IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STEVEN BIVINS, *on behalf of himself and all persons similarly situated,*	
Plaintiff,	CIVIL ACTION FILE NO.
v.	1:15-cv-4325-ELR-JKL
SELECT PORTFOLIO SERVICING, INC.,	
Defendant.	

FINAL REPORT AND RECOMMENDATION

This is a putative class action arising under the Real Estate Settlement Practices Act ("RESPA"), 12 U.S.C. § 2605(e). Plaintiff Steven Bivens contends that Defendant Select Portfolio Servicing, Inc. ("SPS") violated § 2605(e) by failing to adequately respond to a qualified written request ("QWR") for information relating to a mortgage loan that SPS was servicing. Bivens seeks statutory damages under 12 U.S.C. § 2605(f) on behalf of himself and a putative class.

The case is before the court on SPS's Motion to Dismiss Plaintiff's Complaint. [Doc. 10]. For the reasons stated below, I **RECOMMEND** that SPS's

motion be **GRANTED** and that Plaintiff's Complaint be **DISMISSED WITH PREJUDICE**.

I. Background

On or about August 2, 2006, Bivens obtained first and second position loans from Mortgage Lenders Network, USA, Inc., both of which were secured by his residence located at 651 Simmons Mine Circle, Sugar Hill, Georgia.[1] (Compl. [Doc. 1] ¶ 4.) SPS later became the loan servicer for the first-position loan. (*Id.* ¶ 5.)

On March 26, 2015, Bivens mailed a letter to SPS dated March 25, 2015 that requested, among other things, "a listing of all payments received and charges made to this account since the execution of the note with the reasons for any charges to the account." (Compl. ¶ 6, Ex. A [Doc. 1 at 11].) SPS responded to the letter, through counsel, in relevant part as follows:

> As you know, this firm represents Select Portfolio Servicing, Inc. ("SPS") in litigation filed by your client, Steven Bivens, related to the above-referenced loan. We are writing on behalf of SPS to respond to

[1] Plaintiff has been engaged in litigation with SPS, Mortgage Lenders Network, USA, Inc., and others with respect to these loans. *See Bivens v. Mortgage Lenders Network (USA), Inc., et al.*, No. 1:13-cv-3979-ODE (N.D. Ga.). That case was disposed of in early 2014, however, on May 22, 2014, Plaintiff filed a second action against SPS, Bank of America, N.A. and Real Time Resolutions, Inc., *Bivens v. Bank of America, N.A., et al.*, No. 1:14-cv-1569-ODE (N.D. Ga.).

> correspondence dated March 25, 2015, which Select Portfolio Servicing, Inc. ("SPS") received on March 31, 2015, in which Mr. Bivens made a series of enumerated requests for information about the Loan and Property referenced above (the "Letter"). Because our clients are engaged in active litigation, SPS has forwarded the correspondence for response by this firm, and we are responding to you and sending a copy of the same letter to Mr. Bivens.
>
> . . .
>
> **Request No. 3. Please send me a listing of all payments received and charges made to this account since the execution of the note with the reasons for any charges to the account.**
>
> SPS began servicing the Loan on December 1, 2012. An account history showing that no payment for the Loan has been received by SPS since it began servicing the Loan on December 1, 2012 and showing the charges that have been made to the account since that date is enclosed with this letter.

(*Id.* Ex. B [Doc. 1 at 18-19].) SPS enclosed the payment history report referred to in its response. [*Id.* Ex. B [Doc. 1 at 21-31].] Bivens contends the payment history report was incomplete because it did not include payments that he purportedly made to the prior servicer of the loan, and that it was "incomprehensible" because the report used codes and SPS did not provide a key to the codes. (*Id.* ¶ 7.)

Bivens alleges that SPS has admitted that it is SPS's practice to send incomplete payment histories in response to requests for account payment history.

(Compl. ¶ 8, Ex. C [Doc. 1 at 38].) He also alleges that SPS's practice is to send coded payment histories without a key code. (*Id.* ¶ 9; Ex. C [Doc. 1 at 39-40].)

Bivens, on behalf of a putative class of "all persons whose qualified written request for information about their mortgage loan account payment and charges were not responded to by SPS" during the past three years, asserts a single cause of action that SPS violated RESPA, 12 U.S.C. § 2605(e), by sending incomplete and incomprehensible account information in response to QWRs. (Compl. ¶¶ 10, 20.) Bivens does not allege that he or any other member of the putative class suffered actual damages, but instead seeks an award of statutory damages. (*Id.* ¶ 22 (seeking "an award of statutory damages" on behalf of himself and the putative class)).

On February 19, 2016, SPS moved to dismiss the complaint on the grounds that Bivens failed to plausibly allege a violation of RESPA. According to SPS, the Bivens's March 25 letter did not qualify as a QWR under RESPA, and even if it did, SPS's response complied with the statute. [Doc. 10-1 at 5-10.] SPS also contends that plaintiff's failure to plead actual damages is fatal to his RESPA claim and that no statutory damages are available without actual damages. [Doc. 10-1 at 11-14.]

Bivens responds that his March 25 letter was a QWR and that defendant's response was inadequate. [Doc. 11 at 1-4.] Bivens does not dispute that he does not seek actual damages, but instead contends that statutory damages are available even in the absence of actual damages. [*Id.* at 4-7.]

II. Discussion

A. Legal Standard Under Rule 12(b)(6)

In order to survive a Rule 12(b)(6) motion to dismiss, a complaint need not contain "detailed factual allegations," but must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotes and citation omitted).

In *Ashcroft v. Iqbal*, the Supreme Court clarified the pleading standard for civil actions, stating:

> [T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

> defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

556 U.S. 662, 678 (2009) (internal quotes and citations omitted).

The *Iqbal* Court went on to instruct that, while a court must accept all factual allegations in a complaint as true, it need not accept as true legal conclusions recited in a complaint. *Id.* Repeating that "only a complaint that states a plausible claim for relief survives a motion to dismiss," the Supreme Court then advised that

> [d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."

Id. at 679 (alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)) (other citations omitted).

B. Analysis

RESPA requires a loan servicer to respond to a QWR from a borrower that seeks "information relating to the servicing of such loan." 12 U.S.C. § 2605(e). The statute 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 statute requires a servicer to provide a written response to a borrower's QWR within five business days and take any necessary action within 30 days. 12 U.S.C. § 2605(e). A servicer who fails to respond to a qualified written request is liable for the failure, but a borrower is limited to actual damages unless the failure to respond was part of a "pattern or practice of noncompliance" with RESPA's requirements, in which case the borrower may recover "additional damages" of up to $2,000. 12 U.S.C. § 2605(f)(1). In a class action, RESPA authorizes the award of 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 12 U.S.C. § 2605, in an amount not greater than $2,000 for each member of the class, except that the total

amount of damages in any class action may not exceed the lesser of $1,000,000 or one percent of the net worth of the servicer. *Id.* § 2605(f)(2).[2]

The central issue before me is whether a borrower can recover statutory damages in the absence of actual damages. Bivens seeks only statutory damages (*see* Compl. ¶ 22(1)), and has not alleged that he or any other putative member has

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[2] The section of RESPA relating to damages pertinently provides as follows:

> (f) Damages and costs
> Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:
> (1) Individuals
> In the case of any action by an individual, an amount equal to the sum of--
> (A) any actual damages to the borrower as a result of the failure; and
> (B) 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.
> (2) Class actions
> In the case of a class action, an amount equal to the sum of--
> (A) any actual damages to each of the borrowers in the class as a result of the failure; and
> (B) 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 greater than $2,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of--
> (i) $1,000,000; or
> (ii) 1 percent of the net worth of the servicer.

12 U.S.C. § 2605(f).

suffered "actual damages" as a result of SPS's purported failure to adequately respond to the QWRs.

The Eleventh Circuit has addressed this issue, albeit in dicta, in *Renfroe v. Nationstar Mortgage, LLC*, No. 15-10582, ___ F.3d ___, 2016 WL 2754461, at *5 n.4 (11th Cir. May 12, 2016) (Martin, J). The Court wrote as follows:

> This Court has not addressed in a published opinion whether RESPA pattern-or-practice damages are available in the absence of actual damages, and our unpublished opinions have used conflicting language. The question is not now before us, but we observe without ruling on the question, that the use of "additional" seems to indicate that a plaintiff cannot recover pattern-or-practice damages in the absence of actual damages.

Id. I find the Circuit's observation persuasive and I agree that absent actual damages, Bivens fails to state a claim under § 2605(e).

As an initial matter, the Circuit's observation in *Renfroe* is consistent with the plain language of the statute. When a statutory term is undefined, courts give the term its "ordinary meaning" or "common usage," and often look to dictionary definitions for guidance. *See, e.g., United States v. Lopez*, 590 F.3d 1238, 1248 (11th Cir. 2009). The Oxford English Dictionary defines the term "additional" as "[t]hat is in addition to something else," and the word "addition" is defined as "[s]omething which is added or joined to another thing" and "[t]he action, process,

or fact of adding something to something else."[3] Thus, the term "additional" presupposes the existence of some other thing which is supplemented or increased by another. In the context of § 2605(f), which provides that statutory damages are "additional" to actual damages, the statute must be read as requiring the borrower to show actual damages as a condition to receiving statutory damages. *See Ford v. New Century Mortg. Corp.*, 797 F. Supp. 2d 862, 870 (N.D. Ohio 2011) ("[T]o state a plausible claim the plaintiff must allege actual damages arising from the violation.").

Bivens argues that the word "additional" means "also." This argument is not persuasive, however, because the statute uses the word "additional" as an adjective, which modifies the word "damages." By contrast, the word "also" is an adverb, and thus cannot modify the word "damages." What Bivens appears to be arguing is that the ***phrase*** "and any additional" should be read to include the disjunctive as well as the conjunctive. But nothing in the context of 12 U.S.C. § 2605(f) suggests that "and any additional" means "or." *See Am. Bankers Ins. Grp. v. United States*, 408 F.3d 1328, 1332 (11th Cir. 2005) (declining to read the term "and" as meaning "or" within context of unambiguous statute). Plus, the fact that the statutes uses ***two*** words indicating conjunction ("and" and "additional") further

[3] *See* Oxford English Dictionary, http://oed.com (last visited June 1, 2016).

demonstrates that Congress did not intend for the provisions allowing for actual damages and statutory damages to be read disjunctively.

The cases that Bivens cites do not warrant a different result. In none of those cases did a court address whether a § 2605(e) claim can survive absent statutory damages. In each of *Frazile v. EMC Mortgage Corp.*, 382 F. App'x 833, 836 (11th Cir. 2010), *McLean v. GMAC Mortgage Corp.*, 595 F. Supp. 2d 1360, 1366 (S.D. Fla. 2009), and *In re Tomasevic*, 273 B.R. 682, 686-87 (Bankr. M.D. Fla. 2002), the court concluded that the borrower had failed to allege either actual damages or statutory damages.[4]

Finally, Bivens contends that reading § 2605(f) to require proof of actual damages would render RESPA class actions based on § 2605(e) unworkable because individual depositions and trials would be necessary to determine if actual damages had been incurred by each class member before statutory damages could be awarded. [Doc. 11 at 7.] While some cases arising under § 2605(e) may be ill-suited for class treatment because individual damages issues predominate over

[4] While Plaintiff is correct that in *Frazile*, the Eleventh Circuit recited the elements of a § 2605(e) claim and indicated that the borrower can meet his burden to show damages by alleging either actual damages ***or*** a pattern or practice of nondisclosure by the defendants that would warrant statutory damages, that case is not dispositive. Again, the issue of whether a plaintiff must plead and prove actual damages was not before the Court, and, in any event, the case is unpublished and not binding precedent. *See* 11th Cir. R. 36-2.

common ones, Bivens's concern about hypothetical challenges in managing a class action cannot trump the plain statutory language that statutory damages are "additional" damages.[5]

Accordingly, for these reasons, Bivens's complaint should be dismissed. Since the § 2605(e) claim is the sole claim that Bivens asserts and because it is clear that he is not alleging actual damages, the complaint should be dismissed with prejudice in its entirety.

III. Conclusion

For the foregoing reasons, I **RECOMMEND** that Defendant's Motion to Dismiss [Doc. 10] be **GRANTED** and that Plaintiff's Complaint be **DISMISSED WITH PREJUDICE**.

IT IS SO RECOMMENDED this 1st day of June, 2016.

JOHN K. LARKINS III
United States Magistrate Judge

[5] In light of Bivens's failure to plead damages, I have not, and need not, consider SPS's other arguments that the March 25, 2016 letter was not a QWR or that SPS's response complied with RESPA.