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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

CARMEN REBECCA NARANJO, an individual,

Plaintiff,

vs.

JPMORGAN CHASE, et al.,

Defendants.

CASE NO. 11cv2644 DMS (WVG)

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS THE FIRST AMENDED
COMPLAINT**

[Docket No. 10]

This case comes before the Court on Defendants' motion to dismiss the First Amended Complaint. Plaintiff filed an opposition to the motion, and Defendants filed a reply. For the reasons discussed below, the Court grants in part and denies in part Defendants' motion.

**I.
BACKGROUND**

Plaintiff Carmen Rebecca Naranjo is the owner of real property located at 7042 Heron Circle in Carlsbad, California. On January 29, 2007, she executed a promissory note in favor of Washington Mutual Bank ("WaMu") in the amount of \$838,000 secured by a deed of trust on the property. WaMu sold Plaintiff's loan to another entity, which then attempted to securitize Plaintiff's loan by placing it into a trust.

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1 In May 2009, Plaintiff attempted to obtain a modification of her loan. During that process,
2 Plaintiff became unable to make her monthly payments, and her loan fell into default. Plaintiff filed for
3 bankruptcy protection, and received a complete discharge on June 3, 2011.

4 On August 8, 2011, Plaintiff sent to Defendant JPMorgan Chase Bank (“JPMorgan”) a Qualified
5 Written Request (“QWR”) pursuant to the Real Estate Settlement Procedures Act (“RESPA”) to verify
6 and validate her debt. JPMorgan did not respond. Instead, on August 18, 2011, Defendants filed a
7 Notice of Default on Plaintiff’s property.

8 On November 14, 2011, Plaintiff filed the present case against JPMorgan, WaMu and Bank of
9 America (“BofA”). In her original Complaint, she alleged claims for declaratory relief, violation of the
10 RESPA, violation of California Business & Professions Code § 17200, breach of contract, bad faith and
11 violation of California Civil Code §§ 2923.5 and 2924. After a status conference with the Court,
12 Plaintiff filed a First Amended Complaint (“FAC”) in which she realleges her claims for declaratory
13 relief, violations of the RESPA, violations of California Business & Professions Code § 17200, breach
14 of contract and bad faith. She also alleges new claims for quasi-contract, violation of the Fair Debt
15 Collection Practices Act (“FDCPA”) and a claim for an accounting. In response, Defendants filed the
16 present motion.

17 II.

18 DISCUSSION

19 Defendants move to dismiss the First Amended Complaint in its entirety. They argue Plaintiff’s
20 claims must be dismissed because Plaintiff has failed to tender. They also raise other arguments as to
21 each individual claim, which the Court discusses below.

22 A. Standard of Review

23 In two recent opinions, the Supreme Court established a more stringent standard of review for
24 12(b)(6) motions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v.*
25 *Twombly*, 550 U.S. 544 (2007). To survive a motion to dismiss under this new standard, “a complaint
26 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
27 face.’” *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). “A claim has facial plausibility
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1 when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
2 defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556).

3 “Determining whether a complaint states a plausible claim for relief will ... be a context-specific
4 task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 1950
5 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). In *Iqbal*, the Court began this task “by
6 identifying the allegations in the complaint that are not entitled to the assumption of truth.” *Id.* at 1951.
7 It then considered “the factual allegations in respondent’s complaint to determine if they plausibly
8 suggest an entitlement to relief.” *Id.* at 1951.

9 **B. Tender**

10 Defendants’ first argument in support of their motion to dismiss Plaintiff’s FAC is Plaintiff has
11 failed to tender. Defendants cite several cases that hold tender is required before a plaintiff may pursue
12 a claim for irregularity in the sale procedure. However, Plaintiff’s property has yet to be sold, thus those
13 cases are inapposite. Defendants cite other cases that hold tender is required to state claims of wrongful
14 foreclosure and quiet title, but Plaintiff does not allege those claims here. Absent a showing that
15 Plaintiff must satisfy the tender requirement for the specific claims alleged in this case, this argument
16 does not warrant dismissal of Plaintiff’s FAC.

17 **C. Declaratory Relief**

18 Turning to Plaintiff’s individual claims, the first is for declaratory relief. Specifically, Plaintiff
19 asserts there is “a real and actual controversy ... as to the respective rights of the parties to this matter,
20 including ownership of the Property.” (FAC ¶ 55.) Defendants argue this claim should be dismissed
21 because this dispute will be resolved by Plaintiff’s other claims. The Court disagrees with this
22 argument, and thus denies Defendants’ motion to dismiss this claim.

23 **D. Quasi-Contract**

24 Plaintiff’s second claim is for quasi-contract. Defendants argue this claim must be dismissed
25 because the parties’ relationship is governed by express contracts. Defendants are correct that “[a]
26 plaintiff may not ... pursue or recover on a quasi-contract claim if the parties have an enforceable
27 agreement regarding a particular subject matter.” *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342,
28 1388 (2012). However, Defendants’ argument ignores the allegations in the case, namely that

1 Defendants are not parties to any agreement with Plaintiff. Based on those allegations, Defendants are
2 not entitled to dismissal of this claim at this stage of the proceedings.

3 **E. FDCPA Claim**

4 Plaintiff's third claim alleges Defendant BofA violated the FDCPA. Defendants argue they are
5 attempting to foreclose on a delinquent home loan, therefore they are not debt collectors under the
6 statute. Although this argument may entitle Defendants to judgment in their favor on this claim, it is
7 inappropriate at this stage of the case. At this stage, the Court must determine whether Plaintiff has
8 alleged sufficient facts to support a valid legal claim. Plaintiff alleges Defendant BofA is a "debt
9 collector" under the statute, and alleges sufficient facts in support of that assertion. Accordingly,
10 Defendants' argument does not warrant dismissal of this claim.

11 **F. RESPA Claim**

12 Plaintiff's fourth claim alleges Defendant JP Morgan violation the RESPA. Specifically,
13 Plaintiff alleges she sent Defendant a QWR, to which Defendant did not respond. Defendants also argue
14 Plaintiff has failed to plead any damages or a pattern or practice on the part of Defendants that would
15 entitle Plaintiff to statutory damages.

16 **1. QWR**

17 Defendants argue Plaintiff's letter does not include a "specific statement of reasons as to errors
18 or discrepancies ..., as required by 12 U.S.C. § 2605(e)(1)(B)[,]" therefore Plaintiff's letter does not
19 qualify as a QWR under the statute. However, the statute does not require that the QWR include this
20 information. Rather, the statute is written in the disjunctive, and requires either "a statement of the
21 reasons for the belief of the borrower, to the extent applicable, that the account is in error *or* provides
22 sufficient detail to the servicer regarding other information sought by the borrower." 12 U.S.C. §
23 2605(e)(1)(B)(ii) (emphasis added). *See also Amini v. Bank of America Corp.*, No. C11-0974RSL, 2012
24 WL 398636, at *3-4 (W.D. Wash. Feb. 7, 2012) (stating plaintiff not required to state reasons why
25 account was in error because statute written in disjunctive). Defendants have not shown that Plaintiff's
26 letter fails to satisfy both of these requirements, therefore this argument does not warrant dismissal of
27 Plaintiff's claim.

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1 2. Damages

2 Next, Defendants argue Plaintiff has failed to allege she suffered any damages as a result of their
3 failure to respond to the QWR. However, the Court disagrees. Plaintiff alleges “(4) she is unable to
4 determine whether she sent her monthly mortgage payments to the right party; (5) her credit and credit
5 score have been damaged; and (6) she has expended significant funds to cover the cost of attorneys’ fees
6 and related costs.” (FAC ¶92.) At this point in the case, these allegations are sufficient to state a claim.
7 Thus, Defendants’ argument concerning damages does not warrant dismissal of this claim.¹

8 3. Statutory Damages

9 Defendants’ final argument on Plaintiff’s RESPA claim is that Plaintiff has failed to allege facts
10 to support a pattern or practice on Defendants’ part, therefore Plaintiff is not entitled to statutory
11 damages under RESPA. It is unclear whether Plaintiff is seeking to recover statutory damages under
12 RESPA. However, to the extent she is, the Court agrees with Defendants that Plaintiff has failed to
13 allege any facts to support a pattern or practice. Accordingly, to the extent Plaintiff is seeking such
14 relief, that request is dismissed without prejudice.

15 **G. 17200 Claim**

16 Plaintiff’s fifth claim alleges Defendants violated California Business & Professions Code §
17 17200. Defendants argue this claim must be dismissed because Plaintiff lacks standing. Specifically,
18 Defendants assert Plaintiff has failed to allege she lost money or property as a result of any alleged
19 violation.

20 1. Standing

21 California Business and Professions Code § 17204 sets out the statutory standing requirements
22 for section 17200 claims. It states that individual claims may only be brought by “a person who has
23 suffered injury in fact and has lost money or property as a result of the unfair competition.” Cal. Bus.
24 & Prof. Code § 17204. Defendants assert Plaintiff has failed to allege either of these elements in the
25 FAC, but the Court disagrees. Plaintiff alleges she has been injured in numerous ways, and that “she
26 has been paying the wrong party for an undetermined amount of time and overpaid in interest that was
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28 ¹ Because RESPA allows for recovery of attorneys fees, *see* 12 U.S.C. § 2607(d)(5), the Court denies Defendants’ motion to strike Plaintiff’s request for attorneys fees from the FAC.

1 overcalculated[.]” (FAC ¶ 121.) These allegations are sufficient to withstand Defendants’ motion to
2 dismiss for lack of standing.

3 2. Unlawful Conduct

4 Defendants also move to dismiss this claim on the ground Plaintiff has failed to allege any
5 underlying unlawful conduct. For the reasons stated above with respect to the FDCPA and RESPA
6 claims, the Court rejects this argument.

7 3. Fraudulent Conduct

8 Next, Defendants argue Plaintiff has failed to satisfy the requirements of Federal Rule of Civil
9 Procedure 9(b) with respect to her claim of fraudulent conduct under section 17200. Plaintiff responds
10 that “Defendants have fraudulently represented that they are Plaintiff’s true creditors.” (Opp’n to Mot.
11 at 21.) However, this statement does not explain how Plaintiff has satisfied the pleading requirements
12 of Rule 9(b). For instance, Plaintiff fails to identify who “acted in a manner to mislead” her, or when
13 or how that conduct occurred. (See FAC ¶ 105.) Absent more specific allegations, the Court grants
14 Defendants’ motion to dismiss this aspect of Plaintiff’s 17200 claim.

15 4. Unfair Conduct

16 Finally, Defendants move to dismiss this claim to the extent Plaintiff relies on a theory of unfair
17 conduct. Specifically, Defendants argue Plaintiff has failed to allege any facts to support this theory.
18 However, the Court disagrees. Plaintiff alleges Defendants “demanded and accepted payments for debts
19 that were non-existent[.]” “reported payments as late to credit bureaus without the legal right or
20 authority to do so[.]” and committed other allegedly unfair acts. (FAC ¶¶ 101-107.) These allegations
21 are sufficient to withstand Defendants’ motion to dismiss. Accordingly, the Court declines to dismiss
22 this theory of Plaintiff’s 17200 claim.

23 **H. Accounting**

24 Plaintiff’s sixth claim is for an accounting. Defendants argue this “claim cannot stand.” (Mem.
25 of P. & A. in Supp. of Mot. at 14.) However, the Court disagrees. Plaintiff has alleged Defendants
26 owed her “a fiduciary duty ... to properly account for payments” she made to her account, (FAC ¶ 123),
27 and that certain “monies are due to be either credited back to Plaintiff in full or credited to the rightful
28 owner

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2 of Plaintiff's Note and Mortgage." (*Id.* ¶ 124.) These allegations are sufficient to withstand
3 Defendants' motion to dismiss. Accordingly, Defendants' motion to dismiss this claim is denied.

4 **I. Breach of Contract**

5 Plaintiff's seventh claim is for breach of contract. Defendants argue this claim must be
6 dismissed because Plaintiff admits she failed to perform her obligations under the contract. The Court
7 agrees. Although Plaintiff alleges she "substantially performed all of her conditions in the Deed of
8 Trust[.]" (FAC ¶ 132), elsewhere she admits she "could no longer afford her monthly mortgage
9 obligation on the Property." (*Id.* ¶ 25.) Absent facts to show that Plaintiff performed her obligations
10 under the contract, the Court grants Defendants' motion to dismiss this claim.²

11 **III.**

12 **CONCLUSION AND ORDER**

13 For these reasons, the Court grants in part and denies in part Defendants' motion to dismiss.
14 Specifically, the Court grants Defendants' motion to dismiss Plaintiff's 17200 claim to the extent it
15 relies on a theory of fraudulent conduct, Plaintiff's breach of contract claim and Plaintiff's bad faith
16 claim. The Court denies Defendants' motion to dismiss the remaining claims. In accordance with
17 Plaintiff's request, Plaintiff is granted leave to amend the fraudulent conduct theory of her 17200 claim
18 so that it complies with Federal Rule of Civil Procedure 9(b). Because amendment of the breach of
19 contract claim would be futile, that claim and the corresponding bad faith claim are dismissed with
20 prejudice and without leave to amend. Plaintiff is cautioned that if her Second Amended Complaint
21 does not cure these deficiencies, her claim will be dismissed with prejudice and without leave to amend.
22 The Second Amended Complaint shall be filed on or before May 11, 2012. Plaintiff shall also contact
23 the Magistrate Judge's chambers to schedule an Early Neutral Evaluation Conference within 30 days
24 of the filing of this Order, at which time all pretrial and trial dates shall be set.

25 **IT IS SO ORDERED.**

26 DATED: May 2, 2012

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² In the absence of a breach of contract claim, Plaintiff's bad faith claim is likewise dismissed.

HON. DANA M. SABRAW
United States District Judge

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