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UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

ANGELIQUE M AYLSWORTH,
Plaintiff,
v.
WELLS FARGO BANK, et al.,
Defendants.

No. C 13-02286 LB
**ORDER GRANTING DEFENDANTS’
MOTIONS TO DISMISS**
[ECF Nos. 36 & 40]

INTRODUCTION

Plaintiff Angelique M. Aylsworth sued Wells Fargo Bank, N.A., Citibank, N.A., Private Mortgage Advisors, LLC, and First American Trustee Servicing Solutions, LLC (collectively, “Defendants”) for alleged misconduct related to the origination and servicing of her adjustable-rate mortgage loan and the foreclosure proceedings on her property. *See* First Amended Complaint (“FAC”), ECF No. 17.¹ Defendants move to dismiss.² *See* ECF Nos. 36, 40. Upon consideration of the papers submitted and applicable legal authorities, the court **GRANTS** the motions to dismiss.³

¹ Citations are to the Electronic Case File (“ECF”) with pin cites to the electronically-generated page number at the top of the document.

² The court collectively refers to Wells Fargo, Citibank, and Private Mortgage Advisors as “Lenders.”

³ Pursuant to Civil Local Rule 7-1(b), the court finds this matter suitable for determination without oral argument and vacates the May 24, 2012 hearing.

1 Aylsworth. *Id.* The Agent told Ms. Aylsworth that she could always refinance the loan later and
2 directed her to sign the loan documents in a short period of time. The FAC also alleges that “Agent
3 did not disclose and Plaintiff was not aware that, among other things, the first ten(10) years of the
4 loan was interest only and the loan contained a late charge of 5% of the principal and interest due.
5 *Id.* ¶ 23.

6 Ms. Aylsworth felt pressured and that she had no choice but to sign the loan documents. *Id.* ¶
7 22. She signed them in a public place in the presence of a notary. *Id.* Copies of the loan documents
8 were not provided to Ms. Aylsworth until after the loan was signed and recorded. *Id.*

9 Ms. Aylsworth’s loan is an adjustable-rate montage loan in the amount of \$568,000. *See* FAC
10 ¶ 26, Ex. D. The loan is secured by a Deed of Trust on the Property that was executed on or about
11 February 16, 2007.⁶ *See* FAC Ex. D., ECF No. 17 at 44. The Deed names Private Mortgage
12 Advisors, LLC (“PMA”) as the Lender and Fidelity National Title Ins Co as the Trustee. *See id.* at
13 44-45. On February 16, 2007, PMA assigned the Deed to Wells Fargo. *See* FAC Ex. A, ECF No.
14 17 at 35. On February 27, 2008, at PMA’s request, the Deed and the Assignment to Wells Fargo
15 were recorded in the official records of San Mateo County. *Id.* at 35, 44.

16 **II. LOAN MODIFICATION**

17 In mid-2009, Ms. Aylsworth began contacting “Lender” (an entity that the complaint does not
18 specifically identify) to ask about obtaining a loan modification. *Id.* ¶ 24. She submitted a loan
19 modification application and all the required documentation. *Id.* ¶ 47.

20 On August 24, 2009, Wells Fargo, through First American, “its alleged trustee,” recorded a
21 Notice of Default on the Property (the “2009 NOD”). *Id.* ¶¶ 26, 62, 73. The 2009 NOD was signed
22 by Wendy Randall. *Id.* ¶ 63. “Wendy Randall” is a “notorious robo-signature[]” that has “been seen
23 all over the Country.” *Id.* ¶¶ 63, 81, 87. Wendy Randall and the other robo-signatures below are the
24 names of “persons paid to sign documents for pecuniary gain, not based on actual knowledge of the
25

26 ⁶ The record does not indicate the date Ms. Aylsworth signed the Deed of Trust. The
27 document states that it is dated February 16, 2007. *See* FAC Ex. D, ECF No. 17 at 44. The
28 signature pages, however, are undated. *See id.* at 58, 64. The Deed was notarized on February 20,
2007. It was recorded on February 27, 2007.

1 contents of the facts contained in the documents they are attesting to. *Id.* ¶ 87.

2 On September 11, 2009, “Herman John Kennerty, Vice President of Loan Documentation” for
3 “Wells Fargo Bank, NA as it [*sic*] attorney in fact for EMC MORTGAGE CORPORATION” signed
4 a Substitution of Trustee naming First American as Trustee under the Deed of Trust in place of the
5 former Trustee, Fidelity National Title Ins Co. *See* FAC ¶ 64; RJN Ex. B. Herman John Kennerty
6 also is a robo-signature. FAC ¶¶ 64, 81, 87. The Substitution of Trustee was recorded in the
7 Official Records of San Mateo County on September 25, 2009. *Id.*; RJN Ex. B.

8 On October 2, 2009, Wells Fargo signed an assignment transferring its interest in the Deed of
9 Trust to EMC Mortgage Corporation. Complaint Ex. B, ECF No. 17 at 39. A stamp on the front of
10 the assignment has the words “Effective Date” with “9/8/09” handwritten below. *Id.* The
11 assignment was recorded on October 13, 2009. *Id.*

12 In “late 2009,” a Wells Fargo representative spoke with Ms. Aylsworth on the telephone and told
13 her that she had been approved for a temporary loan modification. *Id.* ¶ 48. The Wells Fargo
14 representative also said that if Ms. Aylsworth made three consecutive and timely payments in the
15 amount of \$1,950.17, she would be given a permanent loan modification and that Ms. Aylsworth
16 would receive paperwork in the mail to reflect the trial loan modification payment plan. *Id.* ¶¶ 48,
17 115. Ms. Aylsworth was also asked to provide banking information so that the monthly payments
18 could automatically be withdrawn from her checking account and she provided the necessary
19 banking information. *Id.*

20 In October, November, and December 2009, Ms. Aylsworth made the timely payments required
21 under the trial modification. *Id.* ¶ 48, Ex. E. During that three month period, however, Wells Fargo
22 failed to send Ms. Aylsworth anything in writing to reflect the verbal agreement even though it
23 withdrew the three monthly payments from Ms. Aylsworth’s checking account. *Id.* ¶¶ 48, 115.

24 At the end of the three-month trial modification, Ms. Aylsworth contacted Wells Fargo to ask
25 about her permanent loan modification. *Id.* ¶¶ 49, 116. A Well Fargo representative told her that
26 they were going to mail her a permanent loan modification package. *Id.* Ms. Aylsworth repeatedly
27 contacted Wells Fargo and was told to keep checking the mail and that the application package had
28 been sent. *Id.* Ms. Aylsworth never received a permanent loan modification package. *Id.*

1 Ms. Aylsworth applied for a loan modification approximately five more times, but was always
2 denied. *Id.* ¶¶ 24, 50, 117. Each time she applied, Wells Fargo sent her numerous letters stating she
3 had not provided necessary documentation. *Id.* ¶¶ 24, 50, 117. Ms. Aylsworth would resubmit the
4 document she previously sent and go through a lengthy application process. *Id.* ¶¶ 50, 117. Each
5 time, Wells Fargo eventually denied her request because of the allegedly missing documentation.
6 *Id.*

7 Ms. Aylsworth complied with every request from Defendants in her unsuccessful attempts to
8 obtain a loan modification or assistance. *Id.* ¶¶ 51, 119.

9 **III. DEFENDANTS' NOTICE OF DEFAULT AND ATTEMPTED FORECLOSURE**

10 On October 28, 2010, Wells Fargo rescinded the 2009 NOD. FAC ¶¶ 62, 73. It recorded
11 another Notice of Default (the "2010 NOD") on November 15, 2010. *Id.* ¶¶ 63, 73; RJN Ex. C. The
12 2010 NOD states that as of November 11, 2010, the past due amount on Ms. Aylsworth's mortgage
13 was \$79,884.75. FAC ¶ 104; RJN Ex. C. Ms. Aylsworth alleges that this amount is incorrect. FAC
14 ¶ 104.

15 The 2010 NOD was signed by Olga Volpe and the attached Notice of Default Declaration was
16 signed by Nicole Miles-Todd. FAC ¶ 63; *see* RJN Ex. C. Olga Volpe and Nicole Miles-Todd also
17 are robo-signatures "that have been seen all over the Country." *Id.* ¶¶ 63, 81, 87. The Notice of
18 Default Declaration states that Wells Fargo Home Mortgage met the requirements of California
19 Civil Code § 2923.5, by meeting one of the following five requirements:

- 20 • The Beneficiary has made contact with the borrower pursuant to CA Civil Code
21 2923(a)(2). Contact with the borrower was made in person or by telephone to assess the
22 borrower's financial situation and explore options for the borrower to avoid disclosure.
- 23 • Due Diligence to contact the borrower was exercised pursuant to CA Civil Code
24 2923.5(g)(2) by the Beneficiary.
- 25 • The borrower has surrendered the property as evidenced by either a letter confirming the
26 surrender or delivery of the keys to the property to the mortgage. Trustee, beneficiary, or
27 authorized agent pursuant to CA Civil Code 2923.5(h)(1).
- 28 • The borrower has contracted with an organization, person, or entity whose primary
business is advising people who have decided to leave their homes on how to extend the
foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries
pursuant to CA Civil Code 2923.5(h)(2).
- The borrower has filed for bankruptcy and the proceedings have not been finalized

1 pursuant to CA Civil Code 2923.5(h)(3).

2 *See* RJN Ex. C.

3 Before recording the 2010 NOD, Defendants did not do any of the following: (1) contact Ms.
4 Aylsworth; (2) send her a first class letter that included a toll-free number for HUD; (3) send her a
5 certified letter with return receipt requested after she did not respond to Defendants after two weeks;
6 (4) enter into good faith discussions with her; or (5) attempt to contact her by telephone at least three
7 times, at three hours, and on different days. *Id.* ¶¶ 66, 74-77. Ms. Aylsworth’s mailing address and
8 primary telephone number have not changed since the date of her loan to the present. *Id.* ¶ 74. Her
9 primary telephone number allows for voice messages, and she does not recall ever receiving
10 telephone messages from Wells Fargo prior to the 2010 NOD being recorded. *Id.* ¶ 76.

11 On March 3, 2011, First American signed a Notice of Trustee’s Sale, which it recorded on
12 March 8, 2011. *See* FAC ¶¶ 25, 62; RJN Ex. D. The 2011 Notice of Trustee’s sale was robo-signed
13 by Wendy Randall. *See* FAC ¶¶ 63, 81, 87; RJN Ex. D. On March 5, 2012 Wendy Randall signed
14 another Notice of Trustee’s Sale, which First American recorded on March 8, 2012. FAC ¶¶ 25, 62;
15 *see* RJN Ex. E.

16 On January 16, 2013, Ms. Aylsworth sent Wells Fargo a qualified written request (“QWR”) and
17 sent Wells Fargo and First American a validation of debt (“VOD”). *Id.* ¶ 97. The QWR stated that
18 Ms. Aylsworth believed there had been RESPA or TILA violations in the way certain fees
19 associated with her loan and loan documentation were processed. *Id.* It also requested a specific
20 breakdown of the fees and an explanation for the charges. *Id.* Neither Wells Fargo nor First
21 American have responded. *Id.* ¶ 98. Ms. Aylsworth alleges on information and belief that
22 Defendants reported her debt to a consumer reporting agency within 60 days after receiving her
23 QWR and VOD. *Id.* ¶ 101.

24 On or about January 17, 2013, Ms. Aylsworth appealed the denial of her loan modification
25 application. FAC ¶ 92. The appeal was denied on February 15, 2013. *Id.* The denial letter stated,
26 “[p]lease note that within 15 days of the date of this letter, your home will not be sold in a
27 foreclosure sales.” *Id.* ¶ 92. Despite those assurances, a foreclosure sale had been scheduled for
28 February 27, 2013 – just 12 days later. *Id.* This was brought to Wells Fargo’s attention, but it failed

1 to take any action to postpone the trustee sale. *Id.*

2 Just prior to the sale, on February 27, 2013, Ms. Aylsworth filed for bankruptcy with a
3 certification setting forth exigent circumstances. *Id.* ¶ 93. The trustee was notified immediately and
4 did not move forward with the trustee sale. *Id.*

5 **IV. PROCEDURAL HISTORY**

6 Ms. Aylsworth filed the instant civil action on April 10, 2013 in San Mateo County Superior
7 Court. Notice of Removal Ex. A, ECF No. 1. Wells Fargo was served with the Summons on April
8 18, 2013. *See id.*, ECF No. 1 at 8. The record does not indicate when the other Defendants were
9 served, though none of them dispute that service was proper. None of the Defendants answered the
10 Complaint. Instead, on May 20, 2013, the Lenders removed the action to this court on federal
11 question grounds. *Id.* at 2. First American joined the Notice of Removal the same day. *See Joinder*
12 *in Notice of Removal*, ECF No. 4.

13 On May 22, 2013, First American moved to dismiss Ms. Aylsworth's Complaint. ECF No. 8.
14 The Lenders moved to dismiss on May 28, 2013. ECF No. 12. In response, Ms. Aylsworth filed the
15 operative FAC on June 11, 2013, in accordance with Federal Rule of Civil Procedure 15(a)(1)(B).
16 FAC, ECF No. 17. The court thus denied the motions to dismiss as moot. *See 6/21/2013 Order.*

17 The FAC contains claims for the following: (1) violation of California Business and Professions
18 Code section 17200 (the "UCL") in loan origination by PMA, Wells Fargo, and Citibank; (2) unfair
19 and deceptive business practices in loan servicing by Wells Fargo; (3) unfair and deceptive business
20 practices in the foreclosure process by Wells Fargo and First American; (4) set aside pending trustee
21 sale based on wrongful foreclosure proceedings in violation of California Civil Code section 2923.5
22 as to Wells Fargo and First American; (5) - (6) violations of the Homeowners Bill of Rights under
23 California Civil code sections 2924.17 and 2923.6 by Well Fargo, Citibank, and First American; (7)
24 violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605 by Wells
25 Fargo and First American; (8) breach of the covenant of good faith and fair dealing by Wells Fargo;
26 (9) reformation of a fraudulent contract and restitution as to PMA, Wells Fargo, and Citibank; (10)
27 quiet title as to all Defendants and "all persons unknown" who claim an interest in the Property; and
28 (11) declaratory relief as to all Defendants. *See generally* FAC, ECF No. 17.

1 On June 26, 2013, the court granted the parties' stipulated request to stay the litigation until
2 August 27, 2013 so that the parties could attempt to informally resolve the case. ECF No. 20. The
3 court granted the parties' stipulated extensions to the stay on September 4 and October 1, 2013. *See*
4 ECF No. 24, 26. The parties filed a case management conference statement on October 31, 2013
5 that indicated the matter had not settled and that Defendants intended to file motions to dismiss.
6 *See* ECF No. 33. Accordingly, the court lifted the stay on November 1, 2013. *See* Order, ECF No.
7 39.

8 First American and the Lenders have now moved to dismiss Ms. Aylsworth's First Amended
9 Complaint. *See* First American Motion, ECF No. 36; Lenders' Motion to Dismiss, ECF No. 40.
10 Ms. Aylsworth opposes both motions. *See* Opp'n to First American Motion, ECF No. 42; Opp'n to
11 Lenders' Motion, ECF No. 43. Defendants filed replies on November 22, 2013. *See* ECF Nos. 44-
12 45.

13 ANALYSIS

14 I. MOTIONS TO DISMISS

15 A. Federal Rule of Civil Procedure 12(b)(6)

16 A court may dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) when it does not
17 contain enough facts to state a claim to relief that is plausible on its face. *See Bell Atlantic Corp. v.*
18 *Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads
19 factual content that allows the court to draw the reasonable inference that the defendant is liable for
20 the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "The plausibility standard
21 is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a
22 defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 557.). "While a complaint
23 attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's
24 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and
25 conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual
26 allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S.
27 at 555 (internal citations and parentheticals omitted).

28 In considering a motion to dismiss, a court must accept all of the plaintiff's allegations as true

1 and construe them in the light most favorable to the plaintiff. *See id.* at 550; *Erickson v. Pardus*, 551
2 U.S. 89, 93-94 (2007); *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1249 (9th Cir. 2007).

3 If the court dismisses the complaint, it should grant leave to amend even if no request to amend
4 is made “unless it determines that the pleading could not possibly be cured by the allegation of other
5 facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*quoting Cook, Perkiss and Liehe, Inc.*
6 *v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990)). But when a party
7 repeatedly fails to cure deficiencies, the court may order dismissal without leave to amend. *See*
8 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (affirming dismissal with prejudice where
9 district court had instructed *pro se* plaintiff regarding deficiencies in prior order dismissing claim
10 with leave to amend).

11 **B. Federal Rule of Civil Procedure 9(b)**

12 Federal Rule of Civil Procedure 9(b)’s particularity requirement applies to state-law claims
13 grounded in fraud and requires a plaintiff to plead with particularity the circumstances constituting
14 the fraud. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged
15 generally. “Averments of fraud must be accompanied by the ‘who, what, when, where, and how’ of
16 the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).
17 Rule 9(b) serves to give defendants notice of the specific fraudulent conduct against which they
18 must defend. *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001).

19 **II. MS. AYLSWORTH’S SOLE FEDERAL CLAIM: RESPA**

20 Ms. Aylsworth’s first claim alleges that Wells Fargo and First American violated the Real Estate
21 Settlement Procedures Act (“RESPA”), 12 U.S.C. §§ 2601-17. RESPA protects home buyers “from
22 unnecessarily high settlement charges by certain abusive practices.” 12 U.S.C. § 2601(a). It
23 provides plaintiffs with a private right of action for three types of wrongful acts: “(1) payment of a
24 kickback and unearned fees for real estate settlement services, 12 U.S.C. § 2607(a), (b); (2)
25 requiring a buyer to use a title insurer selected by a seller, 12 U.S.C. § 2608(b); and (3) the failure
26 by a loan servicer to give proper notice of a transfer of servicing rights or to respond to a qualified
27 written request [“QWR”] for information about a loan, 12 U.S.C. § 2605(f).” *Choudhuri v. Wells*
28 *Fargo Bank, N.A.*, No. C 11-00518 SBA, 2011 WL 5079480, at *8 (N.D. Cal. Oct. 25, 2011) (citing

1 *Patague v. Wells Fargo Bank, N.A.*, No. C 10-03460 SBA, 2010 WL 4695480, at *3 (N.D. Cal. Nov.
2 8, 2010)). Ms. Aylsworth’s sole federal claim, and thus the claim upon which this court’s
3 jurisdiction is based, alleges the third type. FAC, ECF No. 17, ¶¶ 95-109.

4 **A. The RESPA Claim as to Wells Fargo**

5 Ms. Aylsworth alleges that she sent Wells Fargo a QWR and a Validation of Debt and that it
6 never responded. FAC ¶ 97. The Lenders argue that the FAC does not sufficiently allege that any
7 correspondence Ms. Aylsworth sent constituted a QWR and fails to allege actual damages caused by
8 the alleged violation.

9 A QWR is a “a written correspondence, other than notice on a payment coupon or other payment
10 medium supplied by the servicer, that – (i) includes, or otherwise enables the servicer to identify, the
11 name and account of the borrower; and (ii) includes a statement of the reasons for the belief of the
12 borrower, to the extent applicable, that the account is in error or provides sufficient detail to the
13 servicer regarding other information sought by the borrower.” 12 U.S.C. § 2605(e)(1)(B). If a
14 servicer of a federally-related mortgage loan receives a QWR from the borrower (or an agent of the
15 borrower) for information relating to the servicing of such loan, RESPA requires the servicer: (1)
16 within 5 days (excluding legal public holidays, Saturdays, and Sundays), to provide the borrower
17 with a written response acknowledging receipt of the correspondence (unless the action requested is
18 taken within such period); and (2) within 30 days (excluding legal public holidays, Saturdays, and
19 Sundays), and, if applicable, before taking any action with respect to the inquiry of the borrower, to:

20 (A) make appropriate corrections in the account of the borrower, including the
21 crediting of any late charges or penalties, and transmit to the borrower a written
22 notification of such correction (which shall include the name and telephone number
of a representative of the servicer who can provide assistance to the borrower);

23 (B) after conducting an investigation, provide the borrower with a written explanation
24 or clarification that includes--(i) to the extent applicable, a statement of the reasons
25 for which the servicer believes the account of the borrower is correct as determined
by the servicer; and (ii) the name and telephone number of an individual employed
by, or the office or department of, the servicer who can provide assistance to the
borrower; or

26 (C) after conducting an investigation, provide the borrower with a written explanation
27 or clarification that includes--(i) information requested by the borrower or an
28 explanation of why the information requested is unavailable or cannot be obtained by
the servicer; and (ii) the name and telephone number of an individual employed by,
or the office or department of, the servicer who can provide assistance to the

1 borrower.

2 12 U.S.C. §§ 2605(e)(1)(A), (e)(2).⁷

3 The Lenders first argue that the FAC does not allege facts showing that Ms. Aylsworth's
4 correspondence constituted a QWR. Lenders' Motion at 17-18. "Plaintiff's alleged letter simply
5 makes a blanket statement that her account is in error, without providing a reason, and requests a
6 payment breakdown. This does not qualify as a QWR." *Id.* at 18. The court disagrees. According
7 to the FAC "[t]he QWR stated that Plaintiff believed there were violations of RESPA or TILA in the
8 processing of certain fees associated with Plaintiff's loan and loan documentation i.e., the servicing
9 of her loan, and requested among other things, a specific breakdown of the fees and an explanation
10 of why such charges were incurred." FAC ¶ 97. The FAC's references to "certain fees" and "such
11 charges" are sufficient to allege a QWR at the motion to dismiss stage. *See* 12 U.S.C.
12 § 2605(e)(1)(B).

13 Moreover, a QWR is valid if it explains why the borrower's "account is in error *or provides*
14 *sufficient detail to the servicer regarding other information sought by the borrower.*" 12 U.S.C.
15 § 2605(e)(1)(B)(ii) (emphasis added). Here, the FAC sufficiently alleges that the QWR identified
16 the information that Ms. Aylsworth sought from Wells Fargo. At this stage, that is enough.

17 In opposition, the Lenders cite cases in which court dismissed similar allegations at the pleading
18 stage. *See Phillips v. Bank of America Corp.*, No. C 10-0400 JF (HRL), 2010 WL 1460824, at *3
19 (N.D. Cal. Apr. 9, 2010); *Pettie v. Saxon Mortgage Servs.*, No. C08-5089RBL, 2009 WL 1325947,
20 at *2 (W.D. Wash. May 12, 2009); *Walker v. Equity 1 Lenders Grp.*, 09CV325 WQHAJB, 2009 WL
21 1364430, at *4-5 (S.D. Cal. May 14, 2009). These cases do not change the outcome. In *Phillips* and
22 *Pettie*, the plaintiffs pleaded themselves out of court by attaching their obviously-deficient purported
23 QWRs to the complaint. In *Walker*, the plaintiff alleged that the operative complaint itself was the
24 QWR. *See* 2009 WL 1364430, at *4-5. In contrast, Ms. Aylsworth's FAC alleges facts about the
25 content of her alleged QWR that permit the court to reasonably draw the conclusion that it met the

26
27 ⁷ The parties rely on an earlier version of 12 U.S.C. § 2605(e)(1)(A) that allows a servicer
28 more time to respond to a QWR. The court quotes the current statute, which became effective July
20, 2011 and applies here.

1 statutory definition. *Cf. Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)
2 (cited in Lenders' Reply, ECF No. 45 at 7).

3 The Lenders' second argument is that Ms. Aylsworth fails to allege actual damages caused by
4 the alleged violation. Lenders' Motion at 18. RESPA permits recovery of "any actual damages to
5 the borrower as a result of the failure" to respond to the QWR, as well as "any additional damages,
6 as the court may allow, in the case of a pattern or practice of noncompliance with the requirements
7 of this section, in an amount not to exceed \$2,000." 12 U.S.C. § 2605(f)(1). In order to state a claim
8 for actual damages under RESPA, a plaintiff has the obligation to "point to some colorable
9 relationship between his injury and the actions or omissions that allegedly violated RESPA." *Allen*
10 *v. United Fin. Mortg. Corp.*, No. 09-2507 SC, 2010 WL 1135787, at *5 (N.D. Cal. Mar. 22, 2010);
11 *see Lawther v. Onewest Bank*, No. C 10-0054 RS, 2010 WL 4936797, at *6 (N.D. Cal. Nov. 30,
12 2010). The plaintiff must allege a "concrete harm caused by the RESPA violation itself, not harm
13 generally resulting from a plaintiff's default and foreclosure process." *Tamburri v. Suntrust*
14 *Mortgage, Inc.*, 875 F. Supp. 2d 1009, 1014 (N.D. Cal. 2012) (collecting cases).

15 Ms. Aylsworth does not allege any connection between her alleged damages and Wells Fargo's
16 failure to respond to the QWR. Her damages allegations are that "[d]ue to [Wells Fargo's] failure to
17 provide a breakdown of such fees resulting in Plaintiff's inability to properly dispute such fees,
18 Plaintiff continues to be charged additional interest, penalties and fees for which she would not
19 otherwise be charged." FAC ¶ 103. She states that the \$79,884.75 past due amount recorded in the
20 2011 NOD is incorrect and that since Defendants have not responded to the QWR she sent on
21 January 16, 2013, she has been "unable to verify this alleged amount due to Defendants." *Id.* ¶ 104.
22 Furthermore, she "has been damaged in the amount of ongoing penalties, fees, and interest charged
23 by Defendants, including but not limited to a charge of 5% of any payment of principal and interest
24 not received in full by the end of fifteen calendar days after the date it was due." *Id.* ¶ 105. Finally,
25 she alleges that Wells Fargo's failure to comply with the prohibition on reporting overdue payments
26 to a credit agency cause "significant injury" to Ms. Aylsworth's credit score and prevented her from
27 obtaining additional credit." *Id.* ¶ 106.

28 To the extent Ms. Aylsworth incurred these damages before Wells Fargo had any obligation to

1 respond to the QWR, the allegations do not support a RESPA claim. *See, e.g., Obot v. Wells Fargo*
2 *Bank, N.A.*, No. C11-00566 HRL, 2011 WL 5243773, at *3 (N.D. Cal. Nov. 2, 2011) (where
3 plaintiff sent QWR after she had already defaulted on her loan, she failed to allege facts plausibly
4 showing damages for fees, interest, and penalties incurred because of default were caused by any
5 RESPA violation).

6 Ms. Aylsworth’s best argument is that her inability to dispute the amount of her alleged default
7 and the resulting penalties, fees, and interest caused her to pay more money in the interim between
8 the date that Wells Fargo should have responded to her QWR (approximately March 1, 2013)⁸ and
9 the date she filed suit (April 10, 2013). But she does not allege that she incurred any damages
10 during that period. Nor can the court reasonably conclude that Ms. Aylsworth suffered damages
11 during that period given that she filed for bankruptcy on February 27, 2013. FAC ¶ 93. Regardless,
12 she provides no facts to support her contention that if Wells Fargo had responded to her QWR, its
13 response would have enabled her to avoid any damages or adverse credit consequences. Such
14 conclusory allegations fail to state a claim. *See Guidi v. Paul Fin., LLC*, No. 13-CV-01919-LHK,
15 2014 WL 60253 (N.D. Cal. Jan. 7, 2014) (dismissing as conclusory nearly identical RESPA
16 allegations in complaint filed by Ms. Aylsworth’s counsel). Accordingly, the court grants the
17 Lenders’ motion to dismiss Ms. Aylsworth’s RESPA claim against Wells Fargo without prejudice.

18 **B. The RESPA Claim as to First American**

19 First American moves to dismiss Ms. Aylsworth’s RESPA claim on the ground that it is not a
20 “servicer” subject to RESPA and because Ms. Aylsworth does not allege she sent First American a
21 QWR. First American Motion at 18-19. The court agrees.

22 RESPA provides that a “servicer” must respond to a borrower’s QWR. *See* 12 U.S.C.
23 § 2605(e)(2). A “servicer” is “the person responsible for servicing of a loan (including the person
24 who makes or holds a loan if such person also services the loan),” and “servicing” means receiving
25 any scheduled periodic payments from a borrower pursuant to the terms of any loan.” 12 U.S.C.

27 ⁸ This is 30 days after January 16, 2013, excluding Saturdays, Sundays, Martin Luther King
28 Day (1/21/2013), and President Washington’s birthday (2/18/2013).

1 § 2605(i)(2) & (3).

2 First American argues that it is not a servicer within the definition of RESPA. First American
3 Motion at 18-19. Ms. Aylsworth does not argue otherwise. *See* Opp'n to First American Motion,
4 ECF No. 43. Accordingly, the court dismisses Ms. Aylsworth's RESPA claim against First
5 American.

6 In her opposition, Ms. Aylsworth argues that the facts in her RESPA claim against First
7 American regarding the Validation of Debt are sufficient to put First American on notice that she
8 has a claim under the Fair Debt Collection Practices Act ("FDCPA") so that the court should require
9 First American to answer the FAC. *See* First American Opp'n at 17; First American Reply at 6-7.
10 The court disagrees. Just because First American is on notice that Ms. Aylsworth intends to bring a
11 claim, that does not mean she has sufficiently pleaded that claim. For example, to be held liable for
12 violation of the FDCPA, a defendant must fall within the FDCPA's definition of "debt collector."
13 *See Heintz v. Jenkins*, 514 U.S. 291, 294 (1995); *see also Romine v. Diversified Collection Servs.*,
14 155 F.3d 1142, 1146 (9th Cir. 1998). The FAC contains no allegations showing that First American
15 falls within that definition. Accordingly, if Ms. Aylsworth seeks to bring an FDCPA claim against
16 First American, she should do it in an amended complaint.

17 **III. SUPPLEMENTAL JURISDICTION**

18 Having dismissed Ms. Aylsworth's sole federal claim, the court must decide whether to retain
19 jurisdiction over her state law claims. In any civil action of which the district court has original
20 jurisdiction, the district court shall have supplemental jurisdiction over related state law claims that
21 are part of the same case or controversy. 28 U.S.C. § 1367(a). "The district courts may decline to
22 exercise supplemental jurisdiction over a claim" if, among other reasons, "the district court has
23 dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The court may
24 also decline to exercise supplemental jurisdiction if the retention of the state claims "requires the
25 expenditure of substantial additional judicial time and effort." *Executive Software North America,*
26 *Inc. v. U.S. Dist. Court for Cent. Dist. of California*, 24 F.3d 1545, 1548 (9th Cir. 1994); *Carnegie-*
27 *Mellon Univ. v. Cohill*, 484 U.S. 343 (1988); *see also Government Employees Ins. Co. v. Dizol* 133
28 F.3d 1220, 1224 (9th Cir. 1998).

1 Here, Ms. Aylsworth's state law claims form the body of this action. They involve a number of
2 disputes arising out of the parties' loan modification discussions, the foreclosure process, and
3 compliance with California statutes pertaining to both. Accordingly, having dismissed all claims
4 over which it has original jurisdiction, the court declines to exercise supplemental jurisdiction over
5 the remaining state law claims. These remaining state law claims are dismissed without prejudice
6 for lack of subject matter jurisdiction.

7 **CONCLUSION**

8 The court **GRANTS** Defendants' motions to dismiss. Ms. Aylsworth may file a Second
9 Amended Complaint within 21 days of this order. If no amended complaint is filed, the Clerk shall
10 close the file.

11 This disposes of ECF Nos. 36 & 40.

12 **IT IS SO ORDERED.**

13 Dated: January 17, 2014

14 
15 LAUREL BEELER
16 United States Magistrate Judge

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