/27/15 Requests and the 12/7/15 Notices**

20
21 Regulation X requires that "[w]ithin five days
22 (excluding legal public holidays, Saturdays, and Sundays) of a
23 servicer receiving an information request from a borrower, the
24 servicer shall provide to the borrower a written response
25 acknowledging receipt of the information request." § 1024.36(c).
26 If a request for information concerns the "identity of, and
27 address or other relevant contact information for, the owner and
28 assignee of a mortgage loan," the loan servicer must respond to

1 the request within ten days. § 1024.36(d)(2)(i)(A). "For all
2 other requests for information," a servicer must respond within
3 thirty days. § 1024.36(d)(2)(i)(B). Finally, the requirements
4 of Regulation X are not applicable to "information request[s that
5 are] overbroad or unduly burdensome." § 1024.36(f)(1)(iv).

6 While Plaintiffs appear to argue that Defendant's
7 acknowledgment of the 8/27/15 Requests was untimely, their
8 argument defies common sense. On a motion to dismiss, "[t]he
9 Court must accept well-pled factual allegations as true and draw
10 all reasonable inferences in favor of the non-moving party."
11 Herrera v. Cal. Dep't of Corr. & Rehabs., 1:16-cv-01053-DAD-SKO
12 (PC), 2017 WL 117861, at *1 (E.D. Cal. Jan. 12, 2017) (some
13 citations omitted) (citing Daniels-Hall v. National Educ. Ass'n,
14 629 F.3d 992, 998 (9th Cir. 2010)).⁴ However, "[t]o survive a
15 motion to dismiss, a complaint must contain sufficient factual
16 allegations, accepted as true, to state a claim that is plausible
17 on its face." Id. (some citations omitted) (citing Ashcroft v.
18 Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009)). First,
19 Defendant states that it received the 8/27/15 Requests on
20 August 31, 2015, and acknowledged receipt the same day ("8/31/15
21 Acknowledgment"). [Mem. in Supp. of Motion at 4.] Plaintiffs
22 allege that they did not receive the 8/31/15 Acknowledgment until

23 ⁴ 2017 WL 117861 is the magistrate judge's findings and
24 recommendation, which was adopted on April 20, 2017. [Herrera,
25 dkt. no. 21.]

1 September 5, 2015, although it was backdated to August 31, 2015.⁵
2 See Complaint at ¶ 47; id. at pg. 85 (Exh. F (8/31/15
3 Acknowledgment)).⁶ Plaintiffs sent the 8/27/15 Requests from
4 California to Des Moines, Iowa. [Id. at ¶ 57.] Thus, Plaintiffs
5 challenge Defendant's contention that it took the 8/27/15
6 Requests a day or two to arrive in Iowa, and that it took a day
7 or two for the 8/31/15 Acknowledgment to reach California. In
8 addition, over the course of the nine days in question, there was

9 ⁵ Fed. R. Civ. P. 12(d) states, in relevant part, that
10 "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside
11 the pleadings are presented to and not excluded by the court, the
12 motion must be treated as one for summary judgment under [Fed. R.
13 Civ. P.] 56." However, there are two exceptions:
14

15 First, a court may consider "material which is
16 properly submitted as part of the complaint" on a
17 motion to dismiss without converting the motion to
18 dismiss into a motion for summary judgment.
19 Branch [v. Tunnell], 14 F.3d [449,] 453 [(9th Cir.
20 1994)] (citation omitted). If the documents are
21 not physically attached to the complaint, they may
22 be considered if the documents' "authenticity
23 . . . is not contested" and "the plaintiff's
24 complaint necessarily relies" on them. Parrino v.
25 FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 1998).
26 Second, under Fed. R. Evid. 201, a court may take
27 judicial notice of "matters of public record."
28 Mack v. South Bay Beer Distrib., 798 F.2d 1279,
29 1282 (9th Cir. 1986).
30
31
32
33

34 Malifrando v. Real Time Resolutions, Inc., No. 2:16-cv-0223 TLN
35 GGH PS, 2016 WL 6955050, at *3 (E.D. Cal. Nov. 29, 2016) (some
36 alterations in Malifrando) (quoting Lee v. City of Los Angeles,
37 250 F.3d 668, 688-89 (9th Cir. 2001)).
38

39 ⁶ There are over a hundred pages of exhibits attached to the
40 Complaint, most of which are not consecutively paginated. The
41 Court will therefore refer to the page numbers assigned by this
district court's electronic filing system.

1 at least one weekend. Finally, § 1024.35(c) gives Defendant five
2 days from "receiving an information request from a borrower," and
3 not five days from the day that a request is sent. Plaintiffs'
4 argument that Defendant's response to the 8/27/15 Requests was
5 untimely is simply implausible. Accordingly, to the extent that
6 Count I is based upon this argument, it must be dismissed.

7 It is unclear whether or not Plaintiffs argue that the
8 responses to the 12/7/15 Notices were untimely, but this claim
9 also fails. In response to the 12/7/15 Notices, Defendant sent
10 an acknowledgment, dated December 11, 2015 ("12/11/15
11 Acknowledgment"). [Complaint at pg. 112 (Exh. I).] While the
12 12/11/15 Acknowledgment includes a stamp stating that it was
13 received on December 19, 2015, the tracking numbers provided by
14 Plaintiffs in the Complaint show otherwise. See Request, Exh. A
15 (showing that all of the 12/7/15 Notices were delivered on
16 December 11, 2015). Any claim regarding the failure of Defendant
17 to timely acknowledge the 12/7/15 Notices must also be dismissed.

18 **B. The Sufficiency of Defendant's Response**

19 **1. Regulation X**

20 Plaintiffs state the following regarding the 8/27/15

21 Requests:

22 - the first request ("First Request") sought "a payoff statement
23 as well as an itemized payoff statement for the mortgage
24 loan"; [Complaint at ¶ 58;]

25
26 //

- 1 - the second request ("Second Request") sought "the promissory
2 note for the Loan or other evidence of indebtedness, the
3 deed of trust, any assignment of information demonstrating
4 the right to foreclose, and payment history since the
5 borrower was less than 60 days past due"; [id. at ¶ 59;]
6
- 7 - the third request ("Third Request") sought "information
8 regarding its participation in and the type and availability
9 of loans under . . . loan modification programs"; [id. at
10 ¶ 60;]
11
- 12 - the fourth request ("Fourth Request") sought "a complete life-
13 of-loan loan history and a complete statement of the amount
14 the borrower must pay to cure any default"; [id. at ¶ 61;]
15
- 16 - the fifth request ("Fifth Request") sought "the full names and
17 addresses of the owner, investor, master servicer, current
18 servicer, special information if Fannie Mae or Freddy Mac is
19 the investor, and property valuation information"; [id. at
20 ¶ 62;] and
21
- 22 - the sixth request ("Sixth Request") sought "the servicing file
23 as well as sections of the [Pooling and Service Agreement
24 ("PSA")] [id. at ¶ 63].
25

26 In a letter dated October 13, 2015 ("10/13/15 Letter"),
27 Defendant responded to the 8/27/15 Requests by sending
28 Plaintiffs' attorney a copy of the note ("Note"), security
29 instrument ("Security Instrument"), and payment history ("Payment
30 History"). See id., Exh. J at pgs. 116-17 (10/13/15 Letter),
31 118-45 (Note and Security Instrument), 146-53 (Payment History).
32 Defendant also informed Plaintiffs: about the origin of their
33 account; the status of their account; and that it was "unable to
34 provide any further information because your remaining requests
35 are too broad." [10/13/15 Letter at 1-2.] The 12/7/15 Notices
36 informed Defendant that Plaintiffs believed it erred in its
37 response to the 8/27/15 Requests. [Complaint at ¶¶ 68-73.]

1 Defendant responded to the 12/7/15 Notices in a letter dated
2 December 21, 2015 ("12/21/15 Letter"), wherein it: re-sent a
3 copy of the 10/13/15 Letter and attachments; and informed
4 Plaintiffs again that it was "unable to provide any further
5 information because your remaining requests are too broad. If
6 you'd like to provide us with more specific details about what
7 you're seeking, we'll review your request again." [Id., Exh. J
8 at pgs. 114-15.]

9 Defendant argues that its response to both the 8/27/15
10 Requests and the 12/7/15 Notices was sufficient pursuant to
11 § 1024.35. [Mem. in Supp. of Motion at 4-5.] Plaintiffs counter
12 that, "[e]ven if the explanation were adequate, the issue here is
13 that no such explanation was provided in Wells Fargo's response
14 to the" 12/7/15 Notices. [Mem. in Opp. at 7.] Section 1024.35
15 states, in relevant part that, in response to a notice of error,
16 a servicer must correct the errors and provide notice of the
17 corrections, or

18 [c]onduct[] a reasonable investigation and
19 provid[e] the borrower with a written notification
20 that includes a statement that the servicer has
21 determined that no error occurred, a statement of
22 the reason or reasons for this determination, a
23 statement of the borrower's right to request
24 documents relied upon by the servicer in reaching
25 its determination, information regarding how the
26 borrower can request such documents, and contact
27 information, including a telephone number for
28 further assistance.

29
30 § 1024.35(e)(1)(i)(A)-(B). The regulation also states, "[a]

1 notice is overbroad if the servicer cannot reasonably determine
2 from the notice of error the specific error that the borrower
3 asserts has occurred on a borrower's account."

4 § 1024.35(g)(1)(ii).

5 Other district courts in the Ninth Circuit have
6 reasoned:

7 While RESPA "provides plaintiffs with a
8 private right of action for . . . the failure by a
9 loan servicer . . . to respond to a [Qualified
10 Written Request ("QWR")] for information about a
11 loan," Gomes v. Wells Fargo Home Mortg., No. C 11-
12 01725 LB, 2011 WL 5834949, at *3 (N.D. Cal.
13 Nov. 21, 2011) (internal quotation marks omitted),
14 it does not require loan servicers to respond when
15 they "reasonably determine" that a request is
16 overbroad or unduly burdensome, see 12 C.F.R.
17 § 1024.36(f). "An information request is
18 overbroad if a borrower requests that the servicer
19 provide an unreasonable volume of documents or
20 information to a borrower." Id.
21 § 1024.36(f)(1)(iv).

22
23 Plaintiffs attached the relevant QWR to their
24 complaint. It consists of 18 single-spaced pages
25 of legal arguments and requests for documents and
26 responses, including several questions amounting
27 to requests for a "complete life of loan
28 transactional history," which courts in this
29 circuit have found overbroad. See also Derusseau
30 v. Bank of Am., N.A., 2011 WL 5975821, at *4 (S.D.
31 Cal. Nov. 29, 2011) (finding a QWR overly broad
32 where it "request[ed] a 'complete life of loan
33 transactional history,' the 'Transaction Codes for
34 the software platform of the Servicer,' and the
35 'Key Loan Transaction history, bankruptcy work
36 sheet (if any), or any summary of all the accounts
37 in an XL spreadsheet format.'"); Junger v. Bank of
38 America, N.A., No. CV 11-10419 CAS (VBKx), 2012 WL
39 603262, at *5 (C.D. Cal. Jan. 24, 2012). . . .

40
41 However, "[t]o the extent a servicer can
42 reasonably identify a valid information request in

1 a submission that is otherwise overbroad or unduly
2 burdensome, the servicer shall comply with the
3 requirements of paragraphs (c) and (d) of [that]
4 section with respect to that requested
5 information." 12 C.F.R. § 1024.36(f)(1)(iv). In
6 this regard, while Plaintiffs allege that Wells
7 Fargo could have attempted to answer some of their
8 questions rather than relying on "[t]he flat
9 assertion . . . that every single one of [their]
10 detailed questions [was] somehow too broad," they
11 nevertheless fail to identify any specific
12 questions they reasonably could have expected
13 Wells Fargo to answer, or additional documents
14 that Wells Fargo should have produced, in response
15 to an appropriately scoped and specific QWR. See
16 also 12 C.F.R. § 1024.36(f)(1)(iv), Supplement I
17 to Part 1024 - Official Bureau Interpretations,
18 comment 36(f)(1)(iv), "Examples of Overbroad or
19 Unduly Burdensome Requests for Information," as
20 published in 78 FR 10695 (Feb. 14, 2013) (stating
21 that requests for information (1) "that seek
22 documents relating to substantially all aspects of
23 mortgage origination, mortgage servicing, mortgage
24 sale or securitization, and foreclosure"; (2) "are
25 not reasonably understandable or are included with
26 voluminous tangential discussion"; (3) ["]purport
27 to require servicers to provide information in
28 specific formats . . . when such information is
29 not ordinarily stored in such formats"; and
30 (4) ["]are not reasonably likely to assist a
31 borrower with the borrower's account, including,
32 for example, a request for copies of the front and
33 back of all physical payment instruments," are
34 overbroad or unduly burdensome). Because
35 (1) Plaintiffs' facially overbroad requests sought
36 a broad range of documents that went well beyond
37 the limited subject matter of a valid QWR,
38 (2) Wells Fargo provided Plaintiffs with a copy of
39 their promissory note in response to the QWRs, and
40 (3) the complaint lacks any specificity as to what
41 in particular was insufficient about Wells Fargo's
42 response, the Court grants Defendants' motion to
43 dismiss Plaintiffs' RESPA and Regulation X claims.
44 See Menashe v. Bank of New York, 850 Fed. Supp. 2d
45 1120, 1132 (D. Haw. 2012). . . .

46
47 Brewer v. Wells Fargo Bank, N.A., Case No. 16-cv-02664-HSG, 2017

1 WL 1315579, at *4-5 (N.D. Cal. Apr. 6., 2017) (some alterations
2 in Brewer) (emphasis and some citations omitted). In addition:

3 Servicing, as defined under RESPA, "does not
4 include the transactions and circumstances
5 surrounding a loan's origination - facts that
6 would be relevant to a challenge to the validity
7 of an underlying debt or the terms of a loan
8 agreement. Such events precede the servicer's
9 role in receiving the borrower's payments and
10 making payments to the borrower's creditors."
11 Medrano v. Flagstar Bank, FSB, 704 F.3d 661, 666-
12 67 (9th Cir. 2012). In Medrano, the Ninth Circuit
13 upheld the dismissal of the RESPA claim for
14 failing to properly request servicing information
15 where the letters from the borrowers to servicer
16 challenged terms of the loan and mortgage
17 documents, and the failure of loan documents to
18 "accurately reflect the proper payment schedule
19 represented by the loan broker". Id. at 667.
20 Under these facts, the court found no duty to
21 respond to the request. Id. Therefore, requests
22 for documents and information "relating to the
23 original loan transaction and its subsequent
24 history" do not qualify as QWRs. Junod v. Dream
25 House Mortg. Co., No. CV 11-7035-ODW(VBKx), 2012
26 WL 94355, at *4 (C.D. Cal. Jan. 5, 2012); see also
27 Consumer Solutions REO, LLC v. Hillery, 658 F.
28 Supp. 2d 1002, 1014 (N.D. Cal. 2009) (dismissing
29 plaintiff's RESPA claim with prejudice after
30 observing that the requirement "[t]hat a QWR must
31 address the servicing of the loan, and not its
32 validity, is borne out by the fact that [12
33 U.S.C.] § 2605(e) expressly imposes a duty upon
34 the loan servicer, and not the owner of the
35 loan."). In addition, requests relating to loan
36 modification are not related to "servicing" of the
37 loan. Smallwood v. Bank of America, N.A., Case
38 No. 15cv336, 2015 WL 7736876, at *6 (S.D. Ohio,
39 Dec. 1, 2015) (citing "Mbakpuo v. Civil Wells
40 Fargo Bank, N.A., No. 13-2213, 2015 WL 4485504, at
41 *8 (D. Md. July 21, 2015) (request for a loan
42 modification did not relate to servicing of a
43 loan); Mayer v. EMC Morg. Corp., No. 2:11-cv-147,
44 2014 WL 1607443, at *5-6 (N.D. Ind. Apr. 22, 2014)
45 (same); Van Egmond v. Wells Fargo Home Mortg., No.
46 12-0112, 2012 WL 1033281, at *4 (C.D. Cal Mar. 21,

1 2012) (RESPA only obligates loan services to
2 respond to borrowers' requests for information
3 relating to servicing of their loans, which does
4 not include loan modification information)");
5 Mobine v. OneWest Bank, FSB, 11cv2550-IEG(BGS),
6 2012 WL 1520116, at *2 (S.D. Cal. Apr. 27, 2012)
7 (same).

8
9 Watson v. Bank of Am., N.A., CASE NO. 16cv513-GPC(MDD), 2016 WL
10 6581846, at *6 (S.D. Cal. Nov. 7, 2016) (some alterations in
11 Watson).

12 Here: Plaintiffs' own descriptions of the 8/27/15
13 Requests reveal that they are facially overbroad and go well
14 beyond the proper subject matter for QWRs; the 10/13/15 Letter
15 provided Plaintiffs with the Note, Security Instrument, and
16 Payment History; and "the complaint lacks any specificity as to
17 what in particular was insufficient about Wells Fargo's
18 response," see Brewer, 2017 WL 1315579, at *5 (citation omitted).
19 The Motion, insofar as it seeks dismissal of the Regulation X
20 claims, is granted. However, the dismissal of this claim is
21 without prejudice. See McCliss v. Ward, No. 2:07-cv-01154-MCE-
22 KJM, 2008 WL 3373821, at *3 (E.D. Cal. Aug. 8, 2008) ("A court
23 may determine that amendment of a complaint is futile, and
24 dismiss a claim with prejudice, if the pleadings could not
25 possibly be cured by the allegation of other facts." (some
26 citations omitted) (citing Cook, Perkiss and Liehe, Inc. v.

1 N. Cal. Collection Serv., Inc., 911 F.2d 242, 246-47 (9th Cir.
2 1990))).⁷

3 **2. Violation of Regulation Z**

4 The Complaint states that it also seeks to enforce
5 "amended Regulation Z, Section 1026.36." [Complaint at ¶ 51.]
6 This district court has stated:

7 Plaintiff is required to establish standing
8 for each claim he asserts. DaimlerChrysler Corp.
9 v. Cuno, 547 U.S. 332, 352 (2006). If a plaintiff
10 has no standing, the court has no subject matter
11 jurisdiction. Nat'l Wildlife Fed'n v. Adams, 629
12 F.2d 587, 593 n.11 (9th Cir. 1980) ("[B]efore
13 reaching a decision on the merits we [are required
14 to] address the standing issue to determine if we
15 have jurisdiction."). There are three
16 requirements that must be met for a plaintiff to
17 have standing: (1) the plaintiff must have
18 suffered an "injury in fact" - an invasion of a
19 legally protected interest which is both concrete
20 and particularized and actual or imminent;
21 (2) there must be a causal connection between the
22 injury and the conduct complained of; and (3) it
23 must be likely that the injury will be redressed
24 by a favorable decision. Lujan v. Defenders of
25 Wildlife, 504 U.S. 555, 560-61 (1992); Wash. Legal
26 Found. v. Legal Found. of Wash., 271 F.3d 835, 847
27 (9th Cir. 2001) (en banc).

28
29 Weston v. Kelso, No. 2:17-cv-0384 CKD P, 2017 WL 1354574, at *2
30 (E.D. Cal. Apr. 13, 2007) (alterations in Weston).

31 //

32 ⁷ While not necessary in ruling on the instant Motion, the
33 Court notes that, if Plaintiffs file an amended complaint, it
34 "should explicitly plead facts that could support a finding that
35 Plaintiffs suffered causal damages arising from Defendants'
36 failure to respond to their QWRs within the allotted time frame,
37 as required by RESPA." See Brewer, 2017 WL 1315579, at *5 n.5
38 (citing Lawthner v. Onewest Bank, 2010 WL 4936797, at *7 (N.D.
39 Cal. Nov. 30, 2010)).

1 With specific regard to Regulation Z, this district
2 court has explained:

3 TILA was enacted "to assure a meaningful
4 disclosure of credit terms" so the consumer can
5 "compare . . . the various credit terms available
6 to him and avoid the uniformed use of credit," and
7 to "protect the consumer against inaccurate and
8 unfair credit billing and credit card practices."
9 15 U.S.C. § 1601(a). To effectuate this remedial
10 purpose, courts "construe the Act's provisions
11 liberally in favor of the consumer." Haulk v. JP
12 Morgan Chase Bank USA, 552 F.3d 1114, 1118 (9th
13 Cir. 2009) (internal quotation marks and citations
14 omitted).

15
16 To the extent relevant here, TILA provides
17 "[a] creditor or servicer of a home loan shall
18 send an accurate payoff balance within a
19 reasonable time, but in no case more than 7
20 business days, after the receipt of a written
21 request for such balance from or on behalf of the
22 borrower." 15 U.S.C. § 1639g. Regulation Z,
23 which implements TILA, provides in relevant part,
24 "a creditor, assignee or servicer, as applicable,
25 must provide an accurate statement of the total
26 outstanding balance that would be required to pay
27 the consumer's obligation in full as of a
28 specified date." 12 C.F.R. § 1026.36(c)(3). The
29 Federal Consumer Financial Protection Bureau is
30 responsible for enforcing Regulation Z, and has
31 explained "payoff statements should be issued
32 according to the best information available at the
33 time." 78 Fed. Reg. 10902 (Feb. 14, 2013).

34
35 Jamison v. Bank of Am., N.A., No. 2:16-cv-00422-KJM-AC, 2017 WL
36 3394120, at *3 (E.D. Cal. Aug. 8, 2017) (alterations in Jamison).

37 Moreover,

38 a procedural violation of the TILA requirements
39 for payoff statements does not inherently
40 establish concrete harm. . . . [T]he TILA
41 provision at issue here regulates only the
42 provision of certain information on the payoff
43 statement. See 15 U.S.C. § 1639g; 12 C.F.R.

1 § 1026.36(c)(3). A procedural violation of the
2 TILA provision may result in no concrete harm if
3 the lender provides the omitted information
4 through other means. Cf. Spokeo[, Inc.] v.
5 Robbins, 136 S. Ct. [1540,] 1550 [(2016)]
6 (“ . . . [N]ot all inaccuracies cause harm or
7 present a material risk to harm.”). Here, the
8 complaint does not allege [the defendant] failed
9 or refused to ever disclose information to
10 plaintiff about her proceeds, but only that it
11 failed to disclose such information on the payoff
12 statements.

13
14 Jamison v. Bank of Am., N.A., 194 F. Supp. 3d 1022, 1029 (E.D.
15 Cal. 2016) (some alterations in Jamison) (some citations
16 omitted). Finally,

17 neither the text of TILA, nor the implementing
18 regulation provide instruction regarding what
19 constitutes an “accurate payoff balance,” though
20 the section-by-section analysis in the Federal
21 Register provides some additional context:

22
23 The Bureau does not believe further
24 regulation on procedures around payoff
25 balances is necessary. A payoff balance
26 request is any request from a consumer, or
27 appropriate party acting on behalf of the
28 consumer, which inquires into the total
29 amount outstanding on the loan, or the amount
30 needed to pay off the loan. While such
31 requests are most often made when a consumer
32 is refinancing their loan, payoff balance
33 requests are not limited to this
34 context. . . . The Bureau is not making any
35 changes to the requirements of the accuracy
36 of the statement. The Bureau believes payoff
37 statements should be issued according to the
38 best information available at the time. . . .

39
40 Mortgage Servicing Rules Under the Truth in
41 Lending Act (Regulation Z) V. Section-by-Section
42 Analysis, 78 Fed. Reg. 10902-01, 10957-10958
43 (Feb. 14, 2013).

44
45 Davidson v. PNC Bank, N.A., CAUSE NO. 1:16-cv-569-WTL-MPB, 2016

1 WL 7179371, at *3 (S.D. Ind. Dec. 9, 2016) (alterations in
2 Davidson).

3 It is undisputed that Defendant sent Plaintiffs a copy
4 of the Note, Security Instrument, and Payment History. Moreover,
5 Defendant informed Plaintiffs that, “[t]he account is due for
6 May 01, 2011, through October 01, 2015, monthly payments totaling
7 \$385,815.94. We’ve paid \$38,243.66, toward property taxes and
8 insurance.” [10/13/15 Letter at 1.] The Payment History
9 includes all of the information necessary for Plaintiffs to
10 easily determine the total amount they would need to pay to
11 satisfy their obligations. Further, Plaintiffs do not state that
12 the Payment History is inaccurate. Instead, they allege that
13 “[t]he Reg. Z requirement provides a borrower with an up-to-date
14 and itemized payoff statement in order to allow the borrower to
15 determine its validity and the feasibility of bringing the loan
16 current,” and that “[a] borrower cannot and is not required to
17 discern this from a payment history provided by the loan servicer
18 that may not include all fees charged to the account.” [Mem. in
19 Opp. at 8.] Plaintiffs do not provide any citation to support
20 their position. Nor do Plaintiffs specifically allege that they
21 were not informed about certain fees or that some fees were not
22 included on the Payment History, and that information about these
23 fees was needed to determine “the feasibility of bringing the
24 loan current.” See Mem. in Opp. at 8. In sum, Plaintiffs have

1 not established a concrete harm, and have therefore failed to
2 show that they have standing to bring their Regulation Z claim.
3 Accordingly, to the extent that Count I alleges a claim for
4 violation of Regulation Z, it must be dismissed without
5 prejudice.⁸

6 **III. Count II**

7 Count II states, in part, that "Defendants' acts and
8 practices, as hereinabove alleged, constitute 'unfair' business
9 acts under Bus. and Prof. Code § 17200, *et seq.*, in that said
10 acts and practices offend public policy and are substantially
11 injurious to Plaintiffs and all consumers." [Complaint at ¶ 89.]
12 Accordingly, Count II is derivative of Count I. "[A] § 17200
13 claim must be brought 'by a person who has suffered injury in
14 fact **and** has lost money or property as a result of the unfair
15 competition.'" Sullivan v. Wash. Mut. Bank, FA, No. C-09-2161
16 EMC, 2009 WL 3458300, at *4 (N.D. Cal. Oct. 23, 2009) (emphasis
17 in Sullivan) (some citations omitted) (quoting Cal. Bus. & Prof.

18 ⁸ Insofar as Plaintiffs allege that Defendant failed to
19 respond to their Regulation Z request by the statutory deadline,
20 their argument is unavailing. A payoff statement must "be sent
21 within a reasonable time, but in no case more than seven business
22 days, after receiving written request from the consumer or any
23 person acting on behalf of the consumer." § 1026.36(c)(3).
24 However, "[w]hen a creditor, assignee, or servicer, as
25 applicable, is not able to provide the statement within seven
26 business days of such a request because a loan is in bankruptcy
27 or foreclosure . . . the payoff statement must be provided within
28 a reasonable time." Id. Plaintiffs do not allege that the time
29 in which the Payment History and other information was provided
30 was unreasonable.

1 Code § 17204). Because Count I was dismissed, Count II must also
2 be dismissed. However, for the same reasons as Count I, the
3 dismissal of Count II is without prejudice.

4 **CONCLUSION**

5 On the basis of the foregoing, Defendant Wells Fargo
6 Home Mortgage's, doing business as America's Servicing Company,
7 Motion to Dismiss, filed on August 3, 2016, is HEREBY GRANTED IN
8 PART AND DENIED IN PART. It is granted insofar as Plaintiffs
9 Clifford M. Anderson and Marlene J. Anderson's Complaint for
10 Damages and Equitable Relief is HEREBY DISMISSED. It is denied
11 insofar as the dismissal is WITHOUT PREJUDICE. If Plaintiffs
12 intend to file an amended complaint, they must do so by
13 **October 30, 2017**, and the amended complaint must cure the defects
14 identified in this Order and must also comply with Local Rule
15 220.

16 IT IS SO ORDERED.

17 DATED AT HONOLULU, HAWAII, September 20, 2017.
18
19
20



21 /s/ Leslie E. Kobayashi
22 Leslie E. Kobayashi
23 United States District Judge
24
25
26
27
28

29 **CLIFFORD M. ANDERSON, ET AL. VS. WELLS FARGO HOME MORTGAGE, ET**
30 **AL., 2:16-CV-01783 LEK**