UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CORY ROBINSON, individually and on behalf of others similarly situated,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

Case No.: 21-cv-00110-AJB-DEB

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

(Doc. No. 12)

Before the Court is Defendant Bank of America, N.A.'s ("Defendant" or "BANA") motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 12-1.) Concurrently with the motion to dismiss, Defendant filed a request for judicial notice of five exhibits. (Doc. No. 12-2.) The motion has been fully briefed. (Doc. Nos. 15 & 16.) Pursuant to Civil Local Rule 7.1.d.1, the Court finds the instant matter suitable for determination on the papers and without oral argument. For the reasons set forth below, the Court **GRANTS** Defendant's motion to dismiss and **GRANTS IN PART AND DENIES IN PART** Defendant's request to take judicial notice.

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I. BACKGROUND[1]

Defendant Bank of America, N.A., is a national bank headquartered in Charlotte, North Carolina, and is the loan servicer for Plaintiff's mortgage. (First Amended Complaint ("FAC"), Doc. No. 11, ¶¶ 19, 21.) On July 20, 2020, Plaintiff, through counsel, sent Defendant a Notice of Error and Request for Information pursuant to the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2605(e), and Regulation X, 12 C.F.R. §§ 1024.35, 1024.36. (*Id.* ¶ 22.) The letter included Plaintiff's name, his loan account number, a request for information, and a reason for the request. (*Id.* ¶ 23.) In the letter, Plaintiff disputed the amount of debt owed and asked for several documents associated with his account, including "[a] copy of any and all recordings of [Plaintiff] or any other person concerning [Plaintiff's] account." (*Id.*) In August 2020, Plaintiff's counsel received Defendant's response to the request. (*Id.* ¶ 24.) However, Defendant's response failed to provide any of the requested information. (*Id.* ¶ 25.) Rather, Defendant stated: "[w]e're committed to protecting the confidentiality of our customer's information and we require written authorization from the customer before we disclose any information . . . . We're unable to respond to the request and consider this inquiry closed . . . . The customer's signature(s) must be a 'live' signature, not a digital signature." (*Id.* ¶ 26.)

Plaintiff asserts he was not required to provide written authorization under RESPA or Regulation X for his QWRs or RFIs. (*Id.* ¶ 27.) Plaintiff's counsel, acting as Plaintiff's agent when he requested the information, is expressly permitted to do so under RESPA, 12 U.S.C. § 2605(e). (*Id.*) Still, on October 19, 2020, Plaintiff sent Defendant an Authorization to Furnish & Release Information to Plaintiff's counsel, as requested by Defendant in its response, and attached a Notice of Error and Request for Information pursuant to 12 U.S.C. § 2605(e) and Regulation X. (*Id.*) In early November of 2020, Plaintiff's counsel received Defendant's response, again failing to provide any of the requested information, stating:

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[1] The following facts are taken from Plaintiff's FAC, which the Court construes as true for the limited purpose of resolving the instant motion. *See Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013).

"[t]he signature must be a 'live' signature, not a digital signature." (*Id.* ¶¶ 29–31.)

On November 23, 2020, Plaintiff again sent Defendant an Authorization to Furnish & Release Information to Plaintiff's counsel, as requested by Defendant in its response, and attached a second Notice of Error and Request for Information pursuant to 12 U.S.C. § 2605(e) and Regulation X. (*Id.* ¶ 32.) Several weeks later, Plaintiff's counsel received a response from Defendant, again failing to provide any of the requested information and using the same boilerplate language to deny the request, insisting the signature "be a 'live' signature, not a digital signature." (*Id.* ¶¶ 34–36.) Finally, on January 5, 2021, Plaintiff's counsel sent a meet and confer letter to Defendant explaining: "we have provided a valid, signed authorization form on multiple occasions . . . . Pursuant to 12 CFR § 1024.36(d)(ii) Bank of America is required to produce all information available through reasonable business efforts . . . . Therefore, please produce the requested documentation along with all audio recordings no later than January 15, 2021." (*Id.* ¶¶ 37–38.) On or about January 20, 2021, Plaintiff's counsel received a response from Defendant, again failing to provide the requested information and reiterating that "[t]he signature must be a 'live' signature, not a digital signature." (*Id.* ¶¶ 39–42.) As of the time of filing this lawsuit, Plaintiff has not received any other documents from Defendant. (*Id.* ¶ 42.)

According to Plaintiff, Defendant's refusal to provide requested information to borrowers or their agents who submit valid QWRs or RFIs is Defendant's standard business policy. (*Id.* ¶ 45.) Furthermore, Plaintiff believes Defendant has refused to produce documents and recordings for "possibly hundreds if not thousands of customers that have requested them." (*Id.* ¶ 46.) Plaintiff alleges Defendant "systematically denied each of its customer's requests by, among other things, requiring that they provide additional information not required under RESPA or Regulation X." (*Id.* ¶ 47.) Plaintiff further alleges Defendant's "uniform responses, requiring a 'live' signature and failing to provide any of the requested documents and recordings, shows a pattern and practice of noncompliance with RESPA." (*Id.* ¶ 49.)

On January 20, 2021, Plaintiff filed the instant action in this court. (Doc. No. 1.) In

March 2021, Plaintiff filed the FAC, alleging one claim for violations of RESPA, 12 U.S.C. § 2601, *et seq.* (*Id.* ¶¶ 66–78.) By the present motion, Defendant moves to dismiss Plaintiff's FAC for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 12-1 at 7–8.)

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff's complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "[A] court may dismiss a complaint as a matter of law for (1) lack of cognizable legal theory or (2) insufficient facts under a cognizable legal claim." *SmileCare Dental Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted). However, a complaint will survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In making this determination, a court reviews the contents of the complaint, accepting all factual allegations as true and drawing all reasonable inferences in favor of the nonmoving party. *See Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007). Notwithstanding this deference, the reviewing court need not accept legal conclusions as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for a court to assume "the [plaintiff] can prove facts that [he or she] has not alleged." *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). However, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 664. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations and citation omitted).

III. REQUESTS FOR JUDICIAL NOTICE

While the scope of review on a motion to dismiss for failure to state a claim is limited to the complaint, a court may consider evidence on which the complaint necessarily relies

if "(1) the complaint refers to the document; (2) the document is central to the plaintiff['s] claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal quotation marks and citations omitted). Furthermore, Federal Rule of Evidence 201 permits judicial notice of a fact which is "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Welk v. Beam Suntory Imp. Co.*, 124 F. Supp. 3d 1039, 1041–42 (S.D. Cal. 2015).

Additionally, courts may consider documents under the "incorporation by reference" doctrine when a plaintiff "refers extensively to the document or the document forms the basis of the plaintiff's claim." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (quoting *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)) (internal quotations omitted). Under the "incorporation by reference" doctrine, courts may "take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012) (internal quotations omitted). A court "may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *Ritchie*, 342 F.3d at 908. However, the court cannot consider any documents incorporated by reference in a complaint if the authenticity of those documents is contested. *See Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds as recognized in Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681–82 (9th Cir. 2006).

In support of its motion to dismiss, Defendant requests the Court to take judicial notice of the following documents: (1) Plaintiff's July 20, 2020, October 19, 2020, and November 23, 2020 letters, and Defendant's responses; (2) Plaintiff's "New Loan Payment Form"; (3) BANA's webpage that displays Defendant's designated address for "Notices of Error & Requests for Information"; and (4 & 5) two official records confirming the fact

that Bank of America Corporation ("BAC") is a holding company. (Doc. No. 12-2 at 2–4.) Defendant contends all documents are appropriate subjects for consideration under judicial notice or the doctrine of incorporation by reference. Plaintiff objects to Defendant's requests, urging the Court not to consider Defendant's exhibits in the motion to dismiss. (Doc. No. 15 at 18–21.) The Court now turns to Plaintiff's objections.

A. Plaintiff's Letters and Defendant's Responses

First, Plaintiff objects to Exhibit 1 to Defendant's motion to dismiss, Plaintiff's letters and Defendant's responses (the "letters"), arguing extrinsic evidence on a Rule 12(b)(6) motion to dismiss is generally excluded. (Doc. No. 15 at 18.) Plaintiff argues the party seeking judicial notice must clearly explain what fact or facts it wants the court to judicially notice, and that here, Defendant fails to specify the fact or facts to be noticed. (*Id.* at 19.) Plaintiff further argues the letters between the parties are not matters of public record. (*Id.*) Finally, Plaintiff argues the Court should not consider the letters under the doctrine of incorporation by reference because they are not "written instruments" under Fed. R. Civ. P. 10(c). (*Id.* at 21.)

The Court finds the letters are inappropriate for judicial notice, as they are not generally known within the Court's jurisdiction, nor can its accuracy readily be determined. However, because the FAC specifically relies upon them and Plaintiff does not question its authenticity, *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012), the Court may incorporate the letters by reference. (*See* FAC ¶¶ 22–26.) Accordingly, the Court **GRANTS** Defendant's request under the doctrine of incorporation by reference.

B. Plaintiff's New Loan Payment Form

Next, Plaintiff objects to Exhibit 2, Plaintiff's "New Loan Payment Form," on the basis that it is not a written instrument. (Doc. No. 15 at 21.) Defendant asserts that Plaintiff's "New Loan Payment Form" is incorporated by reference "as the entire Complaint arises from his inquiries regarding payment and the remaining debt on his mortgage loan with BANA." (Doc. No. 12-2 at 2.) The Court agrees with Plaintiff that Exhibit 2 should not be considered by the Court because these extrinsic documents were

not incorporated by reference in the FAC and are not proper subjects for judicial notice. Moreover, the Court need not rely on this exhibit in reaching its conclusion below. Accordingly, the Court **DENIES AS MOOT** Defendants' request for judicial notice of Exhibit 2.

C. BANA's Public Webpage

Plaintiff further objects to Defendant's Exhibit 3, BANA's webpage that displays its designated address for "Notices of Error & Requests for Information," on the basis that the webpage is not a matter of public record because BANA is not a governmental entity. (Doc. No. 15 at 20.) Plaintiff asserts business websites are improper documents for judicial notice because they are "generally are not the sorts of sources whose accuracy cannot reasonably be questioned . . . ." (*Id.* (internal quotations omitted).) Defendant seeks to use this document to establish the specified address that a borrower would have to use to submit a QWR. Information on websites, especially a party's website, is often not considered an appropriate subject of judicial notice. *Gerritsen v. Warner Bros. Entm't*, 112 F. Supp. 3d 1011, 1030–31 (C.D. Cal. 2015) (citing cases and declining to take judicial notice of the defendant's website); *Spy Optic v. Alibaba*, 163 F. Supp. 3d 755, 763 (C.D. Cal. 2015) (finding "private corporate websites, particularly when describing their own business, generally are not the sorts of sources whose accuracy cannot reasonably be questioned" (internal citation and quotation marks omitted). Furthermore, the FAC does not implicitly or explicitly reference the webpage that displays BANA's designated address for "Notices of Error & Requests for Information." Therefore, the document was not incorporated by reference in the FAC. Accordingly, to the Court **DENIES** Defendant's request for judicial notice of Exhibit 3.

D. Official Records

Lastly, Plaintiff objects to Exhibits 4 and 5, two official records: (1) from the Federal Deposit Insurance Corporation's website, and (2) from the Federal Reserve's National Information Center website, respectively. (Doc. No 12-2 at 35–50.) Specifically, Plaintiff asserts the purported fact is irrelevant to Plaintiff's RESPA claim and because "judicially

noticing that purported fact is not a straightforward process, as BANA asks the Court to look at multiple websites to extrapolate information[.]" (Doc. No. 15 at 20.) The Court agrees with Defendant that Exhibits 4 and 5 may be judicially noticed. This information, from two different government websites, "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" and therefore "is not subject to reasonable dispute." Fed. R. Evid. 201(b); *see Romero v. Securus Techs., Inc.*, 216 F. Supp. 3d 1078, 1084 n.1 (S.D. Cal. 2016) (holding websites run by governmental agencies are reliable Internet sources, and thus proper for judicial notice). Accordingly, the Court **GRANTS** Defendant's request for judicial notice of Exhibits 4 and 5 to the motion to dismiss.

IV. DISCUSSION

Plaintiff asserts Defendant violated RESPA by failing to respond to Plaintiff's QWRs sent on July 20, 2020, October 19, 2020, and November 23, 2020. (FAC ¶¶ 22, 27, 32.) Particularly, Plaintiff alleges violations of 12 C.F.R. § 1024.36 and 12 U.S.C. § 2605(e) and (k). (*Id.* at ¶¶ 75–76.) Plaintiff alleges he "was not required to provide written authorization under RESPA or Regulation X for his QWRs or RFIs" because "Plaintiff's counsel was acting as [his] agent when [he] requested the information," and Defendant's "uniform responses, requiring a live signature and failing to provide any of the requested documents and recordings, shows a pattern and practice of non-compliance with RESPA." (*Id.* at ¶¶ 27, 49.) Plaintiff also alleges Defendant refused to provide "requested audio recordings or transcripts of telephone calls between [other similarly situated borrowers] and BANA" and that Defendant's failure to provide the requested information is sufficient to demonstrate a "pattern or practice" under RESPA. (*Id.* at ¶ 78.) In its motion, Defendant argues Plaintiff's claim is deficient because it did not violate RESPA by requiring written authorization or refusing to accept Plaintiff's electronic signature. (Doc. No. 12-1 at 12.) Further, Defendant argues that even if Plaintiff had submitted a live signature, none of Plaintiff's letters constituted a valid QWR under RESPA because Plaintiff failed to send his QWRs to the address specified by BANA and, therefore, Defendant's RESPA duties

were never triggered in the first place. (*Id.* at 15.) Finally, Defendant claims Plaintiff failed to adequately allege actual or statutory damages as required under RESPA. (*Id.* at 16.)

A. Defendant's Duty to Respond to Plaintiff's QWR or RFI

Congress enacted RESPA in part to "insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges by certain abusive practices." 12 U.S.C. § 2601(a). RESPA creates a private right of action for three types of wrongful acts: "(1) payment of a kickback and unearned fees for real estate settlement services, 12 U.S.C. § 2607(a), (b); (2) requiring a buyer to use a title insurer selected by the seller, 12 U.S.C. § 2608(b); and (3) the failure by a loan servicer to give proper notice of a transfer of servicing rights or to respond to a qualified written request for information about a loan, 12 U.S.C. § 2605(f)." *Choudhuri v. Wells Fargo Bank, N.A.*, No. C 11-00518 SBA, 2011 WL 5079480, at *8 (N.D. Cal. Oct. 25, 2011) (citing *Patague v. Wells Fargo Bank, N.A.*, No. C 10-03460 SBA, 2010 WL 4695480, at *3 (N.D. Cal. Nov. 8, 2010)).

Any claim arising from BANA's alleged failure to respond to a QWR would be of the third variety. Accordingly, whether Plaintiff's complaint states a claim turns on the Court's ability to assess whether the July 20th, October 19th, or November 23rd communications qualify as valid QWRs. Section 2605 defines a QWR as

> a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that—
> (i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
> (ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C. § 2605(e)(1)(B).

The Ninth Circuit has held that "[a]ny reasonably stated written request for account information can be a qualified written request." *Medrano v. Flagstar Bank, FSB*, 704 F.3d 661, 666 (9th Cir. 2012) (quoting *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 687 (7th

Cir. 2011)). Though a borrower should provide reasons for their belief that the account is in error, "any request for information made with sufficient detail is enough under RESPA to be a qualified written request and thus trigger the servicer's obligation to respond." *Id.*

Section 2605(e) requires loan servicers to respond to borrowers' qualified written requests no later than thirty days after receiving the QWR. 12 U.S.C. § 2605(e)(2). However, not all borrower inquiries require responses. The Ninth Circuit has held that a qualified written request triggering the Section 2605(e) duty to respond must "(1) reasonably identif[y] the borrower's name and account, (2) either state[] the borrower's 'reasons for the belief . . . that the account is in error' or 'provide[] sufficient detail to the servicer regarding other information sought by the borrower,' and (3) seek[] 'information relating to the servicing of [the] loan.'" *Medrano*, 704 F.3d at 666. "Servicing" of the loan pertains to "scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts . . . , and making payments of principal and interest and such other payments." *Id.* (quoting § 2605(i)(3)). Moreover, the *Medrano* court explained that servicing "does not include the transactions and circumstances surrounding a loan's origination—facts that would be relevant to a challenge to the validity of an underlying debt or terms of a loan agreement." *Id.* at 666–67. Furthermore, RESPA provides that a "loan servicer" must respond to a borrower's "[QWR] . . . for information relating to the servicing of [his] loan." 12 U.S.C. § 2605(e)(1)(A).

Although the Ninth Circuit has not ruled on the issue, the Second and Tenth Circuits have each held that a servicer's obligation to respond to a QWR is not triggered unless the QWR is sent to the address the servicer has designated for receipt and handling of QWRs. *See Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1149 (10th Cir. 2013) ("Failure to send the QWR to the designated address . . . does not trigger the servicer's duties under RESPA."); *Roth v. CitiMortgage Inc.*, 756 F.3d 178, 182 (2d Cir. 2014) ("[A] letter sent to a different address is not a QWR, even if an employee at that address (who may not have training in RESPA compliance) in fact responds to that letter."); *see also Lowey v. CMG Mortg., Inc.* 385 F. Supp. 3d 1083, 1086 (S.D. Cal. 2019) (same).

Ignoring an exclusive QWR address carries harsh consequences. *Wease v. Ocwen Loan Serv., L.L.C.*, 915 F.3d 987, 995–96 (5th Cir. 2019). Courts have consistently concluded a loan servicer need not answer a misaddressed QWR—and that responding to such a letter does not trigger RESPA duties—if the servicer set an exclusive address. *See, e.g.*, *id.* at 996 ("[B]ecause [the borrower] neglected to send his letters to [the servicer]'s exclusive QWR address," the servicer did not have a duty to respond); *Bivens v. Bank of Am., N.A.*, 868 F.3d 915, 921 (11th Cir. 2017) (same).

Turning to the Plaintiff's letters in this case, it is clear they constitute challenges to the amount of debt owed and request information about how payments were applied. The first letter states the Plaintiff's name, his loan account number, a request for information, and a reason for the request. (FAC ¶ 23.) Plaintiff's next three letters, which include an Authorization to Furnish & Release Information to Plaintiff's counsel and a Request for Information, also constitute requests for release of information related to Plaintiff's loan account. (Doc. No. 12-2 at 12, 13, 20.) Although some of the categories of Plaintiff's requests to Defendant relate to loan origination, rather than servicing, Plaintiff also requested specific information about how payments were applied (audit history, payoff statement), and charges to the account (itemized statement of advances and charges, assessed fees and costs). Thus, these fall squarely within the category of "information relating to loan servicing" and provided sufficient detail as to what information Plaintiff was seeking. (*Id.* at 6–8.) However, Plaintiff addressed his letters to BAC, Defendant's parent and bank holding company, rather than to the address specified by Defendant for handling QWRs. (*Id.* at 6, 12, 20.)

Accordingly, this claim fails for two reasons. First, Plaintiff did not send his QWRs and RFIs to the address specified by his loan servicer. Second, Plaintiff sent his requests to BAC (BANA's parent and bank holding company). Because BANA specified a designated address for receipt and handling of QWRs, and Plaintiff did not send his letters to the specified address, Defendant was not required by RESPA to respond to Plaintiff's QWRs.

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B. The E-SIGN Act

Plaintiff alleges Defendant further violated RESPA by failing to accept electronic signatures for his QWRs or RFIs because written authorization is not required under RESPA or Regulation X. (FAC ¶ 27.) While the E-SIGN Act mandates that no signature be denied legal effect simply because it is in electronic form, the Act does not require any person to agree to use or accept electronic records or electronic signatures. 15 U.S.C. §§ 7001(a)(1), (b)(2). The E-SIGN Act defines "electronic signature" as an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record. *Id.* § 7006(5). The Act provides it does not "limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law . . . other than a requirement that contracts or other records be written, signed, or in nonelectric form . . . ." *Id.* § 7001(b).

Defendant cites to 15 U.S.C. § 6801–02 to argue that "mortgage servicers maintain their customer's sensitive financial information and have statutory obligations to keep that information confidential under state and federal law, including the Gramm–Leach–Bliley Act." (Doc. No. 12-1 at 13.) Defendant states "valid written authorizations to release that information are of course an important component in safeguarding that information." (*Id.*) However, 15 U.S.C. § 6801 "does not apply to the disclosure of nonpublic personal information 'to comply with Federal, State, or local laws . . . ,' such as RESPA." *Mashiri v. Ocwen Loan Serv., LLC*, No. 3:12-cv-02838-L-MDD, 2013 U.S. Dist. LEXIS 154534, at *1, *19 (S.D. Cal. Oct. 28, 2013) (internal citation omitted). Thus, the Court finds Defendant's argument unavailing. However, because Plaintiff failed to send his letters to Defendant's specified designated address, as discussed above, Plaintiff's claim necessarily fails.

C. Damages

Defendant next argues Plaintiff "does not adequately allege that he suffered damages as a result of Defendant's refusal to provide the requested information, as required under RESPA." (Doc. No. 12-1 at 16.) In his FAC, Plaintiff requests "actual damages that

include, but are not limited to, postage expenses and attorney's fees" to satisfy the damages allegation for his RESPA claim. (FAC ¶ 8.)

Damages are a necessary element of a RESPA claim. *See Esoimeme v. Wells Fargo Bank*, No. CIV S-10-2259 JAM EFB PS, 2011 WL 3875881, at *14 (E.D. Cal. Sept. 1, 2011) (dismissing claim where the plaintiff failed to "allege any pecuniary loss from defendant's alleged failure to respond to the QWR"); *Soriano v. Countrywide Home Loans, Inc.*, No. 09-CV-02415-LHK, 2011 WL 1362077, at *6 (N.D. Cal. Apr. 11, 2011) (reasoning that "even if a RESPA violation exists, Plaintiff must show that the losses alleged are causally related to the RESPA violation itself to state a valid claim under RESPA"). While courts interpret this requirement liberally, "a number of courts have read the statute as requiring a showing of pecuniary damages in order to state a claim." *Allen v. United Fin. Mortg. Corp.*, 660 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) (citing cases). A plaintiff's failure to allege a pecuniary loss attributable to a servicer's failure to respond to QWRs has therefore been found to be fatal to the claim. *See Ghuman v. Wells Fargo Bank, N.A.*, 989 F. Supp. 2d 994, 1007 (E.D. Cal. 2013).

First, Plaintiff contends he suffered actual damages because Defendant's alleged failure to respond to the QWRs has forced him to incur postage expenses and attorneys' fees in his pursuit of a response to the alleged QWRs. (FAC ¶¶ 49, 54.) However, this argument fails as a matter of law. Courts have not typically considered attorneys' fees to be "actual damages" in this context. *See Lal v. Am. Home Serv., Inc.*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010) (finding the costs of filing suit were not actual damages for purposes of RESPA because "the loss alleged must be related to the RESPA violation itself"); *Luciw v. Bank of Am., N.A.*, No. 5:10-CV-02779-JF/HRL, 2010 WL 3958715, at *3 (N.D. Cal. Oct. 7, 2010) (citing cases). Furthermore, Plaintiff's claim that he incurred postage expenses as a result of Defendant's failure to respond to his QWRs is insufficient to establish actual damages under RESPA. *See Givant v. Vitek Real Estate Ind. Group, Inc.*, No. 2:11-cv-03158-MCE-JFM, 2012 WL 5838934, at *4–5 (E.D. Cal. Nov. 15, 2012) (finding conclusory allegations that the defendant's failure to respond to a QWR resulted

in postage expenses is insufficient to establish actual damages under RESPA); *Soriano*, 2011 WL 2175603, at *4 ("Plaintiff cannot claim the costs associated with the follow-up letters as actual damages resulting from the alleged RESPA violation.") Consistent with this understanding, RESPA separately includes attorneys' fees as a recoverable cost. *See* 12 U.S.C. § 2605(f)(3). As such, in the RESPA context, a request for postage expenses and attorneys' fees for the lawsuit raising the RESPA claim does not suffice to state damages.

Next, Plaintiff alleges Defendant engaged in a "pattern or practice of noncompliance" with RESPA. Plaintiffs may also recover statutory damages under RESPA if they plead some pattern or practice of noncompliance with the statute. *Id.* § 2605(f)(1)(B). Specifically, RESPA requires the servicer of a federally related mortgage loan to provide a timely written response to inquiries from borrowers regarding the servicing of their loans. *Id.* § 2605(e)(1)(A), (e)(2); *Medrano*, 704 F.3d at 665. If the servicer fails to respond properly to such a request, the statute provides the borrower shall be entitled to "any actual damages to the borrower as a result of the failure; and any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $2,000." 12 U.S.C. § 2605(f). In the case of a class action, the servicer shall be liable to the borrower for any "actual damages to [each of the borrowers in the class] as a result of the failure; and any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of" the statute. *Id.*

Defendant argues Plaintiff fails to plead "a pattern or practice of noncompliance with the requirements of [12 U.S.C. § 2605(f)] . . . for himself or other members of the purported class." (Doc. No. 12-1 at 18.) Defendant argues Plaintiff "provides no facts to support that any putative class member even sent in a legitimate QWR, let alone that any were denied, or denied on the same basis as Plaintiff's requests." (*Id.* at 19.) Rather, Plaintiff "claims that any customer who sent a QWR (valid or invalid) and had it denied for any reason (valid or invalid) is entitled to damages." (*Id.*) The Court finds Defendant's argument persuasive. The FAC states Defendant has engaged in a pattern or practice of

violating RESPA but provides no factual support for this claim. Plaintiff states he "is informed and believes that other similarly situated borrowers have requested audio recordings or transcripts of telephone calls between themselves and BANA only to be likewise denied access to that information by BANA." (FAC ¶ 78.) This is insufficient to plead damages. *See Lal*, 680 F. Supp. 2d at 1223 (dismissing conclusory pattern or practice claim because it was "a legal conclusion couched as a factual allegation"). A plaintiff cannot rely simply on stock legal conclusions, but must allege facts that are sufficient to "raise a right to relief above the speculative level." *See id.*; *Twombly*, 550 U.S. at 555.

Finding no facts in the FAC supporting that Plaintiff incurred damages flowing from Defendant's alleged failure to respond to Plaintiff's QWRs, the Court **GRANTS** Defendant's motion to dismiss with leave to amend.

V. CONCLUSION

In sum, because the Court finds Plaintiff's claims deficient in several aspects, as mentioned above, the Court **GRANTS** Defendant's motion to dismiss Plaintiff's FAC for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6), with leave to amend. Should Plaintiff choose to do so, where leave is granted, he must file an amended complaint curing the deficiencies noted herein by **April 4, 2022**.

IT IS SO ORDERED.

Dated: March 21, 2022

Hon. Anthony J. Battaglia
United States District Judge