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5 **UNITED STATES DISTRICT COURT**
6 **NORTHERN DISTRICT OF CALIFORNIA**
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8 JAIME VARELA, et al.,

9 Plaintiffs,

10 vs.
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12 WELLS FARGO HOME MORTGAGE, et al.,

13 Defendants.
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Case No.: 12-cv-3502 KAW

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS THE SECOND
AMENDED COMPLAINT

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16 Plaintiffs Jamie and Noelia Varela are suing Defendant Wells Fargo Home Mortgage ("Wells
17 Fargo") for violations of the Real Estate Settlement Procedures Act (RESPA).¹ Pending before the
18 Court is Defendant's February 7, 2013 motion to dismiss the second amended complaint. For the
19 following reasons, Defendant's motion to dismiss is granted, with leave to amend.

20 **I. Background**

21 Plaintiffs filed this action in Alameda Superior Court on July 3, 2012, suing multiple
22 Defendants for conduct during the origination of Plaintiffs' mortgage loan, negotiations
23 regarding modification of the loan, and foreclosure proceedings on Plaintiffs' house.

24 Defendants removed the case to this court on July 5. Plaintiffs filed a first amended
25 complaint on July 16. Defendants filed a motion to dismiss the first amended complaint on
26 August 8. On December 21, 2012, the Court granted the motion to dismiss the first amended

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28 ¹ Plaintiffs' previous complaints named multiple Defendants, but the second amended complaint names only Wells Fargo. The clerk of the Court shall terminate former Defendant Cal-Western Reconveyance Corporation on the docket.

1 complaint with leave to amend. On January 22, 2013, Plaintiffs filed the second amended
2 complaint.

3 The second amended complaint contains one cause of action for violations of RESPA, 12
4 U.S.C. § 2601 *et seq.*, against one Defendant, Wells Fargo. Plaintiffs allege the following
5 relevant facts. In August 2005, Plaintiffs obtained an adjustable rate mortgage from World
6 Savings Bank (purchased by Wachovia/ Wells Fargo Home Mortgage). SAC at ¶ 14. Plaintiffs'
7 loan payments increased over the years, but because Plaintiffs did not understand the terms of the
8 loan they had signed, they did not know why their payments were increasing. *Id.* at ¶ 20.
9 Plaintiffs "diligently sought requests for the underwritten documents in order to address the
10 information within those documents. The servicer refused to fully respond, so the Plaintiffs had
11 no way to allege the extent of errors on their loan." *Id.*

12 Plaintiffs sent a letter to Defendant Wells Fargo, which they claim was a qualified written
13 request (QWR) under RESPA. In the letter, Plaintiffs' attorney asked to be informed of the
14 "basis on which the particular amounts are claimed, what assignments or transfers have been
15 made with respect to servicing of the loan in order to identify the proper holder of the note, if the
16 note has been securitized, whether any related security is registered with the Securities and
17 Exchange Commission, and ultimately whether you have any legal standing to make a claim in
18 these premises against [Plaintiffs]." *Id.* at ¶ 28. Plaintiffs' attorney's letter further stated:

19 I suspect violations of the RESPA or of the TILA [(Truth in Lending Act)] in the
20 processing of certain fees associated with my client's Loan and Loan Documentation. I
21 also am disputing the current balance of my Clients loan. Please provide my office a
22 specific breakdown of all the fees and an explanation of why such charges were
23 incurred. Please also provide my client with any and all notices that have not been
24 provided which my client was legally entitled to receive. Section 6, 12 USC §2605(b)
25 requires notice to the borrower of any transfer, for which my Client has no record, and
26 12 USC §2605(i)(3) defines "servicing" as "receiving any scheduled periodic payments
27 from a borrower pursuant to the terms of any loan, including amounts for escrow
28 accounts described in section 10 [12USC §2609], 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, for which the
Client has not been provided a history."

Id. at ¶ 29.

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Defendant sent a response to the letter. *See* Comp'l, Ex. B. The response states:

Although you have referred to your letter as a "Qualified Written Request" under the Real Estate Settlement Procedures Act, it appears that your request is more of an attempt at discovery. A qualified written request is not a substitute for litigation discovery. Please note that 12 U.S.C. 2605(e) affords a borrower a method of disputing and challenging a specific error with the servicing of a loan. If you have a specific dispute with the servicing of the loan, please call so that we can discuss and reach a resolution to the matter.

Pursuant to your request, enclosed is a copy of the Note which validates the obligation to Wells Fargo Home Mortgage under the loan referenced above. For your review, a 12-month Loan History will follow under separate cover. . . .

. . .

Any documents or requested information not provided in this letter is due to the request being too broad to determine specific information needed, or are considered to be proprietary information of Wells Fargo Home Mortgage and will not be provided at this time without a subpoena.

SAC, Ex. B. Plaintiffs allege, "Plaintiff[s] specifically requested the breakdown of the fees placed on their account as they were disputing the charges that were assessed to their account. Defendant's failure to respond to the QWR has resulted in additional interest and penalties that have accumulated on top of these charges that Plaintiffs are still disputing." SAC at ¶ 35.

II. Motion to Dismiss

A. Legal Standards

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss based on the failure to state a claim upon which relief may be granted. A motion to dismiss based on rule 12(b)(6) challenges the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

In considering a 12(b)(6) motion, the court must "accept as true all of the factual allegations contained in the complaint," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted), and may dismiss the case "only where there is no cognizable legal theory" or there is an absence of "sufficient factual matter to state a facially plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing

1 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
2 2001)) (quotation marks omitted).

3 A claim has facial plausibility when a plaintiff "pleads factual content that allows the
4 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."
5 *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate
6 "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
7 will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the
8 elements of a cause of action" and "conclusory statements" are not adequate. *Iqbal*, 556 U.S. at
9 678. "The plausibility standard is not akin to a probability requirement, but it asks for more than
10 a sheer possibility that a defendant has acted unlawfully When a complaint pleads facts that
11 are merely consistent with a defendant's liability, it stops short of the line between possibility and
12 plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal citations
13 omitted).

14 **B. Request for Judicial Notice**

15 As a preliminary matter, Defendant asks that the Court take judicial notice of a number of
16 documents in support of its motion to dismiss. A matter may be judicially noticed if it is either
17 "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and
18 ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.
19 R. Evid. 201(b). "[A] court may take judicial notice of 'matters of public record,'" *Lee v. City of*
20 *Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citing *Mack v. S. Bay Beer Distrib.*, 798 F.2d
21 1279, 1282 (9th Cir. 1986)), and may also consider "documents whose contents are alleged in a
22 complaint and whose authenticity no party questions, but which are not physically attached to the
23 pleading" without converting a motion to dismiss under Rule 12(b)(6) into a motion for summary
24 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other grounds by
25 *Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). The court need not accept as
26 true allegations that contradict facts which may be judicially noticed. *See Mullis v. United States*
27 *Bankruptcy Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987).

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1 The documents are purportedly true and correct copies of: A) a Certificate of Corporate
2 Existence dated April 21, 2006 issued by the Office of Thrift Supervision certifying that World
3 Savings Bank, FSB, is a federal savings bank; B) a letter dated November 19, 2007 on the
4 letterhead of the Office of Thrift Supervision authorizing a name change from World Savings
5 Bank, FSB to Wachovia Mortgage, FSB; C) the Charter of Wachovia Mortgage, FSB; D)
6 Official Certification of the Comptroller of the Currency stating that effective November 1,
7 2009, Wachovia Mortgage, FSB converted to Wells Fargo Bank Southwest, N.A., which then
8 merged with and into Wells Fargo Bank, N.A.; E) a printout from the Federal Deposit Insurance
9 Corporation dated September 2, 2010; F) a Notice of Default and Election to Sell Under Deed of
10 Trust recorded in Alameda County Recorder's Office on October 28, 2010; and G) a Notice of
11 Trustee's Sale Trust recorded in Alameda County Recorder's Office on August 12, 2011.

12 Plaintiffs do not oppose Defendant's request for judicial notice. The accuracy of the
13 information contained in the documents is hearsay and could reasonably be questioned. But as
14 Plaintiff has not disputed the authenticity of Exhibits F and G, the Court finds that the exhibits
15 are true and correct copies of official public records, whose authenticity is capable of accurate
16 and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
17 *See Fed. R. Evid. 201(b)*. Accordingly, the Court will take notice of the existence of the
18 documents and the date on which they were recorded, but will not assume the truth of the facts
19 therein.

20 As for Exhibits A through E, Defendants argue that they are appropriate for judicial
21 notice because they "reflect the official acts of United States' executive departments." The
22 California Evidence Code provides that judicial notice is proper for documents that reflect the
23 acts of executive agencies of the United States government. *See California Evidence Code* § 452
24 (c) (judicial notice may be taken of official acts of the legislative, executive or judicial
25 departments). Some district courts in California follow the California Evidence Code by
26 judicially noticing official acts of the Office of Thrift Supervision, the Comptroller of the
27 Currency, and the FDIC. *See, e.g., Coppes v. Wachovia Mortgage Corp.*, 2010 WL 4483817
28 (E.D. Cal. 2010) at *2-*3 (collecting cases). As Plaintiffs do not object to Defendant's request

1 that the documents be judicially noticed, the Court will take notice of the existence of the
2 documents and the date on which they were recorded, but will not assume the truth of the facts
3 therein.

4 **C. Analysis**

5 Plaintiffs' second amended complaint contains one RESPA cause of action. The Court
6 previously dismissed the RESPA claim in Plaintiff's first amended complaint. The Court found that
7 Plaintiffs had not sufficiently pled a violation of section 2605(e)(3) of the statute, finding:

8 Plaintiffs' allegation that Wells Fargo failed to comply with § 2605(e)(3), which
9 prohibits providing information regarding overdue payments to consumer reporting
10 agencies, is insufficient to state a claim, as it is a conclusory statement that does not
11 meet pleading standards. *Iqbal*, 556 U.S. at 678. Nevertheless, this allegation may be
12 amended to include, if possible, sufficient facts that, taken as true, show that Defendant
reported Plaintiffs' overdue payments to one or more consumer reporting agencies
within 60 days after receiving Plaintiffs' QWR.

13 Plaintiffs' second amended complaint does not cure this defect. Plaintiffs merely state that the
14 statute prohibited Defendant from providing information regarding overdue payments to a consumer
15 reporting agency for a period of time, and then state "Defendants failed to properly comply with 12
16 U.S.C. § 2605(e)(3)." SAC at ¶ 36. Again, Plaintiffs have failed to plead any facts to support their
17 conclusory statement that the statute was violated. Plaintiffs do not allege that Defendant provided
18 information regarding Plaintiffs' overdue payments within 60 days of receiving Plaintiffs' QWR.
19 Perhaps Plaintiffs have failed to make such an allegation because they cannot, and, therefore, cannot
20 amend the complaint to sufficiently state a cause of action. The Court will give Plaintiffs one last
21 chance to do so.

22 The Court also previously found that Plaintiffs had not sufficiently pled actual damages
23 resulting from the RESPA violation. The Court wrote:

24 Finally, Defendants argue that Plaintiffs have failed to plead pecuniary harm resulting
25 from the alleged violation of RESPA. A plaintiff bringing a cause of action under
26 RESPA for failure to respond to a QWR must allege actual damages. *See Williams v.*
27 *Wells Fargo Bank, N.A., Inc.*, C 10-00399 JF (HRL), 2010 WL 1463521 (N.D. Cal.
28 Apr. 13, 2010) (collecting cases finding that conclusory allegations of damages were
not sufficient). In addition, the plaintiff must "point to some colorable relationship
between his injury and the actions or omissions that allegedly violated RESPA." *Allen*
v. United Fin. Mortgage Corp., No. 09-2507 SC, 2010 WL 1135787, at *5 (N.D. Cal.

1 March 22, 2010) (dismissing RESPA claim where Plaintiff alleged he suffered
2 damages of falling behind on his mortgage payments, negative credit impact, and
3 emotional distress, but failed to allege the causal relationship of the damages to
4 RESPA violations).

5 Here, Plaintiffs allege that they have been damaged by "ongoing penalties, fees, and
6 interest charged by Defendant, including but not limited to a charge of 5% of their
7 overdue payment of principal and interest," "copying charges and postal fees in
8 preparing and sending Defendants the herein attached QWR and VOD", and
9 "considerable time away from their employment preparing the QWR and VOD and
10 attempting to contact Defendants inquiring about the whereabouts of Defendants'
11 response causing Plaintiffs to suffer additional losses of income." FAC ¶¶ 100-102.
12 But Plaintiffs have not alleged a causal connection between Defendants' failure to
13 properly respond to the QWR and these losses, and it is unclear why these damages
14 would be caused by Defendants' failure to properly respond to Plaintiffs' request.

15 Plaintiffs' second amended complaint does not remedy this defect, either. The second amended
16 complaint alleges that Defendant's failure to fully respond to the QWR "caused Plaintiff[s] to pay
17 more than necessary on the loan and to incur costs in repairing their credit," "resulted in additional
18 interest and penalties that have accumulated on top of these charges that Plaintiffs are still
19 disputing," and caused Plaintiffs to "suffer damage to their credit score and lines of credit, increased
20 interest, penalties and fees." SAC at ¶ 35.

21 Plaintiffs do not explicitly allege that Defendant's loan statements were inaccurate, and that
22 they were overcharged. If the loan statements were accurate, there is no causal connection between
23 Plaintiffs' injuries and Defendant's failure to respond to the QWR. If the charges were accurate,
24 Plaintiffs would not have paid more than was necessary on the loan, and would not have been
25 charged unfair amounts of interest or penalties. Any damage to Plaintiffs' credit scores or lines of
26 credit, and any costs incurred to repair their credit, would be due to their own default, not any action
27 or inaction by Defendant.

28 Plaintiffs claim that their "inability to properly dispute [the] fees has caused Plaintiffs to
incur additional interest, penalties and fees for which they would otherwise not be charged." Pls'
Opp'n at 2. But this allegation makes no sense, unless the fees Plaintiffs were charged were
inaccurate. Plaintiffs rely on a Northern District of Illinois case, *Johnstone v. Bank of America*, in
support of their argument that the mere inability to dispute fees has a causal connection to paying

1 interest, penalties and fees. *See* 173 F. Supp. 2d 809. In *Johnstone*, the plaintiff had alleged that she
2 had informed the bank of several problems with her mortgage, including that her mortgage payments
3 were not credited to her account, and that the bank had forced her to buy insurance by deducting
4 money from her tax escrow account, causing her tax payments not to go through. *Id.* at 811. In that
5 case, the court found that the plaintiff had sufficiently alleged a causal connection between the
6 defendant's failure to correct these problems and the plaintiff's late fees. In contrast, in this case,
7 Plaintiffs have not alleged that any of Defendant's records or charges were incorrect. Therefore,
8 Plaintiffs have again failed to plead actual damages resulting from Defendant's RESPA violation.
9 The Court will grant Plaintiffs one last opportunity to cure this deficiency.

10 Defendant argues in its motion to dismiss the second amended complaint that it provided a
11 sufficient response to Plaintiffs' QWR. This argument has been addressed, albeit in reference to a
12 different complaint, in the Court's order on the motion to dismiss the first amended complaint. *See*
13 Dkt # 46 at 13-14. Because Plaintiffs' second amended complaint must be dismissed, the Court will
14 not address this argument with respect to the second amended complaint.

15 Accordingly, it is hereby ORDERED that:

- 16 1. Defendant's motion to dismiss the second amended complaint is granted, with leave
17 to amend, if possible, to state a cognizable RESPA claim.
- 18 2. Plaintiffs must file a third amended complaint curing the defects set out above within
19 30 days of the date of this order. The factual allegations that need to be made to sufficiently state a
20 claim are not complicated; either Plaintiffs can allege sufficient facts or they cannot. This will be
21 Plaintiffs' fourth and last chance. No further opportunities to amend will be granted.

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23 DATE: April 30, 2013


KANDIS A. WESTMORE
UNITED STATES MAGISTRATE JUDGE